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## REFLECTIONS ON THE REFORM OF THE WTO DISPUTE SETTLEMENT SYSTEM

### JOINT COMMUNICATION FROM EGYPT, INDIA AND SOUTH AFRICA

The following communication, dated 24 November 2023, is being circulated at the request of the delegations of Egypt, India and South Africa.

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1. The members submitting this communication reiterate our commitment to working towards reform of the dispute settlement system with the view to having a fully and well-functioning two-tier dispute settlement system accessible to all Members, with the Appellate Body at its core.

2. WTO Members have been cognizant of the need to review the dispute settlement system since the inception of the organization. Pursuant to the ministerial mandates at Marrakesh and during the Doha Round, there have been several rounds of discussions on this aspect. Developing countries have been active participants in the reform process and have submitted detailed proposals on various issues, including third party rights, litigation costs, compliance, cross-retaliation, technical and financial assistance, accessibility and capacity building.

3. In this context, we reiterate the following fundamental elements that shape our engagement in the reform process:

- The foundational principles of the dispute settlement system as embodied in the Marrakesh Agreement represent a fine balance of the interests and concerns of the members of the WTO. This balance relates not only to the dispute settlement pillar itself, but to the preservation of an integrated, equitable, durable, and effective rule-based multilateral system.
- Reform of the WTO dispute settlement system is central to providing security, stability and predictability to this system. Such reform should be seen as an opportunity for creating a more inclusive and equitable trading environment.
- Developing countries have long-standing interests in reforming the dispute settlement system and addressing the structural defects that negatively affect the ability of many of them to resort to the dispute settlement system in order to safeguard their rights under the WTO rules.
- A reformed dispute settlement system should recognize that developing countries including LDCs face challenges, such as capacity constraints, resource limitations, and limited access to legal expertise. As such, it should incorporate mechanisms that facilitate their effective participation in dispute settlement proceedings, and help to overcome their administrative, technical, and financial constraints.
- The reform process and the changes it brings about, should not make the dispute settlement system more onerous, in practice, for developing countries including LDCs.
- Dispute settlement reform should be addressed in a holistic manner. Reforms should be conceptualized and implemented as a comprehensive and balanced package, and address the concerns and interests of all Members, in particular developing countries and LDCs.

- At the heart of the outcome on dispute settlement reform is the need to restore the functioning of the Appellate Body as an integral part of the two-tiered multilateral dispute settlement system.

4. Members submitting this communication note the work undertaken in the 'informal discussions' on dispute settlement reforms over the last 18 months. Our understanding is that the outcomes of the current 'informal discussions' have to be considered and evaluated in the context of its initiation and evolution, which is as follows:

- The current informal discussions are a continuation of the US initiated and led informal delegate level discussions, which started in April 2022. The informal process, which is now being voluntarily convened by a delegate, is based on the discussions during the US-led process.
- The themes being discussed at present under the 'informal discussions' were not intended to be a comprehensive listing of concerns of the whole membership. They were a prioritization, for further discussion, of some of the interests that had been raised during the US-led process. For instance, Special and Differential Treatment, which had been raised as an interest by several countries was not listed as a theme for further discussion.
- These 'informal discussions' are meant to contribute to multilateral discussions on dispute settlement reforms as mandated under paragraphs 3 and 4 of the MC12 Ministerial Declaration, rather than to substitute for such discussions.
- Our delegates have been participating in these 'informal discussions' based on the understanding that such participation is without prejudice to our position the mandates of paragraphs 3 and 4 of the MC12 outcome document require a multilateral discussion under a WTO body.

5. It is crucial to acknowledge the challenges faced by developing countries, particularly LDCs, in actively participating in the ongoing informal process. The format and pace of the discussions have made it challenging for most developing countries including LDCs to effectively participate, consult with capitals to thoroughly prepare and present their views and suggestions, submit comprehensive proposals, and review progress. For instance:

- Informal meetings are organized in multiple configurations, including working groups and small group meetings. These informal meetings are often convened in parallel with or overlapping with formal WTO meetings and negotiations, for instance, the General Council, and the Fish Week.
- The informal and fragmented nature of the process, with its multiple meetings and lack of record-keeping, creates information asymmetry, particularly for capacity constrained delegations. This places excessive reliance on the reporting by a volunteer convenor.
- The discussion and drafting processes favour the participation of resource-rich delegations, who are able to follow the process through sustained in-person participation in Geneva. The informal discussions do not allow for the virtual participation of capital-based officials. This hinders the involvement of developing countries including LDCs, and privileges the participation of delegations that have a dedicated legal delegate in Geneva, or are able to send capital-based representatives to Geneva.
- The drafting process deviates substantially from the accepted practice at the WTO. The process hampers the ability of delegations that cannot actively participate in the process, from following the evolution of and contributing to the formulation of the consolidated zero text. For instance, members cannot submit their own textual submissions on any aspect that is of importance to them. The allocation of topics and responsibilities in the drafting groups is done by the volunteer convenor. The composition of the drafting groups has not been made public. The inputs received by the drafting groups from commentators and peer reviewers was initially not shared with all delegates. This resulted in differential access of delegations to the evolving text and discussions.

- These concerns have been raised by developing countries including LDCs in various fora, including through the submissions of the African Group (WT/GC/W/892) and Indonesia (JOB/DSB/6). Proposed changes that would enable the effective participation of developing countries including LDCs such as virtual meetings, written submissions, circulation of inputs, etc., have not been allowed. Interpretation and translation were not available for the majority of the duration of the process.
6. These process issues have led to the absence from the discussions of many of the historical asks of the developing countries and LDCs. Given this context, the systemic and precedential implications of how this 'informal process' interacts with the formal multilateral process must be carefully considered.
7. Going forward, the full, effective and equal participation of the WTO membership has to be ensured through an inclusive, equitable and transparent process. A multilateral, member-driven and inclusive discussion under WTO formal bodies, preferably under the guidance of the Chair of the Dispute Settlement Body is a pre-requisite to meeting the mandates of paragraphs 3 and 4 of the MC12 Ministerial Declaration.
8. The process should enable all delegations to have their concerns addressed as the discussions evolve. They should remain rooted in consensus-based decision making, and be facilitated by multilaterally mandated chairs or co-chairs as is the current practice in the WTO. The methods of work should facilitate the participation of developing countries including LDCs, and delegations with limited resources. In particular:
- All delegations and capitals must have sufficient time and opportunity to reflect on the implications of the outcomes of these 'informal discussions'.
  - Members should be able to address their interests including through introduction of new proposals.
  - Members should be able to raise issues of concern including through submitting inputs and amendments to any outcome of the informal process.
9. Members submitting this communication, consider the following to be indispensable to the outcome of any reform of the dispute settlement system:
- Restoration of the proper functioning of the Appellate Body at the earliest, with needed clarifications and guidance from the WTO Membership to enable more effective functioning of the two-tier system.
  - Meaningfully addressing issues concerning accessibility of developing countries and LDCs, including but not limited to issues pertaining to third party rights, compliance and retaliation, along with technical and financial assistance, litigation costs and capacity building.
  - Ensuring precise, effective and operational special and differential treatment across the entire spectrum of the dispute settlement understanding and related rules and process.
  - Adapting the WTO dispute settlement system to accommodate the diversity of legal systems, levels of development, and power differentials.
10. This communication is without prejudice to further submissions by Members presenting this communication on issues covered under this submission and other substantive issues of concern in reforming the WTO dispute settlement.
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