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PRINCIPLES GUIDING THE DEVELOPMENT AND IMPLEMENTATION OF TRADE-RELATED ENVIRONMENTAL MEASURES

COMMUNICATION FROM THE AFRICAN GROUP (ANGOLA; BENIN; BOTSWANA; BURKINA FASO; BURUNDI; CABO VERDE; CAMEROON; CENTRAL AFRICAN REPUBLIC; CHAD; CONGO; CÔTE D'IVOIRE; DEMOCRATIC REPUBLIC OF CONGO; DJIBOUTI; EGYPT; ESWATINI; GABON; THE GAMBIA; GHANA; GUINEA; GUINEA-BISSAU; KENYA; LESOTHO; LIBERIA; MADAGASCAR; MALAWI; MALI; MAURITANIA; MAURITIUS; MOROCCO; MOZAMBIQUE; NAMIBIA; NIGER; NIGERIA; RWANDA; SENEGAL; SEYCHELLES; SIERRA LEONE; SOUTH AFRICA; TANZANIA; TOGO; TUNISIA; UGANDA; ZAMBIA AND ZIMBABWE)

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1 INTRODUCTION

1.1. With growing awareness of the linkage between trade and environment, the African Group (AG) notes the unrelenting efforts being made at various levels, as well as by individual countries at the World Trade Organization (WTO) to integrate trade and environment policies.

1.2. The AG acknowledges the importance of the climate agenda, but equally acknowledges that issues on trade and environment that are currently being debated and likely to be pursued in the short- and medium-term in the Committee on Trade and Environment (CTE) could have far-reaching implications for developing countries.

1.3. Of particular concern are the unilateral environmental measures being pursued by some countries, which are implemented with little consideration of their potential impact on developing countries and have the effect of:

- (i) undermining the multilaterally agreed mandate of nationally determined contributions (NDCs) of the countries of export,
- (ii) conflicting with and undermine the common but differentiated responsibility and equity (CBDR) principle,
- (iii) creating a preferential treatment for domestic over imported goods, restricting the market access of developing countries and least developed countries (LDCs) and creating a distortive effect on international trade,
- (iv) diminishing the prospects for development of developing countries, and
- (v) leading to a change in trade patterns with no significant reduction on emissions, and such actions will not succeed in either forcing or encouraging other countries to adopt equivalent environment policies.

1.4. A study commissioned by the African Climate Foundation measured the potential impact based on different scenarios for ETS carbon price per tonne and product coverage. It found that even in

the lightest scenario with the most limited impact, 'Africa's economy will be negatively affected by the CBAM with exports to the EU declining by 4% in total, that Africa will be worse affected than any of the other major economies analyzed...that even at €40 per tonne, the CBAM will raise EU import tariff revenue substantially, but have little impact on global CO2 emissions.' With a higher carbon price and more extensive product coverage, Africa's exports to the EU would decrease by 5.75%, 'with Africa's GDP falling by 1.12% (almost twice the initial scenario of a partial CBAM and a lower carbon cost)'. With the impact unevenly distributed among individual countries, some would be affected by more than these averages. These include Mozambique (an LDC), one of whose most important exports is smelted aluminium. According to the Center for Global Development, the CBAM levies on its aluminium exports could reduce its GDP by 1.5%. This places a huge disproportional responsibility to a continent that is among the least responsible for greenhouse gas emissions, but among those most effected by climate change.

1.5. WTO rules do not prevent countries from adopting environmental policies. WTO rules allow complementary trade measures that are conducive to effective implementation of domestic environmental policies but aim to prevent such measures from creating unnecessary obstacles to trade. Therefore, any climate justified measures that directly restrict market access by developing countries and LDCs (e.g. by imposing levies), particularly where research shows the gains in reduction of carbon emissions is minimal, should be avoided.

1.6. Beyond trade, unilateral environmental measures could have implications from an investment, industrial development, and job creation perspective. In addition, the distributional impacts of such measures will be huge and the administrative and compliance burden and cost for exporting will require adequate systems, controls, and procedures to calculate and report on the quantity of carbon embedded emissions. These will be difficult and prohibitive for most, if not all developing countries, particularly if the products contain several different inputs as implications will be felt on the composition and dynamics of entire value chains.

1.7. Environmental concerns also risk being used as the justification for technical barriers to trade (TBTs), further limiting developing country, including LDCs market access. In addition, attempts to recategorize and "greenwash" agricultural subsidies in the context of agricultural reform negotiations, only perpetuate the imbalances in global agricultural trade.

1.8. Environmental requirements are increasing daily and increasingly will affect developing countries' market access significantly. The AG seeks to ensure that the climate agenda and measures implemented in the context of the environment are not used to advance unilateral and protectionist measures and create competitive disadvantages or limit foreign competition for countries that do not meet those standards.

1.9. There is a need to shift the narrative regarding the trade-environment nexus, with more emphasis on how to address the harmful impacts of trade or trade agreements on the environment, while recognizing the needs of developing countries. Green industrial policies are key if developing countries are to adapt to the stresses of a changing climate and are important as there is a need to enhance developing country resilience to better manage, adapt and respond to climate risks. Developing countries are already suffering economic losses due to climate-related disasters. Adaptation costs for developing countries are continuously increasing and these will only rise further as temperatures increase. Adaptation is less a matter of risk management and more one of industrial development and policies. Therefore, measures adopted by developed countries as part of industrial policies aimed at developing green industries should be available to developing countries. As such, the use of policy tools to promote green industrialization should be generalized and made available to developing countries to level the playing field. This necessitates that the CTE engages on issues of importance to developing countries. Doing so highlights the need to better understand the complex relationship between trade, sustainable development and the environment, and the link and role international trade can play.

1.10. This paper serves as an essential point of reference in addressing trade and environment issues; to promote policy dialogue among the members; to enhance the transparency of unilateral measures; to identify gaps; and to address the interface between trade, environment and sustainable development with the aim of ensuring that all trade and environment measures are geared towards a sustainable development framework.

2 MANDATE OF COMMITTEE ON TRADE AND ENVIRONMENT (CTE)

2.1. The CTE is a specialized body that addresses the relationship between international trade and environmental policies. Its mandate is to examine the trade-related aspects of environmental measures and ensure that trade rules and environmental policies are mutually supportive. Therefore, it is important to note that the committee's mandate is focused on the trade and environment interface within the context of the WTO. Its role is to facilitate discussions and promote a better understanding of the relationship between trade and environmental policies, rather than establishing binding environmental regulations.

2.2. Paragraph 32 of the Ministerial declaration adopted in 14 November 2001 instructs the CTE, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to (i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development.

2.3. The CTE is moving away from its core mandate and is being used to expand the potential for the use of environmental measures to restrict market access of goods from certain countries. Inclusion of non-mandated issues in the CTE means an expansion of the mandate and effectively a change in the CTE work programme.

2.4. New initiatives seeking putting environment at the center of trade discussions are given prominence in the CTE - the Trade and Environmental Sustainability Structured Discussions (TESSD), the Informal Dialogue on Plastics Pollution and Sustainable Plastics Trade (IDP), and Fossil Fuel Subsidy Reform (FFSR). These initiatives are intent on moving forward and examining how trade and trade rules can play a positive role in addressing each of their concerns, and how these issues could be addressed effectively within the framework of the WTO. These initiatives occupy an important position in the CTE agenda when they should be discussed under Any Other Business (AOB) or as experience sharing.

2.5. In addition, there is increasing use of unilateral measures, which are being justified as environmental measures. Such measures may not only violate WTO rules, but also undermine the WTO principles, and multilaterally negotiated rights and obligations of countries.

2.6. Paragraph 14 of the MC12 Outcomes Document recognizes global environmental challenges including climate change and related natural disasters, loss of biodiversity and pollution. However, the paragraph does not speak to the CTE mandate. The CTE mandate is reflected in the Doha Ministerial Declaration. The CTE should not be used as a platform for the discussion of non-mandated issues. Instead, given the importance of global environmental challenges, now is an opportune time for the CTE to refer to its mandate and work programme and review any progress it has made to date on the Doha environment mandate. Where there has been no progress, it must be understood why. From a substantive perspective, the CTE has not yet succeeded in resulting or coming to closure on many of the issues relating to the interface between trade liberalization and environmental conservation.

2.7. Now is also the time for the CTE to invigorate the necessary political will amongst Members to move forward on the more difficult environmental issues based on the CTE mandate and work programme, and in a manner that fits countries' needs and priorities, and this includes discussions taking place within a sustainable development framework that better suits the long-term interests and needs of developing countries.

3 DEVELOPMENT APPROACH TO TRADE AND ENVIRONMENT

3.1. The approach to the trade and environment discussions in line with the CTE mandate and work programme requires a holistic, development-oriented and inclusive approach that comprehends the complex relationship between trade, environment and sustainable development, taking into account the developing country interests and challenges. This is not about being for or against protection of the environment. Rather, it is about protection of the environment in a manner that also takes into account the unintended consequences of environmental measures on trade, global economy and recognizes the interests and the needs of developing countries.

3.1 Importance of Sustainable Development

3.2. Sustainable Development is an increasingly important consideration in our work in the WTO given the exponential interest to discuss and engage on matters as they relate to the Sustainable Development Goals and Trade. Sustainable Development emphasizes the importance of integrating environmental protection, social equity and economic prosperity while aiming to create a more resilient, equitable, and prosperous future for people and the planet.

3.3. The CTE, along with the Trade and Development Committee, acts as a forum for debating environmental and development issues, as called for in paragraph 51 of the 2001 Ministerial declaration. The CTE is charged with identifying the relationship between trade measures and environmental measures to promote sustainable development and make appropriate recommendations on whether any modifications of the multilateral trading system are required. To date, the CTE has yet to agree on any such recommendations.

3.4. The CTE should therefore focus on placing sustainable development at the center of its mandate. The preamble to the Marrakesh Agreement, refers to the importance of sustainable development: "There should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other."

3.5. The AG proposes the following principles to guide the discussions towards the development and implementation of Trade-related Environmental Measures (TREMs) while ensuring the achievement of trade related SDGs; this being our contribution to the discussion in the GC, CTE.

3.6. These principles are based amongst others on principles already enshrined in the Marrakesh Agreement Establishing the World Trade Organization, the 1992 Rio Declaration on Environment and Development, Law of the Sea, the United Nations Framework Convention on Climate Change and across other international environmental law.

3.1.1 Guiding Principles

3.7. The principles are intended to serve as a basis for our engagement in the WTO with five (5) core objectives.

- Increasing understanding among the WTO Membership on the principles underpinning TREMs, in particular those that have or will have a global impact or impact on African countries.
 - Ensuring that TREMs achieves coherence with other international agreements and frameworks, including climate change agreements, international environmental law principles and trade rules. By design, TREMs shall avoid undermining the objectives and principles of other international agreements and frameworks, while also ensuring policy coherence between domestic climate goals and international trade commitments.
 - Ensure a better understanding of the relationship between trade, development and the environment, to better understand the links and the role international trade can play.
 - Ensure environmental measures do not create a competitive disadvantage for developing countries, or negatively affect developing countries, including LDCs.
 - Environmental concerns should not be used as justification for TBTs. Proper implementation and operationalization of the Special and differential treatment given to developing countries should be provided in this context, to ensure that developing countries' market share is not negatively affected.
1. **Compliance and interplay with existing WTO rules** – TREMs intersect with some existing rules, at the multilateral level. The principle of Coherence is also applicable to such rules in the development of new trade-related climate measures and policies.
 2. **Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC)**, – a foundational principle of the United Nations Framework Convention on Climate Change (UNFCCC) is generally accepted as one of guiding principles in regulating the international standards and rules related to climate change. The CBDR-RC principle

recognizes that each country should take responsibilities and acknowledges the different capabilities and differing responsibilities of individual countries in addressing climate change, and that developed countries should bear primary responsibilities as they have contributed to the largest proportion of historical and current Greenhouse gas (GHG) emissions. (Article 3 UNFCCC). Developed countries are instructed to take the lead in mitigating greenhouse gas emissions and to provide inter alia financial and technological support to developing countries (Article 4 UNFCCC).

3. **Special and Differential Treatment (S&DT)** – an embedded treaty right in the WTO that requires developed country Members to provide differential treatment to developing country Members. S&DT is based on self-selection and must be precise, effective, and operational.
4. **Historical responsibility** – It recognizes the historical responsibility of higher emitters for historical environmental degradation and CO₂ emissions which have taken place in their territories under their sovereignty and the need for them to support lower emitting countries in their sustainable development efforts.
5. **Polluter Pays** – those who pollute or cause environmental damage should bear the costs of pollution prevention and control costs, costs of the measures to deal with pollutant emissions and the costs of environmental liability.
6. **Transparency** – TREMs that have major implications on world trade should be subject to more intensive discussions with WTO Members prior to adoption of the measures is required.
7. **Non-discrimination should remain a cornerstone.** It is reflected in Article I and III of GATT as well as the chapeau to Article XX GATT. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.
8. **Access to and Transfer of Technology** – emphasizes the importance and necessity of providing developing countries with access to environmentally sound technologies and facilitating the transfer of these technologies on favourable term, as well as an enabling environment for access to and transfer of technology. It recognizes that technology plays a critical role in helping developing countries address environmental challenges effectively.
9. **Technical Assistance and Capacity Building** – Developing countries will require support in implementing TREMs. Capacity building, technical assistance, and financial support to developing countries can help them effectively participate in and benefit from these measures.
10. **Environmental Integrity and Effectiveness** – TREMs should clearly have an environmental impact, be designed to effectively reduce GHG and contribute overall to climate objectives. In addition, unintended consequences, in particular for developing countries, should be avoided, monitored and mitigated.
11. **Environmental Impact Assessment** – For measures with a major global trade impact, the ex-ante environmental impact should be estimated, including the impact of major drafting changes during the development of the measure. Measures that do not have impact should expire or be modified.
12. **Responsible Business Conduct.** Companies, in particular large transnational companies (TNCs) that have a large trade and carbon footprint should be held responsible for climate action. TREMs could consider their compliance with climate commitments.

3.2 Engaging on issues of interest to developing countries

3.2.1 Multilateral Discussions

3.8. Any environmental tariff and non-tariff barriers must be subject to multilateral discussions and agreement and not unilateral, arbitrary, or discriminatory environment measures.

3.2.2 Developing country interests and challenges

3.9. The CTE must engage on issues of importance to developing countries. Environmental policies are evolving rapidly, particularly in the developed world and environmental requirements are increasing at a rapid pace. The emerging environmental policies and environmental requirements can, and increasingly will, affect developing countries' market access significantly.

3.10. Compared to developed countries, developing countries are more vulnerable to the adverse effects of environmental measures on market access and competitiveness and there are various reasons as to why:

- (i) Firstly, lack of infrastructural and monitoring facilities, limited technology choices, inadequate access to (and relatively more expensive) environmentally friendly raw materials and information.
- (ii) Secondly, small, and medium enterprises (SMEs) face more formidable compliance costs and there is an increasing emergence of environmental standards of export interest to them,
- (iii) Thirdly, developing country enterprises lack the skill and technology required for exploiting the trading opportunities generated by environmental measures,
- (iv) Fourthly, developing country exports are more vulnerable to market access barriers due to their scale and sectoral composition. A connected problem is the diseconomies of scale due to small domestic markets, and
- (v) Finally, while developed markets are more amenable to harmonization efforts, developing countries have widely differing environmental standards in accordance with their national priorities, rendering harmonization both difficult and inadvisable as compared to mutual recognition and equivalence. These issues require attention.

3.2.3 Capacity Building and Technical Assistance

3.11. Measures like capacity building, technical assistance and technology transfer should be strengthened and need to be fit for purpose. There are several areas where technical and capacity building assistance can help developing countries, for instance, in building and maintaining systems for environmental monitoring. However, technical and capacity building assistance must be accompanied by the requisite technology transfer as the promotion of an equitable and inclusive transition to a low carbon economy will require transfer of technology to developing countries to build capacity for resilient economies and to help developing countries and LDCs meet their economic development and environmental protection needs. This will, in our view, require a waiver of a number of provisions of the TRIPS.

3.2.4 Adaptation objectives and green Financing

3.12. While TREMs focus mainly on mitigation objectives, there is a need to discuss the interlinkage between trade and adaptation objectives and how trade could be a tool to advance climate adaptation in developing countries. Further discussions should include how trade could contribute in mobilizing climate finance, including adaptation finance. Developing countries need predictable, adequate, and accessible climate finance to achieve mitigation and adaptation objectives. Developing countries lack the funds to cope with adaptation needs, yet it is developing countries that are paying the price. Therefore, there is a need to provide adaptation finance and ensure that 50% of climate finance goes to adaptation objectives, as discussed in relevant international fora.

4 IMPROVED FUNCTIONING OF THE CTE

4.1. To improve the functioning of the CTE to ensure it is better able to meet its mandate and work programme, we propose the following:

- The need to hold thematic discussions, back-to-back with CTE meetings, to focus on issues of importance to the African group and developing countries as stated below.
- Ensuring cross cutting trade and environment dialogue amongst all WTO affected committees. A need for better coordination and alignment within and between the WTO Committees

- Collaboration with other environmentally focused and mandated international organizations, particularly with regards to issues as per CTE mandate.
- Focused discussions on the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development. This may include sharing experience to address issues related to the intersection of intellectual property rights and environmental concerns.
- Focused discussions on environmental requirements and market access. The CTE needs to examine and develop ideas on how to prevent "green protectionism" and promote "win-win-win" situations in relation to environmental requirements and market access especially for developing and LDC members.
- Non-mandated issues - TESSD, plastics, fossil fuels, circular economy - should be moved lower down the agenda under AOB or experience sharing items.
- Balanced Member driven discussions that consider the interests of all Members. WTO seminars and discussions on the environment under the CTE must be balanced, including a balanced agenda and balanced views based on institutions and panelists invited to address the issues.
- Secretariat papers or opinion pieces should – (i) remain those of the Secretariat and should clearly be stated as such; and (ii) should reflect the reality on the ground and not conflate issues nor recategorize measures in ways not so understood by the Membership.

5 CONCLUSION

5.1. Trade and environment linkages present both opportunities and challenges for developing countries. These linkages could present opportunities for growth and development which can be realized if appropriate and multilaterally agreed strategies and policies are put in place. While we recognize that climate change is now widely recognized not only as the most important environmental problem, but also a major development issue, we also recognize that there are growing attempts to undermine the rules and principles that underpin the WTO and the balance reached in relation to issues of environmental policies.

5.2. If the WTO is to play a supportive role in addressing the climate change challenge, it can only do so if trade responses are multilaterally agreed and are underpinned by the principle of CBDR. This also means that measures to protect the environment should be WTO consistent, not be applied arbitrarily nor used as disguised protectionism. For trade and environmental policies to be mutually supportive, the necessary balance needs to be struck between ensuring that environmental policies are not trade protectionist, and that WTO trade rules do not unduly limit developing country policy space for promoting socio-economic development.

5.3. Developed countries as the major polluters, must take on the primary responsibility in addressing climate change, and this includes providing the necessary financial and technological support to developing countries to enable adaptation and mitigation. Countries can only mitigate after necessary adaptation; therefore, adequate adaptation financing must be provided.
