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Dispute Settlement Body
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NEGOTIATIONS ON THE DISPUTE SETTLEMENT UNDERSTANDING

Proposal by the African Group

The following communication, dated 9 September 2002, has been received from the Permanent Mission of Kenya on behalf of the African Group.

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1. African Members, many of them being least-developed country Members[1], have not been active participants in the WTO dispute settlement system (DS). This diminutive participation is not because they have never had occasion to want to enforce their rights, or the obligations of other Members, but due to structural difficulties of the DS. An equitable outcome of the negotiations must include solutions that will clearly facilitate and support the full participation of African Members in the DS.

2. In this context, the African Group wishes to point out pertinent problems that should be fully addressed in the negotiations. In doing so, the African Group draws on the experience of little or no utilization of the DS, and issues of principle as raised by the experience so far of the operation of the DS. The Group takes into account also some proposals made by other delegations that have a bearing on the interests of Africa. The major problems African Members face in seeking to use the DS include the following:

- The DS is complicated and overly expensive;
- Injury suffered has not been satisfactorily compensated in situations where the offending measures are withdrawn before or after the commencement of proceedings;
- The means provided for enforcement of findings and recommendations (trade retaliation) are skewed against and disadvantage African Members;
- In its operation, the DS should not abstract itself from the development fundamentals. Experience has shown that the DS has not satisfactorily and clearly aimed in its operation to contribute towards the tangible attainment of the development objectives of the WTO Agreement;
- The special procedures for developing country Members have not addressed the core difficulties African Members face in seeking to use the DS;
- In their interpretation and application of the provisions, the panels and the Appellate Body have in several instances exceeded their mandate and fundamentally prejudiced the interests and rights of developing-country Members as enshrined in the WTO Agreement;
- The panel and Appellate Body composition and operation have not been conducive to ensuring the achievement of the development objectives of the WTO and of equity in geographical distribution; and

[1] 34 of the world's 49 least-developed countries are in Africa.

- The core development and equity concerns of African Members have not been taken into account in assessing the operation and the need for improvement of the DS. From the perspective of the African Group, any assessment and improvement of the DSU should be primarily based on the development objectives set in the WTO Agreement.

A complicated and overly expensive system – Article 2 of the DSU

3. The DS is complicated and overly expensive, which has institutional and human resource as well as financial implications. This has not supported most developing-country Members in readily using the DS.

(a) Developing-country Members will need supplementary resources and means to be provided to develop both the institutional and human capacity for using the DS. While this may be part of the technical assistance programmes, specific measures will be necessary to address this issue, such as the establishment of a permanent standing fund in the form for instance of a small cess on Membership contributions or otherwise within the framework of the Doha Development Agenda Global Trust Fund.

(b) The Advisory Centre on WTO Law should not be considered as panacea for all institutional and human capacity constraints of developing countries. Its terms of reference are equivocal in certain instances, and it does not cover all developing countries.

(c) It needs to be clearly recognized that every decent legal system ensures that parties that would not be able to exercise their rights in the judicial system for financial constraints are provided means to do so. We will be happy to work with all delegations to further discuss specific issues delegations may wish to raise.

Proposal

- This will require amendment of the institutional provisions of the DSU, such as Article 2, establishing the proposed fund.

Measures withdrawn before finalization of the proceedings – Articles 3.6, 21, 22 of the DSU

4. The economies of most developing-country Members are small and therefore measures restricting their exports even if imposed for short periods will cause them serious injury or severe nullification and impairment of benefits. There have been no adequate remedies for injury suffered as a result of such measures that are withdrawn before the commencement or finalization of proceedings under the DSU.

Proposal

- There should be a rule providing that: measures withdrawn by Members in the course of consultations, shall be notified to the DSB as mutually agreed solutions in accordance with Article 3.6. Where the mutually agreed solutions are notified, the DSB shall recommend compensation of injury suffered by the Member.

- There should be a further rule requiring that: measures withdrawn without or prior to the commencement of any proceedings under the DSU shall entitle a Member to compensation that shall be enforceable under the DSU at the instance of the Members affected.

Compensation for measures withdrawn after finalisation of proceedings – Articles 19.1, 21.8, 22.1, 22.2 of the DSU

5. Where the proceedings have been finalized, the provisions and practice on compensation have not satisfactorily reflected the interests and injury suffered by industries of developing-country Members.

Proposal

- While compensation in the form of further market access has been welcome, compensation should prominently reflect the need for monetary compensation to be continually paid pending and until the withdrawal of the measures in breach of WTO obligations. Such monetary compensation would address the loss suffered as a result of, and for the duration of, the measures in breach of WTO obligations, but without being a substitute for the withdrawal of those measures. The requirement that the measures in breach should be withdrawn, should not be affected by any provision for mandatory monetary compensation

Enforcement of Recommendations – Article 22.2, 22.3 of the DSU

6. Where a party to a dispute does not withdraw measures that are in breach of WTO obligations, the ultimate sanction is for a Member to suspend concessions. It is envisaged that the suspension of concessions will encourage the party to withdraw the offending measure and will in the meantime restore a balance of the rights and obligations. However, realities are such that developing-country Members cannot practically utilise this ultimate sanction, as individual countries, against developed country Members. They would probably suffer further injury if they adopted retaliatory measures. As the DS is the linchpin of the multilateral trading system, this handicap of developing-country Members means that the system is skewed against them.

Proposal

- There should be a provision stating that: in the resort to the suspension of concessions, all WTO Members shall be authorised to collectively suspend concessions to a developed Member that adopts measures in breach of WTO obligations against a developing Member, notwithstanding the requirement that suspension of concessions is to be based on the equivalent level of nullification and impairment of benefits.

- The African Group realizes that this proposal has implications for the underlying approach to certain concepts such as nullification and impairment of benefits, and will therefore work closely with other delegations to address the implications and detailed mechanisms of this proposal. But the Group will do so on the basis that special and differential treatment for developing and least-developed country Members is a fundamental rule of the WTO Agreement.

Development aspects of automaticity and sequencing – Articles 7, 16, 17.14, 19.1, 21, 22 of the DSU

7. The routine adoption of panel and Appellate Body reports, and authorisation of suspension of concessions, has not appreciably taken into account the need to fully address the development implications of certain findings and recommendations.

Proposal

- To take into account the development implications, on the basis that the DS should not ignore and must be part of the mechanisms for achieving the development objectives of the WTO, the terms of reference of the panels should include the following requirement: to evaluate the development implications of any findings and recommendations.

- Further, there should be a rule in the context of Article 22 requiring that: before adopting the finding and recommendations of the panels and the Appellate Body, and before authorizing suspension of concessions, the DSB shall fully take into account reports to be prepared by relevant international organizations particularly UNCTAD and the UNDP on the development implications of the implementation of the findings and recommendations. In this regard, the adoption and authorization shall be done on appropriate terms and conditions that will ensure the promotion of the development prospects of developing-country Members.

Special procedures and assistance for developing countries – Articles 3.12, 12.10, 12.11, 21.2, 24, 27 of the DSU

8. The DSU provides for special and differential treatment. However, this treatment is largely in terms of a few additional or less days in the time frames for the proceedings, the use of the good offices of the Director-General, and assistance by the WTO Secretariat. This approach has not fully or coherently addressed the core difficulties developing-country Members face in seeking to use the DS. The difficulties relate to lack or shortage of human and financial resources, and little practical flexibility in selection of sectors for trade retaliation.

Proposal

- To address these difficulties, all provisions for special procedures should be improved to specifically provide for assistance in the form of, a pool of experts and lawyers in the preparation and conduct of cases, the payment of fees and expenses entailed, compilation by the WTO Secretariat of all applicable law including past decisions to be fully availed to and usable by both the parties and the panels/Appellate Body in each individual case.

Third Parties – Article 10 of the DSU

9. The issue of third parties needs clearer rules, stating that developing-country Members should not be required to demonstrate a trade or economic interest in the case as a precondition for admission as third parties; and that developing-country Members may always be admitted as third parties at whatever stage the case may be.

Proposal

- It should be recognized that the interests of developing-country Members in the case may include, gaining legal expertise in procedural, substantive, systemic, or other issues; gaining insight into the workings of the WTO; and protecting long-term development interests and prospects that any findings and recommendations could adversely affect.

- Accordingly, there should be a provision guaranteeing that: third party developing country Members shall have the rights to all the documents and information, and to fully participate in all the proceedings.

- This would be a concrete contribution towards capacity building for developing lawyers and government officials in this regard.

Controversial Jurisprudence in interpretation and application of WTO provisions – Articles 1, 3.2, 11, 13, 17.6, 17.13, 19.2 of the DSU, and the Ministerial Decision on the Application and Review of the DSU

10. The panels and the Appellate Body have come up with "surprises" in their interpretation and application of WTO provisions, in some cases totally unexpected and unintended in the negotiation of the provisions.

(a) This has affected the rights and obligations, and the expectations of the Members.

Proposals

- Conflicts between Agreements or provisions have been conveniently interpreted away, to the prejudice or potential prejudice of development prospects. For instance, the flexibility developing-country Members may have under transition periods and exceptions could be subject to what the panels and Appellate Body might consider over-riding or cumulative obligations.

- To address such excesses, there should be rules requiring that: the General Council shall be regularly briefed on and shall consider the jurisprudence developed in the DS; parties to proceedings shall have a right to refer questions of interpretation to the General Council at any stage of the proceedings before the authorization of suspension of concessions; and there shall be periodic reviews every five years to evaluate and improve through necessary amendments the manner that the DS promotes the development goals of the WTO.

- The right to seek information, conferred under Article 13 to panels, has been interpreted to mean an obligation to receive un-requested information. This has implications for the intergovernmental nature of the DS and the rights of Members when they seek participation in the DS as third parties.

- Regarding the right of the panels to seek information, the negotiations should clarify the position and adopt new rules stating that: un-requested information may be directed to the parties and shall not be directed to the panels; the Appellate Body shall not receive information that is inconsistent with its exclusive function of examining questions of law and legal interpretations raised on appeal; the right under Article 13 does not refer to the Appellate Body but to panels; and in deciding whether to seek information the panels shall consult the parties and their legal advisors.

- The rules should further reaffirm the use of expert review groups under Article 13.2 and Appendix 4 procedures; and clarify that in disputes raising issues that exceed the trade competence of the WTO, advisory opinions may be sought from the International Court of Justice in order to promote international legal harmony.

(b) It is the view of the African Group that the use of the expression "*amicus curiae*" in the context of Article 13 is inappropriate. Article 13 concerns "the right to seek information" and for clarity that expression should be maintained and used within the framework of the intention in Article 13. "*Amicus curiae*" translates in common parlance as "friends of the court" and is ordinarily understood to refer to respected experts that the court may request for additional advice and guidance

on issues of law and interpretation and issues requiring expert knowledge. The term is not ordinarily used in reference to the adducing of factual evidence in support of a party's case.

System of panelists and an expanded Appellate Body – Articles 6, 8, 12.2, 13, 15, 17, 25, 27 of the DSU

11. Changes to the system of panelists and the Appellate Body should not just be based on concerns, largely unsubstantiated, about the legalistic quality of panel reports. They should reflect a broad assessment by the entire WTO membership of the performance of the DS as a whole.

Proposals

- The African Group notes with concern the still unbalanced representation of Africa on the panels and the Appellate Body. A balanced geographical representation will assist in promoting a balanced DS that reflects the various backgrounds and inherent concerns of the entire WTO membership.

- While the Appellate Body may be expanded to deal with the increasing number of disputes, there is no case for establishing a standing body of panelists. If the system of panelists needs change, consideration should be given to redefining the functions of the panels. Their new functions could be stated to be: the establishment of the facts and issues, and compilation of concise factual reports. The factual reports would then be forwarded to the Appellate Body for application of the relevant provisions. The Appellate Body could on this basis be renamed; for instance, as the WTO Tribunal.

- A rule should be adopted requiring that: members of the panels and the Appellate Body shall each give a written opinion on the issues raised, and the decision shall be the majority opinion of the members. This would assist to ensure a balance in the general development of the interpretation and application of the law, or the development of the jurisprudence, and to show and record various views on issues.

- Improving the quality of panel reports is not a question of tenure of the panelists, and quality is not only tested on the basis of the extent of agreement between panels and the Appellate Body. The quality can be improved through, proper and targeted research support from the secretariat, full engagement with the parties and their advisors, proper use of the right to seek information from relevant international organisations and expert review groups, and the flexibility required under Article 12.2.

- The use of arbitration under Article 25 should also be encouraged through institutional arrangements.

Transparency – Articles 14.1, 17.10 of the DSU, and Working Procedures

12. The African Group does not consider external transparency to be a priority in the DSU negotiations, when viewed in the context of the objectives of the Doha Development Agenda. Further, if transparency is designed to assist delegations and other government representatives to view the process and determine their interests if any, that fact should be very clearly stated and agreed by all delegations as the issue to consider. In that case, there would be technical and financial assistance implications for developing-country Members.

Proposal

- The African Group does not consider it appropriate at this point in time, for the DS to be open to the public. The implications for business and for all Members, and utility for the public in developing-country Members, would need very careful examination.

Justice, Not Just Numbers – Articles 3 (paragraphs 1 to 10), and 23 of the DSU

13. Much has been made of the DS as a resounding success. This conclusion has been based on statistics attesting the relatively large number of disputes so far referred to and finalised by the panels and the Appellate Body in under six years. In contrast, it has been pointed out, other international tribunals including the International Court of Justice, have handled a much smaller number of disputes even over longer periods of up to 50 years. The performance of dispute settlement systems as a measure of justice or success must not only be quantitative, it must above all be qualitative. No large number of judgments handed down makes a system just, if the judgments are one sided or manifestly unjust; if they prejudice or are not fully responsive to sections of the international society.

- It should be clearly affirmed, that the DS is not just about expedition or speed, it is also about real justice to all Members; and that the DS must be part of the mechanisms for attaining the development objectives of the WTO as an institution. Its success should be equally determined on the basis of the extent to which findings and recommendations fully reflect and promote the development objectives.

Final remarks

14. The credibility of the process and the outcome of these negotiations will be helped if they full embody the perspective of developing-country Members that have hardly used the DS, or that have seen their rights infringed but lacked the wherewithal to seek recourse to the system. This perspective needs to be fully taken on board in the negotiations so that the entire WTO membership can use the DS in defending their rights, enforcing the obligations other members owe them, and upholding the WTO as an institution.

15. This is an initial proposal and is without prejudice to further proposals of the African Group, or to the positions individual members of the African Group may take.

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