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## APPELLATE BODY IMPASSE

### COMMUNICATION FROM THE AFRICAN GROUP

The following communication, dated 25 June 2019, is being circulated at the request of the delegation of Benin, on behalf of the African Group.

#### 1 CONTEXT

1.1. The dispute settlement system is recognized in Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) as a central element in providing security and predictability to the multilateral trading system.

1.2. For almost two decades in the DSU negotiations, the African Group sought to address the structural defects in the functioning of this central part of the WTO's legal and jurisdictional instruments. The Group submitted a number of communications and proposals<sup>1</sup> aimed at increasing our access to make use of the WTO dispute settlement mechanism and obtain favourable rules in the DSU to safeguard and promote our interests in the multilateral trading system. These remain an important priority for the African Group.

1.3. In the last year, we note with alarming concern the systemic risks facing the WTO's Appellate Body. The WTO derives its credibility from its mandated function to enforce the commitments entered into by its Members. With the looming paralysis of the Appellate Body come 10 December 2019, there will be no credible enforcement mechanism of the rules-based multilateral trading system. Existing rules will be unenforceable and discussions or negotiations on new rules will be redundant.

1.4. The African Group is acutely aware that an urgent solution is required to ensure the effective functioning of the WTO's Appellate Body as a legitimate forum where all Members can exercise equal opportunity in enforcing their rights. It is critical that all Members contribute to the strengthening of the dispute settlement system in order to enhance predictability in the functioning of the Appellate Body.

1.5. The African Union Ministers of Trade urged that 'priority attention is given to resolving the impasse and commit to work with all WTO Members to find mutually acceptable solutions, while preserving the essential features and integrity of the system'.<sup>2</sup>

1.6. The African Group takes note of all the proposals and submissions on DSU reform to date. We urge Members to ensure that any reform should facilitate the participation of African countries in the dispute settlement system, thereby alleviating the difficulties African countries face in using the system.

1.7. With respect to DSU reform, the African Group is not in favour of making any linkages to resolving the urgent crisis in the Appellate Body with the broader WTO reform agenda. The African

<sup>1</sup> TN/DS/W/15 (25 September 2002); TN/CTD/W/3/Rev.2 (17 July 2002); TN/DS/W/42 (24 January 2003); JOB(03)/55 (13 March 2003); TN/DS/W/92 (5 March 2008).

<sup>2</sup> WT/L/1054, WT/GC/199, TN/C/19 (8 January 2019).

Group reaffirms paragraph 47 of the Doha Ministerial Declaration<sup>3</sup> which specifically excludes the DSU negotiations from the single undertaking.

1.8. The African Group encourages all Members to engage constructively to resolve the Appellate Body impasse. Any agreed procedures and timelines should not compromise the effective functioning of the dispute settlement system.

1.9. The African Group submits for Members' consideration amendments to certain provisions of the DSU. These amendments are aimed at strengthening the functioning of the Appellate Body based on concerns raised about its functioning. We urge Members to engage in a solution-based approach and call on Members to fill the vacancies on the Appellate Body immediately.

## **2 TRANSITIONAL RULES FOR OUTGOING APPELLATE BODY MEMBERS**

2.1. The Appellate Body selection process shall be launched automatically no later than three (3) months before expiry of the term of office.

2.2. Rule 15 should be maintained to allow outgoing Appellate Body Members to discharge their duties until the position has been filled but not longer than a period of two (2) years following the expiry of the term of office.

## **3 COMPOSITION OF APPELLATE BODY MEMBERS**

3.1. Increase the number of the Appellate Body Members from seven (7) to nine (9) Members. In the composition of the Appellate Body, factors such as regional balance, gender representivity and multilingualism may be considered. This provision will amend paragraph 1 of Article 17 of the DSU.

## **4 TERM OF OFFICE FOR APPELLATE BODY**

4.1. The maximum term of office of Members of the WTO Appellate Body shall be seven (7) years, non-renewable. This provision will amend paragraph 2 of Article 17 of the DSU.

## **5 DURATION OF EXAMINATION OF CASES BEFORE THE APPELLATE BODY**

5.1. The duration of ninety (90) days for the examination of cases submitted to the Appellate Body and the presentation of reports should be maintained. However, in exceptional circumstances, the Appellate Body may exceed the ninety (90) day time limit but not more than one hundred and twenty (120) days for the examination of cases referred to the Appellate Body, and for the submission of expected reports. Days not worked (weekends and public holidays) should not be counted. This provision will amend paragraph 5 of Article 17 of the DSU.

5.2. The volume of documentation of parties' submissions should not exceed thirty (30) pages.

## **6 THE APPLICATION OF *OBITER DICTA* DURING DISPUTES**

6.1. Findings unnecessary and unrelated to resolving of a dispute may affect the rights and obligations of Members. The AB should limit itself to the issues raised by the parties to the dispute. Under no circumstance should it pronounce on issues not raised by any parties to the dispute.

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<sup>3</sup> WT/MIN(01)/DEC/1 (20 November 2001).