

**TEXT FOR THE AFRICAN GROUP PROPOSALS ON DISPUTE SETTLEMENT  
UNDERSTANDING NEGOTIATIONS**

Communication from Kenya

The following communication, dated 16 January 2003, has been received from the Permanent Mission of Kenya on behalf of the African Group.

**I. CONFLICT BETWEEN PROVISIONS AND AGREEMENTS**

Article 3.2 should be amended by adding the following:

*When, in the course of proceedings before a panel or the Appellate Body, a question arises on whether or not there is a conflict between provisions of any covered Agreement or between any covered Agreements, the panel or Appellate Body shall refer the matter to the General Council for a determination. In reaching the determination, the General Council may exercise the authority conferred under paragraph 2 of Article IX of the WTO Agreement.*

**II. MEASURES WITHDRAWN BEFORE, OR IN THE COURSE OF, CONSULTATIONS**

Article 3.6 of the DSU should be amended by renaming the current provision as paragraph (a) – as amended – and adding the following paragraphs:

*(b) Developed-country Members that adopt measures against developing or least-developed country Members and withdraw them in the course of consultations or 90 days before the commencement of consultations pursuant to Article 4 of this Understanding shall notify them individually or jointly to the DSB within 60 days of their withdrawal. The notification shall, describe the measure and the reason or circumstances for the withdrawal, state whether consultations were held and finalised, and indicate the amount of injury to the developing or least-developed country Member resulting from the measure. Disputes over the amount of injury may be referred to arbitration under Article 25 of this Understanding.*

*(c) Where injury has resulted from the withdrawn measure, and if the developing or least-developed country Member so requests, the DSB may recommend monetary and any other appropriate compensation taking into account the nature of injury suffered. The level of compensation shall be determined by arbitration in accordance with Article 25 of this Understanding and shall be implemented mutatis mutandis in accordance with Articles 21 and 22.*

(d) *The requests referred to in paragraph (c) may be made at the meeting of the DSB considering the notification of the withdrawn measures or subsequently within a period of 60 days, unless there are exceptional circumstances justifying the consideration of the request at a later date.*

### **III. DEVELOPMENT PERSPECTIVE IN THE TERMS OF REFERENCE**

Article 7 should be amended by adding paragraphs 4 and 5 as follows:

4. *Where a developing or least-developed country Member is a party to any dispute under this Understanding, the panels, in consultation with relevant development institutions where necessary, shall consider and make specific findings on the development implications of the issues raised in the dispute and shall specifically consider any adverse impact that findings may have on the social and economic welfare of the developing or least-developed country Member. The DSB shall fully take those findings into account in making its recommendations and rulings.*

5. *This Understanding is an important mechanism for achieving the development objectives of the WTO Agreement. Accordingly, the findings of the panels and the Appellate Body, and the recommendations and rulings of the DSB shall fully take into account the development needs of developing and least-developed country Members. The General Council shall review this Understanding every five years in order to consider and adopt appropriate improvements to ensure the achievement of the development objectives of the WTO Agreement.*

### **IV. THIRD PARTIES**

Article 10 should be amended by adding the following to paragraph 2:

*For purposes of developing and least-developed country Members, the term “substantial interest” shall be interpreted to include, any amount of international trade; trade impact on major domestic macro-economic indicators such as employment, national income, and foreign exchange reserves; the gaining of expertise in the procedural, substantive, and systemic issues relating to this Understanding; and protecting long-term development interests that any measures inconsistent with covered agreements and any findings, recommendations and rulings could affect.*

Article 10 should be further amended by replacing paragraph 3 with the following:

*Third parties shall receive all the documentation relating to the dispute from the parties, other third parties, and the panel without prejudice to the provisions of paragraph 2 of Article 18. Third parties, if they request, shall have a right to attend the proceedings and to be availed the opportunity to put written and oral questions to the parties and other third parties during the proceedings.*

Article 17.4 should be amended by replacing it with the following:

4. *The parties to the dispute may appeal a panel report. Third parties in the panel proceedings, if they request, shall have a right to attend the proceedings and have an opportunity to be heard and to make written submissions to the Appellate Body. Their submissions shall also be given to the parties to the dispute and shall be reflected in the Appellate Body report.*

## **V. THE RIGHT TO SEEK INFORMATION**

Article 13 should be amended by adding the following as paragraph 3:

3. *For purposes of this Article, “the right to seek information and technical advice” shall not be construed as a requirement to receive unsolicited information or technical advice.*

## **VI. SEPARATE OPINIONS OF PANELISTS AND APPELLATE BODY MEMBERS**

Article 14.3 should be amended by replacing it with the following:

3. *Each panelist shall deliver a fully reasoned, separate written opinion stating clearly the party which has prevailed in the dispute. Where two or more panelists are in agreement, they may decide to provide a joint opinion. The majority opinion shall be the decision of the panel.*

Article 17.11 should be amended by replacing it with the following:

11. *Appellate Body members shall each deliver a fully reasoned, separate written opinion stating clearly the party which has prevailed in the dispute. Where two or more members are in agreement, they may decide to provide a joint opinion. The majority opinion shall be the decision of the Appellate Body.*

## **VII. DEVELOPMENT PERSPECTIVE IN THE IMPLEMENTATION OF RECOMMENDATIONS AND RULINGS**

Article 21.2 should be amended by adding the following:

*In this regard, notwithstanding any finding of inconsistency of measures with a covered agreement, the DSB, if requested by the developing-country Member and fully taking into account the findings of the panel or Appellate Body, as well as the reports of relevant development institutions where appropriate, on the development implications of the issues raised in the dispute, may recommend arbitration in accordance with Article 25 for purposes of drawing up an adjustment programme under which the developing-country Member will gradually implement the recommendations and rulings.*

## **VIII. MONETARY COMPENSATION AND COMPUTATION OF INJURY**

Article 21.8 should be amended by adding the following:

*Further, if the case is one brought by a developing-country Member against a developed-country member, the DSB may recommend monetary and other appropriate compensation taking into account the injury suffered. The quantification of injury and compensation shall be computed as from the date of the adoption of the measure found to be inconsistent with covered agreements until the date of its withdrawal.*

## **IX. COLLECTIVE ENFORCEMENT OF RECOMMENDATIONS AND RULINGS**

Article 22.6 should be amended by renaming the current provision as paragraph (a) and adding the following paragraphs (b), (c) and (d):

(b) *The following principles and procedures shall apply to requests for collective suspension of concessions under paragraph (c):*

(i) *Before making such a request, the developing or least-developed country Member shall refer the matter to arbitration for determination of the level of nullification and impairment, which shall be done taking into account the legitimate expectations of the developing or least-developed country Member. The arbitration shall further take into account any impediment to the attainment of the development objectives of the WTO Agreement as further elaborated by the developing or least-developed country Member.*

(ii) *The arbitration shall consider whether suspension of concessions or other obligations in other sectors by the developing or least-developed country Member would be appropriate to effectively encourage the withdrawal of the measure found to be inconsistent with a covered Agreement, taking into account possible effects on that developing or least-developed country Member.*

(iii) *Where the DSB grants authorisation to Members to suspend concessions or other obligations under paragraph (c), the level of suspension for each Member authorized shall be such as to secure, full compensation for the injury to the developing or least-developed country Member, the protection of its development interests, and the timely and effective implementation of the recommendations and rulings.*

(c) *Where the case is one brought by a developing or least-developed country Member against a developed-country Member and the situation described in paragraph 2 occurs, and in order to promote the timely and effective implementation of recommendations and rulings, the DSB, upon request, shall grant authorization to the developing or least-developed country Member and any other Members to suspend concessions or other obligations within 30 days.*

(d) *The DSB shall review the operation of paragraph 6 of this Article not later than five years after its implementation with a view to ensuring its effectiveness and in this regard may adopt appropriate measures and amendments to this Understanding.*

## **X. RESPONSIBILITIES OF THE SECRETARIAT**

Article 27.1 should be amended by adding the following:

*The Secretariat shall provide all relevant legal, historical and procedural research and other material relating to a dispute to the developing and least-developed country Members that are parties or third parties in the dispute. The material shall cover the specific rights and obligations relating to the particular issues raised in the dispute.*

Article 27.2 should be amended by adding the following:

*The Secretariat shall maintain a geographically balanced roster of legal experts from which developing and least-developed country Members may select experts to assist them in dispute settlement proceedings. Notwithstanding the reference to impartiality in the provision of legal and other services by the Secretariat, the legal expert shall fully discharge the functions of counsel to the developing or least-developed country Member party to a dispute.*

## **XI. FUND ON DISPUTE SETTLEMENT**

A new Article 28 should be introduced in the following terms:

## Article 28

### *WTO Fund on Dispute Settlement*

1. *There shall be a fund on dispute settlement to facilitate the effective utilization by developing and least-developed country Members of this Understanding in the settlement of disputes arising from the covered agreements.*
  2. *The fund established under paragraph 1 of this Article shall be financed from the regular WTO budget. However, to ensure its adequacy, the fund may additionally be funded from extra-budgetary sources, which may include voluntary contributions from Members.*
  3. *The General Council shall annually review the adequacy and utilization of the fund with a view to improving its effectiveness and in this regard may adopt appropriate measures and amendments to this Understanding.*
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