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THE WORK PROGRAMME ON ELECTRONIC COMMERCE¹

STATEMENT BY THE AFRICAN GROUP²

The following statement, dated 5 December 2017, is being circulated at the request of the delegation of Rwanda on behalf of the African Group.

1 INTRODUCTION

1.1. This statement is an African Group contribution to the ongoing preparations towards a possible draft recommendation to Ministers at MC11 on a Decision on E-commerce. This statement was delivered at the Informal Open-ended Meeting on the Work Programme on Electronic Commerce on 16 October 2017.

1.2. At the last Informal Open-ended Meeting on the Work Programme on Electronic Commerce on 5 October 2017, the General Council Chair suggested that proponents submit their proposed texts, taking into consideration the views expressed in the room. It is unfortunate that the proponents have failed to do so.

1.3. In this regard, we wish to recall the African Group statement delivered on 5 October 2017 at the Informal Open-ended Meeting on the Work Programme on Electronic Commerce, and reaffirm the African Group position. The African Group may be able to agree to continue the exploration of issues under the 1998 WTO Work Programme on Electronic Commerce (Work Programme), however we will not agree to go beyond the current structure or institutional arrangement of the Work Programme.

1.4. In building the Africa we want, towards the structural transformation and industrialisation of our economies, our African Union Ministers of Trade have pronounced *'that the work we undertake in multilateral trade and rule-making support Africa's continental integration agenda and, at a minimum, not undermine it'*³.

1.5. On the draft texts in JOB/GC/137, JOB/GC/138 and JOB/GC/139, the African Group offers our general and specific views on the proposals.

2 ESTABLISHMENT OF A WORKING GROUP

2.1. Establishing a Working Group on E-commerce presumes one of two things: One, that something is not working with the current structure; and two, that the new structure will provide some kind of value-addition. A number of delegations have also said that the Work Programme has been exhausted.

¹ This document was previously circulated as JOB/GC/144 dated 20 October 2017.

² This statement is without prejudice to the position of one Member.

³ WT/L/1004.

2.2. In going through the discussions on e-commerce that have taken place in the last ten to fifteen years in the WTO, both at a horizontal level in the General Council and in the relevant WTO bodies (CTD, CTS, CTG, TRIPS Council), Members will observe that discussions, even from a trade policy perspective have not been adequately explored, and where it has, it has barely touched the surface. We should also recall that for many years, there was little or no discussion on e-commerce. E-commerce, and the digital economy have not been static, and many Members are still coming to grips with what appears will be very profound changes brought on by the digital transformation of which e-commerce is integral. Hence, the evolution of the sector makes it necessary to continue the exploratory discussions under the Work Programme.

2.3. In JOB/GC/138, proponents state that '*existing WTO Agreements apply to electronic commerce*'. If this is the case, are the proponents also suggesting that Members' Schedules of Commitments negotiated in the Uruguay Round automatically apply to new technologies such as 3D printing, robotics, drone delivery and Artificial Intelligence, to name a few?

2.4. The African Group objects to this assumption because it has no legal basis in the WTO's framework. It also goes against the basic principle of progressive liberalization. In addition, new business models, new services and new technologies that did not exist at the time Members' Schedules were negotiated do not apply post-hoc.

2.5. Members will recall that there still remains a long paper trail in the WTO of 19 years of unresolved issues pertaining to e-commerce. These include the divergent views on the *technological neutrality* of the GATS, the distinction between, and application of GATS Modes 1 and 2 in e-commerce, whether products delivered electronically are services or goods or both, and the classification of 'new services', to name a few.

2.6. If these issues were resolved, then why are some Members advocating new multilateral rules on e-commerce? A Working Group will not replace these systemic divergences, and these discussions, as per the Work Programme are required to take place in the bodies responsible for administering the relevant Agreement.

3 MULTILATERAL RULES ON ELECTRONIC COMMERCE

3.1. It is perplexing that some Members are advocating for new multilateral rules on e-commerce. We have already undertaken enough rules so far. The multilateral rules as they are, are constraining our domestic policy space and ability to industrialize. Before the GATT came into being, industrialized Members have benefited from the absence of rules, through the utilization of policy space. They then closed this space through GATT Agreements notably by prohibiting the use of local content requirements; industrial subsidies; infant industry protection, among others. In other words, the policy instruments they used during their development process were denied to late comers through GATT Agreements; what we qualified in the CTD SS discussions as 'kicking away the development ladder'.

3.2. This is the very reason why there is a Doha Development Agenda, with development outcomes and aspirations for redressing the imbalances inherited from GATT/WTO agreements. Yet, the propaganda that new e-commerce rules will be good for developing countries has been highly contested. Hence, if developing countries cannot find relief in the current mandates and rules in a Multilateral Trading System that is intended to serve all its Members, then any attempt to adopt new rules on new issues – particularly if those rules are meant to further marginalize poor economies as exemplified by TPP e-commerce rules, then new rules would entrench existing imbalances and further constrain the ability of our governments to implement industrial policy and catch-up.

3.3. The reference to MSMEs in various submissions, including in JOB/GC/138 and JOB/GC/139 is interesting. There is a false narrative that has gained currency in relation to MSMEs, which seeks to paint some delegations as the new Messiahs that we have been waiting for to deliver MSMEs from all of their troubles. Are the proponents suggesting that the current rules we have been negotiating in fulfilment of the DDA mandate, such as on substantial reduction of OTDS in Agriculture; Cotton; and Special and Differential Treatment, with the view to promoting structural transformation and industrialization in building the Africa we want, would not be of benefit to MSMEs in Africa? Why is it that we have not seen the same advocates speak strongly in favour of

the conclusion of the Doha Round, which would have a direct, immediate and positive effect for the thousands, if not millions of deserving MSMEs? Are they suggesting that the fact that we change the mode of operation, that it would suddenly eliminate the supply-side constraints, lack of technology and lack of finance, and the SPS and TBT constraints that many MSMEs face?

3.4. The narrative is that multilateral rules on e-commerce will leapfrog development through the power of MSMEs. Yet, the proposed typology of rules which are confirmed through the Footnote in JOB/GC/138, is that MSMEs as we understand the scope of this definition to be, are the least likely to be able to effectively compete with multinational corporations, who have become global digital leaders, and have decimated smaller companies and who have benefitted from digital industrial policies such as subsidies, R&D subsidies, development of, and access to, and ownership of technologies, economies of scale, government-sponsored infrastructure, tax benefits, etc. We can therefore conclude that given the narrative on MSMEs in recent months, and their sudden prioritization in e-commerce is not to address the problems faced by MSMEs, but to advance an agenda for rules. MSMEs, in our view are only being used to fast-track the proponents' agenda.

3.5. JOB/GC/138 limits the evaluation of the Working Group to the proposals that are footnoted. These include the hard rules that the African Group have condemned for over one year now, such as ensuring the free flow of data, no data localisation requirements, permanent moratorium on customs duties, non-disclosure of source code, barring forced technology transfer, etc. It is also interesting to note that the African Group submission contained in JOB/GC/133 is not part of the evaluation of this proposed Working Group. Hence, the Working Group is intended to serve as the conduit and channel for these new topics contained in the current submissions, and thereafter a decision will be taken on the need to have rules on them.

3.6. In JOB/GC/138, the Working Group will decide in one year's time to negotiate rules. In JOB/GC/137, our reading is that it allows for the possibility of developing rules in the Working Group without any timeframe. Hence, this Working Group is *de jure* a negotiating group.

3.7. The African Group will not support any ideas for negotiating rules, or move in a direction on developing rules on e-commerce. We believe it is entirely premature.

4 TOPICS FOR DISCUSSION

4.1. By the Working Group requesting the WTO bodies for assistance in JOB/GC/137, it reverses the structure established in the Work Programme. In other words, it is no longer bottom-up where the technical issues were dealt with in the technical bodies first, and upon maturity, would be taken to the General Council. The Working Group would instead be top-down. This is not an acceptable solution because the topics for discussion in the Working Group are also open-ended.

4.2. While in JOB/GC/137, the introduction of topics is Member-driven, we have already seen a number of submissions currently on the table that have been identified as international Internet public policy issues by the United Nations Commission on Science and Technology for Development in the Working Group on Enhanced Cooperation in November 2014. Several of these issues being brought into the WTO have been discussed at length by other international organisations that have policy authority over these issues, or they have been resolved in these international organisations. They include:

- a. UN Guidelines for Consumer Protection, which includes a section on e-commerce;
- b. UNCITRAL Model Law on Electronic Signatures;
- c. UNCITRAL Model Law on Electronic Commerce; and
- d. Unsolicited Communications Enforcement Network to curb Unsolicited Commercial Electronic Messages, or Spam.

4.3. Hence, in identifying those 'trade-related issues relating to global electronic commerce', appropriate issues have to pass two tests. First, whether they fall under the scope of the WTO in the Marrakech Agreement in Article II.1 that *'the WTO shall provide the common institutional*

framework for the conduct of trade relations among its Members...'; and second, whether it falls under the existing WTO Agreements covered under the Work Programme.

5 'E-COMMERCE FOR DEVELOPMENT AGENDA'

5.1. The African Group views the so-called 'E-commerce for Development Agenda' as a 'Trade Liberalization Agenda'.

5.2. It is not clear how the proponent rationalizes JOB/GC/139 vis-à-vis the existing Work Programme, which already accommodates discussions on development-related issues. These are contained in paragraph 1.1 where the comprehensive Work Programme was established to: *'examine all trade-related issues relating to global electronic commerce, taking into account the economic, financial and development needs of developing countries'*, and in paragraph 1.3 where it states that *'the work programme will also include consideration of issues relating to the development of the infrastructure for electronic commerce'*. In addition, and very importantly from a horizontal perspective, development discussions fall under the competence of all four relevant bodies.

5.3. Of particular and direct relevance is the Committee on Trade and Development, one of the mandated bodies under the Work Programme, whose Terms of Reference is to *'serve as a focal point for consideration and coordination of work on development in the WTO, and its relationship to development-related activities in other multilateral agencies'*, and *'... to consider measures and initiatives to assist developing country Members, and in particular LDCs, in the expansion of their trade and investment opportunities...'*.

5.4. Hence, by the introduction of JOB/GC/139, is the proponent suggesting that the CTD does not have a mandate to deal with the development aspects being proposed under their 'E-commerce for Development Agenda'?

5.5. On the collaboration efforts between the WTO and certain international and regional organisations, the African Group has a few questions.

- a. On what basis were these International Organizations (IOs) chosen? Other IOs have policy authority over several issues that are being proposed as 'e-commerce' issues in the WTO. Will the WTO take over their mandate?
- b. If this is a 'development agenda' then why is there no reference to the ITU? 193 States are Members of the ITU, who are responsible for allocating global radio spectrum and satellite orbits, developing technical standards that ensure networks and technologies interconnect, and more importantly, they have an international mandate to bridge the digital divide. This is the most prevalent issue underpinning any discourse on e-commerce in the WTO, since you cannot access or engage in e-commerce without having access to the necessary infrastructure.
- c. Why is there a presumption that developing countries need informational material from these organisations to assist them to engage fully in the relevant discussions? The African Group, for example have been engaging fully in the current e-commerce discussions without this arrangement in place and our engagement is not dependent on material from these organisations either. These organizations have never needed permission from the WTO Membership to perform their respective functions. Furthermore, the Work Programme in paragraph 1.4. already accommodates the consideration of work of other intergovernmental organisations, as well as the Marrakech Agreement.
- d. The proposal also states that regional organisations should meet funding gaps. Why are international financial institutions not required to meet funding gaps? It is the WTO where the rules are being advocated for, but regional organisations must bear the brunt of funding? What is the rationale for this?

- e. The six areas identified in paragraph 3(a) to (f) are completely divorced from the development discussions that some Members, such as the African Group have been advocating for.
- f. ICT Infrastructure and Services is about trade in services liberalization. This approach presumes that trade policy will solve the ICT infrastructure and services problem. This has not been the case in most of our countries! In fact, empirical evidence shows us, and as has been expounded in the CTD SS discussions that, it is only through a strong foundational manufacturing base and through sector linkages, where manufacturing becomes the engine of steady growth of other sectors, particularly the services sector, where it can lead to technological catch-up, economic diversification and the structural transformation of our economies.
- g. On Trade Logistics, it is difficult to comprehend how as net importers, developing countries and LDCs will benefit from this type of trade facilitation. If the genuine interest is development, then there should be a concrete attempt at developing the capacity of developing countries and LDCs to become exporters of electronically delivered products.

5.6. Overall, this proposal deviates from the already existing development agenda contained in the current Work Programme to include issues that are about market access and developing rules, and in our view, will not lead to development-friendly outcomes.

6 CONCLUDING REMARKS

6.1. The African Group have made our views, perspectives and priorities abundantly clear in this House, as well as in the formal sitting of the General Council, in our consultations, through a written submission in JOB/GC/133, and in all WTO bodies responsible for the implementation of the Work Programme.

6.2. In our view, the Work Programme has not been adequately tested to warrant a change in its structure. To date, only a large number of submissions have been tabled in the relevant bodies, but what we have observed is a general reluctance by proponents to discuss their submissions in any meaningful way both horizontally, and in the relevant bodies, possibly in the hope that they would seek to create a separate forum for their agenda as we see today.

6.3. It is up to the proponents to face their 'moment of truth' because they have submissions on the table under the current Work Programme, and it is their responsibility to incite this discussion in the relevant bodies. Forum shopping will not provide an acceptable solution.

6.4. The African Group are neither *demandeurs* for the Work Programme nor for the moratorium on customs duties on e-commerce. However, if some Members feel that the discussions in the Work Programme have been exhausted, then they should be free to share with us what those outcomes are on all the outstanding issues. The African Group cannot support the creation of multilateral fora just for the sake of creating motion when there is neither substantive movement nor value-addition, and more so when we know that advocated rules would serve to further marginalize late-comers.

6.5. On the moratorium, the African Group are still discussing it in view of the revenue implications of the current moratorium on customs duties, particularly in the context of increasing digitization of goods and services. For all these reasons, the renewal of the moratorium should not be seen as automatic.

6.6. We urge the General Council Chair to ensure that the draft MC11 text on e-commerce is agreed in Geneva, and that the next time a meeting on this issue is convened, that all the African Group's concerns are taken on board.
