



**5<sup>TH</sup> ANNIVERSARY OF THE NAIROBI MINISTERIAL DECISION: REVIEW OF IMPLEMENTATION, IDENTIFICATION OF GAPS AND THE WAY FORWARD – COMMUNICATION FROM THE LDC GROUP**

The following submission, dated 2 March 2020, is being circulated at the request of the delegation of Tanzania, on behalf of the LDC Group.

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**1 INTRODUCTION**

1.1. The LDC believes that the Nairobi Decision on preferential rules of origin (RoO) of 2015 is a landmark achievement matured thanks to relentless efforts of the Least-Developed Countries (LDC) WTO group and WTO member states. Yet, after five years, time has come to acknowledge that, with few exceptions, implementation of the Decision is lagging behind in terms of reform of rules of origin by preference-granting Members.

1.2. From 2015 to present the LDC WTO group has made several submissions to the CRO to identify the reforms on rules of origin that the preference-granting Members should undertake to make the use of trade preferences more effective. The submissions of the WTO LDC group have shed light on aspects of rules of origin that have benefitted not only the LDCs but also the international trading community at large. Such work should be continued and expanded as there would be gains to open discussion on rules of origin at multilateral level in terms of transparency and best practices.

1.3. It is now time to recognize that the work done in the CRO is promising but that a wider mandate with a work program and a time horizon should be adopted at the next Ministerial Conference to achieve better rules of origin for LDCs.

1.4. This communication aims at setting a roadmap to such course of action.

**2 A SUMMARY OF MAIN STEPS UNDERTAKEN FOR IMPLEMENTING NAIROBI DECISION: NOTIFICATIONS AND UTILIZATION RATES<sup>1</sup> (2016-2017)**

2.1. During 2016, the CRO's efforts for the implementation of the Nairobi Decision that be summarized as follows:

- (a) "No later than 31 December 2016 each developed Preference-granting Member, and each developing Preference-granting Member undertaking the commitments in accordance with paragraph 4.1 up to that date or thereafter, shall inform the Committee on Rules of Origin (CRO) of the measures being taken to implement the above provisions.<sup>2</sup>";
- (b) Calculation of utilization rates of trade preferences granted to LDCs; and
- (c) Developing a template for notification of RoO.

2.2. The development of a template took most of the CRO work during 2016 as it was hoped that preference-giving countries would notify according to such template the eventual improvements to

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<sup>1</sup> See the forthcoming UNCTAD publication.

<sup>2</sup> See paragraph 4.2 of the Nairobi Decision on Preferential Rules of Origin for LDCs.

their RoO to comply with the deadline of 31 December 2016 provided in paragraph 4.2 above of the Nairobi Decision.

2.3. However, it took until the WTO CRO meeting of March 2017 to achieve consensus on the template with the LDCs insisting on notifications to be made according to the new template to allow for a comprehensive review to be held at the 2017 October session of the CRO.<sup>3</sup> Similarly the methodology to calculate the utilization rates was agreed at the end of 2016 as reported by the Chairman during the CRO meeting of March 2017.

2.4. The meeting of the CRO of October 2017 was a litmus test of the implementation of the Nairobi Decision as the majority of preference-granting Members notified their rules according to the template allowing a first assessment. At this CRO meeting, the LDCs made substantive presentations on all items of the Nairobi Decision<sup>4</sup> contrasting them with the notifications made by preference-granting Member. Such presentations made by the LDCs showed in a clear and unambiguous language the significant gaps and divide among the notifications made by preference granting countries who believed to be in compliance with the Nairobi Decision and the views and expectations of the LDC WTO group arising from same Decision.

2.5. In particular, the existing data on utilization rates was used to make a comprehensive presentation by the LDC WTO group<sup>5</sup> showing the impact that reforms of RoO in the EU and Canada had on trade flows and utilization rates. The presentation also highlighted that no positive trade dynamics were observed in the US and Japan given the absence of such reforms.

2.6. Yet no meaningful response was received from preference-granting Members to the arguments raised by the LDC in their presentations in the form of substantive submissions that could have contributed to a constructive dialogue.

2.7. Finally, the 2017 report of the CRO at the General Council pointed out that notifications of some preference-granting Members on utilization rates were lagging behind as it was shown in trade data (i.e. import statistics) not available at that time for the following WTO preference-granting Members: China; Iceland; Kazakhstan; Kyrgyz Republic; New Zealand; Russian Federation; Tajikistan; and Turkey.

### **3 STEPS MADE BY PREFERENCE-GRANTING MEMBERS TO IMPLEMENT THE NAIROBI DECISION**

3.1. The 2017 report of the CRO to the WTO General Council<sup>6</sup> reported, as summary of the efforts made to comply with the Nairobi Decision, that China had adopted new legislation introducing a series of simplifications to its RoO, Canada had announced changes to facilitate the requirements for some apparel items. Norway announced that it allowed for cumulation among LDCs while Australia stated it was conducting a comprehensive review of its Generalized System of Preferences (GSP). The Eurasian Economic Union also revised its GSP and Thailand reported its intention to review its preferential rules of origin.

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<sup>3</sup> See documents G/RO/M/68 and G/RO/84.

<sup>4</sup> See the following presentations made at the 2017 October meeting: "Developments Regarding Methods of Calculation of the Percentage Criterion" (Paragraph 1.1 of the Nairobi Decision and Item 1 of document G/RO/W/169) – Presentation by Tanzania and Laos (RD/RO/52); "Developments Regarding Methods using a Change of Calculation of Tariff Classification Criterion to Determine Substantial Transformation" (Paragraph 1.2 of the Nairobi Decision and Item 2 of Document G/RO/W/169) – Presentation by Benin (RD/RO/53); "Developments Regarding Methods using a Specific Manufacturing or Processing Operation Criterion to Determine Substantial Transformation" (Paragraph 1.3 of the Nairobi Decision and Item 3 of document G/RO/W/169) – Presentation by Myanmar (RD/RO/54); "Developments Regarding Methods using a Combination of Requirements to Determine Substantial Transformation" (Paragraphs 1.4 and 1.5 of the Nairobi Decision and Item 4 of document G/RO/W/169) – Presentation by Tanzania (RD/RO/55); "Developments Regarding Cumulation Provisions (Paragraphs 2.1 and 2.2 of the Nairobi Decision and Item 5 of document G/RO/W/169)" – Presentation by Cambodia (RD/RO/56); "Developments Regarding Documentary Requirements (Paragraph 3 of the Nairobi Decision and Item 6 of document G/RO/W/169) – Presentation by Nepal (RD/RO/57).

<sup>5</sup> See Utilization Rates under Preferential Trade Arrangements for Least developed countries (Paragraph 4.3 of document WT/L/917/Add.1) – Presentation by Yemen (RD/RO/58).

<sup>6</sup> See document G/RO/85.

3.2. The remaining preference-granting Member expressed the view either formally or informally during the various CRO meetings held during 2016 and 2017 that their existing preferential RoO for LDCs were already complying with the Nairobi Decision.

#### **4 FURTHER SUBMISSIONS MADE BY LDCS TO BUILD UP A DIALOGUE IN THE CRO IMPLEMENTATION OF NAIROBI DECISION (2018-2019)**

4.1. Faced with implicit or explicit statements by preference-granting Members that their rules of origin were in conformity with the Nairobi decision, the WTO LDC group renewed efforts in 2018 and 2019 to bring new evidence at the CRO meetings to start a constructive dialogue.

4.2. These renewed efforts focused on:

- (1) A progressive examination of each of the substantive components of the Nairobi Decision to show to preference-granting Members that their RoO deviated from the Nairobi Decision. Several possible best practices that could be adopted were also indicated; and
- (2) Evidence from the analysis of utilization rates that some of the existing RoO were linked to low utilization of trade preferences.

4.3. Under (1), the LDCs initiated a process in 2018 to examine each of the different substantive issues covered by the Nairobi Decision. On the issue of change of tariff classification (CTC) a technical presentation was made by the LDC Group in October 2018<sup>7</sup> containing several issues for consideration by preference-granting Members.

4.4. A further submission in May 2019<sup>8</sup> examined in more details where and how product specific rules of origin of the EU and especially Japan were found not to be in compliance with Paragraphs 1.2 and 1.4 of the Nairobi Decision.

4.5. A detailed annex was attached to the submission by the LDC countries containing samples of product specific rules of origin that were found to be overly stringent and not in compliance with the Nairobi Decision. The annex also contained suggestions of product specific rules of origin that could be adopted by EU and Japan on the basis of best practices.

4.6. While EU and Japan appreciated the submission and engaged in bilateral meetings with the WTO LDC group, no concrete steps have been undertaken to respond to the concerns raised in the submission and its annex besides asking the LDC WTO group to come back with a list of priorities.

4.7. However, it has to be recalled that for some products these priorities were already spelt out in the LDC submission at product specific level. The request for priorities with no attempt to explain why so many exceptions to the CTC basic rule were needed did not signal a genuine attempt to engage in discussions.

4.8. To date, neither the EU nor Japan offered any response or justification on the reasons why so many additional exceptions are needed to the simple CTC. During the bilateral meetings with Japan, it emerged that Japan will undergo a scheduled revision of its GSP scheme in 2021. The pressing issue is whether Japan will consider the issues and proposals made by the LDCs in their submissions and engage in a constructive dialogue. The WTO LDC group would like to recall that the submission clearly indicated that "several steps could also be undertaken by Japan to engage in an overall reform of rules of origin for LDCs".

4.9. In a similar vein, the LDC submitted a substantive paper on direct consignment<sup>9</sup> at the 2019 CRO meeting. As in the case of the submission concerning CTC, this document contained tables clearly showing where and how the legal text of some preference-granting Members were not in conformity with the Nairobi Decision. The same document indicated the best practices that could be

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<sup>7</sup> Developments regarding Methods using a Change of Tariff Classification Criterion to Determine Substantial Transformation (Paragraphs 1.2 and 1.4 of the Nairobi Decision) (RD/RO/72) - Elia N. Mtwewe, Tanzania on behalf of the LDC Group.

<sup>8</sup> See "Note on Change of Tariff Classification Paragraphs 1.2 and 1.4 of Nairobi Decision" (RD/RO/79) - Elia N. Mtwewe, Tanzania on behalf of the LDC Group.

<sup>9</sup> Impact of Direct Consignment Requirements on Preference Utilization by Least Developed Countries (G/RO/W/187) 4 October 2019.

adopted by those who did not conform with the Decision, namely, the adoption of the non-alteration principle as applied by the EU. Yet, there has been a limited response to such submission by preference-granting Member.

4.10. Because of time limitation the WTO LDC group has not been able to analyse in depth the shortcomings and lack of conformity with the Nairobi Decision of the remaining preference-granting Members using *ad valorem* percentage criterion or specific working of processing. Yet it is rather clear that even the initial analysis conducted in 2017<sup>10</sup> shows that the large majority of the preference-granting Members does not meet the request of the LDCs of 75% of non-originating materials, nor other LDCs requests concerning cumulation or other elements of the Nairobi Decision. These remaining issues could be discussed in a subsequent CRO meeting before the Ministerial Conference.

4.11. Under (2) above on utilization rates, the WTO LDC Group made extensive presentations at the CRO of October 2017<sup>11</sup> and 2018<sup>12</sup> based on the data available at that time. The presentations outlined a number of impressive findings, including:

- (a) The possible impact that direct consignment rules could have on utilization rates later confirmed by the findings of the WTO Secretariat;<sup>13</sup>
- (b) According to the data notified by Members to the WTO Secretariat, some preference-granting Members, like India, showed close to zero utilization rates; and
- (c) The fact that multiple preferences available to LDCs under other preferential arrangements have to be taken into account in order to correctly assess the impact of rules of origin under each preferential scheme.

4.12. Such presentations were followed by other submissions prepared by the LDCs on the utilization rates of Switzerland<sup>14</sup> and most recently China<sup>15</sup>, where again significant findings were shown. In relation to Switzerland it was found that there are sectors showing persistent low utilization rates (even for products subject to product specific rules of origin identical to those of the EU, where utilization rates are higher). Bilateral meetings are underway with Switzerland to address this issue and indications are that this could be related to direct consignment obligations.

4.13. The analysis of China's utilization rates again showed, as in the case of India, that there are significant trade flows where utilization rates are minimal or zero.

4.14. The clarifications provided by China at CRO meeting of October 2019, showed that utilization rates under other preferences<sup>16</sup> could explain low utilization of China's LDC preferences by ASEAN LDCs. This response emphasized again the need for a correct and complete dataset on utilization rates as an indispensable transparency and assessment tool. Yet China has notified utilization rates for only one year (2016) and only for DFQF preferences. Incomplete data means that a full analysis is currently not possible.

4.15. According to the latest status report of the WTO Secretariat,<sup>17</sup> there are issues related to the notification of utilization rates concerning:

- (1) Lack of notification or incomplete notification of import statistics by preference-granting Member (Russia Federation and Turkey for instance);
- (2) Even more importantly, there are concerns over the quality and accuracy of the data notified to the WTO Secretariat (for instance only one year for India (2015) and for China (2016)). Consultations with these delegations to improve the quality of their submissions have yet to produce tangible results; and

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<sup>10</sup> See footnote 4 above.

<sup>11</sup> See Utilization rates under preferential trade arrangements for LDCs (Paragraph 4.3 of WT/L/917/Add.1), presentation by Yemen on behalf of the LDCs, October 2017.

<sup>12</sup> See Utilization rates under preferential trade arrangements for LDCs (Paragraph 4.3 of WT/L/917/Add.1), presentation by Tanzania on behalf of the LDCs, October 2018.

<sup>13</sup> See document G/RO/W/185.

<sup>14</sup> See document G/RO/W/186.

<sup>15</sup> See document G/RO/W/192.

<sup>16</sup> In the specific case ASEAN-China Free Trade Area.

<sup>17</sup> See document G/RO/W/163/Rev.7 of 24 February 2020.

- (3) The data notified must encompass import statistics under other preferential schemes available to LDCs (preference-granting Member should progressively notify the utilization rates of other preferences granted to LDC to make possible a transparent and efficient assessment of the use made of their DFQF schemes).

## **5 WHAT THE LDCS ARE EXPECTING FROM MC 12**

5.1. As briefly summarized above, there is an imbalance between the efforts deployed by LDCs countries in the CRO since the Nairobi Decision in terms of submissions, analysis, and the level of the response so far received from preference-granting Members. Implementation of the Ministerial Decision should remain a shared responsibility and not rest exclusively on evidence brought by the LDC Group. Ensuring that "preferential rules of origin applicable to imports from LDCs are transparent and simple and contribute to facilitating market access.<sup>18</sup>" is a clear objective of the multilateral community embedded since 2005 in the Hong Kong WTO Ministerial Decision and reinforced in target 17.12 of the Sustainable Development Goals (SDGs).<sup>19</sup>

5.2. The LDCs believe that is therefore necessary to strengthen the mandate of the Committee on Rules of Origin at the 12<sup>th</sup> Ministerial Conference by:

- a. setting clearer obligations for preference granting members regarding an intensification of their efforts to monitor the impact of their RoO on LDCs' imports and to simplify requirements in line with the provisions of the Nairobi Decision and the best practices as illustrated by the LDC Group in past submissions to the CRO; and
- b. strengthening the role of the WTO Secretariat to monitor conformity with Nairobi Decision. This will have significant spill over benefits for the entire international trading system in an area that is currently unregulated.

5.3. A strong mandate of the Committee on Rules of Origin will lead to an effective participation by both Geneva and capital-based experts in the Committee meetings with a clear agenda on the work ahead.

5.4. To reach this objective the LDC group will engage with preference-granting Members to develop appropriate language to be submitted for consideration of Ministers at the next Ministerial Conference.

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<sup>18</sup> See Hong Kong WTO Ministerial Decision on Measures in Favour of Least-Developed Countries, 2005.

<sup>19</sup> Target 17 .12 of SDG 17 reads as follows Realize timely implementation of duty-free and quota-free market access on a lasting basis for all least developed countries, consistent with World Trade Organization decisions, including by ensuring that preferential rules of origin applicable to imports from least developed countries are transparent and simple, and contribute to facilitating market access.