
THE POST-CANCUN LEGAL STATUS OF SINGAPORE ISSUES IN THE WTO

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EXECUTIVE SUMMARY

1. This note is intended to provide readers with an analysis of the current legal status of the Singapore issues mandate established during the 1996 Singapore Ministerial Conference and extended up to the 2003 Cancun Ministerial Conference by the 2001 Doha Ministerial Conference. The analysis is based on the use of the rules on treaty interpretation recognized under international law to understand and apply the provisions of WTO ministerial declarations relevant to Singapore issues. The note first looks at the rules on treaty interpretation that are applicable. Then it discusses the legal meaning and ramifications of the Singapore issues mandate under the 1996 Singapore and 2001 Doha Ministerial Declarations on the basis of such rules on treaty interpretation. It then goes on to discuss what the legal effects of the 2003 Cancun Ministerial Declaration are on the Singapore issues mandate. The concluding section reiterates the major points that were raised in the preceding sections.
2. It argues that the rules of treaty interpretation under international law, when applied to the mandates for Singapore issues, will establish that such mandates have always been conceived and intended by the Ministerial Conference since 1996 to be time-bound in nature. These mandates were extended in 1998 by

the Geneva Ministerial Conference up to the Seattle Ministerial Conference. The adjournment, rather than closure, of the Seattle Ministerial Conference effectively extended these mandates to the Doha Ministerial Conference, which in turn established: (i) a clear “sunset clause” for the expiration of the study process mandates for Singapore issues that stemmed from the 1996 Singapore Ministerial Conference; and (ii) the “explicit consensus” requirement for a decision on modalities for and the launch of negotiations to be taken at the Cancun Ministerial Conference.

3. As a result of the Cancun failure to achieve explicit consensus on negotiating modalities and to convert the mandate from a study process to a negotiating one in Cancun, coupled with the formal closure of the Cancun Ministerial Conference, Singapore issues can legally no longer be considered as “outstanding issues” for purposes of post-Cancun work. There was no expressed intent of the part of the Ministerial Conference in 2001 to continue the study process after Cancun in the event that establishing a negotiating mandate for Singapore issues failed in Cancun. Neither did ministers in Cancun indicate that the Singapore issues study mandate will be further extended. Singapore issues should hence no longer be deemed to be “outstanding issues” for purposes of the application of the instruction by ministers to trade officials under Paragraph 4 of the Cancun Ministerial Statement, and therefore should no longer be on the WTO’s agenda.
4. Since the study process mandate for Singapore issues begun in Singapore in 1996 and extended in the DMD up to the conclusion of the Cancun Ministerial Conference has already concluded, the conduct of which was the sole *raison d’etre* or function for the three Singapore issues working groups and the CTG’s special sessions on trade facilitation, these WTO bodies should therefore be deemed to have also been automatically dissolved upon the conclusion of the Cancun Ministerial Conference. Absent a clear mandate upon which to base their future work after Cancun, these WTO bodies would essentially be bodies without any function. Since such a situation is something that is not compatible with Art. IV.7 of the WTO Agreement (which requires that a WTO body established by the Ministerial Conference must have specific assigned functions), the Singapore issues WTO bodies should hence be deemed to have been automatically dissolved upon the conclusion of the Cancun Ministerial Conference.

THE POST-CANCUN LEGAL STATUS OF SINGAPORE ISSUES IN THE WTO

I. INTRODUCTION

1. This note is intended to provide readers with an analysis of the current legal status of the Singapore issues mandate established during the 1996 Singapore Ministerial Conference and extended up to the 2003 Cancun Ministerial Conference by the 2001 Doha Ministerial Conference. The analysis is based on the use of the rules on treaty interpretation recognized under international law to understand and apply the provisions of WTO ministerial declarations relevant to Singapore issues. The note first looks at the rules on treaty interpretation that are applicable. Then it discusses the legal meaning and ramifications of the Singapore issues mandate under the 1996 Singapore and 2001 Doha Ministerial Declarations on the basis of such rules on treaty interpretation. It then goes on to discuss what the legal effects of the 2003 Cancun Ministerial Declaration are on the Singapore issues mandate. The concluding section reiterates the major points that were raised in the preceding sections.

II. RULES ON TREATY INTERPRETATION AND THE SINGAPORE ISSUES MANDATE

2. WTO ministerial declarations can, for purposes of the application of rules of treaty interpretation in international law under the 1969 Vienna Convention on the Law of Treaties' rules of treaty interpretation which reflect the customary norms of international law in this regard, be considered a "treaty."¹
3. Ministerial declarations like the 1996 Singapore Ministerial Declaration (SMD) and the 2001 Doha Ministerial Declaration (DMD) create legitimate expectations among States parties concerning future State behavior. Thus, they possess significant normative weight with respect to future State actions at the international level even though non-compliance with such legitimate expectations might not be subject to recourse to the institutional dispute settlement mechanisms. As effectively norm-setting and binding international legal instruments, ministerial decisions or declarations have been instrumental in putting into effect various actions on the part of WTO Members, such as entering into focused discussions or negotiations in various trade-related areas that may have an impact on or be governed by international law.
4. The primary rule for treaty interpretation in international law can be found in Article 31.1 of the 1969 Vienna Convention on the Law of Treaties which says that "a treaty shall be interpreted in good faith in accordance with the ordinary

¹ Art. 2.1(a), 1969 Vienna Convention on the Law of Treaties, defines "treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” From this rule flow other corollary rules for treaty interpretation such as those contained Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.

III. UNDERSTANDING THE SINGAPORE ISSUES MANDATE

A. Establishing the Mandate – 1996 Singapore

5. In 1996, Singapore issues² were institutionalized as part of the WTO work program through the establishment of individual working groups to undertake study processes on trade and investment, trade and competition policy, and on transparency in government procurement. The Singapore Ministerial Conference also directed the Council for Trade in Goods (CTG) to undertake a study process on trade facilitation. These study processes were intended to provide the analytical foundations for deciding whether or not the negotiation of new WTO rules should be undertaken with respect to these issues. Any negotiations on these issues were to be decided upon by “explicit consensus.”
6. The 1996 Singapore Ministerial Conference instructed the General Council, with respect to the working groups that was established to work on trade and investment and trade and competition policy, to “keep the work of each body under review, and ... determine after two years [i.e. by 1998] how the work of each body should proceed.”³ There were no similar instructions to the General Council vis-à-vis the bodies tasked to work on transparency in government procurement and on trade facilitation. Effectively, when read in their ordinary meaning, the mandate for the trade and investment and trade and competition policy working groups was time-bound in the sense that the continuation of such working groups’ mandates would have to be dependent on the General Council’s assessment, by 1998, of “how the work of each body should proceed.” The mandates for the transparency in government procurement working group as well as for the Council for Trade in Goods with respect to trade facilitation was not time-bound.

B. Continuing the Mandate – 1998 Geneva and 1999 Seattle

1. 1998 Geneva Ministerial Conference

7. In May 1998, the 1998 Geneva Ministerial Conference established a work program to be carried out by the General Council that would prepare for the

² These issues refer to the proposed negotiations for WTO agreements that would fall within the scope of the WTO’s existing dispute settlement mechanism and which would: (i) limit the right of governments to regulate foreign investors (trade and investment); (ii) restrict governments from supporting domestic enterprises against foreign competitors (trade and competition policy); (iii) require governments to undertake binding obligations for costly changes in government procurement procedures to ease or facilitate foreign bidding, scrutiny and disputes (transparency in government procurement); and (iv) require governments to undertake binding obligations to effect costly changes in domestic procedures for the release of traded goods (trade facilitation).

³ Paragraph 20, 1996 Singapore Ministerial Declaration.

Third Session of the Ministerial Conference. This General Council work program encompassed, *inter alia*, “recommendations concerning other possible future work on the basis of the work program initiated at Singapore.”⁴ The General Council was mandated to submit to the 1999 Seattle Ministerial Conference “on the basis of consensus, recommendations for decision concerning the further organization and management of the work programme arising from the above, including the scope, structure and time-frames, that will ensure that the work programme is begun and concluded expeditiously.”⁵ (emphasis added).

8. Since all of the Singapore issue bodies were intended by the 1996 Singapore Ministerial Conference to be subsidiary bodies reporting to the General Council, the 1998 Geneva Ministerial Declaration’s mandate for the General Council to come up with recommendations, “on the basis of consensus”, regarding future work on Singapore issues after the Seattle Ministerial Conference meant that the original 1996 mandates for Singapore issues had been: (i) extended in the case of investment and competition, and (ii) time-bound in the case of transparency in government procurement and trade facilitation, with their common future temporal reference point being the Seattle Ministerial Conference. The Singapore issues WTO bodies could, therefore, continue their study and analytical work after the 1998 Geneva Ministerial Conference subject to oversight from the General Council. It is worth noting that during the 1998 Geneva Ministerial Conference, many developing countries continued to voice their opposition to the launch of negotiations on Singapore issues.⁶

2. 1999 Seattle Ministerial Conference

9. That such consensus-based recommendations from the General Council never got to the Seattle Ministerial Conference is well-known. While a draft ministerial text was prepared by the General Council Chair (Ambassador Mchumo of Tanzania) on his own responsibility,⁷ “it had not proved possible to produce a common basis for consideration and action by Ministerial at Seattle”⁸ and “there was nothing new to propose for transmission to Seattle on the basis of consensus.”⁹ The then-WTO Director-General Mike Moore also stated that “the General Council did not have consensus recommendations to present to Ministers” in Seattle.¹⁰ In the 19 October 1999 draft ministerial text that was the subject of discussion by ministers in Seattle, all of the Singapore

⁴ Paragraphs 9(b), 1998 Geneva Ministerial Declaration.

⁵ Paragraph 10, 1998 Geneva Ministerial Declaration.

⁶ See e.g. Lewis Machipisa, *Africans Reject New Issues, Until Old Problems Solved*, 20 May 1998, at <http://www.sunonline.org/trade/process/followup/1998/05200098.htm>.

⁷ See WTO, *Seattle Ministerial Text: Revised Draft*, JOB(99)/5868/Rev.1, 19 October 1999.

⁸ WTO, *General Council – Minutes of the Meeting of 23 November 1999*, WT/GC/M/51, 8 February 2000, para. 1.

⁹ *Id.*, para. 5.

¹⁰ *Id.*, para. 6.

issue paragraphs were placed in square brackets, indicating that there was no consensus on how such issues should be treated.¹¹

10. The Singapore issues paragraphs as reflected in the Chair's draft ministerial text that was discussed during the last Green Room meeting of the Seattle Ministerial Conference on the late afternoon and early evening of 3 December 1999 were already "clean text" in the sense that they were, for the most part, already unbracketed but not yet consensus texts.¹² Many developing countries, however, continued to express their opposition to the launch of negotiations on Singapore issues.¹³ Such express opposition, however, was effectively negated as throughout the Seattle Ministerial Conference, as in the Doha and Cancun Ministerial Conference, the development of the draft ministerial texts was done solely by the Ministerial Conference Chair and his/her appointed set of "facilitators" or "friends of the Chair" on the basis of non-negotiating consultations that they conducted with various ministers through closed-door bilateral or small group meetings.

11. However, a combination of the massive public protests outside the convention center that delayed the official start of the Seattle Ministerial Conference and effectively shortened the period in which negotiations on the ministerial declaration text could be conducted, and the internal major unresolved disagreements over substantive negotiating issues (such as agriculture, textiles and clothing, subsidies, anti-dumping, implementation) and major issues raised with respect to the negotiating processes used (especially with respect to their transparency and inclusiveness vis-à-vis many of the developing country Members¹⁴) caused the negotiations to fail. In her statement to the Ministerial Conference at the adjournment thereof, the Ministerial Conference Chair, USTR Charlene Barshefsky, said that "divergences of opinion that had long dogged the issues under discussion had remained, and while very substantial progress had been made in many areas, the issues that had remained were

¹¹ See WTO, *Seattle Ministerial Text: Revised Draft*, JOB(99)/5868/Rev.1, 19 October 1999, paras. 41 and 56 (investment); 42 and 57 (competition policy); 44, 58, and 76 (transparency in government procurement); and 45-48 and 59 (trade facilitation).

¹² The 3 December 1999 revision of the 19 October 1999 draft ministerial text showed that negotiations were to be launched on transparency in government procurement and on trade facilitation, while the study process mandated by the 1996 Singapore Ministerial Conference was to continue vis-à-vis investment and competition. See WTO, *Seattle Ministerial Text: Revised Draft*, JOB(99)/5868/Rev.2, 3 December 1999, paras. 35 (transparency in government procurement); 36 (trade facilitation); 38-40 (investment); and 41-42 (competition).

¹³ See e.g. WTO, *Meeting Summaries of the Seattle Ministerial Conference 1-3 December 1999*, at http://www.wto.org/english/thewto_e/minist_e/min99_e/min99_e.htm. See also ICTSD, *BRIDGES Daily Update on the Third Ministerial Conference No. 5*, 3 December 1999, at http://www.ictsd.org/ministerial/seattle/wto_daily/991203_eng.htm.

¹⁴ Many developing country WTO Members, such as the members of the Caribbean Community (CARICOM), members of the Organization of African Unity/African Economic Community (OAU/AEC), and members of the Grupo Latino Americano y del Caribe (GRULAC), denounced the decision-making processes used in the ministerial conference and announcing their intention to withhold consensus on the outcomes of the negotiations. The CARICOM Communique can be downloaded from www.thunderlake.com/ministerials/CARICOM.pdf, the OAU/AEC statement can be viewed at www.africaaction.org/docs99/wto9912.htm, and the GRULAC declaration at www.twinside.org.sg/title/grulac-cn.htm.

highly complex and could not have been resolved rapidly. Her own judgment, and in turn the judgment shared by the Director-General, the working group Chairs and Co-Chairs and the membership generally, was that it would be best to take a time-out, consult with one another, and find a creative means to finish the job.”¹⁵ The 1999 Seattle Ministerial Conference adjourned¹⁶ without issuing any ministerial statement or declaration that would have outlined the WTO’s work program in the post-Seattle period.

(a) Legal Effect of Adjournment versus Closure of Sessions of the Ministerial Conference

12. In contrast to the 1996 Singapore, 1998 Geneva, 2001 Doha, and 2003 Cancun sessions of the Ministerial Conference (the first, second, fourth, and fifth sessions), which were all formally closed by their respective Chairs,¹⁷ the Seattle Ministerial Conference was only adjourned.¹⁸ These two terms – i.e. “adjourn” and “close” – have different meanings when used in a parliamentary procedural context such as those of the WTO’s Ministerial Conference. To “adjourn” means that the meeting or session is to be “suspend[ed] ... to another time or place”¹⁹ while to “close” such meeting or session means that the meeting or session has “come to an end.”²⁰ Hence, an adjournment, which was what took place vis-à-vis the 1999 Seattle Ministerial Conference, contemplates a resumption of the session and the discussions therein at some other time or place, whereas a closure of the meeting, which took place in the 1996, 1998, 2001, and 2003 sessions of the Ministerial Conference, means that the discussions in that particular session have ended.

13. The legal effect of the adjournment of the Seattle Ministerial Conference is that the 1996 Singapore Ministerial Declaration mandates for Singapore issues, as modified by the 1998 Geneva Ministerial Declaration, continued to subsist for so long as the Seattle Ministerial Conference had not yet taken any “decision concerning the further organization and management of the work programme arising from the above [including on Singapore issues], including the scope, structure and time-frames, that will ensure that the work programme is begun and concluded expeditiously” and such session had not been officially closed. This meant that from the adjournment of the Seattle Ministerial Conference on 3 December 1999 to the formal opening of the

¹⁵ WTO, *Ministerial Conference Third Session – Summary Record of the Eight Meeting on 3 December 1999*, WTO Doc. Ref. WT/MIN(99)/SR/8, 14 January 2000.

¹⁶ *Id.*

¹⁷ See WTO, *Ministerial Conference First Session – Summary Record of the Ninth Meeting on 13 December 1996*, WT/MIN(96)/SR/9, 27 January 1997; WTO, *Ministerial Conference Second Session – Summary Record of the Second Meeting on 20 May 1998*, WT/MIN(98)/SR/2, 10 June 1998; WTO, *Ministerial Conference Fourth Session – Summary Record of the Ninth Meeting on 14 November 2001*, WT/MIN(01)/SR/9, 10 January 2002; and the webcast of the closing session of the Cancun Ministerial Conference at [rtsp://realserver.citaris.com/wto/Domingo_14/100Kbps/Ingles/real100in_1409_tclausura.rm](http://realserver.citaris.com/wto/Domingo_14/100Kbps/Ingles/real100in_1409_tclausura.rm). or at www.wto.org.

¹⁸ WTO, *Ministerial Conference Third Session – Summary Record of the Eight Meeting on 3 December 1999*, WTO Doc. Ref. WT/MIN(99)/SR/8, 14 January 2000.

¹⁹ Merriam-Webster Online, at <http://www.m-w.com/cgi-bin/dictionary>.

²⁰ *Id.*

Doha Ministerial Conference at 5.30 p.m. of 9 November 2001,²¹ the 1996 and 1998 Singapore issues mandates continued to subsist.

14. The follow-up to the Seattle Ministerial Conference was first substantively discussed by the General Council in February 2000.²² During that February 2000 General Council meeting, the chairs of the Singapore issues working groups for 2000 were agreed to by the membership. This constituted an implicit recognition on the part of Members that the mandate for Singapore issues continued to subsist, notwithstanding the failure of ministers to come to any decisions regarding the future work program to be undertaken vis-à-vis these issues during the Seattle Ministerial Conference.
15. Hence, the post-Seattle mandate of the various Singapore issues WTO bodies continued to be based on the mandates provided under the 1996 and 1998 Ministerial Declarations during the period from the adjournment of the Seattle Ministerial Conference to the opening of the Doha Ministerial Conference. This meant that, as under the 1996 and 1998 mandates, the work of Singapore issues WTO bodies post-Seattle and up to Doha continued to be under the oversight of the General Council.
16. Although the Seattle Ministerial Conference, after it was adjourned on 3 December 1999, was never officially closed by the Ministerial Conference per se resuming and then closing that session, the formal opening of the Doha Ministerial Conference on 9 November 2001 automatically and implicitly brought to a formal close the previous (Seattle) session of the Ministerial Conference. To interpret the failure of the Seattle Ministerial Conference to formally close as meaning that it was still in session even as the Doha Ministerial Conference formally opened its session would result in an absurd situation. A recognized principle of statutory interpretation, applicable to international law as well, is that the members of a body (such as a legislature, or in this case, the WTO Ministerial Conference) must be deemed to have been aware of their previous actions (i.e. of adjourning rather than closing the Seattle Ministerial Conference). Hence, it should be assumed that when ministers formally opened the fourth session of the WTO Ministerial Conference in Doha, they were aware that the third (Seattle) session had not yet closed and that, hence, their formal opening of the Doha session would operate to formally close the Seattle session. The lack of a formal act on the Ministerial Conference to close the Seattle session was hence effectively remedied by the formal opening of the subsequent (Doha) session.

C. Focusing the Mandate – 2001 Doha

²¹ See WTO, *Ministerial Conference Fourth Session – Summary Record of the First Meeting on 9 November 2001*, WT/MIN(01)/SR/1, 10 January 2002.

²² During its 17 December 1999 meeting, the General Council, upon the suggestion of the Chair, had agreed to postpone the discussion to the General Council's first meeting in 2000. See WTO, *General Council – Minutes of the Meeting of 17 December 1999*, WT/GC/M/52, 3 January 2000, and WT/GC/M/52/Add.1, 15 March 2000.

17. As stated above, attempts were made in the run-up to both of the 1998 and 1999 Ministerial Conferences to convert the 1996 mandate into a negotiating mandate, but were consistently opposed by developing countries. Such opposition continued on to the 2001 Ministerial Conference, with the result that in a phrase common to Paragraphs 22, 25, 26, and 27 DMD, each of the working groups as well as the CTG's special sessions on trade facilitation were supposed to continue their analytical work, albeit in a more focused way for each issue, as part of their respective study processes "in the period until the Fifth Session [of the Ministerial Conference]." In addition, the study process mandate was expanded to include possible discussions on modalities due to a phrase common to Paragraphs 20, 23, 26, and 27 DMD – i.e. "we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations."
18. The institutional set-up in which the Singapore issues WTO bodies would be reporting to the General Council continued post-Doha unchanged by the DMD. By renewing and focusing the mandate for Singapore issues, but without effecting any changes in the reporting or institutional oversight procedures to be observed by the Singapore issues WTO bodies, it is clear that the Doha Ministerial Conference intended to have the General Council continue to exercise oversight functions over these subsidiary bodies.

1. Singapore Issues "Sunset Clause"

19. The ordinary meaning of the phrase common to Paragraphs 22, 25, 26, and 27 of the 2001 Doha Ministerial Declaration – i.e. that each of the working groups as well as the CTG's special sessions on trade facilitation were supposed to continue their analytical work "in the period until the Fifth Session [of the Ministerial Conference]" – when read in good faith and in light of the context, object, and purpose of the DMD, is that it established a clear, unambiguous, and specific timeframe within which such study processes were supposed to be continued. This period is that extending from the end of the Doha Ministerial Conference to the conclusion of the Cancun Ministerial Conference.
20. One should note that the DMD established two general kinds of mandates: (i) a negotiating mandate for implementation issues (including those issues covered by the Doha Decision on Implementation Issues), special and differential treatment, agriculture, services, TRIPS, non-agricultural goods, trade and environment, and WTO rules; and (ii) a non-negotiating mandate for other issues such as the Singapore issues, electronic commerce, small economies, trade, debt, and finance, trade and transfer of technology, technical cooperation and capacity building, and the work program on LDCs. The negotiating mandates (except for the DSU negotiations) clearly, under the DMD, have a common deadline – i.e. 1 January 2005²³ -- and are to be part of

²³ Para. 45, DMD.

a single undertaking package.²⁴ The non-negotiating mandates, however, do not have a time-bound deadline and are not part of the single undertaking.

21. Paragraph 52 DMD simply requires, with respect to the non-negotiating mandates, that “[t]hose elements of the Work Programme which do not involve negotiations are also accorded a high priority. They shall be pursued under the overall supervision of the General Council, which shall report on progress to the Fifth Session of the Ministerial Conference.” For purposes of the application of this DMD provision, it should be noted that there are two kinds of non-negotiating mandates contemplated in the DMD.
22. One covers the non-negotiating mandates in the DMD that envisioned continued work beyond the Cancun Ministerial Conference, or which do not contain an expressly stated “sunset clause” – i.e. these would include the mandates for electronic commerce, small economies, trade, debt and finance, trade and transfer of technology, technical cooperation and capacity building, and the work program on LDCs. It should be noted that with respect to none of the issues above does the DMD contain a “sunset clause”. Instead, in virtually all cases, the DMD requires the General Council, to whom the subsidiary WTO bodies tasked with working on these issues report, to itself report to the Cancun Ministerial Conference on “progress” or “further progress” with respect to the work on these issues.
23. The second covers Singapore issues, which do contain an expressly-stated “sunset clause” that showed the intent of ministers to disestablish the mandates for the WTO bodies working on these issues after the Cancun Ministerial Conference by providing for a specific timeframe – i.e. “up to the Fifth Session [of the Ministerial Conference]” as in the case of Singapore issues – for the cessation of such mandates. Hence, once such period had elapsed, i.e. at the conclusion of the Cancun Ministerial Conference on 14 September 2003, the mandate for the continuation of the study process under the DMD will also have elapsed automatically.
24. Hence, when read together, using their ordinary meaning and in the light of the context and purpose of the DMD, the Singapore issues paragraphs in the DMD established the following as the mandate for Singapore issues up to the Cancun Ministerial Conference:
 - (i) *the mandate for the continuation of the study processes being undertaken by each of the working groups and the CTG’s special sessions for trade facilitation extends only up to the conclusion of the Cancun Ministerial Conference; and*
 - (ii) *the study process mandate will be converted into a negotiating mandate after the Cancun Ministerial Conference only upon the fulfillment of the requisite condition precedent for such conversion – i.e. the explicit consensus decision on modalities for negotiations.*

²⁴ Para. 47, DMD.

2. *The Explicit Consensus Requirement*

25. The ordinary meaning of the phrase common to these DMD paragraphs – i.e. “we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations” – is that:

- (i) the requisite condition precedent for the launch of negotiations on Singapore issues after Cancun is an explicit consensus decision on the modalities of negotiations taken in Cancun; and
- (ii) the mandate for Singapore issues in the event that such explicit consensus decision on modalities is taken will be converted from a study process to a negotiating process after the Cancun Ministerial Conference.

26. This understanding was, in fact, clarified in Doha by the Doha Ministerial Conference Chair (Minister Kamal of Qatar) in a statement that he made as the Conference Chair before the Ministerial Declaration was adopted by consensus (in the sense of Art. IX.1 of the WTO Agreement) in the final plenary session which indicates that it is a consensus understanding and a binding interpretation or understanding of what the common phrase in Paragraphs 20, 23, 26, and 27 means.²⁵ His statement should be read as an integral part of the 2001 Doha Ministerial Declaration’s mandate with respect to Singapore issues. It forms part of the context in which the Singapore issues mandate in the 2001 Doha Ministerial Declaration should be read.²⁶

27. The requirement for “explicit consensus” indicated in the 1996 and 2001 Ministerial Declarations means, therefore, that with respect to decisions regarding the launch of Singapore issue negotiations and their modalities, Members must clearly and unambiguously state and express, for the record, their agreement to such launch and modalities separately for each of the Singapore issues. Failure to do so cannot be construed as being tantamount to “explicit” agreement, since silence or non-objection cannot, in these cases, be considered as implicit or explicit agreement.

28. Before and during the 2003 Cancun Ministerial Conference, a large number of developing countries expressly manifested their objections to launching

²⁵ At the closing ceremony and before the adoption of the Doha Ministerial Declaration, the Chair made the following statement: “I would like to note that some delegations have requested clarification concerning paragraphs 20, 23, 26 and 27 of the draft declaration. Let me say that with the respect to the reference to an “explicit consensus” being needed, in these paragraphs, for a decision to be taken at the Fifth Session of the Ministerial Conference, my understanding is that, at that Session, a decision would indeed need to be taken, by explicit consensus, before negotiations on Trade and Investment and Trade and Competition Policy, Transparency in Government Procurement, and Trade Facilitation could proceed. ... In my view, this would give each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that Member is prepared to join in an explicit consensus.” See http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_chair_speaking_e.htm.

²⁶ Art. 31.2(b), 1969 Vienna Convention on the Law of Treaties. See also Art. 32, id.

negotiations as well as to the suggested modalities for Singapore issues contained in the 24 August 2003 and 13 September 2003 draft ministerial texts. These included WTO Members that were part of the African Union, LDCs, the ACP Group of States, the Caribbean Community, as well as China (since accession in 2001), Cuba, India, Indonesia, Malaysia, Pakistan, Philippines, Venezuela, and others. This clearly indicated that there was no explicit consensus among Members regarding either the launch of negotiations or on the modalities for such negotiations on Singapore issues. At the last green room meeting on 14 September 2003 in Cancun, the EC agreed to drop investment and competition in exchange for the launch of negotiations on trade facilitation and transparency in government procurement.²⁷ Other demandeurs continued to press for the launch of negotiations on all four Singapore issues. The AU-ACP-LDC alliance stood firm on their position not to agree to the launch of negotiations on all four Singapore issues.

29. Hence, the failure to achieve explicit consensus on the modalities for negotiations in Cancun means that:

- (i) there are no modalities for such negotiations; and, therefore,
- (ii) there is no mandate to launch negotiations on the Singapore issues for the period after the Cancun Ministerial Conference.

IV. EFFECT OF CANCUN ON THE SINGAPORE ISSUES MANDATE

30. The Cancun Ministerial Conference was formally closed by the Chair at around 6 p.m. of 14 September 2003.²⁸ There was no intention on the part of ministers at the conclusion of the Cancun Ministerial Conference to simply adjourn that session. Rather, the intention was clearly and explicitly to formally and officially close the Cancun session of the Ministerial Conference. The draft ministerial declaration that had been forwarded by the General Council Chair to the Ministerial Conference Chair on 31 August 2003, and which effectively served as the basis for the discussions during the Ministerial Conference, was never adopted.²⁹ Instead, only a six-paragraph ministerial statement was adopted, in which the Cancun Ministerial Conference, upon its conclusion, instructed officials “to continue working on outstanding issues with a renewed sense of urgency and purpose and taking fully into account all the views we have expressed in this Conference”³⁰ and reaffirmed “all our

²⁷ In a turn-around from its immediate post-Cancun position of leaving its offer on Singapore issues on the table, EC has now withdrawn its offer to drop investment and competition from the WTO’s agenda. Charlotte Denny, *Lamy hits back at critics: EU negotiator refuses to shoulder blame for Cancun*, The Guardian, 29 October 2003, at <http://www.guardian.co.uk/business/story/0,3604,1073096,00.html>.

²⁸ See the webcast of the closing session of the Cancun Ministerial Conference at <http://www.wto.org> or at rtsp://realserver.citaris.com/wto/Domingo_14/100Kbps/Ingles/real100in_1409_tclausura.rm.

²⁹ See WTO, *Draft Cancun Ministerial Text*, JOB(03)/150/Rev.1, 24 August 2003, and its revision, JOB(03)/150/Rev.2, 13 September 2003.

³⁰ Paragraph 4, 2003 Cancun Ministerial Statement.

Doha Declarations and Decisions and recommit ourselves to working to implement them fully and faithfully.”³¹

A. Singapore Issues No Longer Part of WTO Agenda

31. Despite the formal closure of the Cancun Ministerial Conference and in light of the failure to achieve explicit consensus on the launch of negotiations on Singapore issues or establish a new mandate for Singapore issues post-Cancun, does the ministerial statement then have the effect of reviving the Doha mandate for Singapore issues? The answer to this question has to be in the negative.
32. *Singapore issues, as a result of the failure to achieve explicit consensus and convert the mandate from a study process to a negotiating one in Cancun and the formal closure of the Cancun Ministerial Conference, can legally no longer be considered as “outstanding issues” for purposes of post-Cancun work.* As discussed above, the 2001 Doha mandate for Singapore issues had provided for a “sunset clause” – i.e. “up to the Fifth Session [of the Ministerial Conference]” – within which the study process was to be conducted. There was no expressed intent of the part of the Ministerial Conference in 2001 to continue the study process after Cancun in the event that establishing a negotiating mandate for Singapore issues failed in Cancun. Furthermore, taking “fully into account all the views ... expressed in this Conference,” which would include the views of both the proponents and oppositors of Singapore issues, one could argue that the views expressed by both sides at the last stages of the Cancun Ministerial Conference clearly indicated that there was a deadlock among the opposing views. This meant that since no consensus of any kind as to the post-Cancun mandate for Singapore issues were arrived at, the expressed provisions of the DMD that called for the cessation of the study process mandate for Singapore issues at the Cancun Ministerial Conference would operate to close off any further discussion on Singapore issues post-Cancun in the absence of the creation, post-Cancun, of any new study mandate for them. Neither can Singapore issues be discussed post-Cancun under a negotiating mandate because such mandate was not established by explicit consensus at Cancun. In short, Singapore issues should no longer be deemed to be “outstanding issues” for purposes of the application of the instruction by ministers to trade officials under Paragraph 4 of the Cancun Ministerial Statement and hence should no longer be on the WTO’s agenda.
33. However, General Council Chair Perez del Castillo on 14 October 2003 stated that the primary focus of the work of Members in Geneva post-Cancun will be on what he termed as the “key outstanding issues: in our judgement [sic], backed up by our consultations, these are first and foremost agriculture,

³¹ Paragraph 6, 2003 Cancun Ministerial Statement.

cotton, NAMA and Singapore issues.”³² This, however, is solely the statement of the General Council Chair and should not be taken to mean as being reflective of the common understanding of the membership as to what should be considered as “outstanding issues” that Members should work on in post-Cancun period. This should not be considered as having any binding normative value for purposes of definitively establishing the parameters for future post-Cancun discussions because it was made by the General Council Chair on his own behalf rather than that of the entire membership. Hence, Members should be free to raise issues and concerns regarding the inclusion of Singapore issues as part of the post-Cancun work program notwithstanding that the mandates for Singapore issues have lapsed and not be re-established, whether as a study process or as a negotiating process.

34. When in Paragraph 6 of the Cancun Ministerial Statement the Cancun Ministerial Conference reaffirmed, inter alia, the DMD and recommitted Members to “working to implement them fully and faithfully”, this cannot be taken to mean that the study process mandate for Singapore issues in the DMD has been revived or that Members should once again discuss the modalities for Singapore issues negotiations for purposes of trying to gain explicit consensus thereon in order to establish a negotiating mandate for Singapore issues. In fact, Paragraph 6 of the Cancun Ministerial Statement could and should be taken to simply mean that the Ministerial Conference, in reaffirming the DMD and committing themselves to implementing it fully and faithfully, intended that:

- (i) the negotiating mandates in the DMD that envisioned continued negotiations beyond the Cancun Ministerial Conference would simply be reaffirmed and implemented up to their stated concluding date – i.e. these would be the negotiating mandates established for implementation issues, special and differential treatment, agriculture, services, TRIPS, non-agricultural goods, trade and environment, WTO rules;
- (ii) the non-negotiating mandates in the DMD that envisioned continued work beyond the Cancun Ministerial Conference, or which do not contain an expressly stated “sunset clause”, would continue to be implemented after the Cancun Ministerial Conference – i.e. these would include the mandates for electronic commerce, small economies, trade, debt and finance, trade and transfer of technology, technical cooperation and capacity building, and the work program on LDCs. It should be noted that with respect to none of the issues above does the DMD contain a “sunset clause”. Instead, in virtually all cases, the DMD requires the General Council, to whom the subsidiary WTO bodies tasked with working on these issues report, to itself report to the Cancun Ministerial Conference on “progress” or “further progress”

³² See WTO, *Statements by the Chair of the General Council and the Director General: Informal Heads of Delegation Meeting on 14 October 2003*, at http://www.wto.org/english/news_e/news03_e/stat_gc_dg_14oct03_e.htm.

with respect to the work on these issues. Unlike in the case of Singapore issues, in no case did the DMD contemplate or show the intent of ministers to disestablish the mandates for the WTO bodies working on these issues after the Cancun Ministerial Conference or provide for a specific timeframe – i.e. “up to the Fifth Session [of the Ministerial Conference]” as in the case of Singapore issues – for the cessation of such mandates.

- (iii) for those issues with a clear “sunset clause” for their mandates – i.e. Singapore issues – the expiration of the mandate on the date specified is reaffirmed and is to be implemented “fully and faithfully.” This means that as far as the study process mandate for Singapore issues is concerned, such mandate (and the WTO bodies tasked to carry out such mandate) should now be deemed fully and completely terminated. And since the explicit consensus decision on modalities required by the DMD for the establishment of a negotiating mandate on Singapore issues was not achieved in Cancun, such negotiating mandate never came about and hence cannot be implemented post-Cancun.

B. Singapore Issues WTO Bodies Should be Deemed Dissolved *Ipsa Facto*

35. As stated above, the Doha mandate for Singapore issues referred only to the time-bound continued conduct of the study process for each issue initiated by the 1996 Singapore Ministerial Conference. The study process mandate, by the express provisions of the DMD, automatically expired when the Cancun Ministerial Conference concluded. The new negotiating mandate for Singapore issues contemplated by the DMD could not be established because the Cancun Ministerial Conference was not able to achieve the explicit consensus on modalities for negotiations required by the DMD for such negotiating mandate to be established.
36. The Ministerial Conference’s power to create new WTO bodies to carry out specific functions is based on Art. IV.7 of the WTO Agreement which authorizes the Ministerial Conference to “establish such Committees with such functions as it may deem appropriate.” (emphasis added). Essentially, this phrase means that the establishment of a WTO body must go hand in hand with an assignment by the Ministerial Conference to that body of its specific functions. Read in this light, it is clear that once the performance by a specific WTO body of its assigned functions have been concluded, that WTO body’s very existence should also be deemed to be terminated.
37. In the case of the Singapore issues WTO bodies, their functions as assigned by the 1996 Singapore Ministerial Conference were to conduct a study process on their respective issues. These functions, as their respective mandates, were extended by the 2001 Doha Ministerial Conference up to the Cancun Ministerial Conference. In effect, the Ministerial Conference in 2001 deemed it appropriate to provide for an automatic “sunset clause” on their exercise of such functions – i.e. “until the Fifth Session” of the Ministerial Conference in Cancun. The DMD did not contain any reference or provision that

contemplated an automatic extension of the study process mandate for Singapore issues after the Cancun Ministerial Conference has concluded. Rather, by the DMD's own provisions, the Doha Ministerial Conference's clearly expressed intent was that such study process mandate would cease and that a new mandate, a negotiating mandate, would be established at Cancun for Singapore issues subject to the achievement of an explicit consensus decision on modalities taken thereat.

38. Since the study process mandate for Singapore issues begun in Singapore in 1996 and extended in the DMD up to the conclusion of the Cancun Ministerial Conference has already concluded, the conduct of which was the sole *raison d'être* or function for the three Singapore issues working groups and the CTG's special sessions on trade facilitation, these WTO bodies should therefore be deemed to have also been automatically dissolved upon the conclusion of the Cancun Ministerial Conference. *Absent a clear mandate upon which to base their future work after Cancun, these WTO bodies would essentially be bodies without any function. Since such a situation is something that is not compatible with Art. IV.7 of the WTO Agreement (which requires that a WTO body established by the Ministerial Conference must have specific assigned functions), the Singapore issues WTO bodies should hence be deemed to have been automatically dissolved upon the conclusion of the Cancun Ministerial Conference.*

V. CONCLUSION

39. To conclude this legal analysis, the following needs to be reiterated:
- (i) the study process mandate for Singapore issues has lapsed automatically upon the conclusion of the Cancun Ministerial Conference, and together with such lapse the automatic termination of the work of the Singapore issues WTO bodies;
 - (ii) the non-achievement of explicit consensus on the modalities for negotiations at Cancun means that a negotiating mandate on Singapore issues has not been established that would authorize Members to continue working on a negotiating basis on Singapore issues;
 - (iii) the 2003 Cancun Ministerial Statement can be taken to read as affirming the points above, rather than being the basis for continued work on Singapore issues (whether as a study process or as a negotiating process) after Cancun;
 - (iv) Singapore issues should not be considered as among the "outstanding issues" that Members need to work on in the post-Cancun period; and
 - (v) The WTO bodies tasked with implementing the Singapore issues mandates pursuant to the 1996, 1998, and 2002 Ministerial Declarations should be considered as having been automatically dissolved upon the conclusion of the Cancun Ministerial Conference.

40. However, an interpretation of the DMD's provisions vis-à-vis Singapore issues according to the rules of treaty interpretation under international law may provide Members with valid legal arguments for the removal of these issues from the WTO's agenda. However, the utility of this legal interpretation depends in large part on the political will of Members to allow law, rather than power relations, to be the main determinant in guiding their activities and discussions after Cancun. It is quite likely, however, that the Singapore issue proponents will continue to raise these issues in the context of the WTO's post-Cancun work program.
41. Based on the discussion above, however, developing countries should note that any new mandate for Singapore issues that the General Council may come up with in its post-Cancun discussions should not longer be based on the 1996, 1998, and 2001 mandates.³³ This means that in order for such a new mandate to be established, Members have to agree to such new mandate by consensus, in accordance with the rules for decision-making embodied in Art. IX.1 of the WTO Agreement, and in accordance with the principles of transparency, effective participation, and inclusiveness which many developing country Members have been raising in the past. Any new mandate on Singapore issues will hence depend on the agreement of the Members regarding such mandate.
42. In the event that the Singapore issue proponents wish to establish a new mandate for Singapore issues in the post-Cancun period, developing countries need to stress that:
- (i) any new mandate for the Singapore issues, *whether on an issue-specific basis or as a single package*, must be limited to a study and analytical mandate, to be focused on looking at: (a) whether the issue needs to be further dealt with by the WTO; and (b) how the issues to be studied, and the actions thereon, may be used to support developing countries' domestic development goals and objectives, including economic diversification;
 - (ii) the issue of future negotiations on Singapore issues should already be *a priori* excluded from the mandate on the basis of the outcomes of Cancun;
 - (iii) if *a priori* exclusion of negotiations on Singapore issues is not feasible, developing countries should reiterate and reintroduce the requirement of explicit consensus for the modalities for and the launch and outcomes of negotiations *for each* of the Singapore issues;

³³ It should be noted that the General Council is, under Art. IV.2 of the WTO Agreement, empowered to carry out the functions of the Ministerial Conference "in the intervals between the meetings of the Ministerial Conference." As such, the General Council may well decide to establish a new mandate for Singapore issues for the post-Cancun period.

- (iv) the inclusion of negotiations on Singapore issues within the single undertaking package of the Doha negotiations should also be excluded *a priori* from any new mandate;
 - (v) in the event that a new negotiating mandate is established, the right of Members to decide whether or not to participate in such negotiations *for each* of the Singapore issues, or to join or accede to the results, is a sovereign right; and
 - (vi) the outcomes of Cancun indicate that only trade facilitation remains as the sole Singapore issue for which a new and limited study mandate may be possible.
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Chemin du Champ d'Anier 17
Case postale 228, 1211 Geneva 19
Switzerland

Telephone : (41 22) 791 8050
Fax : (41 22) 798 8531
Email : south@southcentre.org

Website:
<http://www.southcentre.org>