

## KEY SUBSTANTIVE AND PROCESS ISSUES ARISING FROM THE WTO'S NAIROBI MINISTERIAL CONFERENCE (MC10)

Despite concerted attempts by major trading partners to bury the WTO's Doha Development Agenda (DDA) in Nairobi, they were unsuccessful. Part I of this paper provides a legal reading of the Nairobi Ministerial Declaration (NMD) as it pertains to the DDA, and also discusses other legal questions regarding the conclusion of the DDA.

Part II looks at the area of 'Other Issues' or new issues currently outside the Doha Development Agenda which some Members are keen to commence discussions and negotiations on and provides a legal reading of the NMD in relation to these 'other issues'.

Part III of this paper focuses on process and internal transparency issues during the Nairobi Ministerial Conference, drawing largely from the statements of WTO negotiators after the Ministerial.

**On the DDA:** The paper concludes that in as far as there is no decision by the General Council or Ministerial Conference to conclude the DDA, the DDA mandates and Decisions continue. The majority of developing countries have clearly signalled their wish to continue the DDA negotiations. This is in line with the acknowledgement by Ministers of the 'strong legal structure of this Organisation' (NMD, para 30).

**On 'Other Issues':** There is no agreement in the NMD that there will be the commencement of discussions on 'other issues'. The majority of developing countries are the 'others (who) do not' wish to identify and discuss other issues for negotiations. On the three Singapore issues which include investment, there is no possibility for discussion or work *within* the WTO during the Doha Round unless there is a Decision taken by the Membership that overrides paragraph 1g of the 2004 July Framework General Council Decision.

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## **Introduction**

Despite concerted efforts by major trading partners to bury the WTO's Doha Development Agenda (DDA) in Nairobi, they were unsuccessful. What exactly did Ministers say in the Nairobi Ministerial Declaration (NMD)<sup>1</sup> about the DDA? Part I of this paper provides a legal reading of the NMD as it pertains to the DDA, and also discusses other legal questions regarding the conclusion of the DDA.

Part II looks at the area of 'Other Issues' or issues currently outside the Doha Development Agenda which some Members are keen to begin discussions on and eventually negotiations. This section provides a legal reading of the NMD in relation to these 'other issues'.

Part III of this paper focuses on process and internal transparency issues during the Nairobi Ministerial Conference, drawing largely from the statements and comments of WTO negotiators, including those delivered at the first Trade Negotiations Committee and General Council meetings after Nairobi.

## **I. DOHA DEVELOPMENT AGENDA (DDA)**

### **1) *There was no consensus in Nairobi to close the Round, hence legally the Doha Round is still on-going***

- (i) Decisions at the WTO must be taken by consensus (Marrakesh Agreement Article IX.1<sup>2</sup>). The Doha Round remains on-going until there is consensus to conclude it. Despite efforts by some Members, there was no consensus to conclude the Round in Nairobi.

The Nairobi Ministerial Declaration states in para 30 that "*many Members reaffirm the Doha Development Agenda, and the Declarations and Decisions adopted at Doha and at the Ministerial Conferences held since then, and reaffirm their full commitment to conclude the DDA on that basis. Other Members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address the negotiations*" (WT/MIN(15)/Dec, 21 December 2015).

- (ii) Reinforcing the point on the importance of abiding by the consensus rule is the last sentence in para 30 of the NMD: "*We acknowledge the strong legal structure of this Organisation*" i.e. the consensus rule in decision-making (Marrakesh Agreement Art IX.1) must be adhered to. Without consensus to conclude the DDA, the DDA continues.

### **2) *The NMD does reaffirm the existence of the DDA***

The NMD does reaffirm the existence of the DDA:

- (i) Para 23 of the NMD says "*We welcome the progress in the DDA, which is embodied in the following Decisions and Declarations we have adopted at our Tenth Session...*".

According to the Oxford dictionary, "*Progress*" means "*forward or onward movement towards a destination*". So there is an implicit reaffirmation that Members are still working towards the conclusion of the Doha negotiations.

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<sup>1</sup> Nairobi Ministerial Declaration, adopted on 19 December 2015, WT/MIN(15)/Dec  
[https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/mindecision\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm)

<sup>2</sup> "*The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.*"



- (ii) In para 12, the NMD states that “At our Fourth Session, we launched for the first time in the history of the GATT and the WTO, a Development Round; the Doha Work Programme”. There was no later mention of any conclusion of the Round.

**3) *What are the conditions needed to Conclude the Round? These conditions were not fulfilled in Nairobi***

The Doha Declaration provides the conditions to be fulfilled for the completion of the DDA negotiations:

Para 45 states 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”.*

Para 48 states that

*“Decisions on the outcomes of the negotiations shall be taken only by WTO Members”.*

Hence at least 3 conditions must be fulfilled for the conclusion of the Round:

- a) A Special Session of the Ministerial Conference must be held and the purpose of this Special Session is for Ministers to declare the Round concluded.
- b) Decisions will be taken regarding the ‘adoption and implementation of those results’.
- c) Decisions on the outcomes of negotiations must be taken only by WTO Members.

These conditions were not met in Nairobi.

**4) *How was the Uruguay Round concluded?***

The Punta del Este Declaration launching the Uruguay Round also stipulated a similar process as Para 45 of the Doha Declaration regarding the need for GATT Contracting Parties to decide on the implementation of the outcomes of the negotiations.

Punta del Este Declaration Launching the Uruguay Round:

*“IMPLEMENTATION OF RESULTS UNDER PARTS I AND II*

*When the results of the Multilateral Trade Negotiations in all areas have been established, Ministers meeting also on the occasion of a Special Session of CONTRACTING PARTIES shall decide regarding the international implementation of the respective results.”*

When the Uruguay Round negotiations were completed, Para 6 of the Marrakesh Ministerial Declaration concluding the Uruguay Round establishes a Preparatory Committee to lay the ground for entry into force of the WTO Agreement etc.

**Para 6 of Marrakesh Ministerial Declaration:** *“Ministers declare that their signature of the “Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations” and their adoption of associated Ministerial Decisions initiates the transition from the GATT to the WTO. They have in particular established a Preparatory Committee to lay the ground for the entry into force of the WTO Agreement and commit themselves to seek to complete all steps necessary to ratify the WTO Agreement so that it can enter into force by 1 January 1995 or as early as possible thereafter.”*

Para 8 of the Marrakesh Ministerial Declaration also formally declared the Uruguay Round concluded: *“With the adoption and signature of the Final Act and the opening for acceptance of the WTO Agreement,*

*Ministers declare the work of the Trade Negotiations Committee to be complete and the Uruguay Round formally concluded.”<sup>3</sup>*

**5) *At the conclusion of the Doha Round, what is needed for the negotiated results to be legally binding?***

Article 1.1 of the WTO’s Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) says that the rules and procedures of the DSU apply to

- The ‘covered agreements’:
  - Annex 1A (Multilateral Agreement on Trade in Goods)
  - Annex 1B (General Agreement on Trade in Services)
  - Annex 1C (TRIPS)
  - Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes
  - Annex 4: Plurilateral Trade Agreements (depending on the terms of each agreement); and
- The Agreement Establishing the World Trade Organisation.

To have strong legal value, any negotiated outcome must either find its way into the WTO rule-book as a ‘covered agreement’ (including the modification of schedules); an authoritative interpretation; or a waiver<sup>4</sup>. These are the avenues a negotiated outcome has strong legal value or is legally enforceable under the DSU:

- i) Article IX.2 of the Marrakesh Agreement on authoritative interpretations
- ii) Article IX.3 of the Marrakesh Agreement on waivers
- iii) modification of schedules in accordance with provisions allowing for such modification in the covered agreements (outside of an Art X amendment procedure)
- iv) Article X of the Marrakesh Agreement on amendments.

*Article IX.2 of the Marrakesh Agreement on authoritative interpretations*

The scope of what can be considered an Article IX.2 authoritative interpretation is quite limited. This is not meant to lead to changes in Members’ rights and obligations under the ‘covered’ WTO Agreements.

According to the *EC – Bananas – III* dispute, the Appellate Body discussed methods that Members may use to interpret or modify WTO law provided for in the WTO Agreement, and considered that a multilateral interpretation under Article IX:2 can be likened to a “subsequent agreement” in the sense of Article 31(3)(a) of the Vienna Convention (addressed in the Chapter on the DSU):

*“Article IX:2 of the WTO Agreement sets out specific requirements for decisions that may be taken by the Ministerial Conference or the General Council to adopt interpretations of provisions of the Multilateral Trade Agreements. Such multilateral interpretations are meant to clarify the meaning of existing obligations, not to modify their content. Article IX:2 emphasizes that such interpretations ‘shall not be used in a manner that would undermine the amendment provisions in Article X’.”<sup>5</sup>*

<sup>3</sup> [https://www.wto.org/english/docs\\_e/legal\\_e/marrakesh\\_decl\\_e.htm](https://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm)

<sup>4</sup> Ministerial declarations and decisions have also been taken into consideration by panels and the Appellate Body. They have some legal weight and in particular, they contribute to the context for the purposes of interpreting a covered Agreement. However, they do not have the same legal effect as covered Agreements.

<sup>5</sup> WT/DS27/AB/RW2/ECU, Appellate Body Report, *EC – Bananas III* (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US), para. 393.

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*Article IX.3 on waivers*

Article IX.3 allows in 'exceptional circumstances' for the Ministerial Conference to decide to waive an obligation imposed on a Member by one of the covered agreements.

*Modification of schedules (outside of an Art X amendment procedure)*

Schedules are an integral part of the GATT and GATS, with the same legal weight as any other line or clause in the covered Agreements. As such, according to the WTO Secretariat's 'Handbook on Reading Goods and Services Schedules'<sup>6</sup>, schedules '*can only be changed (or 'unpicked') with some difficulty; in effect, by the same kind of decision that it takes to make changes to the treaty itself*'. Article XXX of the GATT says that in relation to goods '*Except where provision for modification is made elsewhere in this Agreement, amendment to the provisions of Part I of this Agreement... shall become effective upon acceptance by all the contracting parties...'*'.

A strict legal reading would mean that schedules can thus be changed after a Marrakesh Agreement Article X amendment process, or if such modification or improvement of schedules has been provided for in the covered Agreements,<sup>7</sup> or if they are rectifications of a formal character (provided for via the 1980 Certification procedure L/4962 28 March 1980). For the GATT, modifications to Schedules can be made without an amendment procedure when they result from action under GATT Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII (see 'Procedures for Modification and Rectification of Schedules of Tariff Concessions, L/4962, 28 March 1980).

*Article X of the Marrakesh Agreement on amendments*

Article X sets out the processes to be followed for amendments to the WTO Agreements. Some parts of the Agreements require all Members to have accepted /ratified the amendments before entry into force, others require acceptance by 2/3 of the Members.

Article X on amendments would be the most suitable route for incorporating outcomes from the Doha negotiations into the WTO Agreement. This has been the route taken to incorporate the Trade Facilitation Agreement. (The Art X amendment procedure would also be the most suitable legal route to incorporate outcomes in the Nairobi Ministerial Decision on Export Competition into the WTO Agreement. The Decision deals with Export Subsidy disciplines and also new rules on Export Financing Support, State Trading Enterprises, and Food Aid. Parts of the Agreement on Agriculture would have to be changed to be in alignment with the outcomes in that Decision)<sup>8</sup>.

Hence, upon conclusion of the DDA, aside from waivers, outcomes which change Member's rights and obligations will have to go through the Article X amendment procedures in order to incorporate those results into the WTO Agreement. The exceptions to this general rule are modifications or

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<sup>6</sup>WTO Secretariat: 'Handbook on Reading Goods and Services Schedules'  
[https://www.wto.org/english/res\\_e/booksp\\_e/handbook\\_sched\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/handbook_sched_e.pdf)

<sup>7</sup>.

<sup>8</sup> There have been discussion around 'subsequent agreements' – as provided for in the Article 31(3)(a) of the Vienna Convention - whether Ministerial Decisions such as the Nairobi Decision on Export Competition is a subsequent agreement and what the legal weight of such a subsequent agreement would be. A look into WTO jurisprudence shows that the Appellate Body (AB) has been extremely strict and narrow in what it considers a subsequent agreement *and* the legal implication of a subsequent agreement. In the Cloves Cigarettes case, the AB did acknowledge that para 5.2 of the Doha Implementation Decision is a subsequent agreement to Art 2.12 of the TBT Agreement given the specific reference in para 5.2 of the Doha Implementation Decision to Article 2.12 of the TBT Agreement. This specificity is not found in most parts of the Nairobi Decision on Export Competition (aside from Art 9.4 on export subsidies). In terms of the legal implications of a subsequent agreement, the AB in the Cloves Cigarettes case pronounced that a subsequent agreement '*cannot replace or override terms contained in an original WTO provision*' (para 269). If these conditions are applied to the Nairobi Decision on Export Competition, it is unlikely that this Decision could qualify as a subsequent agreement.

improvements to schedules in the very limited cases where the covered agreements allow for such changes to Members' schedules.

Going through the process of incorporating negotiated outcomes into the WTO Agreement will be another signal that the Doha Round has been concluded.

### 6) *The Importance of the DDA Including its Single Undertaking*

Whilst politically, the climate regarding the continuation of the DDA at the WTO is challenging, technically, the DDA is on-going. For developing countries, reaffirming this fact is very important for the reasons captured below.

If Doha issues are negotiated, but not under the DDA framework, many of the development mandates that developing countries are concerned with will not likely be replicated in the same form they had taken in the DDA negotiations.

The following are likely to be lost in any 'Doha issues' negotiations if the DDA framework no longer stands:

- Special and Differential Treatment (S&D) mandate of para 44 - making 'precise, effective and operational' existing S&D provisions.
- Domestic supports in agriculture - the disciplines as captured in the July Framework; Hong Kong Declaration; and in the 2008 Chair's text (Rev.4) targeting very specific areas of developed countries' domestic supports e.g. the various product-specific disciplines etc.
- Less than full reciprocity (LTFR) as a principle in relation to non-agriculture Market Access (NAMA) negotiations (although it should be noted that the Swiss formula and the coefficients subsequently chosen in the Doha negotiations did not operationalise LTFR).
- Sectoral negotiations in NAMA are voluntary
- Para 1g of the 2004 July Framework keeping the three Singapore issues outside the WTO during the Doha Round:  
*'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.'* (July Framework 2004)
- The past DDA cotton mandates - The Hong Kong Declaration says that cotton must be dealt with 'ambitiously, expeditiously and specifically'. The main issue in cotton is and remains domestic supports. The Nairobi language in the cotton Decision on domestic supports is weak. It simply makes the observation that 'some more efforts remain to be made'. In contrast, the Hong Kong language goes much further:
  - Market access: Developed countries provide DFQF for cotton exports from LDCs
  - Domestic Supports: 'trade-distorting domestic supports for cotton production be reduced more ambitiously than under whatever general formula is agreed (in the DDA) and that it should be implemented over a shorter period of time than generally applicable' (Hong Kong Declaration, para 11).
- Development (S&D) provisions applicable to all developing countries (DDA para 2).
- Small and Vulnerable Economies - flexibilities as captured in Hong Kong para 41; the Rev.4 and Rev.3.
- Recently Acceded Members (RAMS) modalities - flexibilities as captured in Rev.4 and Rev.3.
- LDCs modalities - July Framework para 45; Hong Kong Declaration para 20 - LDC exemption from reduction commitments.

- DFQF for LDCs for all products or at least 97% of products by the start of the implementation period of the DDA (Hong Kong Declaration, Annex F, para 36).
- Public Stockholding – whilst this is both a Doha issue and also a stand-alone issue now separate from the DDA, the ‘stabilised’ solution reached on this issue in 2008 notifying Public Stockholding Programmes under the Green Box is already contained in the draft agriculture modalities text (Rev.4, 2008).
- Special Safeguard Mechanism – important elements have been elaborated on it in the Hong Kong Declaration; and the Rev.4.
- Implementation Issues – para 12 of DDA – whilst this has been sidelined for a long time, the implementation issues agenda and mandate provide the opportunity for the historical imbalances that developing countries are still facing in the WTO Agreement to be addressed.
- Single Undertaking and the need for overall balance in the Doha package - The Single Undertaking is developing countries’ only guarantee that not only developed countries’ interests will be addressed, but there must also be outcomes on developing countries’ issues. Whilst the adoption of the Trade Facilitation Agreement is seen by some as having eroded the single undertaking, the instrument, as part of the DDA is still available should Members wish to invoke it. With the very problematic processes and political pressures seen in the last two Ministerials, the importance of the single undertaking should not be taken lightly.

## II. OTHER ISSUES / NEW ISSUES

### 1) *What are the ‘other issues’ or new issues referred to in para 34 of the Nairobi Ministerial Declaration?*

The other issues or new issues which have been raised by developed countries in the last 2 years as areas they want to see in the negotiating agenda at the WTO include

Overall themes:

- Global value chains (GVCs)
- Micro and Small and Medium-sized Enterprises (MSMEs)

Issues:

- Investment (covered under para 1g of July Framework – see below)
- E-commerce
- Competition (covered under para 1g of the July Framework)
- Government procurement (covered under para 1g of the July Framework)
- Deep services liberalisation and regulatory rules in services sectors
- Climate change etc.

GVCs<sup>9</sup> and MSMEs are the broad over-arching themes or frameworks which have been used to justify the need for new rules in specific issue areas such as investment, e-commerce, deep services liberalisation etc.

### 2) *Legal Issues Arising from the Nairobi Ministerial Declaration (para 34) and the Marrakesh Agreement Establishing the WTO*

Para 34 of the Nairobi Ministerial Declaration says:

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<sup>9</sup> For an analysis on Global Value Chains see South Centre 2013, ‘Global Value Chains from a Development Perspective’, [www.southcentre.int/wp.../08/AN\\_GVCs-from-a-Development-Perspective\\_EN.pdf](http://www.southcentre.int/wp.../08/AN_GVCs-from-a-Development-Perspective_EN.pdf)





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

Four legal points are important on the new issues.

**1) There was no agreement to begin discussions on new issues in Nairobi**

It has to be made clear that in para 34 of the Nairobi Ministerial Declaration, there is no agreement on new issues, not even that discussion on them would move forward. It simply highlights the difference in opinions on identification and discussion of 'other issues for negotiation': that 'some wish to identify and discuss 'other issues for negotiation, others do not'.

**2) The July Framework mandate stands and can only be over-turned by a consensus Decision of the General Council or Ministerial Conference i.e. there can be 'no work towards negotiations' on the three Singapore issues within the WTO as long as the DDA is taking place.**

On the new issues, the relevant portion of the Doha mandate that applies is para 1g of the July Framework:

*'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.'*

In the same way that the Doha Round, its mandates and Decisions cannot be terminated except by a decision of the General Council or Ministerial Conference, similarly, paragraph 1g of the July Framework cannot be over-turned or undone except by a General Council or Ministerial Conference Decision.

Para 1g is clear – *'no work towards negotiations on any of these issues will take place within the WTO during the Doha Round'*. Members have understood this to also mean no discussions at the WTO. Hence after the 2004 July Package text was adopted, no further discussions on the three Singapore issues (investment, competition, transparency in government procurement) took place in the respective Working Groups. Para 34 of the Nairobi Ministerial Declaration is clear that *'discussions' on new issues are part of the work towards negotiations – 'some wish to identify and discuss other issues for negotiation' (para 34, Nairobi Ministerial Declaration).*

**3) *Are New Issues 'Mutually Advantageous' for all WTO Members? Will they raise developing countries' standards of living and ensure full employment?***

The preamble of the Marrakesh Agreement says that the Parties to the Agreement recognise that their relations should be conducted with a view to *'raising standards of living, ensuring full employment and a large steadily growing volume of real income ...'*

It also goes on to note that the Parties are desirous to contribute to these above objectives *'by entering into reciprocal and mutually advantageous arrangements...'*

Even before there is an *'identification) and discuss(ion) (of) other issues for negotiation'*, developing country Members must evaluate if the issues will raise their peoples' standards of living and ensure full employment, and if these issues will lead to outcomes that are *'mutually advantageous'*.



For instance, investment rules in the way they had been discussed prior to the 2003 Cancun Ministerial, are about providing the national treatment given to domestic investors also to foreign investors. E.g. Subsidies or other incentives provided to local firms will have to be extended to foreign ones. This has far reaching ramifications for developing countries.

For most developing countries, their interests continue to be industrial development, agricultural development, building domestic services supply capacities and domestic / regional markets. In fact, these new issues would further reduce the domestic regulatory space that developing countries currently have in order to pursue their industrialisation strategies e.g. carefully regulating foreign investors to ensure benefits accrue from their presence; using government procurement to support local businesses and local employment, rather than opening it up to WTO Members.<sup>10</sup>

If new issues are introduced, developing countries' firms will be pitted more directly against the very competitive multinational corporations from developed and some developing countries. Given the unequal playing field, it is not likely that the results will be 'mutually advantageous', or that they will help raise 'living standards' or ensure 'full employment'.

#### **4) Do New Issues Concern Members' 'multilateral trade relations'?**

The WTO, as the multilateral trade organisation cannot absorb simply any issue. What does the WTO's 'constitution' say about what issues can be covered under the WTO and what cannot? Article III.2 of the Marrakesh Agreement says that *'The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations'*.

Any new issue that Members may want to introduce into the WTO has to pass the test of Article III.2. Many of the 'new issues' are primarily domestic regulatory issues, not issues concerning WTO Members' 'multilateral trade relations'. For example, the trade-related aspects of investment have already been incorporated in the Agreement on Trade-Related Measures (TRIMS) in the Uruguay Round. The other issues such as investor protection are not about 'multilateral trade relations'.

Every new issue that seeks to find entry into the WTO must pass the Article III.2 test of the Marrakesh Agreement in order to be in keeping with the constitution of the organisation.

### **III. PROCESS/INTERNAL TRANSPARENCY ISSUES**

There were many problems vis-à-vis process or internal transparency at the Nairobi Ministerial Conference. A non-transparent, non-inclusive process of negotiations has a major impact on the substantive outcomes in the negotiations.

These process problems were highlighted by developing country delegations in the first Trade Negotiations Committee (TNC) and General Council meetings after Nairobi.

The box below provides only some examples of Members' statements on internal transparency or the lack of it. These statements were delivered in the 10<sup>th</sup> Feb 2016 TNC meeting and were submitted to the General Council (GC) meeting which took place thereafter, forming the official records of that GC meeting.

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<sup>10</sup> The discussion in government procurement had been 'transparency in government procurement'. However, the 'transparency' disciplines run very deep and would encroach also on market access.



**Africa Group (statement delivered by the Coordinator, Lesotho):**

'On the second instance Chair, Africa Group cannot overemphasize the need for a candid discussion on the elements inscribed in the Nairobi Declaration. Any attempt to run over the declaration in overdrive mode would be a gross miscalculation. More so given that the Nairobi process was largely left to a few members. A reflection is called for on whether we will operate on the basis of the need justifying the means in our engagements' (see Annex 1 for the full statement).

**Uganda:**

'We would like to register our profound disappointment with the manner in which the negotiations were conducted in Nairobi. We always pride ourselves on the fact that this is a member driven Organisation riding on the principles of transparency, inclusiveness and bottom-up approach. In fact this was the process we had set up in Geneva, prior to Nairobi. However, what transpired in Nairobi left a lot to be desired. Nairobi did not portray our being a member driven Organisation.

'Section III (of the Ministerial Declaration)... was managed in a very ISOLATIONIST manner.

'It ought to be recalled that this was the most critical part of the Declaration and yet, the vast majority of the Membership did not participate in shaping its outcome. We were never consulted. Even when we prompted discussion on this issue in the bilateral, we were greeted with silence. We do not even know who was consulted. This attitude should stop. It cannot become the norm that we all surrender our sovereign right either to the Secretariat, or to a handful of handpicked delegations to decide on our behalf. Our Ministers were relegated to coffee cup bearers instead of negotiating their trading rights. This Organisation is made up of 164 Members and we all have a stake in this Organisation' (see the full statement in Annex 2).

**Zimbabwe:**

'Allow me to express my delegation's real and deep concern about process and outcome of the Nairobi Ministerial Conference... It is trite that the Nairobi package was negotiated and drafted without the involvement of the majority of developing countries. It was then simply presented as a fait accompli on a take-it-or-leave-it basis after consultation with an unrepresentative group of five countries. Africa was marginalised on its very soil. There was no transparency, inclusiveness and participation in decision-making. In the end, the much heralded first WTO Ministerial in Africa brought to the fore the fact that Africa remains in the margins of a largely unequal and unjust global trading system.

'...Clearly a process at which a few selected countries discuss key WTO issues and then the rest are railroaded into a manufactured consensus around the positions of a few countries will not be acceptable to us going forward. We know from experience that conditions are created, at these Ministerial Meetings, which eliminate the possibility of small countries like ours from standing up to oppose the final package. So we are forced to abandon our own national interests and sign up the agenda dictated by richer and more powerful states.'

'It is now time that the WTO established basic rules of democracy, good governance and accountability. Without these rules, the WTO will continue to be seen as a forum in which the demands of the most powerful are afforded more importance than the needs of the most vulnerable, and its free trade agenda will continue to threaten people's rights. Thus it is time that we reform the negotiating procedures at WTO Ministerial Conferences. It is also time to review the Green Room processes to make them more representative...'



**Bolivia<sup>11</sup>**

'We would like to start by drawing attention to a number of elements of the process that need to be corrected in the daily work and in the future work of this Organization.

'Bolivia made great efforts to bring the Bolivian representatives to the meeting in Nairobi but in fact, the participation of Ministers in the main areas of the Conference was very limited. The concepts of transparency, inclusiveness and participation were challenged and were virtually absent in the discussions on the issues of greatest importance to the work of this Organization.

'In a letter to the Organization in 2008, our President Evo Morales, was very critical of the way the issues are dealt with in this Organization, where a number of 20 or 25 countries gather in the so-called "Green Room" to make decisions for the whole Membership.

'In Nairobi we witnessed how a group of five countries met to make decisions for the full Membership replacing the multilateral process. It was regrettable to notice that the issues of greatest interest were never discussed by the vast majority of Members.

'In our view, this way of proceeding undermines the legitimacy of the decisions taken in the Organization.

'Another issue that needs to be carefully examined is the place where the Ministerial Conferences take place. Holding a Ministerial Conference outside Geneva puts unnecessary pressure on delegations to adopt results "at any cost" or under a "take it or leave it" approach. Moreover, it considerably hinders the participation of many developing countries due to the cost of mobilizing the staff from many of the capitals and delegates from Geneva, therefore depriving Members of the support of many of their experts.

'Bolivia believes that pending issues under negotiation should not be taken to the Ministerial Conferences. These issues must be debated and almost concluded in Geneva before being put forward to the Ministers for a final Decision.'

**India:**

'We agree with the views expressed by a number of Members who spoke before me that we need to introspect and reflect on the process both leading up to a Ministerial as well as during the Ministerial as well. This would be in the interest of preserving the credibility of the negotiating arm of the Organisation.'

**Ecuador (General Council 24 February)<sup>12</sup>**

'The principle of transparency was absent from the negotiations in Nairobi. Most of the Members expected that the principles of good practice, participation and inclusiveness that prevailed during the previous weeks in Geneva would be maintained throughout the negotiation process in Kenya. This point leads to the need to reflect on the importance of not repeating the way this process was conducted, with decisions taken only by a small group of countries.

'Ecuador has expressed its conviction that dialogue and debate are the best tools to achieve consensus. Unfortunately, these tools were missing in Nairobi, where already agreed upon decisions were presented to Members. This should not be repeated in future negotiations.

<sup>11</sup> This is an unofficial translation from Spanish

<sup>12</sup> This is an unofficial translation from Spanish

'I also wish to refer to the substantive issues to be discussed in the coming days because they are related to paragraphs 30 to 32 of the Nairobi Ministerial Declaration. On this point I must reiterate my country's position on the need to continue the pending Doha negotiations and, once they are concluded, start dealing with new issues that are not mentioned in any mandate prior to Nairobi. In other words, completion of the Doha Round should be the priority to start this process in the right order.'

The following is a non-exhaustive list of some of the key problems regarding internal transparency at the Nairobi Ministerial Conference.

***1) The key issues developed countries want from the Ministerial are not put on the agenda for negotiations yet are concluded/ harvested at the Ministerial***

Similar to Bali, the strategy seems to be that the issue which developed countries want most out of the Ministerial is not discussed by the Membership as a whole, sometimes not even by any small group. Brackets<sup>13</sup> are dropped from the text without discussion or critical language is slipped into the text and that text is released to the Membership after the Ministerial has already gone beyond its final scheduled date. The Chairs then provide Members an hour or two to consider the entire package before the closing plenary session.

This was also the case for the Trade Facilitation Agreement at the WTO's Ninth Ministerial Conference in Bali (2013). At that time, the Public Stockholding (PSH) negotiations were organised such that it was not completed till the very last minute and there was no time to discuss the Trade Facilitation (TF) Agreement, despite the many brackets that were still in the TF text transmitted from Geneva. A clean text suddenly emerged from "nowhere" in Bali.

In Nairobi, the two most important issues for developed countries were

- a) to insert para 34 in the Nairobi Ministerial Declaration that 'some wish to identify and discuss other issues for negotiation'; and
- b) the wording around the DDA that 'Other Members do not affirm the Doha mandates' (para 30), including language on 'new approaches' (para 30) and 'new architectures' (para 32).

These fundamentally critical issues were not discussed by the Membership as a whole at the Ministerial!

This strategy is based on the inability of most if not all developing countries to stand up and oppose at the last minute in a Ministerial as they would be blamed for the collapse of the Ministerial. This pattern of decision-making at Ministerials which excludes the involvement of the majority in critical decisions, giving them the text only when the Ministerial has passed its deadline is extremely troubling and should be addressed since in the next Ministerial, the stakes could well be even higher.

***2) There was an appearance of transparency or inclusiveness around the Nairobi Ministerial Declaration (NMD), but no real transparency or inclusiveness***

On the 17<sup>th</sup> of December at the Ministerial, the NMD still had bracketed language in many areas. In particular, the paragraphs in bold in Part III of the NMD - on the critical issues of the DDA and on the

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<sup>13</sup> Brackets around draft texts signify that there is not yet an agreement.



new issues<sup>14</sup> – were still in the draft text. The NMD was discussed by the Heads of Delegations (HOD) i.e. all Members in the Ministerial. However, the paragraphs in bold were not discussed in the HOD.

When the text was released to Members for their adoption on 19<sup>th</sup> December, these paragraphs in bold on the critical issues had suddenly disappeared. In their place, new un-bracketed language had been inserted. How did the 17<sup>th</sup> December text transform into the 19<sup>th</sup> December text without discussion by the Membership?

This calls into question the exercise that had been carried out in the Heads of Delegations (HOD) process in Nairobi on the Declaration and even in the final Room W sessions in Geneva, since on the most important areas in the NMD, the Membership at the Ministerial and in the final Room W meetings in Geneva did not have the opportunity to speak to these issues, nor were they informed about who, how or when these issues were being addressed.

### ***3) Extension of the Conference***

This was a major problem for quite several delegations whose Ministers had to leave by the last stipulated day of the Conference (18<sup>th</sup> December). As a result, some representatives were not able to speak at the closing plenary (19<sup>th</sup> December) despite the critical importance of the issues that had been sprung on them in the last-minute text.

However, the issue is not only about the difficulties of representation. The strategy to release the final text when time has already run over increases the political pressure on developing countries. If countries decide to object, since the Ministerial could not be prolonged further, they would simply be blamed for creating a collapse. Note too that all of this is taking place under the watchful eyes of the world's media. With such immense political pressure, Members are put in a position where they may not like the text or where they have fundamental objections, but cannot refuse what is effectively a take-it-or-leave-it text.

### ***4) Members were given 1 or 1.5 hours to read the text before adoption***

In both the Bali Ministerial Conference and at the Nairobi Ministerial Conference, Members were given the final text 1 hour or 1.5 hours prior to the closing plenary. This does not provide sufficient time for delegations to read the texts through carefully, meet with their coalitions, prepare their comments, consult with capitals if needed etc.

There are rules of procedure for Ministerial Conferences (25 July 1996, WT/L/161). Rule 23 says 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*'.

According to the Oxford Dictionary, 'normal' means '*conforming to a standard; usual, typical or expected*'. Rule 23 'shall normally' allows for aberrations to take place only on occasion.

The present practice – providing texts with such a short lead time to delegations – seems now to be the 'usual' or 'typical' practice at Ministerials. Making this the practice is a serious aberration of the WTO's rules of procedure.

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<sup>14</sup> These paragraphs in bold were the most critical paragraphs in the Declaration. They had been inserted by the Membership negotiating together in the Rm W process in Geneva prior to the Ministerial.

### 5) *Composition of the small group doing the negotiations*

In the negotiations at the Nairobi Ministerial Conference, Members met in different configurations on different issues. However, the group that was overseeing the entire package consisted of only five Members - US, EU, Brazil, India and China. (Kenya's Minister was present in her capacity as Chair of the Ministerial Conference). In past Ministerials prior to Bali (MC9), the key coalitions and groupings in the WTO would have been represented in the Green Room. The Green Room was usually composed of 20 – 30 Members.

Who decides on the composition of Members that get to negotiate? Why are these meetings not made clear to others? Why is there no proper representation in Nairobi- in the sense that even the coordinators of big developing country groupings were not involved as representatives of their groupings? What happened to the promise of transparency and inclusiveness?

The Rm W/ HOD format would be the most transparent and appropriate method of negotiations – if negotiations on the real issues are allowed to take place here. The WTO has had some experience of this – the Trade Facilitation negotiations in Room W just before the Bali Ministerial Conference. If there are issues such as the Ministerial Declaration which concern all Members in a fundamental way – this Rm W/HOD format should be used. A less ideal option, although still better than the one used in Nairobi, is the Green Room composed of a fair representation of the whole cross-section of WTO Members.<sup>15</sup> As negotiations take place in the Green Room, there should be breaks given for group coordinators to go back and consult with their groupings.

A democratic decision-making process will not yield the same outcomes as negotiations that are done in secret amongst only a select group.

### 6) *Negotiators Must be Given Sufficient Time to Rest*

The other strategy that has been used in Nairobi, and this has been used also in previous Ministerials, is to wear down the developing country representatives and Ministers who are in the small group/ Green Room to such a point that they can no longer object to what is presented to them, even if they do not agree. This is done by negotiating around the clock. This is especially difficult if a country finds itself sidelined or being the minority voice in the negotiations.

In Nairobi, the final negotiations between the group of five Members took place for 26 hours – from after 11am on the 18<sup>th</sup> of December through to after 1pm of 19<sup>th</sup> December.

This same problem was highlighted by the like-minded group of developing countries in 2002 after the Doha Ministerial Conference. In their submission on process issues (WT/GC/W/471, reproduced in Annex 3), the group noted that *'Late night meetings and marathon negotiating sessions should be avoided'*.

### 7) *Ministerials Are Best Held in Geneva*

Hosting a Ministerial does not mean that that the Member will be advantaged by it. In fact, as one African delegation stated after the Ministerial, *'Africa was marginalised on its very soil'*.

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<sup>15</sup> The downsides to Green Room negotiations comprising 25 – 30 Members including the coordinators of developing country coalitions are i) this is still a small number compared to the entire Membership and in the past, countries have been picked so that those with a view that is different from the view of the more powerful delegations are still a minority in that group; ii) it puts a few developing country Members under considerable political pressure from developed countries and they may or may not be able to withstand this pressure.

Importantly, there were unnecessary pressures on WTO Members (Africans and non-Africans) not to create political embarrassment for both their host country and host continent. Hence, several delegations refrained from objecting to the final package presented to them in Nairobi, even though they had strong disagreement with parts of the package.

It is therefore best to have all Ministerials in a neutral venue - Geneva - in order to avoid such situations in the future whereby unnecessary and additional pressures are put on WTO Members to acquiesce when they might have otherwise chosen differently, in order to protect the pride of the host country or continent.

In addition, Geneva as the venue for Ministerials is the most cost-effective for developing country Members since their substantive staff, administrative support and offices are already in place. Developing country Members with limited resources have to make do with fewer staff at Ministerial Conferences held outside Geneva. This is a major disadvantage given the intensity at Ministerials and what could be critical decisions made in Ministerials.

The like-minded group of developing countries had also made the same recommendation in 2002 (WT/GC/W/471, see Annex 3):

*'This issue had been discussed during the Uruguay Round when it was felt that the Conferences should be held in the WTO itself. Apart from convenience this would also result in savings in costs and efforts. Many developing countries find it prohibitively expensive to participate in the Conferences. There could be a case for having all the future Ministerial Conferences after Mexico (the Ministerial that took place in Cancun in 2003) in Geneva itself.'*

#### **IV. WAY FORWARD**

##### ***DDA: Legally Speaking, the DDA Continues***

On the DDA, para 30 says that *'many Members reaffirm the DDA and ...reaffirm their full commitment to conclude the DDA on that basis.'*

Para 31 of the NMD says that *'there remains a strong commitment of all Members to advance negotiations on the remaining Doha issues'*.

Para 34 also states that *'we concur that officials should prioritise work where results have not yet been achieved'*.

The majority of developing countries have therefore clearly signalled their direction post-Nairobi in the Nairobi Ministerial Declaration: they, the majority still choose to continue pursuing the DDA negotiations. Most importantly, in as far as there is no decision by the General Council or Ministerial Conference to conclude the DDA, the DDA mandates and Decisions still stand.

##### ***'Other Issues' or New Issues: Para 1g of July Framework holds Unless a General Council or Ministerial Conference Decision OvertURNS this***

Paragraph 1g of the July Framework on the three Singapore issues of investment, competition, transparency in government procurement says that *'no work towards negotiations on any of these issues will take place within the WTO during the Doha Round'*.



Para 34 of the Nairobi Ministerial Declaration does not change para 1g on those three Singapore issues. It simply says that on other issues: *'some wish to identify and discuss other issues for negotiations; others do not'*. There is no agreement that there will be the commencement of discussions or work on these issues in the WTO.

The majority of developing countries remain the 'others (who) do not' wish to identify and discuss other issues for negotiations.

In any case, on the three Singapore issues, there is no possibility for 'work towards negotiations' to be undertaken at the WTO unless there is a Decision by the Membership that overturns para 1g of the July Framework. The Membership in 2004 had understood this to also mean the suspension of the Working Group discussions.

### *Importance of Observing the Rules*

Observance of rules in a rules-based organisation is very important, since the rules protect all Members' interests but especially the interests of the weaker parties.

The consensus principle must be respected – decisions once made, such as launching the Doha Round, or the Decision in Para 1g on the Singapore issues, cannot simply be ignored.

### *Process/Internal Transparency Issues*

The process issues arising from the Nairobi Ministerial Conference should be addressed if the negotiations are to move forward taking into account the interests of all Members rather than only some Members. Decisions made at Ministerial Conferences can have long-term and profound economic and social implications in all WTO Member countries. Members should not be pressured into taking decisions through clean texts appearing from 'nowhere' and asked to endorse these at an hour that in effect does not allow for disagreement.

As the Coordinator of the Africa Group had remarked in his statement of 10<sup>th</sup> February, *'A reflection is called for on whether we will operate on the basis of the need justifying the means in our engagements'*.

A more democratic process may not lead to all the outcomes desired by the economically stronger Members, but will lead to outcomes that are more suitable for the economic needs of the majority i.e. a multilateral trade institution that is more supportive of the weaker Members that are still struggling to build fairly basic domestic production capacities and industries and where due to issues of competitiveness and standards, the domestic and regional markets are still the main markets for their value-added products.

**ANNEX 1:**

**Statement by H. E. Ambassador Nkopane Monyane  
on behalf of the African Group  
Trade Negotiations Committee, 10 February 2016**

The first point the Group makes in respect to Nairobi is that it marks the second time in a row, under your stewardship that a WTO Ministerial has made some outcomes. For that Africa congratulates you as well as the whole membership.

On the second instance Chair, Africa Group cannot overemphasize the need for a candid discussion on the elements inscribed in the Nairobi Declaration. Any attempt to run over the declaration in overdrive mode would be a gross miscalculation. More so given that the Nairobi process was largely left to a few members. A reflection is called for on whether we will operate on the basis of the need justifying the means in our engagements.

Secondly, Members have skimmed over the real challenges they face without a thorough discussion. We may understand the brought contours of Members concerns but we have so far not gone deep enough to further understand the specific challenges or even device means with which we can deal with those challenges. What is clear though is that developed members cannot have it both ways without making requisite contribution. These set of Members have maximized the benefits from WTO agreement for the past 20 years with multilateral agreement tilted to their favor. It will be unacceptable therefore for these benefits not to be accounted for in our negotiations.

Thirdly, concerns by some members seeking to depart from the Doha mandates must be openly discussed. One clear standpoint of the Africa Group in this context is that the flexibilities in favour of the African Countries and the key principles underpinning the architecture of the WTO agreements must be preserved. A discussion we will engage in is one that preserves the internationally recognized vulnerabilities and levels of development of Members. We know the truth behind the WTO negotiated outcomes and Nairobi was no different. To this end, we must ensure that the design the MTS is not left in the hands of a few members to model it for the majority of Members.

Fourthly, the architecture of the WTO agreements must be preserved. Marrakesh Agreement provides for clear distinctions along the lines of countries levels of development. It is through these distinctions that LDCs and Developing Africa Countries will be integrated into the Multilateral Trading System. The Africa Group is therefore of a strong view that the architecture of the subsisting WTO Agreements should be preserved.

Fifthly, while it is important to pursue an avenue that will lead us to a win-win outcome, it is equally important to recognize that we have an outstanding inbuilt agenda say in the area of service and Agriculture. We all know that the agreement on Agriculture as it stands today it falls far too short of being characterized as a truly multilateral agreement both in word and in spirit. This is one area that needs urgent attention. It is unacceptable to the Africa Group for the progress in the MTS to be based on domestic process of a few members who in the final analysis give no meaningful concessions. The current phase of the Geneva negotiations should not replicate the structure of negotiations we have seen in times past. The system today is **generally** anchored on negotiations that are considered successful only if developing countries undertake domestic reforms. TF is one of the recent examples. In the final analysis there is no equity and the system turns into one that grants exceptions to the most



economically powerful Members. Clearly, the next set of steps must ensure equity in the negotiated outcomes.

Lastly, the Africa Group will seek well-balanced and properly sequenced negotiations in Geneva. Engagement of capitals is heightened to ensure coherence in all areas and processes that as member states we are involved. A good example of this being the Sustainable Goals Agenda so critical for the developing world. A point I might add, on which Ministers in Davos made unanimous expression.

**I Thank you.**

**ANNEX 2:**

**STATEMENT BY THE H.E CHRISTOPHER ONYANGA APARR, PERMANENT REPRESENTATIVE OF THE REPUBLIC OF UGANDA DURING THE INFORMAL HEADS OF DELEGATIONS MEETING, 10 FEBRUARY 2016.**

Mr. Chairman,

Thank you for giving us the floor and for your report. May I take this opportunity to wish you and all my colleagues a very happy and prosperous New Year. Mr. Chairman, I have a few preliminary points to raise in response to your report. We thank Kenya for hosting us during the Tenth Ministerial Conference

Mr. Chairman,

On Process: We would like to register our profound disappointment with the manner in which the negotiations were conducted in Nairobi. We always pride ourselves in the fact that this is a member driven Organisation riding on the principles of transparency, inclusiveness and bottom up approach. In fact this is the process we had set up in Geneva, prior to Nairobi. However, what transpired in Nairobi left a lot to be desired. Nairobi did not portray our being a member driven Organisation. What happened to Nairobi being a Ministerial Conference?

For the avoidance of doubt, we would like to acknowledge our satisfaction with the work done by the Facilitators on the Declaration. They conducted a transparent and inclusive process. However Section III, which was NOT under the facilitators' responsibility was managed in a very ISOLATIONIST manner.

It ought to be recalled that this was the most critical part of the Declaration and yet, the vast majority of the membership did not participate in shaping its outcome. We were never consulted. Even when we prompted discussion on this issue in the bilateral, we were greeted with silence. We do not even know who was consulted. This attitude should stop. It cannot become the norm that we all surrender our sovereign right either to the Secretariat, or to a handful of handpicked delegations to decide on our behalf. Our Ministers were relegated to coffee cup bearers instead of negotiating their trading rights. This Organisation is made up of 164 Members and we all have a stake in this Organisation.

Mr. Chairman, it ought to be recalled that the Treaty of Westphalia of 1648 codified the principle of the sovereign equality of states. This principle has been carried forward in all conventions and treaties that form the bedrock of international relations. We therefore reject any artificial and isolationist tendencies not grounded in public international law, engineered to deprive states of their inalienable rights of representation. Which is why Mr. Chairman, we call upon you, and all members to ensure that this cardinal principle is promoted, protected and respected at all times.

On documentation: We would suggest that the idea of sending half-baked documents to a Ministerial Conference should not be allowed to happen again. The Ministerial Conference is the highest body of this Organization. Most of our Ministers have competing priorities in capital and do not require to be subjected to the intensive and often acrimonious negotiations that we go through here in Geneva. Like the practice is in other Organizations of similar standing, documents submitted to the Ministerial Conference should simply be for adoption. Nairobi would never have happened in the past. In fact Bali was so much different. LDC issues were closed in Geneva; as for the Trade Facilitation Agreement (TFA), we could identify landing zones in the draft agreement, all that remained was a political decision. Nairobi on the other hand, was neither here nor there. It is therefore our firm belief that, any documentation for submission to a Ministerial Conference should be basically for **ADOPTION**. In the unlikely event that this is not the case, then the exception should be for a simple question of yes or no.

And all of us must procedurally agree, by consensus, whether to submit such unfinished documents or not.

Mr. Chairman

On substance: Our view is that we should start work immediately on the remaining issues of the DDA towards its conclusion with development at the centre. We should take lessons from the past. We have increasingly come to the conclusion that whenever members choose to be creative in interpretation of text, we end up losing time like we did in the Post Bali Phase.

In our reading of Paragraphs 30-31, the mere expression of divergent views on the DDA does not mean its death. By way of example; the mere expressions of marital discontent in public, by a spouse engaged in, inter alia: extra territorial activity, does not necessarily mean the dissolution of the marriage. It may lead to, but it is not, a divorce.

We are therefore encouraged by the resolve of Ministers for us to advance negotiations. This does not mean re-writing history, whether contemporary or ancient in the context of the WTO. It simply means that we soldier on. Towards that end therefore, we would like to reaffirm the Doha Development Agenda and its entire architecture. We call for the preservation of all flexibilities for LDCs and developing countries as enshrined in DMD and all Ministerial Decisions and Declarations adopted thereafter. We commit to work with our colleagues the **MEMBERS** to find ways to advance these negotiations in line with Para 33 of the NMD

On new issues: Para 1 (g) of the July framework is very clear. Which is why we must make haste and conclude the Doha Work Program so as to afford us ample opportunity to treat any new elements as members may want us to.

To conclude Mr. Chairman, we urge all members to engage in good faith. To uphold and implement what we have already agreed. We stand on the shoulders of two particular paragraphs, namely: para 24 and Para 5, especially Para 5, where Ministers agreed to strengthen the multilateral trading system so that it provides a strong impetus to **INCLUSIVE PROSPERITY** and **WELFARE** for **ALL MEMBERS** and respond to **THE SPECIFIC DEVELOPMENT NEEDS** of developing country Members, in particular the **LEAST-DEVELOPED COUNTRY MEMBERS**.

I thank you.

## ANNEX 3:

**WORLD TRADE  
ORGANIZATION****WT/GC/W/471**

24 April 2002

(02-2340)

**General Council**

Original:

**PREPARATORY PROCESS IN GENEVA AND NEGOTIATING PROCEDURE  
AT THE MINISTERIAL CONFERENCES**

*Communication from Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe*

The following communication, dated 19 April, has been received from the Permanent Mission of India.

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Since the WTO was established in January 1995, four Ministerial Conferences have been held so far. The procedures adopted, both in the preparatory process in Geneva and at the Ministerial Conference itself, have been different. This uncertainty in the process makes it difficult for many Members to prepare themselves for the conferences. Some basic principles and procedures for this Member-driven organization need to be agreed upon, so that both the preparatory process and the conduct of the Ministerial Conference are transparent, inclusive and predictable.

**Preparatory process in Geneva**

The aim of the process should be to finalize the agenda for the Ministerial Conference and a broad work programme flowing from the agenda, to be proposed for consideration at the Ministerial Conference. The Geneva process should aim to finalize a draft ministerial declaration, which reflects the priorities and interests of the entire membership. The following elements should guide the preparatory process:

- (i) All consultations should be transparent and open-ended. The preparatory process should be conducted under the close supervision of the General Council and chaired by the Chairman of the General Council. Any consultations or meetings held outside this process are not part of the formal preparatory process. Any negotiating procedure to be adopted should be approved by Members by consensus at formal meetings.



- (ii) The draft agenda should be drawn up only after Members have been given an opportunity to express their views. Once the agenda and its parameters are agreed upon, changes may be permitted only if so decided by the entire membership.
- (iii) There should be frequent formal meetings of the General Council to take stock of the progress in the preparatory work and minutes should be drawn up of such meetings. This would help Members who do not have delegations in Geneva and will give an indication of the status of work to capital based officials. In view of the difficulty that non-Geneva based delegations have in sending representatives for such meetings, a formal meeting of the General Council should be scheduled either just before or just after the Geneva Week, for such delegations.
- (iv) There should be sufficient time for delegations to consider documents to facilitate proper consideration by and consultation with the capital.
- (v) Language of draft ministerial declaration should be clear and unambiguous. The draft ministerial declaration should be based on consensus. Where this is not possible, such differences should be fully and appropriately reflected in the draft ministerial declaration. This could be done either through listing various options suggested by Members or by the chairperson reflecting different positions on issues. If the majority of the membership has strong opposition to the inclusion of any issue in the draft ministerial declaration then such an issue should not be included in the draft declaration.
- (vi) The work on the declaration should be completed in Geneva to the maximum extent possible. Only those issues, which are reflected either as options or where the chairperson has reflected different positions should be left for the ministers to deliberate and decide at the ministerial conference.
- (vii) A draft ministerial declaration can only be forwarded to the Ministerial Conference by the General Council upon consensus to do so.
- (viii) In the preparatory process for the Ministerial Conference the Director-General and the Secretariat of the WTO should remain impartial on the specific issues being considered in the ministerial declaration.
- (ix) Sectoral work by working groups is an effective way for expediting resolution of pending issues. The number, structure and chairpersons/facilitators for such working groups should be decided in the General Council in Geneva, in advance of the Ministerial Conference through consultations among all Members.

### **Process at Ministerial Conferences**

- (a) The agenda for the conference should not be adopted at the ceremonial opening session, but at the first formal plenary session immediately thereafter.
- (b) A Committee of the Whole should be established at all Ministerial Conferences. This Committee should be the main forum for decision-making. All meetings of the Committee of the Whole should be formal.
- (c) The chairpersons including facilitators, who would conduct consultations and meetings on specific subjects at the Ministerial Conference, should be identified by consensus in the

preparatory process in Geneva, through consultations among all Members. Such persons should be persons from Members that do not have a direct interest in the subject assigned for consultations.

- (d) Consultations by chairperson/facilitator should be at open-ended meetings only. The chairperson/facilitator could convene meetings of proponents and opponents on the subject assigned and any other interested Member should be free to join such meetings. For this to be achieved, the schedule of each meeting shall be announced at least a few hours before the meeting.
- (e) Consultations should be transparent, inclusive and all Members should be given equal opportunity to express their views. Chairpersons/facilitators should report to the Committee of the Whole periodically and in a substantive way.
- (f) All negotiating texts and draft decisions should be introduced only in open-ended meetings.
- (g) Late night meetings and marathon negotiating sessions should be avoided.
- (h) Language of declaration should be clear and unambiguous. All drafts shall be considered and finalized in a drafting committee to be appointed for that purpose by all Members and membership of which should be open to all Members.
- (i) The Secretariat and the Director-General of the WTO as well as all the chairpersons/facilitators should assume a neutral/impartial and objective role. They shall not express views explicitly or otherwise on the specific issues being discussed in the Ministerial Conference. Specific rules to conduct the work of the Chairs and Vice-Chairs of the Ministerial Conference should be elaborated.
- (j) Discussions at the Ministerial Conference on the draft ministerial declaration should focus on issues not agreed upon in the Geneva process and the various alternate texts developed at Geneva.
- (k) Any new draft on specific issues should be circulated to all Members well in advance so that Members have sufficient time to consider them. To ensure transparency in the negotiating process any draft on specific issues should clearly indicate the Member(s) suggesting the draft.
- (l) The duration of Ministerial Conferences should be in accordance with the schedule agreed upon in Geneva, as many delegations make their travel and accommodation arrangements accordingly. If an extension is required, it shall be formally approved through consensus.
- (m) In various meetings, formal as well as informal, during the Ministerial Conference arrangements should be made for the Ministers to be accompanied by at least two officers. It is the right of any Member to designate its representative and in this connection the Heads of Delegations has the discretion to mandate his/her officials to speak on his/her behalf.

### **Venue of Ministerial Conferences**

This issue had been discussed during the Uruguay Round, when it was felt that the Conferences should be held in the WTO itself. Apart from convenience this would also result in savings in costs and efforts. Many developing countries find it prohibitively expensive to participate in the Conferences. There could be a case for having all the future Ministerial Conferences after Mexico in Geneva itself.





Recognizing that Ministerial Conferences are to be held at least once every two years, and recalling paragraph 1 of Article IV of the Marrakesh Agreement Establishing the WTO, it is strongly recommended that Members review the evolving tendency of holding Ministerial Conferences that are primarily focused on the launching or review of negotiations.

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