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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



**WTO AS A FRAMEWORK AGREEMENT AND CODE OF
CONDUCT FOR WORLD TRADE**

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I. INTRODUCTION

1. At the 34th Session (1995) held at Doha, the AALCO considered a Secretariat study on the then concluded Marrakech Agreement, entitled, “The New GATT Accord: An Overview with Special Reference to World Trade Organization (WTO), Trade Related Investment Measures (TRIMS), and Trade Related Intellectual Property Rights (TRIPS).” At the 35th Session (1996) held in Manila, the Secretariat presented a comprehensive brief of documents on “WTO as a Framework Agreement and Code of Conduct for the World Trade”. At the 36th Session (1997) held at Tehran, the Secretariat brief reported the outcome of the WTO’s First Ministerial Meeting held at Singapore (1996). At that session, the Secretariat was directed “to continue to monitor the development related to the code of conduct for the world trade, particularly the relevant legal aspects of dispute settlement mechanism”.

2. In fulfillment of this mandate, the Secretariat study presented to the 37th Session of the AALCO (1998) held in New Delhi provided a comprehensive overview of the ‘Understanding on Rules and Procedures Governing the Settlement of Disputes’ as reflected in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. In furtherance of its work programme, the AALCO in co-operation with the Government of India convened a two-day seminar on ‘Certain Aspects of the functioning of the WTO Dispute Settlement Mechanism and other Allied Matters’ at New Delhi.

3. At the 39th (2000) and 40th (2001) Session of AALCO, the Secretariat had respectively presented the developments on the outcome of the Third WTO Ministerial Conference held in Seattle; and the follow-up measures undertaken by the WTO after the Seattle set back. At the 41st Session (Abuja, 2002), the Secretariat reported on the outcome of the Fourth WTO Ministerial Conference held in Doha, which resulted in the Doha Development Round of negotiations. At the 42nd Session held in Seoul (2003), the Secretariat reported on the progress in the Doha Development Round of negotiations, with particular emphasis on the Review of the Dispute Settlement Understanding.

4. At the 43rd Session held in Bali, Indonesia (2004), the Secretariat provided an update on the developments in the Fifth WTO Ministerial Conference held in Cancun and progress in the review process of the Understanding on Rules and Procedures Governing the Settlement of Disputes. In this Session the Organization had directed the Secretariat to “continue to monitor and report on the negotiations under the Doha Development Round, as well as, the outcome of the review process concerning the WTO Dispute Settlement Understanding”¹

¹ AALCO/43/BALI/SD/RES 14

5. Pursuant to this mandate, this brief report intends to provide an update on the developments in the negotiation under the Doha Development Round, with special emphasis on the 'July 2004 Decisions' of the WTO General Council, and progress in the review process of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

II. DEVELOPMENTS UNDER THE DOHA DEVELOPMENT ROUND OF NEGOTIATIONS

6. It may be recalled that at the Doha Ministerial Conference (2001), the Ministers had agreed to launch a new round of negotiations, including a review of the existing agreements. In the Doha Ministerial Declaration, the Ministers agreed to undertake broad and balanced Work Programme incorporating an expanded negotiating agenda. The Work Programme for negotiation as set out by the Declaration involved a wide range of issues such as agriculture, services, implementation-related issues and concerns, intellectual property rights, environment, market access, clarification of trade rules etc. Added to these are the four ‘Singapore Issues’- investment, competition policy, government procurement and trade facilitation.

7. At the Fifth Ministerial Conference of the WTO held in Cancun, 2003, intensive negotiations were held among the WTO Members on the following issues: Agriculture, Non-agricultural market access, Development issues, “Singapore” issues and other issues. Though a draft text of the Cancun Ministerial Declaration was submitted for Members consideration, due to differences in interests dividing the developed and developing Members, the Conference failed to adopt a Ministerial Declaration. In other words, there was no agreement on any of the substantive issues put to Ministers or on procedural questions, such as setting new deadlines for completing work in many sectors lagging months behind the schedule set in Doha two years ago.

8. The only decision that emerged from the Cancun Ministerial Conference was the decision that the General Council shall convene at a senior officials level before 15 December 2003 “to take the action necessary at that stage to enable us to move towards a successful and timely conclusion of the negotiations”. A Ministerial Statement issued on 14 September 2003 instructed officials to continue working on outstanding issues with a renewed sense of urgency and purpose and taking fully into account all the views that have been expressed in this Conference.

9. Since the conclusion of the Cancun Ministerial Conference, there was no progress in any of the areas of negotiations and the Chairs of all negotiating groups reported on progress - or the lack thereof - to the TNC. It was also obvious that no significant movement would occur anywhere until the shape of the framework agreement on agriculture is known. The first half of 2004 also saw intensified negotiation with the new target date of reaching agreement on a package of framework agreements by the end of July 2004. The first draft of the ‘framework’ was circulated on 16 July 2004, and Members started negotiating intensively in various formats of the draft. Finally, agreement was reached on the frameworks and other agreements designed to focus the negotiations by 1 August 2004 and the WTO General Council adopted the “July package” on 1 August 2004.

A. AGREEMENT ON AGRICULTURE

10. The starting point for the current phase of the agriculture negotiations has been the mandate set out in Paragraph 13 of the Doha Ministerial Declaration. This in turn built on the long-term objective of the Agreement on Agriculture to establish a fair and market-oriented trading system through a programme of fundamental reform. A major breakthrough after the deadlock in Cancun was on 1 August 2004. The 147 member governments approved a package of agreements that includes an outline (framework) to be used to complete the “modalities” on agriculture. The General Council’s decision on the Doha Agenda work programme (the “July package”), agreed on 1 August 2004, containing frameworks and other agreements designed to focus the negotiations and raise them to a new level.

11. In Agriculture, the General Council adopted the framework set out in Annex A to the decision. Annex A, “Framework for Establishing Modalities in Agriculture” offered the additional precision required at the present stage of the negotiations and thus the basis for the negotiations of full modalities in the next phase. The level of ambition set by the Doha mandate would continue to be the basis for the negotiations on agriculture. The final balance would be found only at the conclusion of the subsequent negotiations and within the Single Undertaking. To achieve this balance, the modalities to be developed would need to incorporate operationally effective and meaningful provisions for special and differential treatment for developing country Members. The Framework emphasizes that agriculture is of critical importance to the economic development of developing country Members and they must be able to pursue agricultural policies that are supportive of their development goals, poverty reduction strategies, food security and livelihood concerns. It further states that non-trade concerns, as referred to in Paragraph 13 of the Doha Declaration, would be taken into account.

i. Export Subsidies and Competition

12. Regarding export subsidies and competition August 2004 framework stated clearly that all forms of export subsidies would be eliminated by a “credible” date. The elimination would work in parallel for all types of subsidies, including those in government-supported export credit, food aid, and state-sanctioned exporting monopolies. The negotiations would also develop disciplines on all export measures whose effects are equivalent to subsidies. The negotiated date would mark the end of: export subsidies as listed in member’s reduction commitments (“scheduled”); all export credits, export credit guarantees or insurance programmes with repayment periods beyond 180 days; those with shorter repayment periods but failing to conform with disciplines that are to be negotiated; trade-distorting practices of state trading enterprises that are considered to be subsidized (“the issue of the future use of monopoly powers will be subject to further negotiation”); and food aid that does not conform with various disciplines, which would also be negotiated.

13. Developing countries are allowed more lenient terms. Elimination could take longer. They could continue to subsidize transportation and marketing (Article 9.4 of the Agriculture Agreement) for a reasonable period, to be negotiated., beyond the date for ending the main subsidies. At the same time, when members get rid of subsidized components of credit and insurance, they have to be able to avoid harming the interests of least-developed and net food-importing developing countries. And special consideration is given to poorer countries, state trading enterprises whose monopoly privileges aim to keep domestic prices stable for consumers and to ensure food security.

ii. Market Access

14. The framework committed members to “substantial improvements in market access for all product”. Three or four key points emerged in the bargaining over the framework: the type of “tariff reduction formula” that would produce the agreed result of “substantial improvements in market access”; how all countries’ “sensitive products” might be treated; how developing countries might be given further flexibility for their “special products” and be able to use “special safeguard” actions to deal with surges in imports or falls in prices; how to deal with conflicting interests among developing countries over “preferential access” to developed countries’ markets; and how to provide market access for “tropical products” and crops grown as “alternatives to illicit narcotics”. Also discussed was a possible trade-off between cuts in some developed countries’ subsidies and improved market access in developing countries.

15. The framework does not spell out the tariff reduction formula; it sets the scene for the next stage of the negotiations. It stated that the formula must take account of members’ different tariff structures (for example some have tariffs that vary widely from product to product, others have more homogeneous rates), and it spells out key principles for the formula, aimed at expanding trade substantially.

16. The framework also outlined the purpose of special treatment: for rural development, food security and livelihood security. Specifically, special treatment is to be given to developing countries in “all elements of the negotiation”, including “lesser” commitments in the formula, the number and treatment of sensitive products, “lesser” tariff quota expansion, and a longer implementation period. Developing countries would be given additional flexibility for products that are specially important (special products) for their food security, livelihood security and rural development. How many, how they would be selected, and how they would be treated, has to be negotiated. A new contingency measure for developing countries (Special Safeguard Mechanism (SSM), the details of which are to be established.

iii. Domestic support

All developed countries would make substantial reductions in distorting supports, and those with higher levels are to make deeper cuts from “bound” rates (the actual levels of support could be lower than the bound levels). The way to achieve this would include reductions both in overall current ceilings² (“bound levels”), and in two components- Amber Box³ and *de minimis*⁴ supports. The third component, Blue Box supports,⁵ would be capped; at the moment the Blue Box has no limits. The fine print contained a number of details but also stresses that these have to meet the long-term objective of “substantial reductions.”

All of these reduction commitments and caps would apply. However, the new WTO ceiling at the end of the implementation period (“binding constraint”) would be the lower of the value of trade-distorting support resulting from (i) the overall cut and (ii) the sum of the reductions/caps of the three components. In other words, countries would have

² For the overall level of support (Amber Box, *de minimis* and Blue Box combined), a “tiered formula.” would be used. This will be designed so that higher levels of support (those in higher “tiers”) will have steeper cuts. On top of that, in the first year, each country’s ceiling of permitted overall support will be cut by 20%. Details include how to measure the Blue Box component for the overall cut (“the higher of existing Blue Box payments during a recent representative period to be agreed and the cap established in paragraph 15”, which will be 5% of a country’s agricultural production during a yet-to-be-specified period).

³ Amber Box (“final bound total AMS”) supports will also be cut using a tiered formula, so that higher supports have steeper cuts. There will be limits on supports for specific products-“product-specific AMSs will be capped”- in order to avoid shifting support between different products. Since the tiered formula applies to the total of support on all products, the text also says that the result will be cuts in support specified for some products.

⁴ Currently developed countries are allowed a minimal amount of Amber Box support (“*de minimis*”). For support that is not given to specific products, this is defined as 5% of the value of total agricultural production. For support given to a specific product, the limit is 5% of production of that product. Developing countries are allowed up to 10% of these. The framework says *de minimis* will be reduced by an amount to be negotiated, with special treatment for developing countries, which will be exempt if they “allocate almost all *de minimis* support for subsistence and resource-poor farmers”.

⁵ Blue Box supports, currently unlimited, are to be capped at no more than 5% of the value of a country’s agricultural production over a period that still has to be negotiated. Some flexibility will be allowed for countries whose Blue Box supports are an exceptionally large proportion of their trade distorting subsidies.

The framework endorses a point made by countries that defend the use of the Blue Box. They have argued repeatedly that they need to be able to switch from the more trade-distorting Amber Box subsidies to the less distorting Blue Box supports in order to make reform less painful and more feasible. The text therefore says “members recognize the role of the Blue Box in promoting agricultural reforms”. The definition of the Blue Box will be changed to include direct payments that do not require any production, provided the payments are based on certain fixed production conditions (related to acreages, yields, numbers of livestock, or historical production levels). But new criteria will also be negotiated to ensure the Blue Box really is less trade-distorting than Amber Box measures.

Criteria for defining supports as “Green Box” will be reviewed and clarified to ensure that the supports really do not distort trade, or do so minimally. At the same time, the exercise will preserve the basic concepts, principles and effectiveness of the Green Box, and take account of non-trade concerns such as environmental protection and rural development.

to make the required reductions in Amber Box and *de minimis* support, and be within the capped limit of the Blue Box. Then, if they are still above the overall limit, they would have to make additional cuts in at least one of the three components in order to match the ceiling set by the overall cut.

Developing countries would be allowed gentler cuts over longer periods, and would continue to be allowed exemptions under Article 6.2 of the Agriculture Agreement (they can give investment and input subsidies that are generally available and are integral parts of development programmes, and provide domestic support to help farmers shift away from producing illicit crops).

iv. Developing Countries

Special and differential treatment and other issues raised by developing countries are spread through all the subjects in the August 2004 framework. A short paragraph on least-developed countries says they won't have to make reduction commitments. Developed countries should provide duty-free and quota-free market access for LDCs exports, and so should developing countries "in a position to do so".

v. Net food-importing developing countries

In its section on export competition (paragraph 24), the framework says the final agreement on export credit, credit guarantees, and insurance programmes will make appropriate provision of net food-importing and least-developed countries.

THE COTTON INITIATIVE

The General Council reaffirmed the importance of the Sectoral Initiative on Cotton and takes note of the parameters set out in Annex A within which the trade-related aspects of this issue would be pursued in the agriculture negotiations. Members stated that they consider the cotton initiative to be important in both of its two main points: the trade issues covered by the framework and the development issues and stressed the complementarity between the trade and development aspects.

As regards Development issues are concerned, referring to the WTO Secretariat's 23-24 March workshop on cotton in Cotonou, Benin, and other activities, the main part of the text instructed the Secretariat and the Director General to continue to work with the development community and international organizations (World Bank, IMF, FAO, International Trade Centre), and to report regularly to the General Council. Members themselves, particularly developed countries, "should" engage in similar work.

As regards Trade issues are concerned, the annex (the "framework") instructed the agriculture negotiations (the "Special Session" of the Agriculture Committee) to ensure that the cotton issue is given "appropriate" priority, and is independent of other sectoral initiatives. It said that both the overall approach of the framework and the cotton initiative

itself are the basis for ensuring that the cotton issue is handled ambitiously, quickly and specifically within the agriculture negotiations.

Cotton Sub-Committee

The Cotton Sub-Committee was set up under the framework at the 19 November 2004 meeting of the agriculture negotiations. Its purpose is to focus on cotton as a specific issue in the agriculture talks. The terms of reference say the sub-committee would be open to all WTO members and observer governments. International organizations that are observers in the agriculture negotiations would also be observers in the sub-committee. It will report periodically to the agriculture negotiations body, which in turn reports to the Trade Negotiations Committee, General Council and Ministerial Conference. The sub-committee was tasked to work on “all trade-distorting policies affecting the sector”, in all three key areas of the agriculture talks, the “three pillars of market access, domestic support, and export competition”- as specified in the 2001 Doha Declaration, which launched the current negotiations, and the “framework” text, which is part of the July 2004 Package decision.

Its work would take into account the need for “coherence between trade and development aspects of the cotton issue”. This is a reference to the two major components of the original proposal: trade, which is covered by the negotiations on trade barriers, domestic support and export subsidies; and development, which covers various aspects of helping the less developed cotton producers face market conditions and other needs.

Developments Since July Package

During November, Members made progress on issues such as disciplining export subsidies, while talks on the Green Box had failed to move. In December, Members discussed the tariff reduction formula and a paper submitted by the G-33 (“friends of special products) on the safeguard mechanism (SSM) for developing countries. No progress has been made on tariff reduction formula. The paper submitted by G-33, provide developing countries with protection against sudden import surges. The paper notes that existing safeguard provisions have been inadequate “to address the concerns of developing country members related to stabilizing domestic markets and avoiding sudden increase of imports that threaten to disrupt domestic production and employment”. Therefore, the paper proposes, “building on the flexibilities embedded in the existing safeguard provisions (in AOA) rather than extracting from them”.⁶

B. NON-AGRICULTURE MARKET ACCESS (NAMA)

It may be recalled that at the Doha Ministerial Conference (2001), Ministers had agreed to start negotiations to further liberalize trade in non-agricultural goods. The

⁶ Three meetings have already taken place since the July Package (6-8 October 2004; 15-19 November 2004; and 13-17 December 2004). Next meeting is from 7-11 February 2005.

ministers agreed to launch tariff-cutting negotiations on all non-agricultural products. To this end, a Negotiating Group on Market Access was created in 2002. In this regard, Members had submitted more than 40 papers as a contribution which dealt with the 'modalities' for the negotiations, covering tariff reductions, how to deal with non-tariff barriers, how to give developing countries special and differential treatment, and the possible effects of the reduction in tariffs on the development policies of some countries and on their fiscal revenues, etc.

At the Cancun Ministerial Conference, differences remain on the formula for tariff reductions and on sectoral initiatives (whether commitments to eliminate tariffs on all products in a sector should be made by all countries, or whether countries could volunteer to participate). While the EU, US and Canada advocated for significant reduction in industrial tariffs, developing countries strongly opposed in making substantial cuts in their tariffs and harmonizing it. Developing Members wanted provisions allowing it to make smaller reductions, to apply a different coefficient in tariff reduction formulas, and to be allowed to choose whether to join a sectoral initiatives i.e., duty free import of all products within a sector to be protected.

In the post Cancun scenario, Members were generally reluctant to engage in serious negotiations on non-agricultural market access (NAMA) until the level of ambition in agriculture had become clearer, leaving NAMA as the major stumbling block. Consequently, a framework agreement on NAMA which is much less specific than the agriculture annex, only outlining merely "initial elements for future work on modalities" was adopted as Annex B to the July Decision. The Decision reaffirmed that negotiations on market access for non-agricultural products shall aim to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. It also reaffirmed the importance of special and differential treatment and less than full reciprocity in reduction commitments as integral parts of the modalities. It was also agreed in the July Decision that a formula approach is key to reducing tariffs, and reducing or eliminating tariff peaks, high tariffs, and tariff escalation.

In the July decision, they agreed that the Negotiating Group should continue its work on a non-linear formula applied on a line-by-line basis which shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments. Consequently the initial paragraph outlining developing country concerns, which stipulates that "[a]dditional negotiations are required to reach agreement on the specifics of some of these [initial] elements", which relate to the tariff reduction formula, the starting point for binding unbound tariff lines, flexibilities for developing countries, and participation in sectoral initiatives. The developing-country participants shall have longer implementation periods for tariff reductions. While some - mostly developing - countries appear to view the language regarding additional negotiations on specifics sufficient to signal their qualified acceptance of the form and content of the ensuing paragraphs, some

developed countries have suggested that the additional negotiations will simply involve tweaking the elements but maintaining their essential form.⁷

C. THE “SINGAPORE” ISSUES

It may be recalled that the Singapore Ministerial Conference (1996) had mandated the Ministers to establish three working groups i.e., working group on trade and investment, working group on trade and competition policy, and working group on transparency in government procurement, in order to identify any areas that may merit further consideration in the WTO framework. At the Cancun Ministerial Conference, the “Singapore issues” were the priority item on which negotiations were undertaken. Though serious attempt was made by the Chairperson of the Ministerial Conference to avoid a deadlock, the negotiations failed to find a compromise formula which was acceptable to all Member States.

After Cancun Ministerial Conference, the WTO General Council meeting held on 15 December 2003, forty four developing country Members of the WTO issued a formal communication titled “Singapore Issues: The Way Forward”, calling for all further work on three of the Singapore Issues (Investment, Competition and Transparency in government procurement) to be dropped from the agenda.

Accordingly the 31 July Decision of the WTO General Council stressed that the three Singapore issues (investment, competition policy and transparency in government procurement), “no work towards negotiations on any of these issues will take place within the WTO during the Doha Round”. However, certain opponents to WTO involvement in these issues have expressed concern that the language is vague enough to allow clarification work to continue on the sidelines, and does not exclude the possibility of launching negotiations some time in the future.

Trade Facilitation

In the case of trade facilitation, it may be recalled that the Singapore declaration, recognizing that the WTO legal framework lacks specific provisions in some areas of trade facilitation, directed the goods council “to undertake exploratory and analytical work - on the simplification of trade procedures in order to assess the scope for WTO rules in this areas.” The Goods Council had been dealing with trade facilitation at its formal session.

Following the deadlock in the Cancun Ministerial Conference, there was of the view that trade facilitation may continue, but only after the clarification of various aspects of the issue. Finally there was agreement among the WTO Members, which is reflected in the 31 July decision, to launch the negotiations on trade facilitation. Annex D of the July Decision on Negotiations on Trade Facilitation reiterates that the aim of negotiation in trade facilitation is to clarify and improve relevant aspects of Articles V, VIII and X of the

⁷ *ICTDS Bridges*, July-August 2004

GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit. Negotiations shall also aim at enhancing technical assistance and support for capacity building and induce effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues. The modalities for negotiations clearly spell out the need for special and differential treatment, technical assistance and capacity-building for developing countries. This includes a caveat that these countries will not be required to implement the final agreement if support and assistance for the required infrastructure is missing or they continue to lack the necessary capacity.

D. DEVELOPMENT ISSUES

At the Cancun Ministerial Conference, all developmental issues were categorized into one group and this group covered special and differential treatment (S&D); implementation; technical assistance; least-developed countries; commodity issues; small economies; trade, debt and finance; and trade and technology transfer.

As regards the special and differential treatment (S&D) and implementation-issues, the core development elements of the Doha Declaration, the decision only instructed Members to continue the work that has been underway since early 2002 and reiterates earlier commitments with regard to technical assistance and the work programme for least-developed countries (LDCs).

Special and Differential Treatment (S&D)

On the issue of special and differential treatment, differences remain among the Members as to whether the current package of 24 agreed proposals is acceptable for now. A number of developing countries believe that there is little economic value in the current package. Other developing countries felt that though there is some value, more should be achieved.

However, the July Decision rather than adopting the 27 recommendations on 28 Agreement-specific proposals that were agreed ‘in principle’ in the lead-up to the Cancun Ministerial, instructed the Special Session of CTD to expeditiously complete the review of all the outstanding Agreement-specific proposals and report to the General Council, with clear recommendations for a decision, by July 2005. It further instructed the Committee to address all other outstanding work, including on the cross-cutting issues, the monitoring mechanism and the incorporation of S&D treatment into the architecture of WTO rules.

Implementation Issues

Concerning implementation-related issues, i.e. the difficulties in meeting negotiated obligations and perceived imbalances with certain WTO rules, the July Decision renews Members' determination to find appropriate solutions to outstanding

issues. The Council instructs the Trade Negotiations Committee, negotiating bodies and other WTO bodies concerned to redouble their efforts to find appropriate solutions as a priority. It also instructs the General Council to “review progress and take any appropriate actions no later than July 2005”.

Least-Developed Countries

Regarding Least-Developed Countries, the General Council renewed its determination to fulfill these commitments. Members will continue to take due account of the concerns of least-developed countries in the negotiations. The Council confirms that nothing in this Decision shall detract in any way from the special provisions agreed by Members in respect of these countries.

III. PROGRESS IN THE REVIEW OF THE DISPUTE SETTLEMENT UNDERSTANDING (DSU)

It may be recalled that while adopting the ‘Understanding on Rules and Procedures Governing the Settlement of Disputes’ (hereafter "DSU"), the Ministerial Conference in 1994 had agreed through a Ministerial Decision, for a “complete review of the dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement Establishing the World Trade Organization and to take a decision on the occasion, modify or terminate such dispute settlement rules and procedure.”

Accordingly, the review of the DSU was initiated in the Dispute Settlement Body (DSB) of the WTO in 1997. The DSB conducted extensive discussion on various issues related to the DSU in informal meetings. However, as there was no agreement and there remain a number of suggestions by Members that have yet to be considered, the General Council had to extend the time for the completion of the review process in 31 July 1999.

At the Fourth Ministerial Conference of the WTO, held in Doha, Qatar from 9 to 14 November 2001, the Ministers had agreed to negotiate on improvements and clarifications of the DSU. The Ministers agreed that the negotiation process on improvements and clarifications of the DSU shall take place in the Special Session of the DSB and shall complete the review not later than May 2003, the report of which shall be presented at the fifth Ministerial Conference to be held in Cancun, Mexico on 10-14 September 2003.

The Special Session of the DSB was established and number of formal and informal meetings was held. At these meetings, the work progressed from a general exchange of views to a discussion of conceptual proposals put forward by Members and by the second half of 2002 to an issue-by-issue thematic discussion. Since January 2003, the work has focused on discussion of specific draft legal texts proposed by Members.

The Chairman of the Special Session, on 28 May 2003, circulated a draft legal text under his own responsibility. The text contained Members proposals on a number of issues, including: enhancing third-party rights; introducing an interim review and remanding at the appeals stage; clarifying and improving the sequence of procedures at the implementation stage; enhancing compensation; strengthening notification requirements for mutually-agreed solutions; and strengthening special and differential treatment for developing countries at various stages of the proceedings.

However, the Chairman’s Text did not reflect a number of other proposals by Members due to the absence of a sufficiently high level of support. These proposals covered issues such as accelerated procedures for certain disputes; improved panel selection procedures; increased control by Members on the panel and Appellate Body reports; clarification of the treatment of *amicus curiae* briefs; and modified procedures for retaliation, including collective retaliation or enhanced surveillance of retaliation. As

there were disagreement regarding the Chairman's Text, the General Council at its meeting on 24 July 2003, agreed to extend the negotiations from 31 May 2003 to 31 May 2004. The Cancun Ministerial Conference, which was supposed to review the progress in the negotiations in the Special Sessions of the DSB, failed to do so, as there was no consensus among the Members.

Additional progress has been made in the Special Session since the General Council meeting of 24 July 2003, building on the work done thus far, including the proposals put forward by Members as well as the text put forward by the Chair in May 2003. Some delegations have made additional written contributions to the negotiations during this period, which were welcomed by participants. There was also agreement among Members that the Special Session needs more time to complete its work, on the understanding that all the existing proposals would remain under consideration and bearing in mind that these negotiations are outside the single undertaking. Accordingly, it is suggested that action be taken by the TNC and/or the General Council as appropriate, for the continuation of work in the Special Session.

On 1 August, as part of the July Package, the General Council adopted this recommendation. Since then, two meetings of the Special Session have been held, on 22 October and 25-26 November 2004. Both of these meetings were essentially devoted to a discussion of the informal joint contribution by Argentina, Brazil, Canada, India, New Zealand and Norway (JOB(04)/52). This contribution focussed on three issues which have been in discussion in the Special Session: remand, sequencing, and "post-retaliation" issues. The informal discussion of this text in the last two meetings of the Special Session allowed a very constructive exchange of views and led to a clarification of many aspects of the proposed text.⁸

⁸ Report by the Chairman to the Trade Negotiations Committee, TN/DS/10 and TN/DS/11

IV. DELIBERATIONS AT THE FORTY-THIRD SESSION

The item “WTO as a framework for International Trade was introduced by Amb. Dr. Ali Reza Deihim Deputy Secretary-General of AALCO. Dr. Deihim, after giving a highlighting the Cancun Ministerial conference, said that the Conference which failed because of the differences that cropped up, when developed and developing nations stuck to their positions on many important issues, especially on agriculture and Singapore issues.

Agriculture Negotiation, he said, was one of the main factors for the failure of the Cancun Ministerial Conference. He highlighted the major areas where strong differences emerged between the Group-20 developing countries, Cairns Group, and the US and European Union, regarding market access, exports subsidies and domestic support.

As regards the review of the DSU, he informed that the Special Session could not achieve any further progress in the negotiations even after the circulation of a negotiating text of proposals. Though the Chairman’s text had attempted to make some of the Special and Differential Treatment provisions mandatory, no explanations as to how these provisions would be implemented and operationalised had been brought out by the text.

In the view of the AALCO Secretariat, he stated that efforts, even political will, were needed by both developed and developing country Members to redefine their priorities and focus their attention on developing country Members concerns before taking further action on each negotiating item. An overloaded agenda without focus would not only have serious consequences on the outcome of the Doha Development Round, but also impinge on the credibility of the World Trade Organization.

The Delegate of Indonesia felt that the current negotiation had been experiencing deadlock on many sticking issues resulting in sharp disagreement between developed and developing countries. The lack of progress over the implementation of Doha Mandate and Special and Differential Treatment (S&D) issues was a source of deep concern for most developing countries. The fulfillment of this mandate on a priority basis was extremely important to developing countries. His delegation believed that there was an urgent need to agree on a work programme for resolving the outstanding implementation issues and S&D issues within specified timeframe.

He was of the view that Asian and African countries should strive for re-shaping the international economic and financial issues under the multilateral trading system, so that the wealth and income were more equitably distributed. He said that in order to secure sufficient gains from globalization for developing countries, there was an urgent need to bring down the high tariffs and non-tariff barriers on products of export coming from developing countries. He emphasized that it was their duty to ensure that special and differential treatment was achievable for developing countries and the formulation of common undertaking to deal with sensitive products remained an integral part of all elements of negotiations. All special and differential treatment provisions in the WTO

Agreements should be reviewed by strengthening them and making more effective and operational.

Indonesia fully supported the efforts to undertake review of various aspects of trade-related intellectual property rights (TRIPs) Agreement in order to protect the concern of developing countries, especially regarding the protection of traditional knowledge and folklore as their national heritage. Concerning the WTO dispute settlement mechanism, Indonesia maintained that AALCO members should encourage WTO to speed up the review process of the Understanding on Rules and Procedures Governing the Settlement of Disputes. By doing so, it was their hope that in the future this mechanism could become fair, simple and transparent for all WTO members.

He observed that the Asian and African countries through AALCO should agree on the common ground of what should be done and on how to achieve the goals. In doing so, Indonesia put high expectations that their participation in a rule-based multilateral trading system would result in securing a fair share in the growth in international trade, commensurate with the needs of their economic development.

The **Delegate of Ghana** said that his country's position regarding the WTO negotiations was naturally determined by her domestic agricultural policy and the circumstances of world agricultural trade. He said that Ghana was of the view that protection under geographical indications should be expanded to include specific products of African origin like the *kente* and *adinkra* designs, traditional knowledge and genetic resources.

He informed that Ghana's focus as regards multilateral trade negotiations was in the following areas: agriculture, services, market access for non-agricultural products and TRIPS. The objectives were basically to ensure further enhancement of Ghana's market access opportunities; and that the rules guiding international trade facilitate our efforts at improved trade. To realize these objectives, Ghana would continue to seek elimination of high tariffs and tariff escalation, which discouraged developing countries from developing resource-based industrialization.

The **Delegate of Kenya** said that in the Cancun Ministerial Conference Kenya was instrumental in the formation of a common African position under the African Union and merged with other Pacific countries under the auspices of the ACP and LCDs to form the G90 negotiating group. Kenya believed that the problems of Cancun started with the Chairman's text commonly referred to as the "Derbez text" which ignored contributions from the developing countries and instead leaned heavily on proposals by the developed countries. The "Derbez text" contained proposals with far reaching implications especially for African countries. In particular, the framework which proposes a non-linear line-by-line reduction approach which could result in deep tariff reductions by developing countries. Lack of consensus on the Singapore issues of investment, competition policy, transparency in government procurement and trade facilitation, also contributed into the Cancun impasse.

As a way forward, Kenya believed that as worldwide consensus to the Singapore issues emerge, a number of issues must be clarified. This included the need to address developing countries research and capacity constraints, the cost of implementing the new rules, how and by whom. Trade facilitation should also not be subject to trade-sanctioned dispute settlement mechanism. On Agriculture, she was of the view that any further reforms should take into account the need for appropriate policy space to enable developing countries pursue policies that were supportive of their development goals, poverty reduction, food security and livelihood concerns.

On implementation, Kenya favoured the adoption of a work programme that provided for clear road map with time-bound and specific benchmarks for the expeditious fulfillment of the mandate on outstanding implementation of some WTO Agreements and Decision, including the difficulties and resources constraints encountered in the implementation of obligations in various areas.

The **Delegate of Malaysia** she said, Malaysia was concerned with the failure of WTO Members from reaching any consensus despite many packages being prepared on the initiatives of the Chairman of the Special Session of the Dispute Settlement Body. It also saw the powerful signal emitted from Cancun as indicating a new identity for developing countries. Hence, it fully supported AALCO's views that Members need to redefine their priorities and focus their attention on developing countries Members concerns before taking further action on each agenda item.

Malaysia was also concerned by the difficulties that developing countries face in participating in the dispute settlement system. Within the framework of the negotiations on Dispute Settlement Understanding (DSU), it was therefore in favour of initiatives aimed at granting to developing countries a better access to the system under the Special and Differential Treatment, as an entrenched WTO principle to be fully accepted by all WTO Members. Towards this end, she said, Malaysia was actively participating in the DSU review process. It maintained the view that the fundamental problem with the DSU was non-compliance with the Panel and Appellate Body rulings. It therefore welcomed proposals to find solutions to enhance compliance. Therefore, Malaysia firmly believed that it was timely for some changes be made to the DSU mechanism.

The delegate informed the gathering that Malaysia had made a proposal to introduce Preventive Measures in the WTO DSU. It proposed for this temporary relief, which was based on the concept of equity and fairness. She said that Preventive Measures must be made available to all WTO Members. When a WTO Member State imposed a measure for the purpose of protecting its industry, the measure would inevitably cause damage to the industry of the affected Member states, which might be irreparable. Hence, the affected Member State must be allowed to make application for a provisional order to be prescribed, such as an order to stop the imposition of the measure.

The Delegate of Nepal informed the gathering that Nepal had recently acceded to the WTO Agreement. Nepal had virtually become the 147th WTO member and the first LDC member having undergone the accession negotiation process as required under the WTO regime. He observed that trade related investment measures and TRIPS were major critical areas under the multilateral trade regime, with apparent far-reaching implications over the economic and technological development of developing countries. Preparation of intellectual property legislation striking a balance between the private rights and community rights, in consonance with the TRIPS regime was arguably a difficult undertaking. Similarly developing a *sui generis* system for the protection of plant varieties was another complex area. He said that his delegation strongly observed that the patentability of micro-organisms and microbiological processes as provided for in article 27(b) of the TRIPS had resulted in some far reaching consequences for developing countries particularly in connection with protection of the rights and knowledge of indigenous and local communities and of farmer rights.

He also pointed out that the outcomes of the Doha Ministerial Conference had put forward some aspirations for developing countries to have some leverage under the WTO regime so that they could ease possible harsh and difficult positions during the implementation of WTO agreements. He was of the view that in order to materialize the rights of parallel import, compulsory licensing and deferral of patent protection of pharmaceuticals, as envisaged in the Doha Declaration, a common standing and collaboration of AALCO members were highly desirable. He wanted the AALCO members to have a common voice and position on the review and revision of WTO agreements as well as on the future trade negotiations. AALCO members should further develop a quality unity in multilateral trade negotiations and enhance their collective bargaining powers so as to protect and safeguard their common interests.

The delegate also made some recommendations and called upon the AALCO Secretariat in the common interests of the AALCO members should consider developing a model legislative guide on compulsory licensing, common position for utilization of the Doha flexibilities, as well as special and differential treatment provisions; develop some alternative *sui generis* models for protection of plant varieties; and provide technical assistance to its member which intends to join the WTO. He also wanted the AALCO Secretariat to carry on studying and monitoring the developments related to the code of conduct for the world trade, which would keep the member governments abreast of the recent developments in this field.

V. OBSERVATIONS

With the failure of the fifth WTO Ministerial Conference, which was expected to assess the progress in the trade negotiations without adopting a Ministerial Declaration, there was strong pessimism among the WTO Members and the civil society about the future of the Doha Development Agenda. The fifth Conference failed primarily due to acute differences in interests dividing developed and developing country Members. However, the year 2004 saw the breakthrough in the form of a 'July Decision' by the WTO General Council, which set the framework for the future conduct of negotiation of the Doha Development Agenda.

The major break through was the adoption of a rather unambiguous framework for the negotiation of agriculture, which was the major issue which lead to the failure of the Cancun Conference. The July Decision also adopted 'not so specific' modalities for the negotiation of non-agriculture market access. On agriculture, most, if not all WTO Members generally welcomed the July Package as a positive development. General Council Decision reveals slightly more flexibility and stronger language in favour of developing countries on market access compared to earlier texts. However, the extent of 'substantial market access' and 'flexibility' is left to rules and criteria, to be developed in future negotiations. The text includes concrete targets, at least for overall domestic support reduction and a cap for permitted Blue Box levels. Another major development is the decision to address cotton "ambitiously, expeditiously and specifically" with in the agriculture negotiation. To conclude, the Annex simply lays down the basic pillars and a 'framework' for conducting future talks. Negotiations on modalities of substance, much of which has been left undetermined, will be a real challenge that Members have yet to confront.

The 'Singapore issues', another contentious issue which lead to the failure of the Cancun Conference was finally dropped from the Agenda. However, the developing countries were made to compromise on one Singapore issue, i.e., Trade Facilitation, which was retained. The strong opposition from the developing Members led to the complete dropping of the negotiation in three Singapore issues i.e., trade and investment, trade and competition policy, and transparency in government procurement from the Doha Development Agenda. At the fifth Conference, the developing country Members stood firmly against the developed country Members (especially the United States and European Union) proposal for an agreement on the "Singapore Issues". The developing countries were of the position that a negotiation on Singapore issues would divert scarce human and negotiating resources from direct trade issues such as agriculture and industrial products and agreement on these issues will have serious implications on their economy and development prospects.

As regards the review of the DSU, as usual there was no progress. It can be seen that since 1997 when the review initially started, till date, consensus had been reached only on very few provisions, mostly procedural ones'. Chairman of the Special Session has achieved no further progress in the negotiations even after the circulation of

negotiating text of proposals. It is disappointing to note that neither the Cancun Ministerial Conference nor the 'July 2004 package' did reflect on the progress and direction of the review of the DSU, except reiterating the earlier decisions.

Another important development was the launching of a report on "The Future of the WTO" by the WTO, which addresses several institutional issues, with recommendations to reform the way the organization works and how decisions are made. The 86-page report was from a 'Consultative Board' set up by the WTO Director General Dr. Supachai Panitchpakdi and chaired by Peter Sutherland, a former Director-General of GATT and the WTO. The report addresses the WTO's role in globalization, responding to the many criticisms the organization is facing. In separate chapters, it looks at preferential trade arrangements (PTAs), coherence between the WTO and other agencies, relations with civil society, the WTO dispute settlement system, the decision-making process, and the role of the Director General and the Secretariat. The report also suggests that, wherever possible, the provision of technical assistance and capacity building for LDCs should be included as a contractual right (including for funding arrangements) in future new WTO agreements. In a chapter on "the erosion of non-discrimination", the report warns that the practice of the most-favoured nation (MFN) principle is no longer the rule, and it is almost the exception.

Some of the important and some controversial recommendations of the Consultative Board include: the use of the plurilateral approach for suggested new agreements when consensus among members for such rules is not possible; the establishment of a Ministerial-level "consultative group" of up to 30 members, and greatly expanding the powers of the Director-General and the Secretariat so that they can play pro-active and even leadership roles in negotiations.

As regards the proposals on special and differential treatment (S&D), the report says S&D remains a valid concept, but in light of present realities, these mechanisms require further study. It questions the two basic assumptions of S&D. The first assumption is that the economics of trade liberalisation is not valid for poorer countries, so demands for reciprocal trade concessions from them are inappropriate. The report says empirical studies show that inward-looking policies harm developing countries, and that protection undermines developing countries' export performance. The second assumption is that reciprocal concessions from developing countries are not worth the bother as their markets are insignificant. The report says this does not hold for many developing countries today, hence the demands for "graduation."