

## **ANNEX VI CONCERNING THE SETTLEMENT OF DISPUTES BETWEEN THE MEMBER STATES OF THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY**

### **Annex VI Concerning the Settlement of Disputes between the Member States of the Southern African Development Community**

#### **PREAMBLE**

The High Contracting Parties

HAVING UNDERTAKEN to progressively liberalise intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial arrangements;

AND HAVING REGARD to the provisions of Article 32 of this Protocol on the settlement of disputes;

HEREBY AGREE as follows,

#### **ARTICLE 1 Scope and Application**

The rules and procedures of this Annex shall apply to the settlement of disputes between Member States concerning their rights and obligations under this Protocol.

#### **ARTICLE 2 Cooperation**

The Member States shall:

- (a) at all times endeavour to agree on the interpretation and application of this Protocol;
- (b) make every attempt through cooperation to arrive at a mutually satisfactory resolution of any matter that may affect the operation of this Protocol; and
- (c) make use of the rules and procedures of this Annex to resolve disputes in a speedy, cost-effective and equitable manner.

#### **ARTICLE 3**

##### **Consultations**

1. A Member State may request in writing consultations with any other Member State regarding any measure that it considers might affect its rights and obligations under the provisions of this Protocol.

2. The requesting Member State shall notify the other Member States and the CMT of the request, through the Sector Coordinating Unit. Any request for consultations shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis of the complaint.

3. The requested Member State shall accord sympathetic consideration to and afford adequate opportunity for consultations regarding any representations made by another Member State.

4. The requested Member State shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the requested Member State does not respond within 10 days after the date of

receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the requesting Member State may proceed directly to request the establishment of a panel.

5. Whenever a Member State other than the consulting Member States considers that it has a substantial trade interest in consultations being held pursuant to a request made under paragraph 1, such Member State may notify the consulting Member States and the Sector Coordinating Unit, within 10 days after the date of circulation of the request for consultations, of its desire to be joined in the consultations. Such Member State shall be joined in the consultations, provided that the requested Member State agrees that the claim of substantial interest is well-founded. In that event, the consulting Member States shall also inform the CMT, through the Sector Coordinating Unit. If the request to be joined in the consultations is not accepted, the applicant Member State shall be free to request consultations under this Article.

6. The consulting Member States shall make every attempt to arrive at a mutually satisfactory resolution of any matter and, to this end, they shall-

- (a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter may affect the operation of this Protocol;
- (b) treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Member State providing the information; and
- (c) seek to avoid any resolution that adversely affects the interests of any other Member State under this Protocol.

7. If the consulting Member States fail to resolve a matter pursuant to this Article within:

- (a) 60 days after the date of receipt of the request for consultations; or
- (b) such other period as they may agree,

any such Member State may request in writing the establishment of a panel. The requesting Member State shall notify the other Member States and the CMT of the request through the Sector Coordinating Unit.

8. In cases of urgency, including those which concern perishable goods, Member States shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the requesting Member State may request the establishment of a panel.

#### **ARTICLE 4**

##### **Good Offices, Conciliation and Mediation**

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the disputing Member States so agree.

2. Procedures involving good offices, conciliation and mediation shall be confidential, and may be requested at any time by a disputing Member State. These procedures may begin at any time and be terminated at any time.

3. The Chairperson of the CMT, or any other Member of the CMT designated by the Chairperson who is not a national of a disputing Member State, may offer good offices, conciliation or mediation with a view to assisting the disputing Member States.

## **ARTICLE 5**

### **Establishment of Panel**

1. The Sector Coordinating Unit shall establish a panel within 20 days from the date of receipt of a request made pursuant to paragraph 4, 7 or 8 of Article 3.
2. The request for the establishment of a panel shall be made in writing to the Sector Coordinating Unit and shall indicate whether consultations were held, indicate the specific measures at issue and provide a brief summary of the legal basis of the complaint in the light of the relevant provisions of this Protocol sufficient to present the problem clearly.

## **ARTICLE 6**

### **Roster of Panelists**

The Sector Coordinating Unit shall maintain an indicative roster of panelists nominated by Member States on the basis of their relevant expertise and qualifications as stipulated in Article 7. The roster, as well as any modifications thereto, shall be made known by the Sector Coordinating Unit to the Member States.

## **ARTICLE 7**

### **Qualification of Panelists**

All panelists shall:

- (a) have expertise or experience in international trade or international law, other matters covered by this Protocol or the resolution of disputes arising under international trade agreements, and shall be chosen strictly on the basis of objectivity, reliability and sound judgment;
- (b) be governmental and/or non-governmental individuals;
- (c) serve in their individual capacities and not as government representatives, nor as representatives of any organization. Member States shall therefore not give panelists instructions nor seek to influence them as individuals with regard to matters before a panel; and
- (d) comply with a code of conduct and rules of procedures to be established by the CMT.

## **ARTICLE 8**

### **Panel Selection**

1. A panel shall be composed of three panelists.
2. The following procedures shall apply in the selection of panelists:
  - (a) The disputing Member States shall endeavour to agree on the chair of the panel within 15 days of the delivery of the request for the establishment of a panel.
  - (b) Within 10 days of selection of the chair, each disputing Member State shall select one panelist who is not a citizen of such Member State.
  - (c) Where there are more than two disputing Member States, the Member State complained against shall select one panelist who is not a citizen of such Member State. The complaining Member States shall jointly select one panelist who is not a citizen of such Member States. This shall take place within 10 days of the selection of the chair.
3. When a Member State or States, in the selection of panelists pursuant to paragraph 2 fails to agree on the chair of the panel or to select a panelist in the prescribed time, such chair or panelist shall be selected by lot by the Executive Secretary of SADC from a list of twelve panelists who are not citizens of the disputing Member States. The Executive Secretary shall select the chair or panelist, as the case may be, within 5 days after the expiry of the prescribed time referred to in paragraph 2.

4. When a disputing Member State is of the opinion that a panelist does not comply with the requirements set out in Article 7, the disputing Member States shall consult and, if they agree, the panelist shall be removed and another panelist shall be selected in accordance with this Article. 5.

Panelists shall, as far as possible, be selected from the roster contemplated in Article 6.

## **ARTICLE 9**

### **Terms of Reference of the Panel**

Unless the disputing Member States otherwise agree within 20 days from the date of establishment of the panel, the terms of reference for the panel shall be:

(a) To examine, in the light of the relevant provisions of this Protocol, the matter referred to the Sector Coordinating Unit and to make findings, determinations and recommendations.

(b) To determine whether the matter under dispute has nullified or impaired benefits of the disputing Member States according to the provisions of this Protocol.

(c) To make findings, as and when appropriate, on the degree of adverse trade effects on any Member State of any measure found not to conform with the provisions of this Protocol or to have caused nullification or impairment of the complaining Member State.

(d) To recommend that the Member State complained against brings a measure into conformity with this Protocol where such a measure is found to be inconsistent with this Protocol.

## **ARTICLE 10**

### **Panel Procedures**

Unless the disputing Member States otherwise agree, the panel shall conduct its proceedings in accordance with the following rules of procedure:

(a) the disputing Member States shall have a right to at least one hearing before the panel as well as the opportunity to provide initial and rebuttal written submissions;

(b) the panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential; and

(c) the disputing Member States may be represented during the panel procedures by legal representatives or other experts.

## **ARTICLE 11**

### **Procedures for Multiple Complaints**

1. Where more than one Member State requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Member States concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings to the CMT in such a manner that the rights which the disputing Member States would have enjoyed, had separate panels examined the complaints, are in no way impaired. If one of the disputing Member States so requests, the panel shall submit separate reports on the dispute concerned. Notwithstanding the provisions of Article 10(b), the written submissions by each of the complaining Member States shall be made available to the other complaining Member States, and each complaining Member States shall have the right to be present when any one of the other complaining Member States presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible, the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonised.

## **ARTICLE 12**

### **Third Party Participation**

A Member State that is not a disputing Member State having a substantial trade interest in a matter before a panel and which notified its interest in writing to the CMT, through the Sector Coordinating Unit, shall have an opportunity to attend all hearings, to make written and oral submissions to the panel and to receive the written submissions of the disputing Member States.

## **ARTICLE 13**

### **Role of Experts**

On request of a disputing Member State, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate.

## **ARTICLE 14**

### **Initial Report**

1. Unless the disputing Member States otherwise agree, the panel shall base its initial report on the submissions of the participating Member States and on any information before it pursuant to Article 13.

2. Unless the disputing Member States otherwise agree, the panel shall, within 90 days after the last panelist is selected or 45 days in the case of urgency, including those concerning perishable goods, present to the disputing Member States an initial report containing:

- (a) findings of fact;
- (b) its determination as to whether the measure at issue is or would be inconsistent with the obligations of this Protocol or cause nullification or impairment, or any other determination requested in the terms of reference; and
- (c) its recommendations for resolution of the dispute.

3. The disputing Member States may submit written comments to the panel on its initial report within 15 days of presentation of the initial report. In such an event, and after considering such written comments, the panel, on its own initiative or on the request of any disputing Member State, may:

- (a) request the views of any participating Member State;
- (b) reconsider its initial report; and
- (c) make any further examination that it considers appropriate.

## **ARTICLE 15**

### **Final Report**

1. A panel shall present to the disputing Member States a final report within 30 days of presentation of the initial report, unless the disputing Member States otherwise agree.

2. No panel shall, either in its initial report or its final report, disclose which panelists are associated with majority or minority opinions.

3. A panel shall transmit to the CMT, through the Sector Coordinating Unit, its final report.

4. Unless the CMT decides by consensus not to adopt the report, the final report of the panel shall be adopted by the CMT within 15 days after it is transmitted to the CMT and shall promptly be made public thereafter by the Sector Coordinating Unit.

## **ARTICLE 16**

### **Panel Recommendations**

Where a panel concludes that a measure is not consistent with this Protocol, it shall recommend that the Member State complained against bring the measure into conformity with this Protocol. In addition, the panel may suggest ways in which the Member State complained against may implement the recommendations.

## **ARTICLE 17**

### **Implementation of Panel Recommendations**

The Member State complained against shall inform the Sector Coordinating Unit of its intentions in respect of implementation of the recommendations of the panel. If it is impracticable to comply immediately with the recommendations, the Member State complained against shall have a reasonable period of time in which to do so. The reasonable period of time shall be the period of time proposed by the Member State complained against or a period mutually agreed by the disputing Member States. In any case, the period shall not exceed 6 months from the date of adoption of the panel report.

## **ARTICLE 18**

### **Compensation and Suspension of Concessions**

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations of the panel, as adopted, are not implemented within a reasonable period of time determined in accordance with Article 17. Full implementation of the panel recommendations to bring a measure into conformity with this Protocol shall always be preferred.

If the Member State complained against fails to bring the measure found to be inconsistent with this Protocol into conformity within the reasonable period of time determined in accordance with Article 17, it shall enter into negotiations with the complaining Member State with a view to developing a mutually satisfactory solution. If no satisfactory solution has been agreed within 20 days after the expiry of the reasonable period of time determined in accordance with Article 17, the complaining Member State may request authorization from the CMT, through the Sector Coordinating Unit, to suspend concessions or other obligations of equivalent effect to the level of the nullification or impairment.

Unless the CMT decides by consensus otherwise within 20 days from the date of receipt of the request for authorization to suspend concessions or obligations, such authorization shall be granted.

In considering what benefits to suspend, a complaining Member State shall first seek to suspend benefits in the same sector or sectors as that affected by the measure or other matter that the panel has found to be inconsistent with the obligations of this Protocol. A complaining Member State that considers it is not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in other sectors.

If the Member State complained against objects to the level of suspension proposed, the matter shall as far as possible be referred for arbitration to the original panel. Should the original panel not be available, the Executive Secretary of the SADC shall appoint a panelist. The original panel or panelist, as the case may be, shall be appointed within 10 days from the date of receipt of the request for arbitration. The arbitration shall be completed within 30 days after the date of appointment of the original panel or panelist, as the case may be. Concessions or other obligations under this Protocol may not be suspended during the course of arbitration.

The panel or panelist acting pursuant to paragraph 5 shall determine whether the level of the proposed suspension is equivalent to the level of impairment as a result of a measure not complying with this Protocol. The disputing Member States shall accept the decision on the issue submitted to the panel or panelist as final. The CMT shall be informed, through the Sector Coordinating Unit, of the decision of the panel or panelist and shall within 20 days after the date of receipt of the decision of the

panel or panelist, unless it decides by consensus otherwise, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the panel or panelist.

## **ARTICLE 19**

### **Expenses**

1. The CMT shall determine the amounts of remuneration and expenses that will be paid to panelists and experts appointed in terms of this Annex.
2. The remuneration of panelists and experts, their travel and lodging expenses and all other general expenses of panels shall be borne in equal parts by the disputing Member States or in a proportion as determined by a panel.
3. Each panelist or expert shall keep a record and render a final account of his or her time and expenses and the panel shall keep a record and render an account of all general expenses. The Sector Coordinating Unit shall control such accounts and make all payments against the accounts of the disputing Member States.

## **ARTICLE 20**

### **Regulations**

The CMT shall adopt regulations to facilitate the implementation of this Annex.