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AN INCLUSIVE APPROACH TO TRANSPARENCY AND NOTIFICATION REQUIREMENTS IN THE WTO

COMMUNICATION FROM CUBA, INDIA, NIGERIA, SOUTH AFRICA, TUNISIA, UGANDA, AND ZIMBABWE

The following communication, dated 27 June 2019, is being circulated at the request of the Delegations of Cuba, India, Nigeria, South Africa, Tunisia, Uganda, and Zimbabwe.

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1 INTRODUCTION

1.1. Transparency remains an important issue within the operation and monitoring function of the WTO. The issue of compliance with notification obligations has been contentious. Developing countries often struggle to comply with onerous obligations, while in many instances, developed countries also do not comply with their notification requirements or do so selectively.

1.2. In general it can be said that the capacity of developing countries to comply with notification obligations is inextricably linked with their level of economic development and access to resources. The capacity and resource constraints that developing countries face cannot be underestimated. Notifications require a deep understanding of the entire range of WTO Agreements, mature institutional mechanisms and human resource capacities that are often lacking in developing countries. Any work in this area should be on supporting and incentivizing developing countries to address these difficulties, especially as it relates to transparency obligations. Existing notification obligations should be rationalized so that they are commensurate with Members' level of development. Developing countries, SVEs and LDCs should not be expected to take on notification obligations which are beyond their capacities.

1.3. In contrast, in some of the recent proposals on transparency, Members are proposing new or strengthened notification obligations. If developing countries are not able to meet current notification obligations, there would be no possibility of meeting even higher notification requirements in future.

1.4. There is also a prevailing concern about the ongoing activities in the regular bodies that seem to increase transparency obligations under the guise of efficient rationalisation of notification procedures and formats. Some examples of the abovementioned concern include activities in the:

- **Committee on Rules of Origin (CRO)**: Where Switzerland continues to negotiate outcomes on transparency in non-preferential rules of origin. Document G/RO/W/182 remains subject to various concerns raised by developing country Members.

- **Committee on Market Access**: Transparency in applied rates (Russian Federation proposal) JOB/MA/138 is of great concern as it increases the burden of notification.

1.5. Given the challenging issue of resource constraints, developing countries should not be subjected to any transparency obligations which go beyond existing obligations.

1.6. Further, transparency cannot only be seen from the view of notification obligations. It should permeate the full spectrum of the operation of the WTO, from its day-to-day meetings, as well as Ministerial Conferences.

2 CAPACITY CONSTRAINTS OF DEVELOPING MEMBERS

2.1. The capacity and resource constraints that developing countries face are well documented. Under these circumstances, it is natural for states to reserve economic resources for the most urgent and pressing matters. In so far as obligations undertaken under the Marrakesh Agreement and its annexes are concerned, there is no doubt that treaty obligations must be performed in good faith. Having said this, it is clear that the obligation to comply is not blind to the situation that a particular Member or groups of Members may find themselves in.

2.2. There was already discussion on this issue in 1996 in the *Working Group on Notification Obligations and Procedures*. In those discussions, 'some developing country participants pointed out that in view of the ever-increasing workload, combined with limited resources in the small delegations, they had great difficulty in advising their governments on all aspects of the notifications required. Many developing countries had difficulty understanding the frequently complex and highly technical information demanded, and therefore faced a prohibitive task in providing complete responses to the notification requirements and formats. While they recognized that these notifications were part of their Membership obligations and they were prepared to respond to the maximum of their abilities, there were serious constraints to what they could achieve due to their limited resources.'[1]

2.3. As participants considered the specific needs of the developing, and particularly of the least-developed country Members, a number of questions were raised including: whether some additional forms of special and differential treatment in respect of the obligations themselves should be considered or if greater technical assistance to meet the existing obligations would be the most appropriate? With respect to the former, it was suggested that simplified formats might be developed for the developing countries with more detailed information being provided to the committees only when requested to do so. In some situations, prolonged time-frames might be considered.[2]

2.4. The final observations by the Working Group adopted by the Council for Trade in Goods were that it " … agreed to forward to the Committee on Trade and Development the recommendation that active consideration be given … to the development of a special programme of assistance to developing country Members and particularly to the least-developed country Members providing more intensive technical assistance, possibly with the participation of other organizations, focusing on the development of systems and structures required to respond to notification obligations".[3] These observations also clearly point out that problems that Members face in meeting their notification obligations transcend the ambit of the WTO, hence a call for a multi-agency approach.

2.5. In contrast, the Transparency proposal (JOB/GC/204/Rev.1) presupposes the causes and remedies for non-compliance and proposes increased notification obligations rather than addressing developing countries' difficulties in complying with these obligations.

2.6. Members proposing new or strengthened notification obligations must do so only on the basis of empirical evidence. They must show that their remedies are tailored to address the problems developing countries encounter in this area.

2.7. Given the challenging issue of resource constraints, developing countries cannot agree to any transparency obligations which go beyond existing obligations. Further, punitive approaches to enforce notification and transparency obligations are not acceptable. Any work in this area must

[1] Report of the Working Group on Notification Obligations and Procedures, G/L/112, 7 October 1996, paragraph 53.

[2] Report of the Working Group on Notification Obligations and Procedures, *ibid*, paragraph 54.

[3] This recommendation, together with several others are contained in the Council of Trade in Good's Report to the General Council (G/L/134, 5 November 1996) which in turn formed part of the General Council's Report that was transmitted to the Singapore Ministerial Conference, see WT/GC/W/46, 7 November 1996.

support developing countries' ability to address their difficulties through inclusive and mutually agreed approaches, such as through simplified notification formats. In some situations, prolonged time-frames can also be considered. Technical assistance and capacity building must be central components; however, they will not completely resolve the human resource and institutional limitations. Flexibilities must be provided to developing countries, SVEs and LDCs in relation to existing notification obligations so that they are commensurate with their levels of development.

2.8. Notifications can only be made by the concerned Member and no counter-notifications will be valid. Neither the Secretariat or any other Member of the WTO shall have the right to notify information on behalf of another Member unless this possibility has been provided for in existing agreements. It is also important to preserve the international character of the WTO Secretariat by ensuring that it takes no positions relative to approaches advanced by Members.

3 INSUFFICIENT INFORMATION IS NOT ONLY THE CONCERN OF DEVELOPED MEMBERS

3.1 Developing countries also have concerns about some Members' notifications

3.1.1 Improving Agriculture Notifications

3.1. Members with Final Bound AMS commitments should provide their final notification no later than 120 days following the end of the year.

3.2. Several of these Members however take up to two years or more to submit these notifications.

3.1.2 Improving GATS Article III.3

3.3. Advances in technology have expanded and deepened the linkages between manufacturing and services, which further underlines the importance of Services notifications. Hence, we note with interest that some developed countries are chronically low in their level of compliance with existing notification requirements, notably under GATS Article III.3.

3.4. The overview reflecting notifications over some twenty-three years in the CTS reveals that developing countries, and especially least developed countries, have submitted more notifications under the GATS than some developed countries.

3.5. We would encourage developed countries to comply with their notification obligations under GATS Article III.3. Many have not done so.

3.2 Some Members undermine their WTO commitments or have not implemented them in the spirit in which such commitments were made

3.6. If the discussion on Transparency goes beyond addressing capacity issues, the first step must be to tackle the following concerns:

3.2.2 GATS Mode 4

3.7. Entry-related issues have undermined existing Mode 4 market access commitments. Over the years, various proposals have been submitted by developing countries to enhance Mode 4 GATS transparency to allow for effective realization of the market access which has already been provided for.

3.8. We therefore encourage developed Members to regularly notify existing and new measures which significantly affect their mode 4 commitments.

3.2.3 Article 66.2 of the TRIPS Agreement

3.9. Article 66.2 of the TRIPS Agreement requires developed country Members to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed-country Members in order to enable the creation of a sound and viable technology base.

3.10. Developed countries have a positive legal obligation to provide incentives to enterprises and institutions in their territories to promote and encourage technology transfer to least-developed countries (LDCs). For the longest time, LDCs have demanded that this requirement be made more effective. Pursuant to the Doha Ministerial Conference, the TRIPS Council has put in place a monitoring mechanism, however this mechanism does not evaluate whether developed countries are compliant with their obligations under Article 66.2.

3.11. The obligation articulated in Article 66.2 is not only mandatory but also continuous since no time limit has been set for the termination of this obligation. The record of compliance by developed countries is abysmal since information submitted under Article 66.2 is so wide-ranging that in most cases it is not possible to distinguish where the information applies to developing countries in general or only to LDCs.

3.12. Information provided in this context in no way targets LDCs. In order to enhance Members understanding of Article 66,2 it may be necessary to agree on a definition of what constitutes 'technology transfer', whereas the lack of a common understanding of the type of incentive required for promoting and encouraging technology transfer in LDC Members may further clarify developed Members' understanding of the Article 66.2 obligation.

3.13. More transparency in this area would be supportive of LDCs' efforts to build a viable technological base.

3.2.4 Disclosure of origin of biological resources and/or associated traditional knowledge in patent applications

3.14. Paragraph 39 of the Ministerial Declaration of 18 December 2005 requires that WTO Members agree to amend the TRIPS Agreement to establish an obligation for Members to require patent applications to disclose the origin of biological resources and/or associated traditional knowledge, including Prior Informed Consent (PIC) and Access to Benefit Sharing (ABS).

3.15. Despite a long discussion in the TRIPS Council in Special Session, no outcome has been produced on an implementation issue. Non-disclosure of such resources severely effects developing countries' efforts at improving substantive examinations and in assuring the integrity of determinations under traditional intellectual property legal requirements, in providing greater certainty as to the validity of granted rights or privileges.

3.16. Traditional communities are severely affected by unlawful appropriation of biological resources and/or associated traditional knowledge. It would be useful to require WTO Members to make annual notifications on the number of patent applications based on traditional knowledge.

3.2.5 Transparency in Tariffs

3.17. Most non-*ad valorem* tariffs are being implemented by developed Members at the WTO. Non-*ad valorem* tariffs are non-transparent, create uncertainty and can block access to the market.

3.18. At the least, their *ad valorem* equivalents should be notified every year. Or for even more transparency, non-*ad valorem* tariffs should be converted to *ad valorem* duties.

4 TRANSPARENCY MUST PERMEATE THE OPERATION OF THE WTO

4.1. Even more important than notification obligations, the functioning of the WTO must be transparent and inclusive. This includes:

4.1.1 The scheduling of various committee meetings which often conflict. Thus transparency issues arise as this practice limits the ability of developing country Members to effectively participate in important deliberations;

4.1.2 the proliferation of informal open-ended negotiating meetings for example in fish and agriculture has made it impossible for small delegations to follow all the negotiations, disadvantaging these delegations. Further, this is not helped by the fact that these meetings are not minuted;

4.1.3 how Ministerial Conferences are conducted, and the processes that precede them in Geneva. Each WTO Member must be provided an equal opportunity in the decision-making process. Thus, meetings must be open to all, not only to some in Green Room processes[4];

4.1.4 language remains a fundamental constraint and a capacity issue for many delegations where their effective participation is dependent on translation.

[4] Decision-making in Ministerial Conferences often takes place in the Green Room meetings. Most developing countries who are not invited are relegated to the position of effectively being 'decision-takers' since texts would only emerge at the end of the MC or even after the pre-set MC deadline has already passed, leaving them in reality with no real option to object. See also, JOB/GC/158 – JOB/TNC/64, a submission by the African Group, the Plurinational State of Bolivia, the Republic of Cuba and the Bolivarian Republic of Venezuela, dated 28 November 2017.