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## STRENGTHENING THE WTO TO PROMOTE DEVELOPMENT AND INCLUSIVITY

COMMUNICATION FROM PLURINATIONAL STATE OF BOLIVIA, CUBA, ECUADOR, INDIA, MALAWI,  
OMAN, SOUTH AFRICA, TUNISIA, UGANDA AND ZIMBABWE

*Revision\**

The following communication, dated 22 July 2019 is being circulated at the request of the delegations of Plurinational State of Bolivia, Cuba, Ecuador, India, Malawi, Oman, South Africa, Tunisia, Uganda and Zimbabwe.

### 1 INTRODUCTION

1.1. The preamble to the Marrakesh Agreement establishing the WTO recognizes that international trade is not an end in itself, but a means towards 'raising standards of living and ensuring full employment'. More importantly, it recognizes that 'there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'.

1.2. For the fulfilment of these founding objectives of the WTO, all Members, no matter their trade share, must have an equal say in decision-making. The credibility and continued relevance of the multilateral trading system is premised on two essential features – mutual benefit from the system, as perceived by its Members, and mutual trust.

1.3. However, throughout its history, the World Trade Organization (WTO) has experienced a number of challenges. Recently, some of these relate to a wider 'crisis of multilateralism', but others can be understood as the result of a confluence of factors rooted in the legal commitments that WTO Members undertook at the establishment of the Organization in 1995. Specifically, inequities and imbalances in some of the existing multilateral trade rules have provided an inherent advantage mainly to the developed Members. Thus, whilst WTO rules such as those on border trade measures have helped developing countries by providing certainty to trade, more often than not, developing Members found themselves constrained from pursuing their development and industrialization objectives due to other rules which have been overly intrusive or imbalanced. TRIPS rules, for instance, have facilitated monopoly rents, and diminished the possibility for technology transfer. The TRIMS Agreement has disallowed Members to use local content requirements. The Subsidies Agreement constrains the policy space developing countries need to nurture their industries. However, it allows advanced economies that have the financial means to provide substantial support to their high-tech, knowledge-intensive industries deemed critical to their future prosperity. The Agreement on Agriculture has allowed developed countries to continue their high subsidies on agriculture products, including those exported to developing countries, impacting their small farmers' livelihoods and food security. This has been compounded by the lack of inclusiveness and transparency in the process of WTO negotiations.

1.4. Developing Members have called for certain reforms in the WTO since 1996 in an effort to address asymmetries and bring balance to the WTO rules, as well as create more policy space for themselves to pursue development and to use the same policy tools as developed countries to

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\* This revision is to add Oman as co-sponsor to the submission.

industrialize. The reform agenda put forth by developing Members was incorporated into the Doha Development Agenda in 2001. This included the strengthening of Special and Differential Treatment Provisions, Implementation Issues, addressing the existing asymmetries in the WTO Agreements, particularly in Agriculture with a view to facilitating the realization of the SDGs on food security and alleviation of rural poverty. However, increasingly the WTO is moving away from the principles entailed in the Marrakesh Agreement and the negotiations mandate contained in the Doha Development Agenda which sought to place the needs and interests of developing countries at the heart of the Work Programme.

1.5. In recent months, some Members have suggested a broad range of reforms at the WTO including a slate of new rules, even though existing mandates from the DDA remain unaddressed. 'WTO reform' does not mean accepting either inherited inequities or new proposals that would worsen imbalances. Reforms must be premised on the principles of inclusivity and development and respond to the underlying causes of the current backlash against trade and the difficulties that developing Members continue to face *vis-à-vis* their industrialization challenges.

1.6. In addition to these challenges, the WTO is now confronting immediate existential crises: The resort to unilateral measures and the impasse in the Appellate Body (AB). Clearly reform is needed in these areas.

1.7. Through this concept paper, we seek to identify the issues that must be addressed if the WTO is to be strengthened in a balanced manner. A *sine qua non* for strengthening the system is unblocking the vacancies in the Appellate Body. This is an urgent priority since in the absence of a functional, effective and independent mechanism for enforcing rules, negotiating new rules in any area makes no sense.

## **2 PRESERVING CORE PRINCIPLES OF THE MULTILATERAL TRADING SYSTEM**

2.1. Recent actions by some WTO Members indicate a weakening of commitment to the multilateral trading system. Preserving and strengthening the WTO must include:

2.2. First, laws and regulations of WTO Members which mandate unilateral action on trade issues that are inconsistent with WTO rules would need to be amended. This will ensure that WTO Members are not perpetually under threat of unilateral action on trade issues by some Members.

2.3. Second, the following rules in the Marrakesh Agreement are fundamental and must be respected:

- a. Articles II and III on the multilateral functions of the WTO;
- b. Article IX on the continuation of the practice of decision-making by consensus;
- c. Article X – when there are amendments (additions or changes) to WTO rules, there must be consensus, followed by ratification by Members. New rules enter into force only when the ratification numbers required have been attained.

2.4. Third, multilateral avenues, based on consensus, remain the most effective means to achieve inclusive development-oriented outcomes. In the post-MC 11 phase, many Members have evinced interest in pursuing outcomes in some areas through joint statement initiatives (JSIs). Provisions governing plurilateral agreements in the Marrakesh Agreement must be adhered to. If they are to be multilateral agreements, the outcomes of these initiatives, by way of new rules, can be introduced into the WTO when there is consensus; and Art. X of the Marrakesh Agreement on amendments must govern any changes or additions to the WTO Agreement. The JSIs should not change the fundamental multilateral architecture of WTO.

2.5. Fourth, there is a need to address the implementation issues (correcting the imbalances in WTO Agreements) as mandated in the Doha Round and also build on the work done so far in negotiations, in accordance with existing mandates as elaborated in Section 4.

### 3 RESOLVING THE DISPUTE SETTLEMENT ISSUES

3.1. A functioning, independent and effective dispute settlement system is indispensable for preserving the rights and obligations of all WTO Members and for ensuring that the rules are enforced in a fair and even-handed manner. Without such a system there would be no incentive to negotiate new rules or to undertake reforms. Therefore, resolution of the Appellate Body (AB) impasse needs to precede other reforms.

3.2. As per Articles 17.1 and 17.2 of the DSU, all WTO Members have a collective duty to ensure the maintenance of a standing Appellate Body comprising of seven members. It would be disingenuous to use the pretext of the Appellate Body's alleged digression from the clear mandate of the DSU to justify wilful non-compliance with the same by the Membership.

3.3. Attempts at addressing the crisis in the dispute settlement system must preserve its essential features namely an independent, two-tier dispute settlement system, automaticity in the launch of proceedings and decision-making by the Dispute Settlement Body (DSB) by negative consensus, where provided. Developing Members' concerns about affordability and equitable access to the use of the dispute settlement system are also very important.

### 4 SAFEGUARDING DEVELOPMENT CONCERNS

4.1. Special and Differential Treatment (S&D) is a treaty-embedded and non-negotiable right for all developing Members. The available data indicates that the gap in the standards of living between developing and developed countries has not narrowed to any significant extent since the establishment of WTO.<sup>1</sup> This necessitates the preservation and strengthening of the S&D provisions in both current and future WTO agreements, with priority to outstanding LDC issues.

4.2. The multilateral trading system must give policy space for developing Members to fulfil their development goals including industrialization. Developing Members continue to confront many formidable challenges, which underscores the continued relevance of S&DT provisions in their favour. The long-awaited outstanding 'development' issues from the Doha Round continue to be paramount and include:

- Implementation Issues<sup>2</sup> – aimed at rebalancing the imbalanced rules from the Uruguay Round such as in the areas of agriculture, TRIMS (Trade Related Investment Measures), TRIPS (Trade Related Intellectual Property Rights), Subsidies Agreement<sup>3</sup> etc.
- Special and Differential Treatment (S&D) – strengthening and making effective and operational the S&D provisions in WTO Agreements, in accordance with paragraph 44 of the Doha Declaration.
- Cotton – the imbalances in Agriculture Domestic Support due to AMS beyond *de minimis* leading to subsidized exports by some, show up clearly in the area of cotton, where cotton prices have been depressed. This has impacted negatively on rural livelihoods and employment across many developing countries including the C4 Members.
- Public Stockholding (PSH) – a permanent solution must be agreed upon and adopted. The General Council Decision of 27 November 2014 (WT/L/939) says that 'If a permanent solution for the issue of PSH is not agreed and adopted by the 11<sup>th</sup> Ministerial Conference, the mechanism... shall continue to be in place until a permanent solution is agreed and adopted'.
- Special Safeguard Mechanism – Ministers in Nairobi (MC10, 2015) mandated Members 'To pursue negotiations on an SSM for developing country Members in dedicated sessions of the Committee on Agriculture in Special Session'.

<sup>1</sup> See WT/GC/W/765/Rev.2.

<sup>2</sup> Developing countries' requests are contained in the Implementation issues agenda or Para. 12 of the Doha Declaration, WT/MIN(01)/DEC/1.

<sup>3</sup> See Para. 5.8 of the developing country submission WT/GC/W/765/Rev.2.

- Agriculture Domestic Supports – to rectify the imbalances in the existing rules due to some Members having Aggregate Measures of Support (AMS) entitlements whilst others do not. High per farmer subsidies by OECD countries, with huge flexibility continue to have serious implications on food insecurity and rural poverty in developing countries.<sup>4</sup>

4.3. In addition to the issues mentioned above, work should also continue on the following issues emphasizing the development components and in accordance with existing mandates:

- Fisheries Subsidies – in accordance with the Doha, Hong Kong and MC11 Ministerial Declarations. All of these emphasize the importance of S&D in the outcome of these negotiations because of the 'importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns.<sup>5</sup> SDG 14.6 also reinforces S&D.
- Discussions under the 1998 E-Commerce Work Programme in the relevant WTO bodies.<sup>6</sup>

4.4. Another issue that must be addressed in any reform process relates to the alleged theft of traditional knowledge that is held, preserved and developed by traditional communities/indigenous people. The rules of the multilateral trading system must also support developing countries in building their technological capacities, and their access to affordable medicines and medical technologies.

4.5. The SDGs articulate important development challenges still confronting developing countries, including overcoming poverty and hunger. WTO rules must be supportive, rather than a constraint to these efforts.

## 5 TRANSPARENCY AND NOTIFICATIONS

5.1. Developing countries face challenges in complying with all their notification obligations due to human resource and institutional capacity constraints. Any non-compliance is not willful. Treaty obligations must be performed in good faith. Yet despite the best of intentions, the ability to fulfill all notification obligations inevitably depends on capacities that are commensurate with a Member's level of development and resources available. In light of these difficulties, we do not agree to additional transparency obligations. Any work in this area must be in the provision of capacity building to developing countries. Developed Members should also lead by example in submitting comprehensive, timely and accurate notifications.

5.2. Some Members have found innovative ways to undermine their WTO commitments, or not implement the spirit of those commitments. If the discussion on Transparency goes beyond addressing capacity issues, the first step must tackle the undermining of WTO commitments through:

- Regular notification of entry-related measures affecting existing Mode 4 commitments of Members;
- Article 66.2 of the TRIPS Agreement. Developed countries have a legal obligation in the area of technology transfer towards LDCs. More transparency would be supportive of LDCs' efforts to build a viable technological base;
- Disclosure of origin of traditional knowledge and genetic resources in patent applications;
- Transparency in tariffs – non-ad valorem tariffs should be notified in ad valorem terms or converted to ad valorem tariffs.

5.3. Transparency must also permeate the entire functioning of the WTO including:

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<sup>4</sup> See Graph 5 of WT/GC/W/765/Rev.2 for a comparison of agriculture subsidies between some developed and developing Members.

<sup>5</sup> WT/MIN(05)/DEC 2005 'Hong Kong Ministerial Declaration', Annex D para. 9.

<sup>6</sup> WT/L/274 1998 'Work Programme on Electronic Commerce' adopted by the General Council on 25 September 1998.

- Taking note of the resource constraints of small delegations and thus rationalizing meetings at the WTO so that there are no overlaps. In areas where there are active negotiations for outcomes, these meetings should as far as possible take place in formal mode. They should always be open, inclusive and transparent and take seriously the resource constraints of developing countries.
- Ministerial Conferences (MCs) and the processes preceding them in Geneva. The basic principles and procedures for this Member-driven organization need to be agreed upon. For instance, all meetings in the MC, which is the body for decision-making, should be open to all Members without restricting the decision-making process to smaller Green Rooms.

## **6 IN CONCLUSION**

6.1. The immediate priorities for reform at the WTO must include:

- Resolving the crisis in the Appellate Body;
- Addressing the unilateral actions taken by some Members.

6.2. Any reforms must:

- Keep development at its core through delivering on the long-promised development concerns, in particular the outstanding development issues of the DDA; as well as address the asymmetries in WTO Agreements such as those in Agriculture and other areas;
  - Strengthen the multilateral character of the WTO, especially preservation of consensus decision-making and respecting Art. X of the Marrakesh Agreement on Amendments;
  - Continue with the on-going multilaterally mandated negotiations;
  - Last but most importantly, reform must reaffirm the principle of Special and Differential Treatment, which is a treaty-embedded, non-negotiable right for all developing countries in the WTO; and promote inclusive growth, widening spaces for states to pursue national development strategies in the broad framework and principles of a rules-based system.
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