

**SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS**

Joint Communication from the African Group in the WTO

The following communication, dated 29 January 2003, has been received from the Permanent Mission of Kenya on behalf of the African Group.

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**Part I**

*Proposed Improvement on the Chairman's Text*

A. GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

**Article XXXVI**

Recommendations:

The General Council agrees that, provided this shall be without prejudice to any preferential regime governing the exports of developing and least-developed country Members maintained by developed country Members, the provisions of paragraphs 2 to 7 of Article XXXVI of GATT 1994 are binding commitments on the part of developed country Members in favour of developing and least-developed country Members to:

- (a) ensure a rapid and sustained expansion of the developing and least-developed country Members;
- (b) ensure that developing and least developed country Members secure a share in the growth in international trade commensurate with the needs of their economic development;
- (c) provide the maximum market access to products of export interest to developing and least-developed country Members and take measures to stabilise and improve conditions in world markets for these products particularly measures to attain stable, equitable and remunerative prices;
- (d) assist in the diversification of the economies of developing and least-developed country Members; and
- (e) ensure coherence in global economic policymaking and implementation in a manner that ensures that gains and opportunities in the multilateral trading system are

supported and not undermined by programmes implemented by international lending agencies and vice versa;

The General Council further agrees that the Committee on Trade and Development (CTD) shall biannually review the implementation of the principles and objectives set out in Article XXXVI of GATT 1994, and report to the General Council with appropriate recommendations.

#### **Article XXXVII**

Recommendation:

The General Council agrees that any Member may initiate discussion in the CTD on the basis of Article XXXVII, with a view to ensuring compliance with commitments in that Article. The General Council further agrees that it shall be incumbent upon the developed country Member in question to provide a detailed explanation to matters raised; and the CTD may adopt appropriate recommendations to the developed country Member.

The General Council further agrees that paragraphs 1 and 3 of Article XXXVII provide for binding obligations and the commitments set out shall be fully implemented and where it is felt that this would not be possible, leave shall be sought in the General Council by the concerned developed country Members on the basis of consultations on specific grounds advanced.

#### **Article XXXVIII**

Recommendation:

The General Council instructs the Director General to pursue and conclude co-operation arrangements with all relevant agencies of the UN including the Common Fund for Commodities, and with all relevant international and regional organisations, with a view to ensuring the full implementation in a coherent manner of the commitments in Article XXXVIII of GATT 1994.

The General Council further instructs the CTD to regularly receive studies and reports from the agencies and the organisations, that may assist its work relating to, specific development goals, desirable rates of growth in actual market access levels for products of export interest to developing and least-developed country Members, targets to be achieved over the short and medium terms, measures to be taken in the WTO framework and by other international organisations as well as the assistance required by developing and least-developed country Members to ensure the achievement of the goals and targets, and to deal with any relevant matters.

#### **B. UNDERSTANDING ON ARTICLE XXIV OF GATT 1994**

Recommendations:

The General Council agrees that the Understanding on the Interpretation of Article XXIV of the GATT 1994 shall not in anyway prejudice the right of developing and least-developed country Members to enter arrangements for mutual reduction or elimination of tariffs and non-tariff barriers to their trade, in accordance with the Decision of 28 November 1979 on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause) (BISD 26S/203). The General Council further agrees that this Decision is part of GATT 1994, pursuant to note 1(b)(iv) to the GATT 1994 and as such remains fully applicable notwithstanding the Understanding on the Interpretation of Article XXIV of the GATT 1994.

The General Council notes that the Negotiating Group on Rules is addressing Article XXIV of the GATT 1994. In this regard, the General Council agrees that the Negotiating Group on Rules

shall develop appropriate mechanisms providing flexibility to address the concerns of developing and least-developed country Members. The General Council agrees that such concerns include inter alia, the need for policy space to protect important public policy, the pursuance of development programmes for diversification and the strengthening of domestic industries, and the adoption of regional integration programmes covering sectoral co-operation and the building of development infrastructure.

C. AGREEMENT ON PRESHIPMENT INSPECTION

**Article 3.3**

Recommendations:

The General Council agrees that technical assistance for purposes of the Agreement shall address the concerns of developing and least-developed country Members relating among others to:

- (i) training customs and revenue officials to ensure that the objectives of preshipment inspection are achieved; particularly those relating to prevention of false declaration, wrong classification, and any fraud;
- (ii) ensuring that it is duly inspected consignments that are shipped to user Members; and
- (iii) regulation of preshipment entities.

The General Council further agrees, in the context of the Agreement on Customs Valuation and of the Decision Regarding Cases Where Customs Administrations Have Reasons To Doubt The Truth Or Accuracy Of The Declared Value, that customs authorities of Members shall closely co-operate with a view to fully assisting user Members achieve the objectives of the Agreement on Preshipment Inspection.

D. AGREEMENT ON RULES OF ORIGIN

Recommendations:

The General Council:

- (a) Regarding preferential rules of origin under the Common Declaration in Annex II to the Agreement, agrees that in their arrangements for mutual reduction or elimination of tariff or non-tariff barriers, developing and least-developed country Members shall have the right to adopt preferential rules of origin designed to achieve trade policy objectives relating to their rapid economic development, particularly through generating regional trade; and
- (b) Instructs the Director General to ensure and promote the ever-increasing participation of developing and least-developed country Members in the activities of the World Customs Organisation and the Technical Committee on Rules of Origin.

E. AGREEMENT ON IMPORT LICENSING PROCEDURES

**Article 3.5**

Recommendations:

The General Council agrees that for purposes of subparagraph (a)(iv) of Article 3.5, developing country Members shall not be required to provide import statistics with respect to products subject to import licensing unless they can do so within the current administrative and financial means, which they shall themselves determine.

The General Council further agrees that:

- (a) The word "should" in subparagraph (j) of Article 3.5 shall be replaced with the word "shall" wherever it appears, on the understanding that this does not change the nature of the legal obligation in this provision; and
- (b) Priority in licence allocation shall be accorded to importers from developing and least-developed country Members.

F. UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU)

**Article 8.10**

Recommendation:

The General Council agrees that in disputes between a developing country Member and a developed country Member, at least one panellist shall be from a developing country Member, unless the developing country Member agrees to waive this right.

**Article 27.2**

Recommendation:

The General Council agrees that:

- (a) The Secretariat shall always provide developing country Members with qualified legal experts of their choice to assist them in disputes; and for this purpose the Secretariat shall maintain a geographically balanced roster of legal experts from which developing country Members may select.
- (b) The requirement for "continued impartiality of the Secretariat" in paragraph 2 shall mean that the qualified legal expert provided to assist a developing country Member in a dispute shall assist the country for the duration of the dispute and not continue to be counsel for the country after the dispute; and that the expert shall fully discharge his or her role as counsel for the developing country Member.

G. DECISION ON MEASURES IN FAVOUR OF LEAST-DEVELOPED COUNTRIES

**Paragraph 2**

Recommendation:

The General Council agrees that:

- (a) Notwithstanding any provision of any WTO Agreement, least-developed country Members shall always be entitled to extensions for their transition periods as they may require; and
- (b) Technical assistance to least-developed country Members shall aim among other things to remove supply side constraints to benefits under all WTO Agreements, such as benefits of market access opportunities and development of domestic productivity.

**Part II**

*Recommendations from the African Group's Proposals*

A. INCORPORATION OF S&D INTO THE ARCHITECTURE OF WTO RULES:

The General Council agrees that the CTD in Special Session shall urgently consider and make clear recommendations for a decision by the General Council by 30 March 2002 on how special and differential (S&D) treatment may be incorporated into the architecture of WTO rules. This exercise shall include the consideration of concrete rules governing the type, wording, effectiveness, and operationalisation of any S&D treatment provisions to be considered for inclusion in WTO Agreements. In this regard, the Committee shall fully take on board all the Africa Group proposals on cross-cutting issues as set out in Part II of the Communication from the Africa Group in document TN/CTD/W/3/Rev.1.

B. GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

**Article XVIII**

Recommendation:

The General Council agrees that the provisions of this Article aim to promote the rapid development of domestic industries and the needed adjustments where domestic industries experience difficulties in developing and least developed country Members. Therefore, this Article shall be implemented, interpreted and applied by Members and in all the WTO processes in a manner that fully supports the attainment of these goals. In particular, developing and least-developed country Members shall not be subjected to cumbersome requirements or conditions, or to any requirements and conditions that would undermine the attainment of these goals. In determining whether any requirements or conditions are cumbersome, the views of the developing and least-developed country Members concerned shall be fully accommodated and shall not be prejudiced or rejected except with the consensus of all Members.

The General Council agrees further that Members shall at the 5<sup>th</sup> Session of the Ministerial Conference adopt an Agreement on Special and Differential Treatment, elaborating a multilateral

framework on the provisions of Article XVIII and Part IV of GATT 1994, Article IV of GATS and Articles 7 and 8 of the TRIPs Agreement.

**Article XVIII:A**

Recommendation

The General Council agrees that where developing or least-developed country Members wish to modify or withdraw concessions under Article XVIII:7, they shall not be required to offer or make compensatory adjustments that are inconsistent with their development needs or would unreasonably strain their resources. In particular, they shall not be required under paragraph 7(a) to make or offer unreasonable compensatory adjustments, and compensatory adjustment shall be adequate within the meaning of paragraph 7(b) where the developing and least-developed country Members modifying or withdrawing the concession offer to adopt measures that allow a period of three months for exporters based in the Members affected to undertake necessary adjustments.

**Article XVIII:B**

Recommendation:

The General Council agrees that short term financial flows shall not be included in determining the external reserves or surpluses of Members and financial instability shall be duly taken into account as a problem to be addressed over a reasonable period of time when measures under Article XVIII: B shall be maintained. The reasonable period of time shall not be less than three years, taking into account differences in industry types.

C. UNDERSTANDING ON ARTICLE II:1(B)

Recommendation:

The General Council agrees that "other duties or charges" shall not be construed or applied in a manner that prejudices the right of developing and least-developed country Members to levy duties or charges to meet their requirements relating to government revenue and administrative expenses.

D. UNDERSTANDING ON ARTICLE XVII

Recommendation:

Members agree that state trading enterprises may have a significant role to play in protecting public policy in developing and least-developed country Members.

E. UNDERSTANDING ON BALANCE-OF-PAYMENTS PROVISIONS OF GATT 1994

Recommendation:

The General Council agrees that Articles 8 and 12 of the Understanding on Balance-of-Payments are special and differential treatment provisions and their effect in part is that, in the case of developing and least-developed country Members, full consultation procedures (BISD 18S/48-53) shall only be used when it is not appropriate to use the simplified consultation procedures (BISD 20S/47-49). It shall be upon Members preferring full consultation procedures to show why they are appropriate and the Committee shall only use full consultation procedures with the consent of all Members.

F. UNDERSTANDING IN RESPECT OF WAIVERS OF OBLIGATIONS UNDER GATT 1994

Recommendation:

The General Council agrees that waiver of obligations in accordance with Article IX of the WTO Agreement shall be for the benefit of, Members seeking the waiver, or those that the waiver is sought for. Other Members shall not prejudice the benefits under waivers sought in favour of developing or least-developed country Members.

G. UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XXVIII OF GATT 1994

**Paragraph 1**

Recommendation:

The General Council agrees that all small and medium-sized exporting Members shall be deemed to have a principal supplying interest. The General Council further agrees that these Members shall have negotiating rights in any proposed modification or withdrawal of a concession that would have any effect on their trade.

H. AGREEMENT ON AGRICULTURE

**Article 6.2**

Recommendation:

The General Council agrees that the permitted subsidies under Article 6.2 shall be without limitation as to amount and shall include any programmes in developing and least-developed country Members for, *inter alia*, promoting food security and rural development, and assisting resource poor or low-income farmers.

**Article 14**

Recommendation:

The General Council agrees that that measures covered by the Agreement on the Application of Sanitary and Phytosanitary Measures shall not be used as disguised restrictions against the trade of developing and least-developed country Members. Members shall biannually report to the Committee on Agriculture on any measures being implemented under the Agreement on the Application of Sanitary and Phytosanitary Measures that affect any products from developing and least-developed country Members.

**Article 15.1**

Recommendation:

The General Council agrees that measures for special and differential treatment nature shall be embodied in the schedules of commitments or concessions of Members that adopt them as binding commitments in favour of developing and least-developed country Members. However, this shall be without prejudice to any preferential regime governing the exports of developing and least-developed country Members to developed country Members.

## Article 15.2

Recommendation:

The General Council agrees that transition periods under the Agreement shall be extended for developing and country Members that face adjustment difficulties. The General Council further agrees that developing and least-developed country Members shall have the right to modify their commitments as may be necessary to protect the public interest in ensuring food security and alleviating rural poverty.

### I. DECISION ON MEASURES CONCERNING THE POSSIBLE NEGATIVE EFFECTS OF THE REFORM PROGRAMME ON LEAST-DEVELOPED AND NET FOOD-IMPORTING DEVELOPING COUNTRIES

The General Council agrees that, in the context of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries and of the Ministerial Decision on Implementation Issues and Related Concerns, developed country Members shall embody in their schedules of commitments undertakings on, contributions to a revolving fund for normal levels of food imports, providing food aid in fully grant form, and maintaining food aid levels consistently with recommendations and rules under the Food Aid Convention.

### J. AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES

## Article 9.2

Recommendations:

The General Council agrees that:

- (a) The term "substantial investments" in Article 9.2 of the Agreement on Sanitary and Phytosanitary Measures shall be construed relative to resources of concerned government departments in developing and least-developed country Members and to their development needs. Any changes that would require additional resources to existing levels of current expenditure or their restructuring, or additional training or staffing, shall be construed to amount to "substantial investments".
- (b) Where the importing Member does not actually provide such technical assistance, that Member shall withdraw the measures immediately and unconditionally; or the importing Member shall compensate the exporting developing country Members for loss resulting directly or indirectly from the measures.
- (c) Technical assistance shall be fully funded technical assistance and shall not entail financial obligations on the part of the exporting developing and least-developed country Members.
- (d) Impact assessments shall be conducted to determine the likely effect on the trade of developing and least-developed country Members for any proposed standards before adoption. Where it is assessed that the impact would be adverse, except for cases of urgent problems as provided for by paragraph 6 of Annex B, the standards shall not become applicable until the Committee has established that developing and least-developed country Members that would be affected have acquired the capacity to beneficially comply with them.

## Articles 10.1 and 10.4

Recommendations:

The General Council agrees that:

- (a) The requirement to "take account of the special needs of developing country Members, and in particular least developed country Members" in Article 10.1 shall mean that Members shall either withdraw measures that adversely affect any developing and least-developed country Members or which they find difficult to comply with, or shall provide the technical and financial resources necessary for the developing and least-developed country Members to comply with the measures.
- (b) The requirement shall further mean that Members shall always initiate consultations in the Committee whenever they propose or intend to take any measures that are likely to affect imports from developing and least-developed country Members. In the consultations, Members shall establish whether or not the proposed or intended measures, if justified under the Agreement, would adversely affect any developing and least-developed country Members.
- (c) Technology transfer and any technical and financial assistance under the Agreement to developing and least-developed country Members shall be cost free.

The General Council further agrees to establish a facility within the Global Trust Fund for ensuring that:

- (a) Developing and least-developed country Members have the financial and technical capacity to meet the requirements under the Agreement;
- (b) Delegations from developing and least-developed country Members attend and effectively participate in meetings of the Committee and relevant international standard setting organisations;
- (c) Developing and least-developed country Members effectively utilise the flexibility under the Agreement; and
- (d) Measures adopted under the Agreement do not contravene the rights of developing and least developed country Members.

## Article 10.3

Recommendation:

The General Council agrees that the phrase "the Committee is enabled to grant such countries" shall mean that the Committee shall grant such countries; and the phrase "specified, time-limited exceptions" shall refer to periods of not less than three years notwithstanding any provision in any WTO Agreements and in any case such periods such be adequate for developing and least-developed country Members to undertake any adjustments necessary for them to comply with the provisions of the Agreement. The phrase "taking into account their financial, trade and development needs" shall mean that the periods shall objectively relate to the time and resources necessary for developing and least-developed country Members to undertake necessary adjustments to comply with the provisions of the Agreement.

K. AGREEMENT ON TEXTILES AND CLOTHING

**Articles 2.18 and 6.6**

Recommendations:

Without prejudice to any preferential regime governing the exports of developing and least-developed country Members to developed country Members, the General Council agrees that:

- (a) In the context of paragraph 4 of the Ministerial Decision on Implementation Issues and Related Concerns adopted on 14 November 2001, "advancement by one stage" shall mean the cumulation of the current and the succeeding stages, and "equivalent changes" shall refer to changes that are not less favourable than the cumulation. In determining equivalent changes, proposals made by developing and least-developed country Members shall be accepted unless there are compelling reasons, which shall be recorded and examined by the Textiles Monitoring Board.
- (b) There shall be no cumulation of imports from developing or least-developed country Members in determining volumes of imports for purposes of measures against imports under the Agreement. The phrase "differential and more favourable treatment" in Article 6.6(b) shall mean that no safeguard measures shall be taken against exports of Members that constitute a small volume or a small percentage of total textile and clothing imports. In this regard "small" shall be understood to refer to imports from any developing and least-developed country Member that are less than 10 per cent of the total textile and clothing imports of a Member.
- (c) The phrase "special consideration" in Article 6.6(c) shall mean that no restrictions shall be imposed on such exports of such developing and least-developed country Members.
- (d) In accordance with paragraph 42 of the Declaration of the Fourth Session of the Ministerial Conference, textile and clothing exports of least-developed country Members shall be accorded duty free, quota free treatment by developed country Members.

L. AGREEMENT ON TECHNICAL BARRIERS TO TRADE

**Articles 11 and 12**

Recommendations:

The General Council agrees:

- (a) That Article 11 constitutes binding obligations;
- (b) Recognising the importance of standardisation in promoting exports of developing and least-developed country Members, that a facility be provided under the Global Trust Fund into which contributions shall be made by Members to assist developing and least-developed country Members in implementing the Agreement. Members that propose to introduce new standards that are required to be notified under the Agreement, shall prior to adoption of the standard, deposit amounts into the fund in accordance with assessments by the Committee based on resource implications for

developing and least-developed country Members in complying with such standards;  
and

- (c) That a further facility within the Global Trust Fund be established for ensuring that:
  - (i) developing and least-developed country Members have the financial and technical capacity to meet the requirements under the Agreement;
  - (ii) delegations from developing and least-developed country Members attend and effectively participate in meetings of the Committee and relevant international standard setting organisations;
  - (iii) developing and least-developed country Members effectively utilise the flexibility under the Agreement; and
  - (iv) measures adopted under the Agreement do not contravene the rights of developing and least-developed country Members.

The General Council further agrees that:

- (a) Reference to the special needs and difficulties of developing and least-developed country Members in Article 12 shall mean that developed country Members shall provide full technical and financial assistance to developing and least-developed country Members that are to comply with standards in accordance with the Agreement; and
- (b) Technical assistance shall be fully funded technical assistance and shall not entail financial obligations on the part of the exporting developing and least-developed country Members.
- (c) Impact assessments shall be conducted to determine the likely effect on the trade of developing and least-developed country Members for any proposed standards before adoption, and if the impact would be adverse, the standards shall not become applicable until the Committee has established that developing and least-developed country Members that would be affected have acquired the capacity to beneficially comply with them.
- (d) In paragraph 8 of Article 12 the phrase "the Committee ... is enabled to grant" shall mean that the Committee shall grant, and the phrase "specified, time-limited exceptions" shall refer to periods of not less than three years and in any case such periods such be adequate for developing and least-developed country Members to undertake any adjustments necessary for them to comply with the provisions of the Agreement.
- (e) Technology transfer and any technical and financial assistance under the Agreement to developing and least-developed country Members shall be cost free.

M. AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES

**Article 3**

Recommendation:

The General Council agrees that provision in Article 3 of the TRIMs Agreement that all the exceptions in GATT 1994 shall apply, as appropriate, to the TRIMs Agreement, shall mean that, co-operation arrangements, laws, measures and policies adopted on the basis of the provisions of GATT 1994 that operate as exceptions, apply to the provisions of the TRIMs Agreement. Such exceptions include:

- (a) co-operation arrangements among developing country Members under which certain preferential treatment is accorded to parties to the arrangements;
- (b) quantitative restrictions taken in accordance with among others Articles XII, XVIII and XIX of GATT 1994; and
- (c) measures taken to improve living standards in developing country Members under Article XVIII including programmes on incentives relating to domestic content requirements.

**Article 4**

Recommendations:

The General Council agrees that in accordance with paragraph 1.1 of the Ministerial Decision on Implementation-Related Issues and Concerns adopted at the Fourth Session of the Ministerial Conference on 14 November 2001, which "reaffirms that Article XVIII of the GATT 1994 is a special and differential treatment provision for developing countries and that recourse to it should be less onerous than to Article XII of the GATT 1994", Members shall interpret and apply Article 4 of the TRIMs Agreement in a manner that fully supports measures taken by developing and least-developed country Members to safeguard the external financial position, the balance of payments, and sufficiency of reserves.

The General Council further agrees that the phrase "free to deviate temporarily from the provisions of Article 2" that appears in Article 4 of the TRIMs Agreement shall, in view of the structural bottlenecks of developing and least-developed country Members, refer to a period of not less than six years.

**Article 5.3**

Recommendation:

On the basis of the development, financial and trade needs of least-developed and other low income developing country Members, the General Council agrees that the Council for Trade in Goods shall grant requests for extension of or for fresh transition periods from least-developed country Members, and from developing country Members that are eligible under the Agreement on Subsidies and Countervailing Measures, to maintain subsidy programmes that may wholly or in part be covered by or have a relation to the TRIMs Agreement.

N. AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 (DUMPING)

**Article 15**

Recommendation:

The General Council agrees that for purposes of Article 15 of the Agreement:

- (a) "Special regard", "special situation", and "essential interests of developing country Members", read together, require that developed country Members shall specifically take into account the development needs of developing and least-developed country Members particularly for sustainably maintaining or increasing market access for products of export interest to them. In this regard:
  - (i) the causal link between the fact of dumping and of injury on the one hand, to imports from developing and least-developed country Members on the other, shall be determined on a case by case basis taking into account the WTO goals of improving living standards in developing and least-developed country Members through growth in the trade of these countries, in a manner that demonstrates that the achievement of these goals in developing and least-developed country Members has duly been taken into account; and
  - (ii) coherence shall be ensured between the Anti-dumping, and the Subsidies and Countervailing Measures agreements on the basis of the importance of sustainably maintaining or increasing market access for products of export interest to developing and least-developed country Members; and of maintaining their export competitiveness.
- (b) "Constructive remedies provided for by this Agreement" shall include:
  - (i) consultations for mutually agreed solutions within the meaning of paragraph (a) above other than anti-dumping duties, price undertakings, or any action prohibited by the Agreement on Safeguards;
  - (ii) internal reforms in developed country Members regarding market conditions, and employment and investment conditions to improve competitiveness on the basis of fair competition rather than taking anti-dumping measures against imports; and
  - (iii) exploring solutions against anti-competitive practices if determined to have taken place, on the basis of taking into account and protecting the interests of domestic consumers, rather than taking any anti-dumping measures.

O. AGREEMENT ON IMPLEMENTATION OF ARTICLE VII OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 (CUSTOMS VALUATION)

**Article 20.1-2**

Recommendation:

The General Council agrees that delays of application of the Agreement provided for under Article 20 read together with Annex III and the Decision on Texts Relating to Minimum Values and

Imports by Sole Agents Sole Distributors and Sole Concessionaires, shall be extended whenever that is necessary to protect the development, financial and trade needs of developing and least-developed country Members as requested by the Members seeking such extensions.

### **Article 20.3**

Recommendation:

The General Council agrees that the provisions of paragraph 3 of Article 20 constitute binding obligations. The General Council further agrees that programmes undertaken by developed country Members, shall be implemented on a long-term basis. Regarding least-developed country Members, the programmes once commenced shall be implemented for as long as the country remains classified as such.

## **P. AGREEMENT ON IMPORT LICENSING PROCEDURES**

### **Article 1.2**

Recommendation:

The General Council agrees that the requirement to take into account the "development purposes and trade needs of developing country Members" in Article 1.2 of the Agreement shall mean that import licensing regimes shall be designed in a manner that prevents adverse effects to the trade of developing country Members. In this regard, the regimes shall specifically be expeditious in relation to the trade of developing country Members.

## **Q. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES**

### **Article 27.1**

Recommendation:

The General Council agrees that developing country Members shall have a right to use subsidies as may be necessary for their economic development. Extensions shall be granted in accordance with Article 27.4 of the Agreement bearing in mind the important role subsidies play in the economic development of developing country Members.

### **Article 27.4**

Recommendations:

The General Council agrees that:

- (a) Members that consider certain subsidies that developing country Members maintain to be "inconsistent with its development needs" shall show that they are prohibited or actionable subsidies and that those subsidies would clearly not benefit any domestic industry of the developing country Member; and
- (b) Developing country Members that seek extensions under Article 27.4 and the Decision on Procedures for Extensions Under Article 27.4 for Certain Developing Country Members (G/SCM/39) shall be speedily granted such extensions. Members shall refrain from invoking technicalities, such as slight or reasonable delays to seek the extension within the prescribed time frames.

### **Article 27.8**

Recommendation:

The General Council agrees that in consultations and in any proceedings, there shall be no presumption of serious prejudice whatsoever including on the basis of any percentage or amount of subsidisation where developing country Members grant subsidies; and that any serious prejudice shall be demonstrated exclusively by positive evidence.

### **Article 27.9**

Recommendation:

The General Council agrees that nullification and impairment in cases of actionable subsidies that developing country Members grant or maintain, shall be construed to mean only the displacement or impediment of imports of a like product into the market of the developing country Member or injury to a domestic industry in the market of the importing Member.

### **Article 27.13**

Recommendation:

The General Council agrees that Article 27.13 covers any privatisation programmes undertaken within the period from 1 January 1995 and that developing country Members may grant or maintain the subsidy programmes under Article 27.13 to ensure good adjustment of their economies; and that "limited period" refers to a period of not less than eight years.

### **Article 27.15**

Recommendation:

The General Council agrees that "interested developing country Member" shall refer to any developing country Member regardless of any subsidy programmes maintained, on the basis that developing country Members have an abiding interest in the use and operation of subsidies due to their importance in the rapid economic development of developing country Members.

## **R. AGREEMENT ON SAFEGUARDS**

### **Article 9.1-2**

Recommendation:

The General Council agrees that:

- (a) Paragraph 1 of Article 9 constitutes a binding prohibition against taking safeguard measures against products from developing country Members that do not exceed 3 per cent of imports of a Member; and
- (b) Paragraph 2 of Article 9 is a binding right for developing country Members to extend safeguard measures for an additional two years and to take fresh safeguard measures against products previously the subject of safeguard measures.

S. DECISION ON MEASURES IN FAVOUR OF LEAST-DEVELOPED COUNTRIES

**Paragraph 1**

Recommendation:

The General Council agrees that the effect of the Decision on Measures in Favour of Least-Developed Countries is that least-developed country Members, notwithstanding any provision of any WTO Agreement, shall not be required to implement or comply with obligations or commitments that are prejudicial to their individual development, financial or trade needs, or their administrative and institutional capacity.

T. DECISION ON DIFFERENTIAL AND MORE FAVOURABLE TREATMENT, RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES, OF 28 NOVEMBER 1979

Recommendation:

Without prejudice to any preferential regime governing the exports of developing and least-developed country Members to developed country Members, the General Council agrees that:

- (a) In formulating schemes under paragraphs (a) and (b) of clause 1 of the Enabling Clause, developed country Members shall consult under the auspices of the Committee on Trade and Development with developing and least-developed country Members with a view to ensuring that products of export interest to developing and least-developed country Members are accorded meaningful market access that will achieve the objectives set out in Article XXXVI of GATT 1994. In this regard, developed country Members shall show to the Committee on Trade and Development how they have included in the programmes specific products of particular export interest to developing and least-developed country Members and taken measures to ensure meaningful market access.
- (b) Meaningful market access shall be construed in accordance with targets set or adopted from time to time in the Committee on Trade and Development.
- (c) The Enabling Clause provides developing and least-developed country Members with the right to enter regional or global arrangements for the mutual reduction or elimination of tariffs or non-tariff barriers. The arrangements can be for reduction or elimination of tariffs or non-tariff barriers, and with regard to reduction or elimination of tariffs no WTO body or Members should prescribe any criteria relating to the arrangements. Members shall respect any such arrangements as an exercise of rights that developing and least-developed country Members have under the WTO Agreement.

U. GENERAL AGREEMENT ON TRADE IN SERVICES

**Article IV**

Recommendation:

The General Council agrees that:

- (a) The Committee on Trade and Development shall set periodic benchmarks on financial and technical cooperation and other mutual arrangements under which

developed country Members shall accord to developing country Members special and differential treatment and undertake commitments in negotiations as and when held designed to ensure:

- (i) The strengthening of the capacity, efficiency and competitiveness of domestic service industries of developing country Members and designed to effect technology transfer to developing country Members;
  - (ii) Access by domestic service industries of developing country Members to distribution channels and information networks of developed country markets; and
  - (iii) Liberalisation of market access in sectors and modes of supply of export interest to developing country Members.
- (b) Developed country Members shall reserve quotas for supply of services by developing country suppliers as may be appropriate in sectors that developing country suppliers have interests, and that developed country Members shall not adopt horizontal limitations with respect to movement of natural persons and shall over a period of two years phase out the limitations they maintain at the adoption of this decision.
- (c) Developed country Members shall twice every 12 months:
- (i) report to the Council for Trade in Services on how they are implementing and complying with targets set by the Committee on Trade and Development for the operationalisation of Article IV;
  - (ii) the Council for Trade in Services and the Committee on Trade and Development shall make recommendations to developed country Members to ensure the implementation of Article IV.
- (d) Commitments or concessions under the General Agreement on Trade in Services, shall reflect a proportion of, at least 40 to 60 in short term actual gains, for developing and developed country Members respectively, provided that special attention shall be demonstrably accorded to the interests of developing and least-developed country Members.

### **Article V:3**

#### **Recommendation:**

The General Council agrees that the references to "flexibility" and "more favourable treatment" with respect to agreements for liberalisation of trade in services among developing country Members, shall mean that the agreements shall not be required to comply with the rules set out in Article V provided that the agreements are entered into within the framework of or form part of wider economic liberalisation or regional integration programmes.

V. AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

**Articles 65, 66.1, 70.8, 79.9**

Recommendation:

The General Council agrees that:

- (a) Developing country Members shall be entitled to extensions beyond the additional five year period under Article 65.4 relating to other areas of technology required to be protected under the TRIPS Agreement.
- (b) For purposes of the requirement to grant exclusive marketing rights during transition periods, there is a clear distinction between "patent rights" on the one hand and "exclusive marketing rights" on the other. The two shall not confer the same rights. Patent rights as set out in Article 28 of the TRIPS Agreement are the following: "to prevent third parties not having the owner's consent from the acts of making, using, offering for sale, selling, or importing for these purposes the (patented) product" as well as the products obtained directly by the patented process. These rights conferred by a patent, are not the same rights as may be conferred by the grant of exclusive marketing rights. Members have the right and the freedom to define what constitutes exclusive marketing rights, and may do so in light of any interpretations that the General Council or the TRIPS Council may adopt. There shall be no requirement to grant exclusive marketing rights until and only if marketing approval is granted.

**Articles 7, 8, 66.2**

Recommendation:

The General Council agrees that the following conditions shall govern the implementation of Article 66.2 of the TRIPS Agreement:

- (a) developed country Members shall give incentives to enterprises and institutions in their territories through their laws or other administrative instruments, and the incentives shall be of a magnitude and nature that will effectively operate as motivation to transfer technology to least-developed country Members taking into account the actual conditions in the least-developed country Members and the difficulties expressed by the enterprises and institutions; and
- (b) The incentives shall take any appropriate forms provided that the forms shall effectively operate as incentives to motivate the enterprises and institutions to transfer technology to least-developed country Members.

The General Council further agrees that

- (a) Developed country Members shall report on their implementation of Articles 7, 8, and 66.2 of the Agreement, according to a reporting schedule to be regularly drawn up by the TRIPS Council. The reports shall be evaluated in the TRIPS Council to establish whether or not the implementation is achieving the objectives of building sound technological bases in developing and least-developed country Members.
- (b) "Technology" for purposes of the Agreement shall include equipment, knowledge and skills including their tacit forms and trade secrets, practical and theoretical training,

and insights into the history and global context of innovations and processes relating to particular technologies.

- (c) Co-operation arrangements between enterprises and institutions of developed country Members on the one hand and research and other learning institutions in developing and least developed country Members on the other, shall be essential components of implementing the Agreement. The reporting shall indicate implementation in terms also of arrangements with the research and learning institutions.

#### W. DISPUTE SETTLEMENT UNDERSTANDING

##### **Article 4.10**

Recommendation:

The General Council agrees that:

- (i) in consultations, requests by developing and least-developed country Members to be involved shall always be accepted; and
- (ii) in the proceedings developed country Members shall present evidence of, and in the written decisions the panels and the Appellate Body shall indicate, how special attention has been given to particular problems and interests of developing country Members during the stage of consultations.

##### **Article 12.10**

Recommendation:

The General Council agrees that:

- (i) consultations within the period set for consultations and consultations that may be extended under the Dispute Settlement Understanding, may only be declared as concluded with the consent of all parties involved in the consultations; and
- (ii) "sufficient time for the developing country Member to prepare and present its argumentation" shall be understood to be a period of six months or the longer period requested by the developing country Member.

##### **Article 12.11**

Recommendation:

The General Council agrees that Article 12.11 of the Dispute Settlement Understanding requires the panel, in reaching a decision, to fully take into account the special and differential treatment provisions that appear in any covered Agreements that are raised or that are relevant in the dispute.

### **Article 21.2, 21.7, and 21.8**

Recommendation:

The General Council agrees that paying "particular attention" to the "interests of developing country Members" in paragraph 2, and consideration of "what further action the DSB might take" in paragraph 7, shall be understood to require that recommendations made by the Dispute Settlement Body and their implementation and surveillance shall address:

- (a) any economic or trade loss suffered by the developing country Member computed from the adoption to the withdrawal of the measures, by requiring that the developed country Member pay monetary compensation or make some other form of compensation to the developing country Member; and
- (b) any difficulties that a developing country Member may face in seeking to enforce compliance with the recommendations of the Dispute Settlement Body, through authorising collective suspension by the rest of the WTO Membership of obligations to the Member against which recommendations were made, notwithstanding the requirement that the level of suspension should be commensurate to the resulting nullification and impairment. Under such authorisation any Member may suspend any obligations to the Member against which suspension is authorised.

### **Article 24.1**

Recommendation:

The General Council agrees that the requirement to "exercise due restraint in raising matters under these procedures involving a least-developed country Member" shall mean that panels shall before proceeding with the case first determine whether the Member bringing the case has given particular consideration to the special situation of the least-developed country Member. In this regard, the panel shall take into account all relevant factors including, the value of any alleged nullification or impairment, the possible harm to the economy and resources of the least-developed country Member that could result from the case, and the capacity in the circumstances of the least-developed country Member to effectively deal with the case.

## **X. CRITERIA FOR TECHNICAL AND FINANCIAL ASSISTANCE**

The General Council agrees upon the following criteria for technical and financial assistance. Technical assistance plans of the WTO and other assistance provided by Members shall be fully consistent with these criteria.

1. (a) Technical and financial assistance shall be country driven. In this regard, training courses shall be sustainable. Sustainability shall require, inter alia,
  - (i) follow up training,
  - (ii) readily useable local infrastructure for keeping current on relevant developments in the field, and
  - (iii) the targeting of different knowledge levels of trainees in a manner that increasingly equips developing and least developed country Members with progressively higher levels of skills in all relevant fields.

- (b) The long-term and integral components of capacity building shall include the establishment of reference and research libraries, the introduction of relevant courses in institutions of learning at university level, and the planned and predictable availability of opportunities for training in other jurisdictions so as to have domestic skills conversant with regimes of other Members;
- 2.
  - (a) Training shall be relevant to identified priorities and effective in directly helping the redress of bottlenecks faced by Members. In this regard it shall be directed towards addressing,
    - (i) implementing obligations,
    - (ii) effectively participating in negotiations on a consistent basis,
    - (iii) achieving the clear and unequivocal inclusion of their concerns in instruments adopted by WTO bodies,
    - (iv) equitably taking up and utilising opportunities availed under the multilateral trading system and other market access arrangements; and
    - (v) achieving acceptable or high levels of domestic economic growth.
  - (b) Capacity building shall aim for the attainment in developing country Members of projected levels of skills required in government departments, in diplomatic missions and their line ministries, and in negotiating teams. The developing country Member concerned shall establish the appropriate levels. The levels shall relate inter alia to experience and training of individuals in relevant disciplines and the number of personnel.
- 3. Transparent, inclusive, fair, and fully accepted institutional arrangements for ensuring the proper functioning of capacity building programmes and activities shall always be in place as a condition precedent for the commencement of transition periods.
- 4.
  - (a) There shall be:
    - (i) prior assessment and costing of implementation, and of compliance and adjustment requirements of developing and least developed country Members under each or every agreement;
    - (ii) the determination of ability to meet these requirements; and
    - (iii) the prior establishment of binding rules on the subsequent execution of modalities for meeting these requirements bearing in mind that these requirements will have financial, human resource, and socio-economic implications.
  - (b) Capacity building shall assist:
    - (i) a proper integration in developing country Members among all relevant government departments to address the cross-cutting and multi-disciplinary nature of WTO obligations and rights,

- (ii) the establishment of a functioning link between developing country capitals and their Geneva missions; and
- (iii) mechanisms for co-ordinating capacity building activities in Geneva and in the capitals that come under the auspices of participating donor facilities including the WTO secretariat.

5. The success of capacity building shall not be reckoned or assessed on the basis of the quantity of money pledged or spent; nor on the basis of the number of technical missions, or of seminars and workshops. In this regard, the success of capacity building shall be assessed taking into account all the criteria in this Decision and the objectives of the WTO.

6. With respect to negotiations, capacity building shall aim to provide practical material and skills on how to negotiate and on issues for consideration, rather than only further introductory courses and seminars designed for new or mid-career government officials. While the trade policy courses should continue, there shall be courses designed for government officials with a good working knowledge of the WTO system, aimed at assisting the internalisation of negotiating procedures and mechanisms in relation to their issues and priorities as individual Members or regions or groups of Members.

7. Capacity building shall not take the form of persuading developing country officials on positions they should take on issues. Rather, it shall aim for the in-depth internalisation of issues and the development of the capacity to resourcefully apply the Agreements to practical issues relating to the development needs of the country.

8. With respect to new obligations proposed in negotiations, the general guidelines shall be that existing domestic laws shall not need to undergo major changes. Where any major changes would be required, new obligations will be considered only if the Members already have in place the relevantly skilled people, the institutional framework and financial resources to undertake the required changes.

#### Y. CRITERIA IN THE FORMULATION AND CONDUCT OF SEMINARS AND WORKSHOPS

The General Council agrees upon the following criteria to govern the formulation of seminar and workshop programmes.

1. Seminars shall target the different knowledge levels on WTO agreements of government officials in and issues of concern for developing and least country Members, and specific elements of WTO work programmes. New officials or officials unfamiliar with the WTO Agreement may benefit from introductory courses and seminars. Officials that have been working on WTO matters for a while and who may be the government negotiators, will need seminars that explore issues and options for country positions at some length and with some detail, rather than generalisations or introductions.

2. Seminars shall have a degree of continuity, through follow up seminars and continuous access to current literature. This continuity shall not be in the form of mere repetition of the seminars previously given, but of building upon previous seminars into deeper discourses and research coursework. So, the preparation of seminars for a capacity building programme should have a long-term framework, with projected results or products in terms of trained officials and levels of training to be attained over a given framework of time. It would be upon governments and their officials to try to ensure that the officials benefit from this continuity.

3. Seminars shall normally be situated or localised in the territories of Members and regions, in addition to those that are given at the WTO secretariat. When situated in territories of Members and

regions, they shall be directly linked into the curricula of institutions of high learning particularly at university level. Some seminars should be given as part of the courses at these institutions of learning. University teaching staff should be involved as trainers on seminars given to government officials and civil society. The seminars should be scheduled within or make part of the long-term capacity building programmes within the country or region.

4. Seminars and workshops shall include the specific subject of special and differential treatment, to assist in ensuring that the provisions are utilised to the maximum.

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