

WTO's MC10: The Nairobi Ministerial Declaration

When launched in 2001, the Doha Development Agenda (DDA) had the objective of being a Development Round. However, substantive development concerns have often been sidelined in the course of the negotiations. Without the Doha mandate, developing countries have no guarantee that the important issues of disciplines on domestic supports, special safeguard in agriculture and cotton will feature in future negotiations on Agriculture. Moreover, if the Doha mandate is closed, the 2004 General Council's decision on the Doha Agenda work programme (i.e. the "July package") that investment, transparency in government procurement, and competition will not be negotiated within the WTO during the Doha Round will not stand anymore.

Since the Doha Ministerial Conference in 2001, subsequent Ministerial Declarations and General Council Decisions have reaffirmed the Doha Mandate. In the run up to Nairobi, developing countries have taken a consistent position calling for the reaffirmation of the Doha Development Agenda. They also did not welcome the introduction of 'new issues'.

The stakes are high for developing countries in the process of preparing the Ministerial Declaration. According to the WTO rules, a Ministerial Declaration is a declaration of the highest decision-making body of the WTO, and embodies a political mandate and further guidance regarding the round of negotiations, which can be altered only by another Ministerial Declaration (or decision of the General Council conducting the functions of the Ministerial Conference). Furthermore, a Chair's text, although not binding, can be referred to later on in the negotiations and could have an important persuasive impact on the direction of negotiations.

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THE DOHA MANDATE AND THE VALUE OF THE DOHA WORK PROGRAMME

When launched in 2001, the Doha Development Agenda (DDA) had the objective of being a Development Round. Paragraph 2 of the Doha Ministerial Declaration (DMD) states that: *“The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work programme adopted in this Declaration”*.

Within this framework, developing country Members accepted to launch discussions under the work programme with the assumption that development issues were to be prioritised in the negotiations, while market access was to be approached as a means, which must serve the needs of development.

Agriculture

The negotiations under the Doha Mandate were expected to result in effective curbs on **agriculture subsidies and tariffs** by developed countries. Agriculture has been the sector with the most distortions; the WTO rules on agriculture have been an area where the rules are imbalanced, to the detriment of developing countries and their fragile agriculture sectors. The Agreement on Agriculture has allowed large subsidisers among developed countries to continue their support programmes whilst many developing countries that joined the WTO with little or zero bindings for ‘aggregate measures of support’ have not been able to increase their subsidies, except within their ‘de minimis’ limits¹.

During the Uruguay Round, developing countries had already given significant concessions in return for bringing the issues pertaining to the protectionist agriculture practices of developed countries back under the disciplines of the multilateral trading system, through accepting rules in regard to intellectual property (TRIPS), services, and trade-related investment measures (TRIMS).

Under the Doha Ministerial Declaration, WTO Members *“commit(ed) ... to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support”*². WTO Members also agreed that *“special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development”*.

Without the DDA, agriculture will still be negotiated under the WTO (because of Article 20 of the Agreement on Agriculture – ‘continuation of the reform process’). However, what is most valuable in the Doha negotiations is what has been captured on trade-distorting domestic supports in the last version of the agriculture modalities text (TN/AG/W/4/Rev.4, commonly known as ‘Rev.4’). It is for this reason that the US wants to jettison the Round and hence, whilst filled with some flaws, Rev.4 is likely to embody disciplines on agriculture domestic supports which the Members would not likely see in the coming years (perhaps decades).

¹ These levels are 5% of the value of production for developed countries and 10% in the case of developing countries.

² See : paragraph 13 of the Doha Ministerial Declaration WT/MIN(01)/DEC/1

The other important areas in the agriculture negotiations for developing countries, which may not be a feature of future negotiations are those on the Special Safeguard in agriculture for developing countries; and critically, the mandate in cotton – that cotton must be dealt with ambitiously, specifically and expeditiously.

Implementation Issues

'Implementation Issues' were also a top priority issue for developing countries after the Uruguay Round because of

- (i) the non-realisation of anticipated benefits from some of the Uruguay Round agreements; and
- (ii) the need to rectify imbalances and asymmetries in some of the agreements³.

'**Implementation-related issues and concerns**' highlighted by developing countries were given priority in the Doha Work Programme. Members declared that they "agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme ... and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 [of the Doha Ministerial Declaration]...[and] shall proceed as follows: (a) where we provide a specific negotiating mandate in this declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies..."⁴.

Special and Differential treatment

Strengthening **special and differential treatment** (SDT) for developing countries was also central to the 'development mandate'. Members agreed under paragraph 44 of the DMD "that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational"⁵. Overall, the Doha mandate establishes that SDT provisions under various WTO Agreements will be strengthened and made more operational, and that SDT, including the principle of 'less than full reciprocity', will be an integral element across all areas of the negotiations, including on market access in agriculture, non-agricultural products and services.

Single Undertaking

The Doha Mandate is built on the '**Single Undertaking**' approach. The DMD provides that "the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking"⁶. All Members committed to concluding the Doha Round and its development mandate on the basis of the single undertaking in an inclusive and transparent manner.

³ Third World Network (2009), "Implementation-Related Issues in the WTO: a Possible Way Forward".

⁴ See Paragraph 12 of the Doha Ministerial Declaration WT/MIN(01)/DEC/1

⁵ WT/MIN(01)/DEC/1, 20 November 2001

⁶ See: paragraph 47 of the Doha Ministerial Declaration

Although ‘development’ was supposed to be the centrepiece of the Doha mandate, however substantive development concerns have often been side-lined in the course of the DDA negotiations. Through the negotiations’ process, the emphasis was largely been on market access and the approach was more slanted towards the interests of developed countries.

The DDA and Singapore Issues

WTO Member Countries agreed that discussions in regard to investment, transparency in government procurement, and competition will not be negotiated within the WTO during the Doha Round. The General Council Decision of July 2004 (usually referred to as 2004 July Framework) provided that:

“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. 1g of the Text of the ‘July package’ – the General Council’s post-Cancún decision⁷).

In effect, the Doha Mandate and its subsequent General Council Decision of 1 August 2004 restrict the possibility of opening discussions on these areas under the WTO as long as the Doha Mandate is ongoing.

RAMs and SVEs: Categories first recognized by the DDA

A first reference to the ‘small economies’⁸ can be traced back to the Ministerial Declaration emerging out of the 1998 Geneva Ministerial conference. On this occasion Ministers expressed deep concern “over the marginalization of least-developed countries and certain small economies.”⁹ Yet, the reference to a ‘Work Programme’ specific to SVEs¹⁰ first appeared in the Doha Ministerial Declaration¹¹.

⁷ See : https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm

⁸ During the Uruguay Round small economies undertook the same type of commitments as other developing countries and were not subject to any specific special and differential treatment

⁹ https://ecampus.wto.org/admin/files/Course_385/Module_1607/ModuleDocuments/TD_SEs-L2-R1-E.pdf

¹⁰ WTO members recognize SVEs as a group of members that face certain risks while not forming an official sub-category of members. A definition of SVEs is proposed under paragraph 13 of the 10 July 2008 revised draft NAMA modalities and under Annex I of the 6 December 2008 revised draft agriculture modalities, and footnote 11 (paragraph 65) and paragraph 157-159. The 2008 revised draft NAMA modalities propose in paragraph 13 under the section entitled “Small, Vulnerable Economies” that: “With the exception of developed Members, those Members having a share of less than 0.1 percent of world NAMA trade for the reference period of 1999 to 2001 or best available data as contained in document TN/MA/S/18).

¹¹ Paragraph 35 of the Doha Ministerial Declaration provides the following: “We agree to a work programme, under the auspices of the General Council, to examine issues relating to the trade of small economies. The objective of this work is to frame responses to the trade-related issues identified for the fuller integration of small, vulnerable economies into the multilateral trading system, and not to create a sub-category of WTO Members. The General Council shall review the work programme and make recommendations for action to the Fifth Session of the Ministerial Conference”. See: wt/min(01)/dec/1 (20 november 2001)

In 2002, WTO Members agreed on a Work Programme on SVEs in accordance with the Doha Declaration¹². The SVEs' Work Programme has been reaffirmed in later Ministerial Declarations¹³.

Similarly, the 'recently acceded Members' (RAMs) category was first given Ministerial recognition in the Doha Ministerial conference. The Chair of the Committee on Agriculture released a reference paper (2006) on the specific flexibility provisions given to RAMs, where he indicated that the starting point on the issue of RAMs is paragraph 9 of the Doha Ministerial Declaration¹⁴.

Other references to RAMs' treatment were developed in Ministerial Declarations and General Council Decisions subsequent to the Doha Ministerial Declaration (DMD), for example, paragraphs 58 of the Hong Kong Ministerial Declaration and paragraph 47 of the Decision adopted by the General Council on 1 August 2004 Agreed Framework¹⁵.

ORGANIZATION OF DDA NEGOTIATIONS AND THE RULES PERTAINING TO CONCLUDING THE DDA

Organization and management of the Doha Work Programme are addressed under Paragraph 45 of the Doha Ministerial Declaration.

Paragraph 25 of the DMD provides that: "45. *When the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results*" (emphasis added).

Moreover, Paragraph 48 of the Doha Ministerial Declaration provides that: "*Decisions on the outcomes of the negotiations shall be taken only by WTO members*" (emphasis added).

Based on these two paragraphs, it could be inferred that declaring the negotiations under the Doha Work Programme concluded requires an explicit decision from WTO Member Countries proclaiming that they addressed all areas of the negotiations and were able to

¹² Source: https://www.wto.org/english/thewto_e/minist_e/min11_e/brief_svc_e.htm. This Work Programme is carried out in dedicated sessions of the Committee on Trade and Development under a two-track approach endorsed by Ministers at the Hong Kong Ministerial Conference.

¹³ For example, Ministers decided to "reaffirm commitment to the Work Programme on Small Economies" in a decision taken at the Bali Ministerial Conference (WT/MIN(13)/33 WT/L/908). See also as example para. 41 of the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC, 22 December 2005).

¹⁴ Paragraph 9 of the Doha Ministerial Declaration provides that: "We note with particular satisfaction that this conference has completed the WTO accession procedures for China and Chinese Taipei. We also welcome the accession as new members, since our last session, of Albania, Croatia, Georgia, Jordan, Lithuania, Moldova and Oman, and note the extensive market-access commitments already made by these countries on accession. These accessions will greatly strengthen the multilateral trading system, as will those of the 28 countries now negotiating their accession. We therefore attach great importance to concluding accession proceedings as quickly as possible. In particular, we are committed to accelerating the accession of least-developed countries". A proposal submitted by RAMs to the Negotiating Group on Market Access stated that the proper treatment for RAMs has been on the agenda since the negotiations started back in 2001. http://jmcti.org/2000round/com/doha/tn/ma/tn_ma_w_083.pdf, visited 08.10.2015.

¹⁵ Paragraph 58 of the Hong Kong Ministerial Declaration states that: "We recognize the special situation of recently-acceded Members who have undertaken extensive market access commitments at the time of accession. This situation will be taken into account in the negotiations." Paragraph 47 of the Decision Adopted by the General Council on 1 August 2004 Agreed Framework (Annex A "Framework for Establishing Modalities in Agriculture" of WT/L/579) states that: "The particular concerns of recently acceded Members will be effectively addressed through specific flexibility provisions."

achieve- or not achieve- certain results. WTO Member Countries sitting in capacity of a Ministerial Conference are expected to take an explicit decision on how the 'adoption and implementation' of the results will proceed once results have been achieved in all areas of the negotiations included under the DMD.

Thus, the conclusion of the negotiations under the mandate established by the Doha Ministerial Declaration is linked to establishing results in all areas of the negotiations mentioned under the Declaration. The Doha Mandate is assumed to be concluded once results have been achieved in all areas of the negotiations. Otherwise, Ministers are required, in accordance with paragraph 45 of the DMD, to explicitly declare that the mandate would be considered concluded even though results were not achieved in all areas of the negotiations.

Paragraph 48 of the DMD reaffirms and complements paragraph 45, providing that decisions on the outcomes of the negotiations under the Doha Mandate shall be done through a decision "only by the WTO Members". Thus, no other statement, including a statement by the Chair of a Ministerial Conference or Chair of a General Council, could declare an end of the Doha Mandate.

MINISTERIAL DECLARATIONS: VALUE, PROCESS, AND CONTENT

According to the WTO rules, a Ministerial Declaration is a declaration of the highest decision-making body of the WTO, and embodies a political mandate and further guidance regarding the round of negotiations. The legal basis for Ministerial Declarations is imbedded in Article IV:1 of the WTO Agreement (entitled Structure of the WTO)¹⁶. Article IV.1 of the WTO Agreement sets the general decision-making power of the Ministerial Conference, and provides the Ministerial Conference with "*the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member*".

Ministerial Declarations are instruments that reflect a text negotiated among WTO Members. For adoption purposes, the Ministerial Declaration is supposed to be included among the legal texts that the Chair of a Ministerial Conference gavel for adoption purposes.

A Ministerial Declaration can be altered only by another Ministerial Declaration or decision of the General Council¹⁷ conducting the functions of the Ministerial Conference in the intervals between ministerial meetings. In case a Ministerial Conference does not result in a Ministerial Declaration, the previous declarations continue to operate as the basis for the way forward in the negotiations.

¹⁶ Article IV.1 of the WTO Agreement provides that: "There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement".

¹⁷ The General Council is granted the authority to conduct the functions of the Ministerial Conference in the intervals between meetings pursuant to Article IV:2 of the WTO Agreement.

Chair's texts

A Chair's statement delivered at a Ministerial Conference or General Council does not carry a specific legal status under the decision-making rules of the WTO. Nevertheless, even though a Chair's summary report is not legally binding, it can be referred to later on in the negotiations and could have an important persuasive impact on the direction of negotiations. Accordingly, WTO Member Countries ought to give careful attention to a possible Chair's text or statement produced at a Ministerial Conference level, its content, and the process in which it would be presented or read out.

The legal status and interpretative role of a Chair's text could vary depending on its form, substance and whether it is referenced in another WTO legal document of higher value, or whether it is presented as representing consensus among the WTO Membership.

In some cases, a Chair's statement could be 'explicitly agreed' to by a competent decision-making body of the WTO¹⁸, such as the General Council or Ministerial Conference. Some academic references consider that a Chair's statement that is

ISSUES PERTAINING TO PROCESS - AT THE MINISTERIAL CONFERENCE

- In Nairobi, the negotiations on the ministerial declaration should also continue in the **Committee of the Whole**. It should not be taken into small group discussions where the majority of Members are excluded. The principles of full participation, inclusiveness, transparency must be respected.
- This same process should also be carried out for the 'deliverables' that may still be negotiated in Nairobi - these discussions should take place in the Committee of the Whole (which is the Ministerial equivalent of Rm W).
- If the discussions on 'deliverables' take place in smaller group configurations, it is important that meetings are nevertheless open to all Members that are interested in attending. Hence notices must be given to all Members so that they too have the opportunity to attend these meetings.
- The constraints of small delegations must be taken into account and there should not be critical meetings taking place in parallel on issues that are important to all Members, especially small delegations.
- Members are free to choose to decide who they want to represent them at a Ministerial Conference meeting, and how many advisers they might need in a meeting. It is against the rules of procedure to have meetings where the number of representatives is limited and this could severely handicap a Member.
- Rule 8 of the 'Rules of Procedure for Sessions of the Ministerial Conference' (WT/L/161) notes that 'Each representative may be accompanied by such alternates and advisers as the representative may require'. The WTO Secretariat cannot decide that any meeting is limited to Minister only or even Minister + 1. In the past, delegations have asked for at least Minister + 2.
- Members should not be surprised by new texts when they arrive at a meeting. Texts for discussion must be circulated well in advance. Rule 23 (WT/L/161) notes that 'Proposals and amendments to proposals shall normally be introduced in writing and circulated to all representatives not later than twelve hours before the commencement of the meeting at which they are to be discussed'.

¹⁸ See: Henning Grosse Ruse-Khan, (2007) "The Role of Chairman's Statements in the WTO". For example, the case of the Chairman's statement on waivers and accessions made during a General Council meeting in November 1995, clarifying the relationship between Article IX.1, IX.3, 4, and XII.2 of the WTO Agreement, was explicitly agreed.

'explicitly agreed' could amount to a "decision" under Article IV.1 and Article IX.1 of the WTO Agreement. In other cases, a Chair's statement could be 'taken note of' by the WTO Members. Such references do not carry any legal weight and merely provide evidence that the intervention has been made in the General Council or Ministerial Conference and that the Council or Conference has noticed it¹⁹. These differentiations could carry significance in case the panel or Appellate body is to refer to the document.

For example, at the 8th Ministerial Conference that took place in Geneva (2011), the Chair concluded with a statement in two parts: a consensus statement on "elements for political guidance" (WT/MIN(11)/W/2, dated 1 December 2011), and a factual summary of points that Ministers made in the meeting²⁰. The Chair noted in the opening section of his concluding statement that "Neither the Elements nor my summary are legally binding" (WT/MIN(11)/11, 17 December 2011). Yet, intentional separation of the document into a consensus statement and a factual summary implies that each carries a different weight.

It is also important to note that the legal weight of a Chair's statement could be altered whenever it is referenced in other legal instruments of the WTO, such as the reference made to the Chair's statement delivered at the 8th Ministerial Conference in the Bali Ministerial Declaration (para. 1.12 of WT/MIN(13)/DEC/W/1/Rev.1).

In terms of procedure, a Chair's report does not apparently involve the formal participation of the Member States. Yet, given its importance, past Ministerial Conferences have shown that some developed Members have more influence than other Members over the formulation of the Chair's statements/reports. Developing countries however, have in the past asserted influence over the content of the Chairman's statement, but such a situation has not been without struggle or difficulty. For example, the Chairman's statement delivered during the Closing Session of the Doha Ministerial Conference was made upon the absolute insistence by some developing Members that an elaboration be made by the Chair to define 'explicit consensus' and to clarify the scope of the implementation issues negotiations.

Reaffirmation of the DDA in all Ministerial Conferences since the Doha Ministerial Conference (2001)

Since the Doha Ministerial Conference in 2001, subsequent Ministerial Declarations and General Council Decisions have reaffirmed the Doha Mandate. Following are examples of language that has been adopted in this regard during WTO Ministerial Conference or foras of the WTO.

Cancun Ministerial Statement (WT/MIN(03)/20, 23 September 2003):

Paragraph 3: *"More work needs to be done in some key areas to enable us to proceed towards the conclusion of the negotiations in fulfilment of the commitments we took at Doha"*.

Paragraph 6: *"Notwithstanding this setback, we reaffirm all our Doha Declarations and Decisions and recommit ourselves to working to implement them fully and faithfully"*.

¹⁹ See: Henning Grosse Ruse-Khan, (2007) "The Role of Chairman's Statements in the WTO", *Journal of World Trade* 41(3): 475-534, p. 514

²⁰ https://www.wto.org/english/thewto_e/minist_e/min11_e/min11_e.htm

July 2004 Framework General Council Decision:

"The [General Council] reaffirms the Ministerial Declarations and Decisions adopted at Doha and the full commitment of all Members to give effect to them".

Hong Kong Ministerial Declaration (WT/MIN(05)/DEC, 22 December 2005):

Paragraph 1: *"We reaffirm the Declarations and Decisions we adopted at Doha, as well as the Decision adopted by the General Council on 1 August 2004, and our full commitment to give effect to them. We renew our resolve to complete the Doha Work Programme fully and to conclude the negotiations launched at Doha successfully in 2006".*

Chair's summary of the 7th ministerial conference (WT/MIN(09)/18, 2 December 2009)

"...First, the Round. There was strong convergence on the importance of trade and the Doha Round to economic recovery and poverty alleviation in developing countries. The development dimension should remain central to the Round and particular attention should be paid to issues of importance to developing countries. Ministers reaffirmed the need to conclude the Round in 2010 and for a stock-taking exercise to take place in the first quarter of next year. ...It was widely acknowledged that the importance of the WTO extends beyond the Round. It was also noted that finishing the Round - a stimulus package with limited fiscal cost - is vital in order to ensure that the WTO remains relevant..."

Chairman's Concluding Statement, 8th Ministerial Conference (2011), specifically under the first part that was based on consensus "Elements for Political Guidance":

"[T]he Doha mandate remains as formally agreed by Members in its entirety and neither the consensus Elements for Political Guidance in Part I, nor the non-exhaustive summary in Part II of this statement, change or reinterpret it."

"Despite this situation, Ministers remain committed to work actively, in a transparent and inclusive manner, towards a successful multilateral conclusion of the Doha Development Agenda in accordance with its mandate".

Bali Ministerial Declaration (WT/MIN(13)/DEC, 11 December 2013):

Part III on post-Bali work, first paragraph: *"We reaffirm our commitment to the WTO as the pre-eminent global forum for trade, including negotiating and implementing trade rules, settling disputes and supporting development through the integration of developing countries into the global trading system. In this regard, we reaffirm our commitment to the Doha Development Agenda, as well as to the regular work of the WTO".*

Part III on post-Bali work, second paragraph: *"We take note of the progress that has been made towards carrying out the Doha Work Programme, including the decisions we have taken on the Bali Package during this Ministerial Conference. These decisions are an important stepping stone towards the completion of the Doha Round. We reaffirm our commitment to the development objectives set out in the Doha Declaration, as well as to all our subsequent decisions and declarations and the Marrakesh Agreement Establishing the WTO".*

The challenges associated with the ‘Singapore Issues’ and other ‘New Issues’ (1)

- As noted on in the first section of this paper, the July 2004 Framework General Council Decision contains a decision by Members not to negotiate investment, competition, and transparency in government procurement under the Doha Round.
- Experts considering the challenges associated with discussing the Singapore issues at the WTO pointed out that these are ‘non-trade’ issues that do not belong to the WTO. For example, principles such as national treatment that were created for a regime dealing with ‘trade issues’ may not be suitable when applied to ‘non-trade issues’. If these issues are brought into the WTO, and WTO principles are applied to them, developing countries will be at a great disadvantage, undermining their economic sovereignty, and their ability to make national policies of their own regarding economic, financial, social and political issues²¹. Moreover, it was noted that “the discourse on competition policy entirely in terms of the traditional WTO framework of market access, national treatment, transparency etc. is prejudicial to [developing countries’] development interests”²².
- It is worth noting that developed countries might like to bring many non-trade issues in the WTO, not because it would strengthen the trade system, but because they would like to make use of the dispute settlement and enforcement system of the WTO, including through cross-retaliation as an enforcement mechanism²³.
- The exercise undertaken in the dedicated working groups on Relationship between Trade and Investment (between June 1997 and June 2003), Interaction between Trade and Competition Policy (between July 1997 and May 2003) and Transparency in Government Procurement (between May 1997 and June 2003) showed that there are very wide gaps in the approaches among WTO Members on these issues, in addition to disagreement and lack of clarity in regard to the substance, implications and rationale of prospective multilateral rules in these areas.
- This is why, the WTO membership, upon a push from developing countries, came to the agreement to freeze these discussions in 2004. Whilst the DDA is on-going, the July Framework on Investment, Competition and Transparency in Government Procurement sets a standstill on the possibility of tackling the Singapore issues under the WTO. Accordingly, if some Members want to pursue negotiations on these issues, they cannot do so unless there is consensus to overturn the July Framework language.

²¹ Martin Khor “Key Points on Positions for New Issues and New Round in the WTO” (2000)

²² Ajit Singh and Rahul Dhumale (1999) “Competition Policy, Development and Developing Countries”, South Centre, page 17.

²³ Martin Khor “Key Points on Positions for New Issues and New Round in the WTO” (2000).

OVERVIEW OF DISCUSSIONS PERTAINING TO A POTENTIAL NAIROBI MINISTERIAL DECLARATION

A facilitators-led process

In the run up towards the Ministerial Conference in Nairobi, the discussions of the Ministerial Declaration's content were handled in multiple tracks. The Director General appointed three Ambassadors (Ambassadors of Kenya, Colombia, and Norway) to facilitate the process of gathering inputs from Members. The three facilitators held closed meetings with Member countries and Members representing groupings of countries (in total 58 delegations were consulted, some of which represented groups. See JOB/TNC/55, 29 October, 2015). On the 29th of October 2015, the facilitators issued a report entitled "Tenth Ministerial Conference- Consultations on Ministerial Declaration" (JOB/TNC/55), through which they sought to summarize what they heard from delegations.

The way the facilitators formulated the report raised several concerns. The facilitators avoided clarifying the weight behind the different elements they convey in their report. These include two main areas of convergence: (1) reaffirming the commitment to the Doha Development Agenda, and (2) rejecting 'new issues' (Some delegations conditioned tackling such 'new issues' on credible and successful conclusion of the DDA and on consensus among the membership). Masking the proportion of the Membership behind certain positions in effect undermines the weight of developing countries' voice in the process of preparing the outcome document for the Nairobi Ministerial. Some of the problematic aspects of the facilitators' report are that it goes a long way listing 'new issues', which are presented as issues that "could be pursued after Nairobi" or as "recurring issues" (See para. 4.17 of JOB/TNC/55). Yet, because the report did not reflect a weighted opinion, it did not clarify how many delegations have called for such 'new issues'.

The report notes at the same time that "Delegations expressed different and often divergent views on whether non-DDA issues should be included in any post-Nairobi work (para. 4.15 of Job/TNC/55) and that "some delegations said that no new issues should be introduced before the conclusion of the DDA and stressed that even then, they could only be considered on an exploratory basis and for some, by explicit consensus" (para. 4.15 of Job/TNC/55).

Challenges associated with the 'Singapore Issues' and other 'New Issues' (2)

The scope of the term 'new issues' is not clear; thus caution is needed with this term. The terms 'new issues' were not used in previous Ministerial Declarations or decisions taken by WTO members. The use of these terms could potentially provide very broad grounds to expand the exploratory or negotiations' mandate of the WTO. This would extend beyond addressing 'investment' 'competition' and 'government procurement', which are usually referred to as 'Singapore Issues' or 'new issues'²⁴. It could include extensive rules on e-commerce, energy and trade, among other issues.

²⁴ The Singapore Ministerial Conference held in December 1996 issued a Ministerial Declaration that established working group on the relationship between trade and investment, one on the interaction between trade and competition policy, and another to conduct a study on transparency in government procurement practices. See paragraphs 20 and 21 of the Singapore Ministerial Declaration.

WTO Members' Submissions

WTO Member Countries submitted proposed text for the content of the Ministerial Declaration, which was compiled by the WTO secretariat and discussed in an open configuration of heads of delegations and experts, referred to as 'Room W', where all Members take part. Based on the submissions by Members, it was clear that the majority of WTO Member Countries are calling for a clear reaffirmation of the Doha mandate.

The African Group (WT/MIN(15)/W/7), LDC Group (WT/MIN(15)/W/18), ACP Group (WT/MIN(15)/W/2), and China, Ecuador, India, Indonesia, South Africa and Venezuela, through a collective submission (WT/MIN(15)/5), asked for the recalling of the Declarations and Decisions adopted at Doha and at the Ministerial Conferences held since then and reaffirmed full commitment to give effect to them.

Developing countries included in their submission language "reaffirming the Declarations and Decisions adopted at Doha, and all subsequent Declarations and Decisions notably the Decision adopted by the General Council on 1 August 2004; the Hong Kong Declaration of 2005 and the Bali Ministerial Declaration of 2013"²⁵.

Developing countries also called for "proceeding towards the full, successful and multilateral conclusion of the negotiations pursuant to paragraphs 45, 47 and 48 of the Doha Ministerial Declaration in fulfilment of the commitments [taken] at Doha" (See: Joint Proposal by China, Ecuador, India, Indonesia, South Africa and Venezuela [WT/MIN\(15\)/5](#) and African Group submission [WT/MIN\(15\)/W/7](#) and LDC submission [WT/MIN\(15\)/W/18](#)).

Challenges associated with the 'Singapore Issues' and other 'New Issues' (3)

- Experts have noted that, for agreeing on any new issues to be brought into the WTO, developing countries must insist on a strict criteria²⁵, including the following:
 - o That the issue be a trade issues appropriate of the multilateral trade rules;
 - o That the WTO is the appropriate venue, and there are not venues that are more appropriate;
 - o That the issue is sufficiently 'mature', in that Members have an understanding of it and how it related to WTO and their interests;
 - o If brought into the WTO, the issues and how it will be interpreted be clearly to the interest of developing countries and the majority of the membership;
 - o That there must be consensus of all Members that the issues should be brought in, and how it should be brought in.

Developing countries stressed as well "strong resolve to complete the DDA as has been reaffirmed by our Leaders in the Sustainable Development Goal 17.10"²⁷. In September 2015, World Leaders adopted the Sustainable Development Goals (See: General Assembly Resolution A/RES/70/1), which in Goal 17.10 included a commitment to "[P]romote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system

²⁵ Martin Khor "Key Points on Positions for New Issues and New Round in the WTO" (2000)

²⁶ See: Joint Proposal by China, Ecuador, India, Indonesia, South Africa and Venezuela [WT/MIN\(15\)/5](#) and African Group submission [WT/MIN\(15\)/W/7](#) in addition to similar language in the ACP submission [WT/MIN\(15\)/W/2](#)

²⁷ See: African Group [WT/MIN\(15\)/W/7](#) and collective submission [WT/MIN\(15\)/5](#)

under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda”.

On the other hand, submissions by two Member Countries made a direct reference to ‘new issues’. Turkey’s submission referred to “the evolving nature of the global economy” and “the necessity to explore the ways to address new issues and challenges within the Multilateral Trading System, without compromising the negotiations on the existing issues”²⁸. Korea’s submission referred to “tak(ing) on, at least on an exploratory basis, any trade-related issues deemed necessary in order to stay relevant and in keeping with the evolution of the global economy” and to “explor(ing) of such issues in a manner that does not undermine the ongoing work to deal with outstanding issues”²⁹.

Facilitators’ draft text

The three Ambassadors (Ambassadors of Kenya, Colombia, and Norway), in their capacity as facilitators of the Members’ discussions in regard to the tenth Ministerial Conference Declaration presented a ‘consolidated draft by the facilitators’ (RD/WTO/7*, 27 November 2015). In a disclaimer in the cover note to the report, the facilitators pointed that their report does not contain language on the “reaffirmation of the DDA and instructions on the way forward” and on ‘New Issues’.

The facilitators’ draft was organized in three parts; Part I is a preamble and speaks of the WTO’s 20th anniversary, its achievements and challenges, Part II is supposed to include a listing of the decision adopted in Nairobi, and Part III is supposed to deal with the way forward in the negotiations. Members had asked to pursue an architecture for the Ministerial Declaration that is similar to the one adopted for the Bali Ministerial Declaration, which was also organized in three such parts.

Despite the facilitators’ disclaimer, the report did include language that implicitly tackles the future of the DDA and engagement with ‘New Issues’. This text included the following language:

“23. We welcome the advances made in the Doha Development Agenda. We regret that it has not been possible to reach agreement on all areas of the negotiations, including Agriculture, NAMA, Services, Rules, including fisheries subsidies, and TRIPS. In particular, we note the importance of agriculture to many WTO Members, including LDCs. We will therefore address all aspects of agriculture reform as a matter of priority.

24. In reaffirming the centrality of development, we agree that the principles of Special and Differential Treatment and Less Than Full Reciprocity for developing and least-developed country Members shall remain integral parts of the WTO’s future work” (See paragraphs 23 and 24 of RD/WTO/7.*

Read together, and without accompanying language on reaffirmation of the DDA, paragraphs 23 and 24 imply an agreement among Members that they have ended the Doha Mandate and are taking steps towards future work in the WTO without the Doha

²⁸ See Turkey WT/MIN(15)/W/16

²⁹ See: Korea WT/MIN(15)/W/9

Development Agenda. The language of paragraph 23 indicating “regret that it has not been possible to reach an agreement on all areas of the negotiations...” gives the impression that members have agreed that no progress is possible on these areas, without giving any indication that a process will be pursued to achieve progress in these areas, as was the case with previous Ministerial Declarations. Such language as used in paragraph 23 did not appear in any of the language submissions by Members.

It is worth noting that paragraph 45 of the Doha Ministerial Declaration on ‘Organization and management of the work programme’ provided that “...When the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results”. As noted in previous sections, this implies that an explicit agreement should be reached among Members on the status of negotiations in all areas under the DDA before ending the Doha Round is possible. The language used in paragraph 23, specifically the reference to inability to “to reach an agreement on all areas of the negotiations”, can be considered to be such a step or stand by Members.

Paragraph 24 selects among the principles of the DDA, but does not reaffirm the DDA in its entirety. It also sets the grounds for moving into future work of the WTO beyond the DDA.

The facilitators also said that the text will not have language on New Issues. However, paragraph 28 of the facilitators’ report provides that “*We reaffirm the need to ensure that Regional Trade Agreements (RTAs) remain complementary to, not a substitute for, the multilateral trading system. We agree to enhance the role of the Committee on Regional Trade Agreements so as to map the systemic implications of RTAs and their coherence with WTO rules. We deem it necessary to conduct a study on the systemic implications of RTAs, modalities of which will be decided by the General Council*”.

Being placed in Part III of the proposed Ministerial Declaration, which is supposed to deal with the future of the WTO negotiations, this language could present a subtle platform for starting to introduce ‘new issues’ emerging under the RTAs into the WTO (such as GATS-plus, TRIPS-plus rules, investment, competition etc). Furthermore, the language of the proposed paragraph 28 refers to “enhance(ing) the role of the Committee on RTAs so as to map the systemic implications of RTAs and their coherence with WTO rules”, and ‘conduct a study on the systemic implications of RTA”.

It is worth noting that during the 8th Ministerial Conference, similar language was presented by a Member³⁰, which was of concern to developing countries, leading them to rejecting it. Developing countries were worried that a mandate to address the systemic coherence of RTAs with the WTO rules could be an additional step towards introducing ‘new issues’ or multilateralizing the commitments under RTAs. The WTO secretariat has already undertaken

³⁰ A proposal by Australia in MC8 read as follows: “*Ministers notes the growth and increasing prominence of RTAs in world trade, and saw value in WTO Members assessing the implications of this for the multilateral trading system. Ministers, noting that the Committee on Regional Trade Agreements (CRTA) has the mandate to consider the systemic implications of RTAs for the multilateral trading system (WT/L/127), therefore direct the CRTA to undertake a work programme, using factual reports to be prepared by the Secretariat, to consider the cross-cutting elements, trends, and practices in RTAs. This work programme could eventually help Members reflect on the implications for the multilateral trading system and gather collective views on negotiating RTAs that uphold the multilateral trading system. The results of this work programme will be reported to the Ninth Ministerial Conference of the WTO*”.



several studies about different aspects of RTAs, including commitments in services, rules of origin etc.

Thus, despite the facilitators' disclaimer in the opening section of their draft, paragraphs 23 and 24 of their report could in effect imply an end of the DDA if they were accepted as stand-alone without an accompanying reaffirmation of the DDA, while paragraph 28 could potentially open the way for 'new issues' to be brought into the WTO.

ANNEX: TERMS, PHRASEOLOGY, AND THEIR IMPLICATIONS

The following section includes comments on elements of language that could potentially be proposed for a Ministerial Declaration emerging out of Nairobi and their implications:

“This does not conclude the single undertaking of the Doha round”.

- ➔ This language is a fact-stating sentence. It does not give an indication that work will continue towards concluding the single undertaking of the Doha round. It does not provide a way for future work under the Doha mandate.

“On the future of the Doha Development Agenda and the negotiating function of the WTO, we take note of significantly different perspectives, which remain very difficult to reconcile”.

- ➔ Including such language in a Ministerial Declaration documents disagreement over the Doha mandate, whereby consensus over the Doha Mandate does not hold anymore. If it is included in a Ministerial Declaration, it could have the effect of undermining the Doha mandate.
- ➔ Even a chair’s text resulting from the Ministerial conference, which reflects disagreement over the mandate, could carry problematic implications vis-à-vis the Doha Mandate, as it would set the context post-Nairobi.

“We all agree that we should spend more time after Nairobi on the remaining issues”.

- ➔ This statement does not define the context within which the ‘remaining issues’ will be addressed. Moreover, “spend more time” does not imply a clear objective, such as concluding or completing the work on the remaining issues. Previous ministerial declarations have used other operational terms, such as:
 - “to proceed towards the conclusion of the negotiations” (Cancun Ministerial Statement WT/MIN(03)/20, 23 September 2003);
 - “complete the Doha Work Programme fully and to conclude the negotiations launched at Doha successfully in 2006 (Hong Kong Ministerial Declaration WT/MIN(05)/DEC, 22 December 2005)

“We commit to implement all elements of the Bali package and to swiftly define a WTO work programme on the remaining issues of the Doha Development Agenda to get negotiations back on track”³¹.

- ➔ This does not mean recommitting to the DDA if there is no accompanying language reaffirming the Doha Declaration or the need to complete negotiations under the

³¹ G20 Leaders’ Communiqué in 2014, <https://www.whitehouse.gov/the-press-office/2014/11/16/g20-leaders-communicu>

DDA. This effectively means the Membership is entering a new ‘work programme’ or Round

“We agree that the outstanding/ remaining issues of the DDA should continue to be addressed in the WTO”

→ **Dictionary meaning of ‘outstanding’ is:** not yet settled, or resolved, or dealt with³² (Synonyms: to be done, unattended to, unfinished, incomplete, left, remaining, pending, ongoing).

→ **Dictionary meaning of ‘remaining’:** Still existing, present, or in use; surviving: Not yet dealt with, or resolved, Still to happen³³.

→ **“the use of these terms will carry different implications taking into consideration whether they are used in a sentence that ‘reaffirms the Doha mandate’ or not.** Reference to ‘outstanding issues’ in a context that does not reaffirm the commitment to concluding the DDA could imply that Doha mandate is closed and the issues standing out of the mandate, or unfinished yet, should be addressed under a different framework. This implies that the issues will be tackled outside the Doha mandate. The use of the term ‘remaining’ in such a context is also problematic. The differences between the two will depend on how they are used within the broader sentence or context. For example, reference to “Members agree to conclude the remaining issues within the DDA” would be better than “Members agree to address the outstanding issues in the DDA”.

Differences between: Doha mandate/ Doha framework/ Doha issues

→ These are different ways to refer to the Doha work programme and they carry different implications. Reference to ‘Doha issues’ implies that issues addressed under the Doha mandate are going to be pursued but not necessarily within the Doha mandate.

→ ‘Doha mandate’ and ‘Doha framework’ seem similar terms, but are not the same. Reference to ‘Doha framework’ is not as clear as reference to ‘Doha mandate’. In dictionary terms, ‘framework’ is taken to mean: “A basic structure underlying a system, concept, or text³⁴ or a set of beliefs, ideas or rules that is used as the basis for making judgements, decisions. Thus, it could be argued that reference to the ‘Doha framework’ falls short of a full reaffirmation of the Doha mandate. For example, special and Differential Treatment could be argued to be part of the framework of the DDA. Also the fact that the negotiations of the DDA had agriculture, NAMA, Services, S&D as key pillars could also be argued as part of the ‘framework’ of the DDA. But this does not mean reaffirming the DDA in its entirety.

³² <http://www.oxforddictionaries.com/definition/english/outstanding>);

³³ See: <http://www.oxforddictionaries.com/definition/english>)

³⁴ See: <http://www.oxforddictionaries.com/definition/english/framework>

“We reaffirm the **architecture** of the DDA”

- ➔ Dictionary meaning of Architecture: design and structure. This wording does not capture the DDA in its entirety.

“Addressing” vs “concluding”

- ➔ ‘Addressing’ falls short of ‘concluding’, and does not necessarily mean that members have the intention to conclude or fulfil the negotiation mandate on the concerned issue.

“Explicit consensus”

- ➔ This term was clarified in a Chairman’s statement at Doha (2001). “...In a statement made prior to the adoption of the Doha Declaration, the Chairman of the Conference, Mr. Youssef Hussain Kamel (Qatar), expressed his understanding that the requirement in paragraph 23 for a decision to be taken, by explicit consensus, on the modalities for negotiations before negotiations on competition policy and other "Singapore issues" could proceed, gave ‘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 a explicit consensus’.³⁵

³⁵ See WTO Summary Record of the Ninth Meeting, doc. WT/MIN(01)/SR/9

