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General Council

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**STATEMENT BY INDIA ON AGENDA ITEM 18
GENERAL COUNCIL MEETING – 13 - 15 DECEMBER 2023**

COMMUNICATION FROM INDIA

The following communication, dated 20 December 2023, is being circulated at the request of the delegation of India.

1. This communication refers to discussions in the General Council held from 13 to 15 December 2023. The agenda for this meeting was circulated in the document [WTO/AIR/GC/53](#), dated 4 December 2023. Item 18 in this agenda reads as below:

18. INFORMATION ON INVESTMENT FACILITATION FOR DEVELOPMENT – REQUEST FROM CHILE AND THE REPUBLIC OF KOREA ([JOB/GC/373](#))

2. During the meeting, India wanted to make a detailed statement in view of the sensitivities involved in starting a new negotiation in the WTO. However, a two/three minute time limit imposed on Members to deliver their oral statements on this agenda item meant that it was not feasible to deliver from the floor a full statement that was necessary to explain India's position on this sensitive issue involving serious systemic concerns.

3. Though India is of the conscious view that the "*right to reply*" necessitated India getting the time that it needed on this highly sensitive item, India abided by the direction of the Chair.

4. Subsequent to the GC meeting, many Members have approached India in formal and informal discussions requesting to share India's written statement. In this context, India is submitting this detailed written statement as annexed to this document to explain to the Membership, with the help of facts, past discussions, decisions, and the systemic concerns and sensitivities involved. This written statement will appear in the GC meeting minutes, but going by the past record, it might take six to eight weeks which brings this very close to the Ministerial Conference. Hence, for the purpose of transparency, and ready reference India feels it is necessary to appraise the Membership of the systemic concerns that it had wished to explain during the meeting on the agenda item at the earliest.

ANNEX**COMPLETE STATEMENT OF THE INDIAN DELEGATION ON AGENDA ITEM 18
OF THE GENERAL COUNCIL - 13-15 DECEMBER 2023**

1. Opening pleasantries

2. Chair, first of all, India would like to thank the coordinators of the informal process for this submission meant only for information of the membership. If you recall, the day before yesterday, India had sought a specific clarification as to whether this proposal was only for information. One of the coordinators, Chile, had confirmed that it was indeed for information only. Chair, you also had confirmed this. I thank all the respondents who have spoken on this topic.

3. Negotiation on Investment does not belong to WTO. India's concern emanates from the fact that proponents of IFD, a Joint Statement Initiative (JSI) process, should not be attempting to bring a non-mandated, non-multilateral issue to the formal process in the WTO in violation of the WTO framework and fundamental rule of consensus-based decision-making for starting a negotiation. There has not been any Ministerial mandate for starting negotiations on investment-related matters. Several attempts have been made in the past to push this agenda, starting from the 1st MC and till the 11th MC. However, these attempts ended with a negative mandate every time.

4. The negative mandate did not allow the Members, desirous of IFD, to pursue it in a multilateral forum upon a consensus. Therefore, to circumvent the negative mandate and short-circuit the consensus requirement that is fundamental to initiating any formal discussion in WTO architecture, certain Members began an informal process that did not have any legal sanctity, and now, at the end of their informal process, these members are back to consensus seeking on their outcome of an informal process the foundation of which is devoid of consensus. What could be more ironic in WTO than this, i.e., violating the treaty-embedded right of members to start consensus-based negotiations on mandated issues, and then at the end of such unrecognized and unlawful process, seeking consensus from those very members whose treaty-embedded right was intentionally vitiated in the first instance.

5. In this context, I would like to take Members back in memory, and I'm sure those who were here in 2017 during the May General Council meeting would be aware of the historical facts of this subject. In this regard, India would like to draw attention of members to four facts, -

- i. One is what we call the July 2004 framework. I would like to place this on record document number [WT/L/579](#) dated 2 August 2004, as part of our statement. As captured in this document, the GC gave an explicit negative mandate to this topic and on initiating any negotiation or even taking this item in any Work Programme. The relevant para of this document reads as below:

"Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round." [Para 1(g)].

- ii. **It is also worth recalling that the Doha Declaration, in para 20, envisaged that negotiations on this topic could only be on the basis of a decision to be taken by explicit consensus.** July framework made it explicit that there was a negative consensus in the Council.
- iii. In the Nairobi Ministerial 2015, i.e., just eight years back, which in the WTO context is not very distant, negative mandate again continued on this issue along with certain other issues. I am not saying non-mandated issues but the negative mandate of Ministers not to have negotiation on such subjects on which all members have not agreed to discuss in consensus, such as Competition, Government Procurement, and this issue of investment facilitation. Paragraph 34 of the Nairobi Ministerial declaration reads as below:

"34. While we concur, that officials should prioritize work where results have not yet been achieved, some wish to identify and discuss other issues for negotiation; others do not. Any decision to launch negotiations multilaterally on such issues would need to be agreed by all Members."

- iv. Then, of course, we had in 2017 the GC deliberation over two days, 10 May and 18 May in 2017. The minutes thereof are available in the WTO document No. [WT/GC/M/167](#), dated 21 July 2017. This is the third document which I would like to place on record as part of my statement. Clearly, members interested in discussions on investment facilitation had stated that their proposed informal dialogue on the issue was only for information sharing and that there was no intention to start negotiation. Further, India had opposed the agenda in the May 2017 GC meeting to begin with. However, India was asked to allow the agenda as it was not a proposal to start any negotiations. It was mentioned that members involved in informal discussions wished only to inform other GC members of an informal process they wanted to initiate. The observations of the GC Chair were as follows:

"Members will recall the July 2004 General Council Decision (as contained in [WT/L/579](#)) as well as paragraph 34 of the Nairobi Ministerial Declaration...."

It is noted that the proponents seek to share information on informal dialogues on investment facilitation, and that the communications do not constitute proposals for negotiations. Proponents believe that informal dialogues on investment facilitation are important.

It is also noted that some Members believe that investment facilitation does not lie within the scope of the WTO and hence the General Council.

Finally, pursuant to rules 2 and 4 of the Rules of Procedure for the General Council, we note that the General Council is not required to take any decisions under this item of the agenda." [Para 65]

- v. It is clear, as is evident from the observation of the GC Chair, that members had vastly differing views on the issue. It lacked consensus. In the backdrop it was clarified in no uncertain words that the issue was only for information, and GC was not required to take a decision, nor could it have taken a decision taking into account the negative mandate. Needless to say, GC did not take any decision to start negotiations, but some members decided to go ahead with negotiations in utter disregard to the system and the architecture of the WTO.
- vi. Members engaged in negotiations on a negative mandate issue have breached their own commitments made in this very forum. They are trying to do it one more time by altering the very framework whose custodianship lies with these members. They are doing it through violation of Articles III.1, III.2, IX, and X of the Marrakesh Agreement. Article III.1 of the WTO Agreement states that *"the WTO shall facilitate the implementation, administration and operation and further the objectives of this Agreement and of the multilateral trade agreements"*. Article III.2 of the WTO Agreement stated that *"the WTO shall provide a forum for negotiations among its Members concerning their multilateral trade relations"*. Article IX and X, respectively, prescribe for consensus-based decision-making and amendments of the Marrakesh Agreement or the Multilateral Agreements covered therein.
- vii. I will not get into the substance and will only talk about the process. As per the provisions of Article III.2 and Article X of the Marrakesh agreement, any new disciplines needing negotiation require consensus of all WTO members.
- viii. In respect of any new Agreement that has to become part of Annex 4 (Plurilateral Agreement), if such agreement falls within the scope of WTO, consensus is needed to start such negotiation, and consensus is needed to incorporate the negotiated and agreed text to the Annex 4 in accordance with Article X of the Agreement. Slicing this consensus rule only to seek to incorporate an agreement into Annex 4 is illegal.

- ix. And the last document which I would like to quote is the document presented by Namibia, South Africa, and India, which is [WT/GC/W/819/Rev.1](#). In this document, we have explained our understanding as to why JSIs do not have any legal status.

6. Members interested in IFD or any other non-mandated issue could have informal discussions outside the formal structures of the WTO. However, when discussions under JSIs turn into negotiations, and their outcomes are sought to be formalised into the WTO framework of rules, it can only be done in accordance with the rules of procedure for amendments as well as decision-making as set out in Article, III.2, and X of the Marrakesh Agreement. Investment facilitation has a negative mandate, as detailed above. Hence, with this negative mandate even to start negotiation, a case for its formalisation in WTO does not arise. Therefore, it is a matter of serious concern to us if the proponents of IFD, a JSI outcome, try to force their interests into the rule-based WTO multilateral system in violation of WTO Rules and the basic foundation of the Marrakesh Agreement, which specifically requires decision-making through consensus.

7. In our view, the proponents of the informal process are trying to take away our treaty embedded right in the consensus-based decision-making process of the WTO in their attempt to push this agenda. Certain members who are willing to give away this treaty embedded right in the case of IFD should very well be ready for a WTO future wherein members will bring issues of their interest and push them into WTO, even without consensus. Would the same Members now pushing for IFD negotiations without consensus forgo this treaty-embedded right of theirs with the same eagerness for issues like "Trade and Forced Labour", "Trade and Democracy", and *Trade and Human Rights*? We have already heard the interest of some members in rulemaking in WTO on these issues. Similarly, we would also wish to ask here as to whether we could appoint Appellate Body members without a consensus, as only one member has a different view on this.

8. Unlike other international organisations, where only a few members dictate the agenda, the WTO provides rights to every individual member to have a say in deciding the negotiating agenda. The interests of the developing and LDC Members are safeguarded in the WTO and also attract them to join the WTO because of this crucial aspect of WTO architecture even though wide asymmetry exists in WTO that is against the interests of the developing and LDC members. Therefore, it is of paramount interest to this organisation that this treaty-embedded right is preserved and not eroded in the name of WTO reforms.

9. In this background, I would like to reiterate that Investment Facilitation for Development, which supposedly facilitated investment, did not pertain to multilateral trade relations. **Investment per se is not trade.** It could or could not result in cross-border trade, which is the subject of multilateral trade relations. Investment covers a wide range of assets or enterprises subject to a separate universe of obligations. A linkage of an issue with the trade does not empower WTO to negotiate on it under the aegis of multilateral trade relations. For example, certain members mentioned that trade, investment, and employment are all related; hence, they should be discussed. Going with this logic, and also considering that employment is listed as an objective in the Marrakesh Agreement, would such Members be ready to discuss trade and forced labour in the WTO since labour/employment is also related to trade?

10. As far as the investment aspects of trade are concerned, the Agreement on TRIMS and the GATS already deal with trade-related investment aspects in goods and services, respectively. The TRIMS deals with certain trade-related investment measures that can restrict and distort trade. The GATS dealt with the supply of services through commercial presence in the territory of any other Member, which was related to trade in services and not purely investment. None of these agreements, however, has provided the context for a general discussion on policies, rules and regulations surrounding investment.

11. If we stretch the argument of the proponents that investment and trade are linked and, therefore, we could make rules on investment in the WTO, then we could start rulemaking in Intellectual Property (IP) here in the WTO, even for the non-trade related aspect of IP.

12. India would like to reiterate again that Members interested in IFD, or any other non-mandated subject are entitled to take up informal discussions outside the formal structure of the WTO.

13. We do not have any reservations about changes, additions or deletions of WTO Treaty commitments, Mandates or Decisions in the WTO, but that should be done through legal means,

that is, first amending relevant Articles. As demonstrated, the whole approach to JSI is legally inconsistent with the fundamental principles and procedures of the Marrakesh Agreement. We, therefore, do not agree to bring disciplines within the rule-based WTO legal framework through this illegal process.

14. Finally, to sum up, the document referred to in the communication is an outcome of an illegal process nurtured in a rule-based multilateral system, and therefore, we would not like it to be placed before the Ministers. Thank you.
