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PREPARATIONS FOR THE 1999 MINISTERIAL CONFERENCE

The TRIPS Agreement

Communication from Kenya on behalf of the African Group

The following communication, dated 29 July 1999, has been received from the Permanent Mission of Kenya.

I. INTRODUCTION

1. The TRIPS Council is carrying out work on the review of various provisions contained in the TRIPS Agreement. Some parts of this work create difficulties for members of the African Group. This paper sets out some of the key issues of interest to the Group, highlights difficulties facing the Group on these issues and makes proposals on how these difficulties should be redressed.

II. OVERLAPS AND SEQUENCING

2. The WTO work programme on intellectual property issues is made up of three components, namely; implementation, built-in agenda, and preparations for future negotiations. Whilst in conceptual terms these components are simple to categorize, at operational level they are dealt with in a complex tapestry of overlaps, characterized by lack of proper sequencing. This poses serious difficulties to the African Group.

- First, whilst developed countries underwent legislative reviews unencumbered by other work, developing countries will undergo this exercise concurrently with work on the built-in reviews of TRIPS provisions;

- Second, the current built-in reviews of TRIPS provisions are likely to continue into 2000 at which time the overall review of the TRIPS Agreement will be conducted pursuant to Article 71.1 of the Agreement.

- Third, the overall Article 71.1 review of the Agreement is scheduled to coincide with the next set of multilateral trade negotiations in which TRIPS issues are likely to form part of the agenda.

3. This concurrency of work poses three sets of difficulties for the Group: first, institutional capacity problems; second, lack of national experiences on the impacts of implementation of the Agreement; and third, undermining of the ability of developing countries to identify their interests.

Proposal

4. The African Group considers it appropriate that the work of the TRIPS Council should be staggered and sequenced in a manner that enables developing countries with meagre resources to participate effectively in its work. This can be achieved by *inter alia* delaying some of the reviews or speeding up those on which conclusion is nearing such as the one on non-violation complaints.

III. ARTICLE 64.3 - NON-VIOLATION COMPLAINTS

5. Article 64.3 provides for the non-violation remedy in the TRIPS Agreement. However, this Article also contains a built-in moratorium on application, due to expire on 1 January 2000 unless otherwise decided by Members - by virtue of a Ministerial Decision - after reviewing the scope and modalities of non-violation disputes in the context of TRIPS.

6. A number of factors need to be considered before this decision can be taken. First, there is currently no sufficient experience with the application of the DSU provisions to the TRIPS Agreement. Furthermore, developing countries have as yet not implemented their obligations under the Agreement and as such have not as yet had the benefit of direct experience on the scope and modalities of the non-violation remedy as foreseen in the provisions. More important is the fact that the non-violation provisions contained in the GATT 1994 were crafted for trade in goods. The TRIPS Agreement seeks to establish minimum standards of protection and not liberalization.

Proposal

7. That the moratorium on the application of the non-violation remedy under the TRIPS Agreement be maintained indefinitely until Members agree by consensus that sufficient experience has been gained with the application of the Agreement and that the remedy if adopted will not increase Members' level of obligations.

IV. ARTICLE 66.2 - INCENTIVES FOR TRANSFER OF TECHNOLOGY TO LDCs

8. This Article calls on developed countries to provide incentives to their enterprises and institutions to encourage them to transfer technology to LDCs.

9. The provisions of this Article are couched in "best endeavour" terms. Best endeavour provisions are fundamentally flawed in that they are neither enforceable nor do they constitute a real benefit for developing and least-developed countries. Consequently many developed countries have as yet not demonstrated how they are fulfilling the provisions of this Article.

Proposal

10. Need for a regular full review of the implementation of the provisions of Article 66.2 by developed countries.

V. ARTICLE 27.3(b) - PROTECTION OF PLANT VARIETIES

11. The review of Article 27.3(b) is complex both in the way it is being dealt with and in its very substance. First, there are issues of procedure and interpretation of the scope and mandate of the TRIPS Council on the review process. Second, there are issues relating to the review of the substantive provisions of the Article itself. For the African Group, these issues need to be resolved speedily for there to be progress in the light of the up-coming Seattle Ministerial Conference.

Part 1 - On procedures and interpretation

Nature and scope of review

12. The question of interpretation of the nature and scope of the review of Article 27.3(b) still remains to be resolved. The debate is about whether Article 27.3(b) provides for the review of the implementation of the provisions therein, or for the review of the substantive provisions of the Article itself. It is our view that the review mandated and meant is a review of the substance of the subparagraph itself, and is not meant to be confined to the implementation of the subparagraph. This is clear from the wording of the last sentence of Article 27.3(b): "The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement."

Proposal

13. Members will need to clarify the mandate of the TRIPS Council on this issue. It is the firm understanding of the African Group that the mandate of the Council is to review the substantive provisions of Article 27.3(b). Since no provision is made for review of implementation of this specific Article (except implicitly in the context of the overall review scheduled for 2000 in Article 71.1) members of the African Group consider it appropriate that any information (to be) submitted under the current review will not be used for the purpose of reviewing the implementation of the provisions of this Article.

Timing for implementation of Article 27.3(b) provisions

14. The review of the provisions of Article 27.3(b) scheduled for 1999 has been ongoing since the beginning of the year. On the other hand, the deadline for implementation of the obligations by developing countries of the TRIPS Agreement is January 2000.

15. In effect, the review is scheduled to precede the implementation of obligations undertaken by developing countries. Developing countries have as yet not had sufficient experience with the operation of the Agreement and hence no prior opportunity to conduct impact assessment studies of implications resulting therefrom.

16. Furthermore, the review, if undertaken in 1999 will pre-empt the outcome of deliberations in other related fora such as CBD, UPOV, FAO, International Undertaking on Plant Genetic Resources, and the development of an OAU model law on Community Rights and Control of Access to Biological Resources. These are important fora dealing with Article 27.3(b) issues (from a developmental perspective) which the TRIPS Council cannot afford to ignore.

17. The process of reviewing the substantive provisions of Article 27.3(b) could well extend to beyond 2000, and it could result in changes to the provisions. It would thus be premature for developing countries to implement the subparagraph by January 2000.

Proposals

18. Members of the African Group consider it appropriate that the implementation deadline should be extended to take place after the completion of the substantive review of Article 27.3(b). The period given for implementation of the provisions should be the same as that allowed in Article 65(1) and (2), namely, five years from the date the review is completed. This period is provided to allow developing countries to set up the necessary infrastructure entailed by the implementation.

Part 2 - On substantive provisions

Artificial distinctions between biological and microbiological organisms and processes

19. There is lack of clarity on the criteria/rationale used to decide what can and cannot be excluded from patentability in Article 27.3(b). This relates to the artificial distinction made between plants and animals (which may be excluded) and micro-organisms (which may not be excluded); and also between "essentially biological" processes for making plants and animals (which may be excluded) and microbiological processes.

20. By stipulating compulsory patenting of micro-organisms (which are natural living things) and microbiological processes (which are natural processes), the provisions of Article 27.3 contravene the basic tenets on which patent laws are based: that substances and processes that exist in nature are a discovery and not an invention and thus are not patentable. Moreover, by giving Members the option whether or not to exclude the patentability of plants and animals, Article 27.3(b) allows for life forms to be patented.

Proposals

21. (a) The review of the substantive provisions of Article 27.3(b) should clarify the following:

- Why the option of exclusion of patentability of plants and animals does not extend to micro-organisms as there is no scientific basis for the distinction.

- Why the option of exclusion of patentability of "essentially biological processes" does not extend to "microbiological processes" as the latter are also biological processes.

(b) The review process should clarify that plants and animals as well as microorganisms and all other living organisms and their parts cannot be patented, and that natural processes that produce plants, animals and other living organisms should also not be patentable.

Clarifying the option of a *sui generis* system for plant varieties

22. Article 27.3(b) provides for protection of plant varieties by either a patent, a *sui generis* system or a combination of both. The implementation of the provision in respect of plant varieties needs to be clarified to allow developing countries to:

- Meet their international obligations, for example under the Convention on Biological Diversity, and the FAO International Undertaking for Plant Genetic Resources;

- Satisfy their need to protect the knowledge and innovations in farming, agriculture and health and medical care of indigenous people and local communities. The resolution of this issue affects the food security, social and economic welfare, and public health of people in developing countries. These concerns are central and can be taken into account under Articles 7 and 8 of the TRIPS Agreement, when Members take measures to implement TRIPS.

- To protect human, animal and plant life and to avoid serious prejudice to the environment. Exclusions from patentability for these purposes are permitted under Article 27(2) of the TRIPS Agreement.

Proposal

23. After the sentence on plant variety protection in Article 27.3(b), a footnote should be inserted stating that any *sui generis* law for plant variety protection can provide for:

(i) the protection of the innovations of indigenous and local farming communities in developing countries, consistent with the Convention on Biological Diversity and the International Undertaking on Plant Genetic Resources;

(ii) the continuation of the traditional farming practices including the right to save, exchange and save seeds, and sell their harvest;

(iii) preventing anti-competitive rights or practices which will threaten food sovereignty of people in developing countries, as is permitted by Article 31 of the TRIPS Agreement.

Relation between Article 27.3(b) and CBD and the International Undertaking on Plant Genetic Resources

24. The CBD aims to protect the rights of indigenous people and local farming communities and to protect and promote biological diversity. The International Undertaking on Plant Genetic Resources (under the FAO) seeks to protect and promote farmers' rights and to conserve plant genetic resources. These are international obligations undertaken by States, including most of the Members of the WTO. It is therefore imperative that Article 27.3(b) recognize the principles, objectives and measures planned and proposed under the CBD and the International Undertaking. By mandating or enabling the patenting of seeds, plants and genetic and biological materials, Article 27.3(b) is likely to lead to appropriation of the knowledge and resources of indigenous and local communities.

Proposal

25. The review process should seek to harmonize Article 27.3(b) with the provisions of the CBD and the International Undertaking, in which the conservation and sustainable use of biological diversity, the protection of the rights and knowledge of indigenous and local communities, and the promotion of farmers' rights, are fully taken into account.

VI. ARTICLE 23.4 OF THE TRIPS AGREEMENT - ESTABLISHMENT OF A MULTILATERAL SYSTEM OF NOTIFICATION AND REGISTRATION OF GEOGRAPHICAL INDICATIONS

26. With the objective of facilitating the protection of geographical indications for wines, Article 23.4 of the TRIPS Agreements requires the Council for TRIPS to undertake negotiations concerning the establishment of a multilateral system of notification and registration of geographical indications. At Singapore in 1990, Ministers declared themselves in favour of the extension of these negotiations to spirits.

Proposal

27. Considering that Ministers made no distinction between the two above-mentioned products, the African Group is of the view that the negotiations envisaged under Article 23.4 should be extended to other categories, and requests, in this regard, that the scope of the system of notification and registration be expanded to other products recognizable by their geographical origins (handicrafts, agro-food products).