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## **SPECIAL AND DIFFERENTIAL TREATMENT**

*Submission by Rwanda on behalf of the ACP Group, the African Group and the LDC Group*

The following communication is being circulated at the request of the delegation of Rwanda on behalf of the ACP Group, the African Group and the LDC Group.

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### **RESPONSES BY UGANDA ON BEHALF OF THE G90 PROPOSAL NUMBER 01 - TRIMS**

**12 OCTOBER 2017**

AUSTRALIA

- (i) For each of the ten proposals submitted in JOB/DEV/47, could the G90 please provide specific examples of how existing WTO Agreements are limiting developing country members' abilities to take measures necessary for development?

EUROPEAN UNION (14 SEPTEMBER 2017)

- (ii) Could you explain this proposal in the light of the Hong Kong Ministerial Declaration (Annex F: paragraph 84)?
- (iii) What is the reasoning for insisting on a proposal rejected in 2015? How have the circumstances changed since then?
- (iv) What is the economic rationale for allowing all developing countries regardless of size to introduce TRIMS-inconsistent measures for a potentially indefinite duration?
- (v) Do you agree that the phrase "[t]he Council for Trade in Goods shall, upon...request by a developing country member, accord extensions" means that such extension will be granted automatically upon request? Would that mean that the proposal to renew temporary modification is equal to allowing for a permanent waiver from the TRIMS Agreement?
- (vi) What is the reasoning for re-introducing in paragraph 1.2 a permanent waiver for LDCs from the TRIMS Agreement, already rejected in 2015? How have the circumstances changed since then?
- (vii) What are the specific challenges you encounter in the application of specific TRIMS provisions and you would like to solve through this proposal?

RESPONSES

Thank you for calling this meeting and providing us with the opportunity to respond to the issues raised by the members. We received seven questions from Australia and the European Union. We thank them for the questions. We come to this Special session with one goal in mind, to ensure the structural transformation, diversification and industrialisation of our economies with the view

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to building the future we want for all of our peoples and to promote the effective integration of the G90 into the Multilateral trading system. To ensure that our peoples get employment, improve household incomes, and alleviate the high levels of poverty.

It is important for members to recall, and fulfill the founding objective inscribed in the Marrakesh Agreement with the view to recognizing the 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. It is upon that background therefore that we would invite members to view our responses to the issues raised and these ASPs.

One of the cross cutting questions that is on everyone's mind is what has changed. Why the same proposal, that were rejected in the past? The problem is that nothing has changed, neither in the lives of our people, nor in our respective economies. On the contrary the situation has either remained stagnant or in some cases simply become worse.

In 1964, Africa's share in world trade in goods was a staggering 6%. However between 2009-2016, Africa's share in world exports dropped from 3.1% to 2.2% in goods & from 2.4% to 2.0% in services. In 2016, exports of primary commodities accounted for almost 80% in comparison to about 30% for manufactured goods. Viet Nam, a country whose economy declined in the 1960s and in the 1970s due to the war has now overtaken Africa in exports of manufactured goods. In 1995, Africa exported \$28 billion and Viet Nam only \$2 billion. Yet, in 2016, Africa's exports stand at \$92bn compared to about \$140bn for Viet Nam.

54% of the population in 46 African countries is still living in poverty. Out of the 420 million youth, one-third are unemployed and discouraged, another third are vulnerably employed, and only one in six is in wage employment. While 10 to 12 million youth enter the workforce each year, only 3.1 million jobs are created.

According to the UNIDO Report to the G20 Working Group on Industrialization in Africa and Least Developed Countries of 2016, Africa's Manufactured Value Added (MVA) accounted for just 1.6% of the global total in 2014 and its growth has lagged far behind that of other regions since 1990. It is also important to recall that at about the same time in 2015; world leaders also agreed to deliver on SDG 9 on Industry, Innovation and Infrastructure. This precipitated the G90 members to closely examine their structural transformation, industrialization and diversification needs and the policy measures required to realize them.

A number of studies have shown that the main reason why developing countries, especially LDCs have not been able to participate effectively in the multilateral trading system is mainly because they are lagging behind in terms of industrialization, in particular the production of value added and competitive manufactured products. In order to catch up with developed countries, developing countries, in particular LDCs and low income economies need the flexibility to use local content requirements in order to direct investments into the productive sectors and catalyse industrialization.

This then brings me to the issue specific to LDCs. The circumstances requiring a waiver for LDCs will not change as long as a member is an LDC. Nothing has changed. It all remains more of the same. Our economic numbers between 2015 and now remain the same. LDCs have low levels of industrialization, their exports are concentrated on a few products, and their share in world trade is very low. LDCs account for less than 1% of world exports of goods and commercial services, 1.9% of global investment inflows and 1% share of manufacturing value added. They also depend on exports of primary commodities, mainly minerals and fuels, which are subjected to global price fluctuations. These are the 2015 numbers. 2017 is not any different. Our view therefore is that the position to reject the proposal should be reversed.

Further, LDC status is not self-designated. According to the UN classification criteria, the classification of LDCs is contingent on a number of key human development indicators including levels of poverty, literacy, infant mortality and economic vulnerability. There are currently 48 countries that meet these criteria. The good news is that according to the 2016 UNCTAD Report on LDCs the path to graduation, 16 LDCs are projected to graduate by 2024. 32 LDCs will graduate by 2025. It therefore means that the request is not infinite. Given the fact that LDCs have spent a lot of time and resources negotiating extensions; there is a need to exempt LDCs

from TRIMS until they graduate from LDC status. This will create investor certainty and allow LDCs to use the TRIMS flexibility to industrialise and transform their economies.

**ON HOW EXISTING WTO AGREEMENTS ARE LIMITING DEVELOPING COUNTRIES FROM TAKING THE NECESSARY MEASURES FOR DEVELOPMENT**

Industrialised economies have over the years, as our coordinator has eloquently indicated, including to this day, used specific interventions and performance requirements to attract and harness the application of investment towards productive capacities in order to structurally transform and industrialise their economies. With the advent of the Uruguay Round agreements, detailed disciplines incorporated under the WTO under Trade-Related Investment Measures (TRIMS) have severely restricted the use of performance measures on foreign investors, thereby hampering deployment of a historically heavily-used industrial policy instrument.

In the context of GVCs, the need for policy space is still as relevant as ever, particularly to facilitate upgrading of production networks to participate in global value chains. Members will recall this as one of the outstanding implementation issues. Developing members have never equivocally renounced this issue. Proposals were filed within the TRIMS committee, but political obstacles have prevented them previously advancing this issue in the WTO.

Developing countries are significantly constrained in applying policy space to structurally transform and diversify their economies in this area. As far as specific examples go, the record of questions in TRIMS committee against developing countries is illustrative: at the most recent TRIMS Committee meeting, out of the 9 TRIMS measures re-tabled for continued discussion, 8 of them were imposed by developing country members and were subject to rigorous scrutiny by industrialised countries. Within the TRIMS committee, previous attempts to invoke the flexibility in Article 4, which allows developing country Members to temporarily deviate from the provisions of Article 2 for balance-of-payments purposes, have been blocked, notably with respect to various trade balancing measures developing members sought to apply in the context of developmental purposes. This is because access to the Article XVIII B process is cumbersome and very difficult to justify within the BOP committee, with developing countries facing endless rounds of questioning, before they can implement the measure.

In addition to rigorous questioning of developing country measures within the TRIMS committee, the jurisprudence is prolific with respect to challenges against developing country use of TRIMS measures. Between 1996 and 2016, there are 27 recorded TRIMS challenges against developing countries with only 15 against developed countries. Recent jurisprudence over the last 2 years, striking down TRIMS measures invoked by certain developing countries that would have diversified their economies and assisted development of their domestic industries<sup>1</sup>, illustrates the inherent difficulties and lack of flexibility within the TRIMS agreement, as well as the fact that developing countries still require this flexibility.

For example, in the Indonesia –Autos case, the Panel examined the consistency of certain Indonesian measures with the TRIMs Agreement. The measures were aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia.<sup>2</sup> In examining whether the measures at issue in the dispute before it were “trade-related”, the Panel in Indonesia — Autos held that local content requirements were necessarily trade-related: “[I]f these measures are local content requirements, they would necessarily be ‘trade-related’ because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade”. The Panel found that Indonesia was in violation of Articles (I) and (II): 2 of GATT 1994, Article 2 of the TRIMs Agreement, and Article 5(c) of the SCM Agreement. This decision shows how the WTO agreements could potentially constrain industrial policy.

As we indicated during our last session, Since 1995-2015, of the 29 items considered by the Committee, 20 related to measures of developing country Members, and the overwhelming

<sup>1</sup> DS 456bIndia — Certain Measures Relating to Solar Cells and Solar Modules; DS 497, DS 472 Brazil — Certain Measures Concerning Taxation and Charges.

<sup>2</sup> “The 1993 Programme” provided import duty reductions or exemptions on imports of automotive parts based on the local content percent; and “The 1996 National Car Programme” provided various benefits such as luxury tax exemption or import duty exemption to qualifying (local content and etc.) cars or Indonesian car companies.

majority (28/29) of these measures include issues relating to local content, although in some cases they also included other aspects. By 2015, 41 dispute settlement proceedings had been initiated, which included a claim under the TRIMS Agreement. Of these 41 proceedings, 27 involved a developing country Member as a respondent, and 25 out of 27 which in effect is (93%) included an allegation relating to local content. This shows that a number of developing countries still require flexibility to use local content requirements to promote upstream and downstream linkages with the local economy and achieve industrialization and economic transformation.

These constraints serve to dis-incentivise developing countries' deployment of these measures in order to structurally transform, and accordingly these entrenched disincentives would be a strong motivator for introducing some flexibility for developing countries with regard to TRIMS Agreement. An issue was raised that many of the cases that had been raised relate to major emerging countries. Madam Chair, We don't understand the logic of the concern. Does this therefore justify the kicking away of the ladder?

We would also like to deal with the issue on the Relationship with the Hong Kong Ministerial decision. It will be recalled that the Hong Kong Decision allows LDCs flexibility to maintain these measures until 2020 subject to procedural requirements. The notification date expired as LDCs did not have capacity to take advantage of the notification period. Given the need for industrialization, structural transformation and diversification, the proposal takes into account the grave lapse of time. It therefore means that the flexibility beyond 2020 is imperative, as LDCs still require protection/policy space beyond 2020.

#### **ON DIFFERENTIATION**

There are two points we would like to make (i) the relevant Articles of the TRIMS agreement do not differentiate among developing countries. The G90 does not propose to take away the legitimate rights enjoyed by developing countries. (ii) That said however, what the proposal seeks to do is to ensure that Developing countries and LDCs are distinguished in the degree of benefit that would accrue to them without taking away the legitimate rights of either group as provided for in the Agreement. Which is why Developing countries are looking for a specific amount of time, while for the LDCs the duration is contingent on their LDCs status, which is already well defined.

In closing Chair, most of the developing and least developed countries are in the process of developing their industrialization policies and strategies. Trade Related Investment Measures (TRIMS) when used in conjunction with other measures, such as local content/performance requirements and technology transfer requirements play a vital role in the industrialisation process. Indeed most developed countries, while in the early stages of their industrial development, employed protective industrial, trade and technological measures including local content. The local content requirement could strengthen the backward and forward linkages which could be supportive in achieving the SDGs, specifically the SDG-9.

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#### **RESPONSES BANGLADESH ON BEHALF OF THE G90 PROPOSAL NO. 2 - ARTICLE 18 A AND C**

We have received 11 questions from Australia, European Union and Japan on the proposal on Article A and C. We thank them for their questions.

Those, who were present in discussions we had before Nairobi and during Nairobi, may recall that we had discussions on use of Article XVIII A and C and we had a report from the secretariat as well. As we mentioned in our submission before the establishment of the WTO, some developing countries invoked these sections and releases were granted to them. However, after 1995 no developing countries were allowed to use these sections despite the fact that Article XVIII is designed to allow developing country members to provide assistance. From 1995 through July 2002, three developing country Members (Colombia, Bangladesh, Malaysia) sought recourse to Article XVIII:C. In the case of Malaysia and Colombia, despite both countries arguing it should be taken up in the CTD, it was heard in the CTG. Bangladesh case was addressed in BoP Committee. Discussions on those requests could not yield positive results. Burdensome

consultation procedures make it difficult for developing countries especially the paragraph 4 (a) countries to seek recourse to these sections. The proposal of G90 intends to bring clarity in the procedures of application of Sections A and C of Article XVIII. The existing text does not specify as to where to notify for invoking these sections. Accordingly, the paragraph 2.4 proposes to make notification to the Committee on Trade and Development. Para 2.4 also brings clarity in the consultations process and implementation of the outcome through consultations which are in line with the Agreement on Safeguard. Any rebalancing measures and the application of substantially equivalent concessions or other obligations are subject to a time delay of five years before they can be introduced or exercised. This is designed to give developing countries some breathing space before retaliatory measures are taken as the introducing members will take recourse to these sections for development purpose.

As you are aware the Paragraph 4 (a) of Article XVIII defines the coverage of members, who can resort to these sections. By adding the phrase "developing country member facing constraints" G90 tries to focus on the developing country members, who are in actual need. As regards question relating to paragraph 20 of article XVIII, we like to mention that the Decision on Safeguard Action for Development purposes, of 28 November 1979 (L/4897) (para 1) provides similar language, but doesn't leave it as open so as to give members the leeway to deviate to the extent it deems necessary.

The Terms member having "substantial interest" and "principle supplying interest is widely used by the WTO. Reference to these two terms may be found in Article XXVIII of GATT 1994 and Understanding on interpretation of article XXVIII of GATT 1994.

You may recall that the present texts, which have been substantially modified by taking into consideration the discussions we had in 2015, were proposed in December 2015 just before MC10 and members did not have sufficient time to discuss the proposal in detail. G90 believes that members are now in position to discuss this proposal more elaborately. It is noteworthy that the adoption of the SDGs at the end of 2015 especially goal 9 requires policy measures for paragraph 4 (a) members to meet their structural transformation, industrialization and diversification needs.

As regards one member's observation on the open list of development objectives proposed in paragraph 2.3 of our proposal, we need to have more clarity on reference to the closed list of objectives in Sections A and C?

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### **RESPONSES BY EGYPT ON BEHALF OF THE G90 PROPOSAL NO. 3 - ARTICLE 18(B)**

#### **Proposal**

#### **3. ARTICLE XVIII OF GATT – SECTION B**

3.1. Notwithstanding the current provisions in Article XVIII B and the Understanding, developing countries in balance of payments difficulties shall be enabled to take measures to address their BOP difficulties including quantitative restrictions and tariffs until such time these difficulties have been overcome.

3.2. Members agree that in drawing up its conclusions and recommendations to the General Council, including on determining the adequacy<sup>2</sup> of reserves for a developing country referred to in paragraph 4(a) of Article XVIII, in particular, a least developed country or a small and vulnerable economy, in accordance with Article XVIII:9 (a) and (b), the Committee on Balance of Payments Restrictions, while taking account of the findings, facts, and other determination provided by the IMF in accordance with Article XV GATT, shall ensure that its conclusions and recommendations are adequate in the context of a members economic development policies as expressed by the concerned members and do not undermine the objectives of paragraph 2 and 9 of the Article XVIII.

3.3. Actions stipulated in the last sentence of Article XVIII subparagraph 12 (c)(ii) and last sentence of Article XVIII subparagraph 12(d) shall be suspended for a developing country Member referred to in paragraph 4(a) of Article XVIII, in particular, a least developed country or a small and vulnerable economy.

### **BALANCE OF PAYMENTS**

With reference to the G90 proposal on Article XVIII section B on "BOP", We have received around 6 written questions from Japan, EU in addition to 2 general ones from Australia, In addition to the comments or questions raised during the previous meetings. We thank All members for their active participation and comments and special thanks for those members who provided us with written submissions for their effective engagements.

The questions and raised concerns seek clarifications or more understanding towards the following:

- Problems behind the proposal and challenges facing developing countries.
- What is the Rational for wanting to improve Art XVIII B and BOP?
- Reactions towards Related cases within the WTO especially the most recent one(s).
- Does the proposal deviate from the current measures ?
- Comparison between the Current proposal and the 2015 one with special considerations on paragraphs 3.2 , and 3.3 from the proposal.
- The proposal and the issue of Differentiation.

#### **1. General remarks**

It is important to remind us with what we have all agreed upon that most of the S&D provisions were couched in non-mandatory language and thus unenforceable, and for this reason, we all agreed, (Developed countries, Developing countries and LDCs) in the Doha mandate that S&D provisions needs to be strengthened and should make it more effective and operational.

The Doha mandate did not state as a condition that in order to strengthen the S&D provisions, the developing countries need to provide challenges they face when applying the S&D provisions. The rational , the challenges and the reasoning for re-introducing these proposals again are clearly known for all WTO members since the Doha Mandate till nowadays.

Against this important introduction, I would like to directly address the questions received from the esteemed delegates in order to strengthen our discussions and engagement to achieve a meaningful outcome with this regard.

#### **2. Problems behind the proposal and challenges facing developing countries**

Based on the scope of this proposal, Many developing countries and LDCs have demonstrated declines in manufacturing and insufficient or a lack of growth in a manner that has devastated their potential for sustained industrialization, structural transformation of their economies and follow-on diversification.

The end of commodity price cycle has negatively impacted the current accounts and financial markets, which may have a deep impact on future competitiveness enhancing investments. Since the decline in commodity prices in 2014, revenues have not managed to keep up with expenditures. it has not been easy for adjust to a diminishing inflow of capital. For example, Over the past two years, the aggregate macroeconomic environment of Africa has worsened due to higher debt, higher public deficit and lower savings.

As we stated before, The balance-of-payments resides at the crux of development. It illustrates the intersection of trade and finance and reveals the relationship of a given economy to the international marketplace. The reasons for balance-of-payments crises among developing countries stem from the basic obstacles that they face in trying to become industrialized, and also illuminate why those difficulties are so entrenched.

There are both traditional and more novel causes of balance-of payments crises. A traditional cause of balance-of-payments crises is a sudden and severe increase in a country's trade deficit. Such an increase might occur, for example, if bad weather like what we suffer nowadays drastically reduces production of key export crops and export earnings. Another classic case is one in which a steep rise in oil prices dramatically increases a country's import bill.

Thorough analysis of the IMF related work on Why do balance of payments problems occur? We can relate it to Bad luck, inappropriate policies, or a combination of the two may create balance of payments difficulties in a country—that is, a situation where sufficient financing on affordable terms cannot be obtained to meet international payment obligations. In the worst case, the difficulties can build into a crisis. The country's currency may be forced to depreciate rapidly, making international goods and capital more expensive, and the domestic economy may experience a painful disruption. These problems may also spread to other countries. The causes of such difficulties are often varied and complex. Key factors have included :

- weak domestic financial systems;
- large and persistent fiscal deficits;
- high levels of external and/or public debt;
- exchange rates fixed at inappropriate levels;
- natural disasters;
- or armed conflicts or a sudden and strong increase in the price of key commodities such as food and fuel.

Some of these factors can directly affect a country's trade account, reducing exports or increasing imports. Others may reduce the financing available for international transactions; for example, investors may lose confidence in a country's prospects leading to massive asset sales, or "capital flight." In either case, diagnoses of, and responses to, crises are complicated by linkages between various sectors of the economy. Imbalances in one sector can quickly spread to other sectors, leading to widespread economic disruption.

### **3. What is the economic Rational behind the current proposal on improving Art XVIII B and BOP?**

- Currently we are in situation whereby many developing countries are entering into debt and are having to go to the IMF/ WB for bailouts. This is due to low commodity prices and the reversal of capital flows away developing countries.
- On the economic front, instability in capital flows and in relative currency rates continued. In 2015 there was a reversal of capital flows to developing countries, with net outflows of US\$656 billion or 2.7% of their GDP, according to UNCTAD data. This was a big change from a net inflow of 1.3% of GDP in 2013. In the midst of these large fluctuations in perceptions and actual flows, many developing countries remain vulnerable to financial instability.
- Going through these cycles, the debt of developing countries has grown. Developing countries' external debt rose from US\$2.1 trillion in 2000 to \$6.8 trillion in 2015. Their overall debt (foreign and domestic) jumped by over \$31 trillion with total debt-to-GDP ratios reaching over 120% in many countries and over 200% in some others.
- In some countries, the problem is compounded by currency devaluation (which increases the value of external debt) and lower commodity prices. These countries are thus hit by multiple factors -- lower commodity prices and export earnings, net outflow of funds, devaluation (which causes their foreign debt to increase), a higher cost of servicing debt, and a slowdown in economic growth.
- More low-income countries are in a downward economic spiral that has led them into or on the brink of a new debt crisis. They have had to turn to institutions like the IMF and World Bank for bailouts. UNCTAD lists Angola, Azerbaijan, Ghana, Kenya, Mozambique, Nigeria, Zambia and Zimbabwe as countries that have already asked for financial assistance or are in talks to do so.
- This points to a shortfall in the international financial system – the lack of an orderly and fair debt workout mechanism which countries facing a debt crisis can have recourse to. In its absence, indebted countries often face many years of austerity and recessionary conditions imposed by the creditors and rescuing agencies, and with no guarantee that their debt level will even decrease. the imminence of debt crises shows how important are the issues of preventing debt crises, and to manage them properly when they happen.

#### **4. Reactions towards Related cases within the WTO especially the most recent one(s)**

Since the establishment of the WTO and when it comes to Balance of payments restrictions there are about 104 notifications mostly related to several members such as Ecuador, Pakistan, Ukraine, Bangladesh, Romania, Slovak Republic, Tunisia, Bulgaria ..

In recent years, some WTO Members have applied BOP measures in order to address specific economic concerns. On 25 February 2015, Ukraine adopted BOP measures. We understand that Ukraine's BOP measures are no longer in force.

With respect to the question on Nigerian measures, it illustrates even more obviously the need of G90 members and developing countries need for flexibility to be able to diversify their economies, industrialize and structurally transform.

Ecuador applied BOP measures in 2009 and again in 2015. In its 2015 notification<sup>3</sup>, Ecuador referred to the "highly unfavourable economic climate prevailing in the country and its impact on the balance of payments" as the grounds for imposing "a temporary and non-discriminatory tariff surcharge for a period of up to 15 months in order to regulate the general level of imports and thereby resolve Ecuador's critical balance-of-payments situation". The imposed surcharges were in response to a sharp drop in oil prices starting in late 2014, which led to a deterioration in the country's balance of payments. There were applied to nearly 3,000 tariff lines, or 38% of the country's total.

Under the rubric of "essential products", Ecuador excluded from the scope of the import surcharge "capital goods, inputs and raw materials essential to production, medicines and medical equipment", and certain other goods. Ecuador's measures have been subject to extensive discussions as part of the consultations process which lasted for 6 consecutive rounds, with some Members expressing concern as to whether they comply with the relevant requirements of Article XVIII of the GATT 1994. Ecuador began to phase these measures out earlier in 2016, but following the earthquake in April 2016, it informed the BOP Committee that it intended to delay the phase out for a year to facilitate recovery from the economic effects of the earthquake. Ecuador informed the WTO's Committee on Balance-of-Payments Restrictions on 21 July 2017 that the final phase-out of the surcharges was made effective on 1<sup>st</sup> of June 2017. As per the report of the committee on balance of payments restrictions, Ecuador informed the committee that the safeguard made it possible for Ecuador to protect its external financial situation, restore macroeconomic balance and safeguard its dollarized economy.

It is important to emphasize the newly added pressing challenges that we currently face due to the climate change and its negative impact on our efforts towards sustainable development, the new norms of fighting the severe waves of natural disasters (typhoons, floods, and hurricanes adding additional burdens on our economic capacities, and leads to balance of payments difficulties along with socioeconomic disruptions. Yet, the need for Balance of Payment measures will remain pertinent due to instabilities in the global monetary system.

Based on the IMF data, we can observe that many developing countries have continued deficit in their balance of payments (in its both main indicators the current account and the financial account indicators) from the period 2008 till 2015 (most recent available data) this deficit is combined with another deficit in the net of international investment positions within the same period.

Moreover there are many developing countries, and in particular LDCs that their balance of payments has been overall in a deficit zone since the 70s.

And again, due to onerous procedural requirements our developing countries, SVEs, and LDCs have not been able to fully utilize these provisions.

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<sup>3</sup> WT/BOP/N/79 (7 April 2015).



## 5. Concerns related to the deviation from the current measures

We would like to confirm that we are not deviating the current measures to address balance of payments concerns. Allow me to explain more the current measures and what we are looking for.

1.1. Article XII and XVIII:B of the GATT 1994 both establish rules allowing WTO Members to impose restrictive import measures specifically in order to address BOP concerns. Both provisions operate as an exception to Article XI:1 of the GATT, which imposes a general prohibition on quantitative restrictions and other trade restrictions on imports and exports.

1.2. Article XII may be invoked by all WTO Members, whereas Article XVIII:B may be invoked only by developing country Members. Article XVIII:B covers measures to safeguard a Member's financial position, and also permits measures "to ensure a level of reserves adequate for the implementation of [the Member's] programme of economic development".<sup>4</sup> Article XVIII:B authorizes measures to forestall the threat of or to stop "a serious decline in its monetary reserves"<sup>5</sup> and to achieve a reasonable rate of increase in its "inadequate monetary reserves".<sup>6</sup>

1.3. In terms of procedural requirements, measures taken under both Articles XII and XVIII:B must be taken in accordance with the procedures laid out in the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 (the "Understanding"). Pursuant to the Understanding, Members must give preference to measures that have the least restrictive effect on trade. These measures may include import duties and surcharges that exceed the bound rates in a Member's Schedule. Members should avoid quantitative restrictions unless, because of a critical balance of payments problem, price-based measures are not adequate to "arrest a sharp deterioration in the external payments position".<sup>7</sup>

1.4. In addition, measures taken for BOP purposes "may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation".<sup>8</sup> In effect, this means that BOP measures should not be used to provide protection to specific sectors. Members may exclude from the scope of BOP measures certain "essential products". In the case of developing countries, under Article XVIII:10, this means "products which are more essential in the light of [the Member's] policy of economic development" provided that the restrictions are applied in "so as to avoid unnecessary damage to the commercial or economic interests of any other [Member]". BOP measures must be progressively relaxed as the BOP situation improves.<sup>9</sup>

1.5. The Committee on Balance of Payments ("BOP Committee") must carry out consultations in order to review BOP measures. Members imposing BOP measures must notify the General Council and the BOP Committee and must enter into consultations, convened by the BOP committee within four months of the application of the measures and measures are subject to periodic review. Members must provide justification of the criteria used to determine which products are subject to restriction. Pursuant to Article XV:2 of the GATT 1994, the General Council, once advised of a BOP matter, is required to consult with the International Monetary Fund ("IMF"). These consultations are conducted through the WTO's BOP Committee. The WTO is obliged to accept the IMF's findings of fact and determinations<sup>10</sup> as to whether the measures are consistent with the IMF's Articles of Agreement. Therefore, the view taken by the BOP Committee on BOP measures depends on a positive determination by the IMF as to the monetary situation of the requesting country.

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<sup>4</sup> Article XVIII:B(9) of GATT 1994.

<sup>5</sup> Article XVIII:B(9)(a) of GATT 1994.

<sup>6</sup> Article XVIII:B(9)(b) of GATT 1994.

<sup>7</sup> Understanding, para. 3.

<sup>8</sup> Understanding, para. 4.

<sup>9</sup> Articles XII:2(b) and XVIII:B(11) of GATT 1994.

<sup>10</sup> This must be based on statistical and other facts relating to the BOP situation of the WTO Member applying the BOP measure.

1.6. BOP measures applied pursuant to Article XVIII:B are subject to an **biannual review** by the BOP Committee.<sup>11</sup>

**6. Specific questions related to the Current proposal and the 2015 one with special considerations on 3.1 , 3.2 , and 3.3**

**What is the reasoning for re-introducing in paragraphs 3.2 and 3.3 a proposal which was rejected back in 2015?**

Rejections in 2015 were clearly motivated by disinterest on the part of developed Members in the proposals in the first place. The adoption of the SDG 9 was also a determining event at the end of 2015, which precipitated G90 members closely examining their structural transformation, industrialization and diversification needs and the policy measures required to realize them.

With respect to article 3.3, in 2001 Ministers reaffirmed in the 2001 Doha Ministerial Declaration on Implementation Related Issues and Concerns that Article XVIII is a special and differential treatment provision for developing countries and that recourse to it should be less onerous than to Article XII of the GATT 1994. (para 1.1)

**With regard to your proposal in paragraph 3.2, we note that it has been very difficult to achieve consensus in the Committee. In this respect we reiterate the question we had back in 2015: Don't you think that adding further discretion to the assessment of adequacy would further complicate the achievement of consensus even for the application of existing provisions?**

G90 is not adding further discretion to the assessment of adequacy by stipulating what the committee should consider in assessing adequacy of monetary reserves for a developing country referred to in para 4(a) of Article XVIII. This provision is designed to ensure that the unique challenges facing developing countries, including commodity price volatility and volatile financial capital flows are taken into account. In particular, it serves to clarify that short-term financial flows should not be included in determining the adequacy of a developing country's external financial position. The recent 2 cases of Ecuador on 2009 and 2015 are clear examples on that.

Furthermore, Members will recall that this issue was an outstanding implementation issue, notably Annex C of the Cancun 28 SDT provisions, viz. provision no 28. We remind members that one of the positive findings of the India-Autos Panel <sup>12</sup>, had been that GATT Article XVIII:B allowed the use of balance-of-payments provisions for development purposes. G90 is of the view that consideration of the issues described in Paragraph 3.2 will facilitate the decision making process with regard to application of Article XVIII: B.

**Could the G90 please clarify how differentiation among developing countries is addressed in each of the proposals? Would those developing countries that have significantly larger economies than others also be entitled to the proposed special and differential treatment in the proposals?**

Article XVIII:B clearly dealt with this issue , as it has to be utilized by the developing country Members in the early stages of development and with a low standard of living). GATT Article XVIII.B.8 is clear as follows:

"The contracting parties recognize that contracting parties coming within the scope of paragraph 4 (a) of this Article tend, when they are in rapid process of development, to experience balance of payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade."

And to clarify more on the scope of paragraph 4(a):

" 4. (a) ... a contracting party, the economy of which can only support low standards of living\* and is in the early stages of development,..."

<sup>11</sup> Articles XII:4(b) and XVIII:B(12)(b) of GATT 1994.

<sup>12</sup> India – Measures Affecting the Automotive Sector DS 146 and DS 175 of December 2001.

In conclusion, it is important to highlight:

1. Article XVIII:B of the GATT 1994 establish rules allowing WTO Members to impose restrictive import measures specifically in order to address BOP concerns.
2. Yet, the status quo of balance of payments restrictions linked with both laudable and troubling developments in today's international economic order. The order has gained considerable authority and coherence, over the country applies quantitative restrictions regime, and by WTO close coordination with the IMF.
3. The WTO should not employ these efforts to pursue an unduly narrow understanding of the goals of the international economic order.
4. One Final message to our Esteemed Members who raised concerns about the G90 intentions, The main objectives of the G90 are to simplify the procedures for invoking BoP measures to enable them to achieve the objectives of this article.
5. With regard to the Concerns about the WTO consistency and the importance of avoiding excessive use of these provisions; I would like to clarify that the proposal respects the WTO related provisions and doesn't aim to change it. The proposal does not change the fundamentals of Article XVIII B . The proposal doesn't interfere with the consultations with IMF nor the bi annual review and consultations carried out by committee on BoP restrictions. The proposal only seeks to allow developing countries to use their right, The right that we "All" .. All of us agreed upon. What We propose better guidelines for determining the adequacy of Member's reserves that are adequate within the context of developing countries' economic development programmes. We also propose suspension of the right to retaliate against countries that use this Article.

The G90 is looking forward to receiving your comments and suggestions on the proposed text and open for further discussions.

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**RESPONSES BY SOUTH AFRICA ON BEHALF OF THE G90  
PROPOSAL NUMBER 04 AND 05**

**The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and**

**The Agreement on Technical Barriers to Trade (TBT)**

The statement delivered in the previous CTD-SS, on behalf of the G-90 group of countries under proposal 4 and 5 (SPS and TBT) brought evidence that justifies a favourable consideration to these proposals by all Members. We have also presented on the specifics of the proposals contained in JOB/DEV/48; this statement provides responses to questions received from Members on these proposals.

The questions presented gives us the opportunity once more to explain and highlight in a detailed manner the challenges inherent in the application of Special and Differential Treatment (S&DT) in the SPS and TBT Agreements. Some of these issues have repeatedly been raised by developing countries during the work of the committees with no solutions provided thus far. The G90 has evaluated these challenges in drafting the current proposals. The questions we have received cover the following issues:

- Re-introduction of proposals discussed in 2015.
- Capacity constraints.
- Adversely affected Members.
- Longer time period for comments and compliance.
- Capacity building and technical assistance.

These issues continue to be relevant to the G90, as they are closely linked to the obligation to provide S&DT more generally. We have previously stated that the incorporation of provisions on technical assistance and capacity building in the SPS and the TBT Agreement has been an acknowledgement that there are challenges faced by developing countries and LDCs in complying

with Non-Tariff Measures (NTMs). Furthermore, Members have acknowledged that the S&DT provisions in these Agreements provide legally weak and vague undertakings, which cannot be translated into specific obligations and therefore not enforceable.

The TBT committee has encouraged Members to continue to exchange information on the implementation of Article 12 of the TBT Agreement. In the SPS committee developing countries have indicated that although a substantial amount of technical assistance is provided in the SPS area, in many cases it is not appropriate and it does not correspond to their needs. Therefore, developing Members continue to call for the implementation of S&DT provisions under Article 9 of the SPS Agreement.

### **Re-introduction of proposals discussed in 2015**

The G90 proposals are re-introduced in each negotiating Round because they have not been considered in a meaningful way in previous negotiating Rounds. These improved proposals aim to find concrete ways to strengthen the S&DT provision and to make them more precise effective and operational as envisaged by the Mandate which is provided in paragraph 44 of the Doha Ministerial Declaration.

We continue to bear witness that market access for products of export interest to developing country Members are increasingly being dependent on the ability to comply with trade regulatory measures. While these measures are legitimate, they continue to fragment trade. A WTO report on challenges facing small economies revealed that as small economies become more specialized in products, they are increasingly exposed to NTMs.

In fact, one major developed member has just announced in The Telegraph (11 October, 2017) that it has to align its regulatory framework to comply with the EU's complex SPS measures, which are presenting significant barriers. They specifically mention that their agri-producers might have to introduce new handling logistics, which is a costly commitment. Can you imagine how developing countries and LDCs who lack the necessary capacity continue to grapple with complex regulatory measures.

A technical note done by UNCTAD<sup>13</sup> in 2015 show that developing countries encounter significant additional costs while adapting their production processes to comply with foreign regulatory measures and standards. This lead to de facto discrimination against exports of those countries that have the highest difficulties to comply with the regulations in export markets due to capacity constrains and/or lack of finance. The adverse effect of such measures and standards can be reduced by assisting developing countries and LDCs to comply.

### **Members facing capacity constraints and adversely affected**

While we note that food safety and agricultural health capacity referred to as SPS management capacity is an important requirement to ensure compliance with SPS measures in exports markets, particularly in developed countries. Most often, capacity constraints in developing countries and LDCs prevent us to comply with stringent SPS requirements and to undertake the necessary conformity checks.

The term referred to in the proposal as "developing country Members facing capacity constraints" is meant to assist Members to examine and determine the extent to which a Member can or cannot comply with a regulatory measure. This determination should ensure that exports of a Member, facing capacity constraints are not adversely affected by a measure that is introduced by a developed country Member.

Chairperson, I would like to refer to the case of The Gambia on Pesticide residue testing for horticultural product exports. This case demonstrates the impact of SPS measures on a developing country that has experienced capacity constraints.

**Case Gambia: [Pesticide residue testing for horticultural product exports from The Gambia]** Exports of horticultural products to the EU are relatively small, but they are of great economic importance to a country the size of The Gambia and are also considered an important

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<sup>13</sup> If you care about LDCs, care about NTMs, 2015, UNCTAD.

element of the country's programme of export development. Although public authorities, and in particular the Department for Agricultural Services, have implemented the necessary procedures to perform SPS certification, as required by the EU, they have experienced a number of problems in meeting the EU's requirements. Indeed, some consignments of product have been rejected following border inspection. The problems faced by the Gambian authorities are two-fold. Firstly, they find it difficult to obtain reliable information on the EU's SPS requirements for the products that they export. In particular, the time taken for information to reach the appropriate authorities when the EU's requirements change can delay implementation and in the meantime there is a risk that product consignments will be rejected. Secondly, in certain cases the appropriate testing equipment is not available in The Gambia. This is a particular problem in the case of maximum residue levels (MRLs) for pesticides, which can be beyond the detection capability of the equipment that is available. Thus, in certain cases, tests can be undertaken and certificates issued, but there can be no guarantee that the product complies with the EU's requirements.<sup>14</sup>

In other cases, involving developing countries when exports have been stopped, despite the adequate compliance period allowed and the standards board approved as the 'competent authority' to issue licenses to export, they are not able to go back to earlier levels. In certain cases, companies are unable to comply with SPS requirements in the time permitted and/or the cost of doing so is prohibitively high.

### **Longer time period for comments and compliance**

A limited time period provided for comments has also presented a challenge for developing countries. In the SPS committee over the years, developing countries have requested that longer periods for comments be allowed in the case of products of special export interest for developing countries.<sup>15</sup> Specifically, developing countries have requested that notification procedures give developing countries the opportunity to identify where they may have potential problems meeting new requirements affecting their exports, so they could request a phased-in introduction of the proposed measures. Some developing country Members have even requested longer time frames for compliance as long as 12 months.<sup>16</sup> Even though in the TBT committee it has been agreed that the normal time for comments on notified technical regulations and conformity assessment procedures should be 60 days, developed country Members were encouraged to provide more than a 60-day comment period in order to deal with the challenges related to transparency and to improve the ability of developing country Members to comment on notifications. During the meeting of the TBT committee held in June 2017<sup>17</sup>, a developed country expressed concern regarding the possibility to have enough time to comment on new regulation. If developed countries can request for more time to comment on regulations imposed by developing country Members, the opposite situation is even more true.

It should be noted that due to the large number and complexity of SPS and TBT measures, longer time period for comment is required to allow developing countries time to review the notifications and send to various stakeholders at the national level including the private sector and also to provide feedback. Such notifications often require some training and capacity building initiatives to stakeholders for them to understand the proposed measure and assess the possible implication of the measures.

The focus here is not only on the comments but on other considerations such as the capacity to comply with the SPS measure, including technology, human resources and infrastructure needs, with a view to exploring solutions to preserve market access for developing country Members, especially LDCs. Responding to these complex and stringent measures including the determination of the appropriate financial and technical assistance cannot be done in 60 days, hence the requirement for a longer time period for comments and compliance.

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<sup>14</sup> [http://siteresources.worldbank.org/INTARD/864477-1112355387702/20424577/henson\\_et+al.pdf](http://siteresources.worldbank.org/INTARD/864477-1112355387702/20424577/henson_et+al.pdf)

<sup>15</sup> COMTD/219 and G/SPS/GEN/128 (Egypt Proposal 1999).

<sup>16</sup> G/SPS/R/19 dated 2000.

<sup>17</sup> G/TBT/M/72.

### **The extent of the technical and financial assistance**

The G90 proposals allow Members to determine the extent of the technical and financial assistance to be provided to developing countries. A 2002 WTO survey<sup>18</sup> that sought to determine the priority needs of 45 developing countries for technical assistance and capacity building in TBT, with reference to the implementation of the TBT Agreement found that the responses varied across different priority areas. This shows that the extent of technical and financial assistance cannot be predefined but must respond to specific country needs. This will enable even investments in appropriate technology to ensure that developing countries comply with SPS and TBT measures; allow them to effectively participate in Global Value Chains (GVcs) and integrate them into the Multilateral Trading System.

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### **RESPONSES BY CAMEROON ON BEHALF OF THE G90 PROPOSAL NUMBER 06**

#### **THE AGREEMENT ON SUBSIDIES AND COUNTERVEILING MEASURES**

On this proposal, we received 12 questions from 3 Delegations: Australia, European Union and Japan. After considering and analysing the issues and concerns raised, we were able to merge them in seven questions or seven points. I will take them one after the other.

#### **1. Examples showing how WTO agreements limit DCs abilities to take measures necessary for development**

Before and during the GATT years, developing countries had a considerably freer hand in the use of industrial subsidies until the Uruguay Round, as a preferred instrument to support structural transformation.

Historically, many developed members have used subsidies to grow, diversify and industrialise targeted sectors, including for the revitalization of distressed regions and the restructuring and rationalization of existing industries, as well as providing government support in the form of R&D to specific sectors, aerospace being particularly relevant.

Furthermore, support contingent on the use of local content (Buy American) and environmental support programs such as commencing production of more fuel-efficient vehicles have also been employed.

The WTO's SCM Agreement has entailed much tighter constraints on subsidy use, just when developing countries have sought to industrialise and diversify and grow their economies. This agreement was originally a Tokyo round plurilateral code, imposed on G90 members to adopt and multilateralize in the Uruguay Round, when they had weak capacity to negotiate. They were not part of the negotiation of that agreement or any of the Tokyo Round Codes.

Recent jurisprudence has also shown that notwithstanding the SDT provisions in Article 27 of the SCM Agreement, and the Doha 2001 Implementation Decision with regard to subsidies, these have not really assisted developing countries seeking to industrialise, diversify and structurally transform their economies.

Therefore, the flexibility we seek under the SCM Agreement is not any more than has been afforded to and utilised by industrialised members with first mover advantages in the past.

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<sup>18</sup> G/TBT/W/193, 10 February 2003

## **2. Developing Countries facing constraints**

The intention here is to say that not all developing countries are facing constraints on everything. Not all constraints are listed. Criteria are meant to limit to only those with a direct link with the agreement.

This term was designed to assist in the concept of distinguishing between developing countries. The granting Member would examine and determine the extent of capacity constraint on a case by case basis, relevant to the specific proposal and agreements.

The notification referred to in paragraph 6.3 required to demonstrate the evidence of the criteria referred to in paragraph 6.2. As you probably clearly understood, any of the criteria can be demonstrated. The criteria are not cumulative.

## **3. Conditioning proposal upon expired Article 8 which DCs were unwilling to renew in that time (in connection with paragraph 6.1)**

At the outset, I should say that the non-renewal of article 8 of the SCM Agreement in 1999 was due to a lack of consensus by all members. However, the issue of non-actionable subsidies was also considered in 2001 and consensus was reached under paragraph 10.2 of the Doha Ministerial Decision on Implementation-related issues and concerns. That Decision taken by Ministers provides that the Ministerial "Takes note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production as non-actionable subsidies, and agrees that this issue be addressed ...". It is only logical to address this proposal now after more than a decade the Doha Implementation Issues Decision has been in place.

The proposal is even more relevant now given the declining trade balance, lack of industrialization and diversification of our countries. We urge Members to agree to a decision on this matter as reflected in the proposals in 2015 for MC10 and now for MC11.

## **4. The legality of inclusion by making reference to the requirements of an expired provision, which has disappeared**

It is legally possible to re-craft any WTO provisions that members by consensus deem useful, either in the same or similar terms to what existed before. Furthermore, the SCM Agreement is currently on the DDA agenda of rules negotiating issues, under paragraph 28 (of Doha Declaration 2001); with a mandate to 'clarify and improve' the agreement.

In fact, in 2004 and 2006, some developed country members sought to reinsert the expired deeming provision in article 6.1 (a) (which is in relation to serious prejudice) which also expired at the same time as article 8 of the SCM Agreement, on 31 December 1999. Even now, in October 2017, a current proposal under review in the Rules negotiating group by a developed member (EU) proposes to re-introduce a rebuttable presumption of serious prejudice in the case of non-notification of subsidy programmes.

Having participated in the TFA negotiations since Bali, I think every body here can recognize that the Decision adopting the Protocole was taken by the General Council in November 2014. Remember the deadline set by the ministerial decision was 31 July.

## **5. Open list of development goals and closed list of Article 8**

Allow me to read the question as it was formulated: "How do you reconcile the open list of development goals in your proposal with the closed list of Article 8, if the latter would be applicable? And how would you see the rest of the requirements of Article 8 apply?"

This question is not clear. Please explain. Are you suggesting that you will agree to these proposals if the criteria proposed under Proposal 6 is utilized for the other proposals as well? Please clarify.

**6. Why the reference to DCs listed in Annex VII of the SCM Agreement?**

Annex VII of the SCM Agreement, which includes LDCs and listed countries, is the trigger for this element. It is intended to narrow the scope of application. We recognize that the WTO Secretariat has issued a periodic note reporting the status of the listed countries, plus Honduras (added by rectification decision in 2000), in terms of eligibility if the country falls below \$1'000 per capita for three consecutive years (See most recent - G/SCM/110/Add.14). Our intention is that the procedure is maintained and applicable to this proposal.

**7. Significance of the insertion of the condition "only when the products concerned are destined to exports" since the scope of the provision refers to import substitution subsidies**

Article 3 of the SCM Agreement refers to two types of prohibited subsidies. While recognizing the importance of subsidies in economic development of the developing countries in paragraph 27.1, the Agreement allows Annex VII countries to provide only export subsidies (Article 3.1 (a) type subsidies but not subsidies contingent upon the use of domestic over imported goods (3.1 (b) type subsidies).

Since this proposal of G90 is directed towards industrialization, it is proposed to allow Annex VII countries to provide 3.1 (b) type subsidies to the products only when products concerned are destined for export. As I explained in September 14, this will limit the use of 3.1 (b) subsidies and link this type of subsidy with the 3.1 (a) type subsidies to promote industrialization in Annex VII countries.

To conclude my intervention chair, I wish to encourage members to consider the creativity reflected in this proposal and how the solution proposed by G90 takes into consideration the issues of concerned Developing Countries Members without changing existing rules frameworks.

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**RESPONSES BY SENEGAL ON BEHALF OF THE G90  
PROPOSAL NUMBER 07 – CUSTOMS VALUATION**

Today, we would like to provide some preliminary replies to the questions raised by the European Union, Japan and Switzerland during the meeting of 21 September 2017.

As you know, proposal No. 7 on customs valuation aims on the one hand to combat customs under-invoicing – a common practice in many developing countries and LDCs in particular – and on the other hand to facilitate access to price databases in the LDCs in order to be able to check more accurately the truth of the values declared by economic agents through effective cooperation between the LDCs and the exporting countries.

By relieving the LDCs of these constraints, it should be possible to mobilize greater budgetary resources to finance their economic and social needs and to improve the efficiency of their customs control operations.

The European Union wondered about the problems that the LDCs were experiencing in implementing the Agreement on Implementation of Article VII of the GATT, while Switzerland wondered what results the technical assistance provided over the past few years had produced.

As we mentioned when introducing proposal No. 7, application of the alternative methods of customs valuation in a strict sequence is a constraint and a burden, and slows down the implementation process. It requires updated information on the value of identical or similar goods as well as information that is not easily available or requires complicated calculations. Moreover, application of the computed value requires investigations in the exporting country and certain procedures that are difficult for the LDCs to accomplish owing to financial constraints and limited human resources.



We would like to refer the European Union to its communication G/VAL/W/112 in which it explains the reasons for its concerns in relation to the truth or accuracy of declared values. These include:

- lack of mutual confidence between trade and customs, error, mistrust;
- lack of experience with regular commercial flows;
- importers are motivated to take risks by mis-declarations to customs. Cases of fraud or attempted fraud leading to generalization of conclusions in relation to loss of revenue;
- under-trained customs and inadequate management; conflict in relations between customs and trade;
- uncooperative trade sectors and/or non-structured trade: traders do not keep accounts (or proper accounts), traders are not accessible or cannot be relied upon to cooperate in case of post import controls or audit;
- lack of a comprehensive understanding of the Valuation Agreement and its applicability to the diversity of trade flows;
- national laws relating to the powers of customs are incomplete or inadequate.

Today as back then, the LDCs and their customs administrations are faced with the shortcomings and problems described by the European Union at the time, in spite of all the efforts that have been made and the technical assistance provided.

Indeed, technical assistance is not an end in itself. It is a contribution which goes hand in hand with human and financial efforts on the part of the beneficiaries to improve a particular situation. In fact, not all of the LDCs have benefited from technical assistance. Besides, the projects and activities financed in this context are limited in time and in resources, and do not guarantee results, particularly if there is no exit strategy and if there is no long-term provision in the State budget, under own resources, to ensure that the project's achievements are preserved indefinitely. We all know that the LDCs have escalating budgetary constraints to which under-invoicing largely contributes.

Like many Members, Japan recognizes the difficulties facing the LDCs, particularly those relating to under-invoicing. Nevertheless, it is worried by the potential negative effects of using minimum values, and shares with Switzerland the systemic concerns in connection with the prohibition of minimum values by the Customs Valuation Agreement.

We would like to recall, in this connection, that special and differential treatment (S&D) is an exception or a derogation from the rules. Seen from this angle, consistency with the Customs Valuation Agreement should not be an issue. Moreover, the use of minimum values is authorized under Annex III of the Customs Valuation Agreement. As we recalled at our last meeting, the fact that no LDC has applied the reservation under paragraph 2 of Annex III since 2007 is not linked to improvement in the capacities of the LDCs or to their need to use minimum values, but rather to the conditions established by the Committee on Customs Valuation in granting S&D to requesting countries.

What the LDCs are asking for today comes under the mandate of paragraph 44 of the Doha Declaration, namely to make the S&D provisions effective and operational, and above all to ensure that they address the economic and social needs of the LDCs in a meaningful way.

As we mentioned at our last meeting, we are ready to examine whatever modalities Japan thinks might ease its concerns as to the potential negative effects of using minimum values, taking account, of course, of the needs and constraints of the LDCs.

In conclusion, in response to the European Union's question regarding the Trade Facilitation Agreement's contribution to access to price data, we would like to recall that while Article 12 of the Trade Facilitation Agreement is indeed, as we stated earlier, a significant step in strengthening customs cooperation between WTO Members, the procedures, the limitations and the discretion

left to the Members to whom the request for assistance is directed can prove burdensome or counterproductive for the LDCs, in that no specific provisions were included to take account of their particular situation.

Moreover, under Article 10.5.1 of the Trade Facilitation Agreement, Members no longer have the possibility of requiring the use of preshipment inspections in relation to tariff classification and customs valuation.

For some countries that have recourse to preshipment inspection firms, this means a transfer of those obligations to the customs administrations.

This is the case for certain LDCs that have contracts with preshipment inspection firms and are faced with the dual challenge of bringing their TFA commitments into conformity and implementing the procedures under the Customs Valuation Agreement.

In view of the previously mentioned limits associated with the provision and the effectiveness of technical assistance, our view is that the TFA will only be able to provide any possibilities in this respect if it enables these constraints to be properly addressed; and it is somewhat premature to reach any conclusions at this stage given that the Agreement only entered into force recently and that the LDCs are still far from receiving the support they need in this framework.

I hope that I have answered the questions and concerns raised by Members regarding proposal No. 7. Once again I would like to thank you, Madam Chair, as well as the Members. We reaffirm our determination to achieve an outcome on the S&D proposals, and on this one in particular, in Buenos Aires.

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**RESPONSES BY BANGLADESH ON BEHALF OF THE G90  
PROPOSAL NUMBER 08 - THE ENABLING CLAUSE**

We have 5 questions on this proposal from Australia, EU and Japan. G90 expresses its gratitude to those members for their questions, which will bring clarity in our proposal and enable us to have further discussions.

First of all, G90 likes to emphasize that the proposal is not necessarily an obligation of result. It is merely sought that developed countries give due consideration to meaningful market access.

We refer, as further articulation of article 2 a in the Enabling Clause, the Decision of the CONTRACTING PARTIES of 25 June 1971, which envisages, the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries" (BISD 18S/24). It is not impractical for developed members, in designing their GSP schemes to proactively consider how meaningful market access can be best secured for developing and least developed country members. We seek that developed countries, in formulating their GSP schemes, should consider how the export interests of relevant developing and least developed country members can be ensured, and make the market access accorded to them under the various GSP schemes meaningful.

In this regard, G90 has some pertinent questions about GSP schemes.

First, don't the WTO Members consider that GSP was agreed upon by the WTO Members for expanding export opportunities of the developing countries especially those which have limited export products? In fact, Paragraph 3 (a) of the Enabling clause maintains "Any differential and more favourable treatment provided under this clause: shall be designed to facilitate and promote the trade of developing countries".

Second, don't the members think that proposal of G90 will facilitate operationalization of this provision through consultations?

Third, don't the WTO Members consider that there is a responsibility for the GSP granting countries to design their scheme to facilitate and promote the trade of developing countries?

G90 members are looking forward to having further discussions on the proposal.

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### **RESPONSES BY EGYPT ON BEHALF OF THE G90 PROPOSAL NUMBER 9 - TECHNOLOGY TRANSFER**

With reference to the G90 proposal on Technology transfer (TT), We have received around 7 written specific questions from some members including EU and Canada. We thank All members for their active participation and comments in previous meetings and special thanks for those members who provided us with written submissions for their effective engagements. The questions seek clarifications or more understanding towards the following:

- Why we introduce this new important proposal?
- how existing WTO Agreements are limiting developing country members' abilities to take measures necessary for development?
- TRIPS Article 66.2 & its relation with the proposed provision 9.3
- What is meant by "under the control of developed country members"? Does this mean technologies owned by a government?
- What is meant by "technologies developed with public funding"?
- Specific questions seeking to understand more the concerns of LDCs with regard the current practice and initiatives related to ToT.

The following presentation will try to address some of those concerns and rest will be clarified more throughout the discussion and the interventions of the members especially the LDC members in order to bring practical examples from their side.

#### **1. Why we introduce this proposal?**

The scope of the G90 proposal is to address the needs for Industrialization, structural transformation, and diversification, therefore we introduced this totally new proposal to complete and complement the rest of proposals.

As we stated before, There is no productivity without the adequately needed technology. Technological progress is a key factor in economic development and decreasing the technology gap between developed and developing countries will have a positive impact on the international trade.

Many developing countries have demonstrated declines in manufacturing and insufficient or a lack of growth in a manner that has devastated their potential for sustained industrialization, and structural transformation of their economies. As Developing and Least Developed countries continue to struggle with industrialization because many are still far behind technologically, specific measures need to be taken within the WTO to encourage such flows of technology.

#### **2. How existing WTO Agreements are limiting developing country members' abilities to take measures necessary for development?**

A number of provisions in the WTO agreements mention the need for a transfer of technology to take place between developed and developing countries. However, it is not clear how such a transfer takes place in practice.

Major aspects of the technology and knowledge deficits in many developing countries are easily spotted by observing such indicators as the share of gross domestic product (GDP) devoted to scientific and technological research or the low share of manufacturing and technology products in exports.

However, a more comprehensive and actionable perspective can be gained by making further assessments on the functioning of the national innovation systems. For this, technology and knowledge stocks and flows, as well as the supporting institutional and policy frameworks, must be brought into the picture.

### **BARRIERS TO TECHNOLOGY TRANSFERS FOR DEVELOPING COUNTRIES**

Technology transfer is a four-stage process, consisting in acquisition, learning, adaptation and diffusion. Market failures can act as barriers to technology acquisition and diffusion of technology. Some forms of market failure may be particularly important barriers to technology transfers to developing countries. The process of technology transfer to developing countries may also encounter major obstacles in the phases of learning and adaptation.

What are the major barriers to technology transfers to developing countries ? There are two types of problems - firm-level problems that derive from the specific characteristics of a firm, and systemic problems that derive from the environment in which firms operate.

(a) At the firm level, possible barriers to technology transfers include:

- incomplete knowledge about all ranges of technological alternatives;
- inability to identify the technology that best suits its needs;
- limited access to finances;
- inadequate workforce skills and mechanisms for their upgrading;
- slower pace of technological development in downstream or upstream firms that inhibits the upgrading of technology;
- organizational rigidities within firms.

(b) At the systemic level, barriers to technology transfers may include:

- lack of access to information on new technologies and innovations;
- market distortions, including barriers to trade;
- lack of education and skills;
- ineffective institutions for carrying out R&D;
- Universities and research institutions disconnected from the needs of industry;
- inadequate development of the financial and insurance markets;
- lack of resources, knowledge and capabilities within policy institutions;
- regulatory constraints.

### **3. Proposal 9.2 related to TRIPS Article 66.2 & its relation with the proposed provision 9.3**

The proposal benefited from the existing related discussions on Trade and TT within the WTO. The proposed provisions especially 9.2 and 9.3 deals with the following fundamentals :

(1) The Enabling Environment

(2) Role of Home Country Measures

To clarify more, Members have discussed the vital role of domestic policy and framework in the generation, transfer and diffusion of technology. There is a recognition that development of human capital, infrastructure, legal framework, macroeconomic conditions and the level of indigenous skill of workers and the domestic education system are key elements in creating a suitable enabling environment for the flow and diffusion of technology. A number of presentations have also emphasized the role of absorptive capacity in deriving economic gains from transfer of technology.

- Underlying the importance of partnership in technology transfer and for it to be a win-win situation, the evolving discussions seem to recognize that both home and host countries measures are important factors in facilitating transfer of technology. Members share the understanding that transfer of technology is a two-way process but have somewhat different views on the relative importance of home and host country measures.

- From developing countries prospect, we continue to hold the view that home country measures, including financing for transfer of technology, incentives to stimulate FDIs with a technology transfer component, incentives for Small and Medium Enterprises seeking partners in developing countries, simplification of rules of origin and the establishment of a database to ensure the flow of all relevant information on technology are much more important in facilitating technology transfer.

**4. With regard to questions that seeks more understanding of Developing countries in particular LDCs concerns**

Technology transfer initiatives to developing countries in particular LDCs have not been operationalized. For instance, in the TRIPS council, with regard to actions taken or contemplated under article 66.2, some members have raised that the programmes reported by some developed members wherein they are providing tech transfer under article 66.2, are not necessarily specifically tailored towards LDCs (November 2016 TRIPS meeting). Indeed, the EU has admitted that these programmes are not necessarily targeted to LDCs but often cover a regional scope which include a variety of countries, some including developing countries, who are not the object of this mandate.<sup>19</sup> Furthermore, many of the programmes and policies reported are not technical in nature nor include a technology transfer component. In addition to , Reference has been made to an ICTSD study discussing implementation of Article 66.2 of the TRIPS Agreement, wherein it was shown that out of the 384 programmes reviewed only 42 qualified as technology transfer programmes despite the very liberal definition of technology transfer adopted by the ICTSD for the purpose of its study. Even those programmes were not sufficiently targeted to LDCs or LDCs alone. Furthermore, the WGTTT has not made any recommendation to the GC on steps to increase tech flows to developing countries.

**5. On the question related to clarification on 9.4, this paragraph**

Requests targeted technical assistance to be provided to support LDCs domestic efforts to enhance their technological base and improve their innovation capacities.

**6. Publicly owned technology or publicly funded research**

- Historically, governments have played a key role in supporting research and development through national laboratories, universities, and through international collaborative ventures.
- Many governments emphasise the contribution that public support to R&D can make to economic competitiveness and the importance of commercialising publicly-funded R&D.
- The country case studies indicate that public funding remains a major source for R&D activities.
- Public funding of R&D, according to the UNCTAD, UNEP and UNDESA paper, usually takes two forms: general support to national R&D institutions and laboratories, and direct funding of specific projects according to set government priorities.
- There is a close relationship between the governments and the private sectors results 'spill over'.
- One example of publicly funded research being made available to the public is the mandatory Public Access Policy of the US National Institutes of Health (NIH) which requires all investigators funded by the NIH to make publicly available their publications through the National Library of Medicine's no later than 12 months after the official date of publication, thus improving the sharing of scientific findings, the pace of medical advances, and the rate of return on benefits to the taxpayer. A similar concept could also be envisaged to address prompt availability of publicly funded technologies to developing countries.

**7. On the concern or the question related to why WGTTT ?**

The proposal seeks to enhance and revitalise the work of the working Group on Trade and Transfer of Technology (ToT) by mandating it to examine certain issues. The Working Group on Transfer of Technology was established by the Ministers in Doha and aims to examine the relationship between trade and the transfer of technology from developed to developing countries, and ways to

<sup>19</sup> Minutes of Meeting of November 2016 IP/C/M/83/Add.1 dated 30 January 2017.

increase the flow of technology to developing countries. As per the reports of the WG on TT, the Chairman reiterated that it had been over 14 years since the Working Group was established by the Ministers in Doha with a clear mandate to work upon. The Working Group still remained far from fulfilling the Ministerial mandate.

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**RESPONSES BY BENIN ON BEHALF OF THE G90  
PROPOSAL NUMBER 10 - ACCESSIONS**

Australia

1. For each of the ten proposals submitted in JOB/DEV/47, could the G90 please provide specific examples of how existing WTO Agreement are limiting developing country members' abilities to take measures necessary for development.
5. Could the G90 please clarify what is meant by the term "full restraint" in proposal 10 similarly, could the G90 clarify what is meant by "fast-tracking" accession process? We would also be interested in understanding the proponents' specific concerns with the 2012 LDC Accession Guideline?

Canada

- What is meant by the term "full restraint" in paragraph 10.2?
- How do the proponents define "fast track" accession procedure?
- What concrete steps are envisaged that would lead to the implementation of a "disciplined" fast track procedure?

EU

1. What is meant by "fast track" accession procedure and by the proposed obligation on Members to "discipline" it? Assuming that such a procedure would exist, what are the suggestions of proponents to discipline it?

Thirty LDCs are original WTO members and accession package of nine LDCs have been approved among 36 countries since the establishment of the WTO. But there are still a significant number of LDCs out of the system of which 8 are in the process with other 13 developing countries in the queue.

Because of increasing appetite and demand for a wider market access from the side of Member states combined with other constraints associated with LDCs own limitations of development; human, institutional, infrastructural & regulatory capacities, accession process of LDCs is becoming onerous and challenge. From the records so far, accession process on average took nearly 11 years for developing and 13 years for LDCs. 13 years on average even as high as 20 for some on accession process in addition on their limited technical capacity to negotiate and limited financial resources.

To this effect, the 2002 an LDC Accession Guideline in addition the 2012 General Council Decision was to further strengthen, streamline and operationalize the LDCs accession. The Guideline urge Member States to exercise restraint in seeking market access concessions and commitments from acceding LDCs that is beyond their levels of development in order to facilitate their accession.

The Guidelines stipulate that Members: to exercise restraint in seeking market access concessions from acceding LDCs, while the latter are expected to offer reasonable concessions commensurate with their individual development, financial and trade needs. Notwithstanding that the Guideline allows flexibilities to acceding LDCs consistent with their individual development, financial and trade needs as a fundamental objective: it also requires LDCs to make a comprehensive binding

coverage on both Agriculture and NAMA. The Guidedelines set basic principles both for Goods and Services negotiation. On goods the principles are:

- Comprehensive binding coverage on both Agriculture and NAMA (50% for Agriculture & 35% for NAMA);
- Tariff negotiations should ensure appropriate balance between predictability of tariff concessions and to pursue legitimate developmental needs of LDCs to address their specific constraints or difficulties; and
- Establishing benchmarks on average bound rates.

On Services to:

- Members to respect the principle of special treatment for LDCs contained in Articles IV<sup>20</sup> and XIX<sup>21</sup> of the General Agreement on Trade in Services (GATS), in particular, Members to take into account the serious difficulty of acceding LDCs in undertaking commitments, in view of their special economic situation and their individual development, financial and trade needs;
- flexibility for acceding LDCs for opening fewer sectors, liberalizing fewer types of transactions, and progressively extending market access in line with their development situation;
- acceding LDCs shall not be expected to offer full national treatment, nor are they expected to undertake additional commitments under Article XVIII of the GATS on regulatory issues which may go beyond their institutional, regulatory, and administrative capacities.

With these principles, the Guideline among others, gives the flexibilities for acceding LDCs,

- to identify their priority services sectors and sub-sectors and make reasonable offers commensurate with their individual development, financial and trade needs as well as their regulatory and institutional capacities;
- be provided with technical assistance, as appropriate, to enhance their regulatory and institutional capacities;
- not be required to undertake commitments in services sectors and sub-sectors beyond those that have been committed by existing WTO LDC Members, nor in sectors and sub-sectors that do not correspond to their individual development, financial and trade needs;
- Accordingly, WTO Members shall exercise restraint in seeking commitments in trade in services from the acceding LDCs.

Though LDCs on accession are willing in taking commitments that are consistent to their level of development, human, institutional, infrastructural & regulatory capacities, the size and depth of commitments that LDC countries took indicates the depth of demands and pressures made on LDCs for more market access. The commitments are excessive and some commitment terms are even much beyond the level of development and ability of LDCs to meet their obligations in tandem with their developmental ambitions to get their people out of poverty and benefiting from the global trading system on balanced terms after accession. i.e., acceding LDC members are still exposed to WTO plus commitments by developed members, hence eroding LDCs' policy space, what was dubbed "kicking away the development ladder".

We seek Members to respect the principle of special treatment for LDCs contained in Articles IV and XIX of the General Agreement on Trade in Services (GATS). In particular, Members shall take

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<sup>20</sup> Article IV(1.c) General Agreement on Trade in Services (GATS) stipulates, the liberalization of market access should consider sectors and modes of supply of export interest to them. And Article IV(3) specifically refer LDCs as follows: "Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs".

<sup>21</sup> GATS Art XIX.2 The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

into account the serious difficulty of acceding LDCs in undertaking commitments, in view of their special economic situation and their individual development, financial and trade needs.

We therefore,

- i. seek to discipline the Guideline as an LDC Accession Instrument and ensure that LDCs accede on a fair and equal terms to previous members, and that their conditions of access to the WTO should not be onerous than founding members;
- ii. as per the principles of the Guideline, Members to restraint in seeking market access concessions and commitments from acceding LDCs in trade in services that they are not ready to make any concession or take any commitment that is beyond their level of development and regulatory capacity. You are all encouraged to attend the Working Party on the accession of LDCs to witness what we are talking about.
- iii. because of their limited technical financial resources capacity, it should not be lengthy process and be exercised in a fast-track approach.

With the principles of universalizing the multilateral trading system in a balanced term consistent with the level of development, ambition and developmental needs of LDCs, we hope that the Buenos Aires, M11's outcomes will ensure;

- a) with the principle of not to leave anyone behind in benefiting from the global trading system, full implementation of the Guideline that sets a benchmark for goods and services' commitments by disciplining the Guideline as part of Special and Deferential Treatment (S&DT) of the LDCs accession,
  - b) re-affirm Members commitment to restraint from seeking market access concessions and commitments from acceding LDCs that they are not ready to make concession or take commitment because of their level of development capacities and developmental ambition;
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