

ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



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

Prepared by:

**The AALCO Secretariat
29-C, Rizal Marg,
Chanakyapuri Diplomatic Enclave
New Delhi- 110021
(INDIA)**

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

Contents

I.	Introduction	1-1
II.	A Brief Background to the Nairobi Ministerial Conference	1-3
III.	Outcome of the Nairobi Ministerial Conference	3-6
	<ul style="list-style-type: none">• Agriculture• Cotton• LDC Issues	
IV.	Comments and Observations of the AALCO Secretariat	6-8
V.	Draft Resolution on the Agenda Item	9-9

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

I. Introduction

1. At the Thirty-Fourth Session of the AALCO held at Doha, Qatar in 1995, the item “WTO as a Framework Agreement and Code of Conduct for the World Trade” was for the first time introduced in the Agenda of AALCO. This coincided with the Uruguay Round negotiations which were completed in 1994 and had culminated in the establishment of the World Trade Organization (WTO) in 1995. Thereafter, this item continued to remain on the agenda of the Organization and was deliberated upon during the subsequent sessions. At these sessions, the Secretariat was directed to monitor the development related to the WTO, particularly the relevant legal aspects of dispute settlement mechanism.

2. In fulfillment of this mandate, the Secretariat had been preparing reports and presenting it to the Member States for their consideration and deliberation. In furtherance of its work programme, the AALCO in cooperation with the Government of India also convened a two-day seminar on ‘Certain Aspects of the functioning of the WTO Dispute Settlement Mechanism and other Allied Matters’ at New Delhi (1998). Further, at the Forty-Second Session held in Seoul (2003), the Secretariat presented a Special Study on ‘Special and Differential Treatment under WTO Agreements’.

3. Be that as it may, the Report of the AALCO Secretariat for this year focuses on the Tenth WTO Ministerial Conference which took place at Nairobi in December 2015, and the first such meeting hosted by an African State. It first gives a brief background to the Nairobi Conference before highlighting the landmark decisions that were arrived at in Nairobi in certain critical areas of concern to the developing countries. Thereafter, it will also go on to offer some general comments.

II. A Brief Background to the Nairobi Ministerial Conference

4. The ninth Ministerial Conference of the World Trade Organization (WTO) which was held in Bali in December 2013 was a qualified success. After years of stagnation the WTO received a boost at the Bali Ministerial Conference with an agreement on Trade Facilitation and several other decisions. Of the 21 subjects that were part of the original Doha Declaration (WT/MIN (01)/ DEC/1), the Bali Package addressed only four of them, namely: agriculture; LDC issues; cotton; and trade facilitation. Regarding the Regular Work under the WTO General Council, the subjects covered were e-commerce; intellectual property; small economies; and trade and technology transfer. The Bali Package was an effort to break the long-lasting stalemate in multilateral trade negotiations. In Bali, the WTO Members agreed to formulate a clearly defined post-Bali work programme (PBWP) on the outstanding issues of the Doha Development Agenda (DDA), with a view to overcoming the key stumbling blocks to the conclusion of the DDA negotiations. While there were other 'housekeeping' decisions on issues like the rules of origin, preferential access to least developed countries etc, it was clear that the main political standoff in Nairobi would be on how the issue of 'public stockholding' would be resolved.

5. It is to be mentioned here that the run-up to the Nairobi Ministerial was unlike any of the previous Ministerial Conferences, as most of the members of WTO did not show much interest in drawing up an agenda (for the members from the 162 members) to discuss and take decisions. It was not very difficult to surmise why the developed countries looked preferred to walk away from the multilateral trading system that the WTO represents. One of the reasons might be the frustration that the WTO process is not bearing fruits which developed countries expected in time and that the developments in the WTO, especially in the Doha Round negotiations, was forcing the big powers to share the economic pie with not just the emerging economies, but had also raised the spectre of bringing the new aspirants, the so-called Next Eleven and others. A reaction to it have been the series of initiatives taken by the United States and the European Union to forge mega-regional trade deals. The first of these deals, the Trans Pacific Partnership (TPP), a 12-member arrangement initiated by the United States, was agreed two months before the convening of the Nairobi Ministerial, while the United States and the European Union are working to forge the Transatlantic Trade and Investment Partnership (TTIP).

6. Hence, a number of important developments in the last two years (since the Bali Ministerial of 2013) made the Nairobi meeting important for two reasons:

- Should the Doha Development Round, which began in 2001, be declared closed, as some commentators have argued? Should the next Ministerial in 2017 herald a new round?
- What about the fate of the WTO itself, in light of recent developments in three major plurilateral agreements - the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP) and the Regional Comprehensive Economic Partnership (RCEP?).

7. A few words about the importance of TPP and TTIP need to be mentioned here. This is because they tend to deviate from the core tenets of the DDA that has been the guiding framework of negotiations for the developing countries. Negotiations in the Doha Round that were conducted under the rubric of the Doha Development Agenda challenged the carefully crafted framework of rules that the major economic powers had put together in the covered agreements under the WTO. The DDA, which was launched after the Doha Ministerial Conference in 2001, was put forward as an agenda to re-work several of the key agreements keeping in view the development concerns of the developing countries. Thus, the agriculture negotiations were mandated to include in the WTO's Agreement on Agriculture (AoA) instruments that would take cognisance of the food security and rural livelihood interests of developing countries, while at the same time, curb the use of trade-distorting subsidies. The latter mandate was focused on a politically inconvenient issue for the developed countries, especially the United States and to a lesser extent, the European Union members. The Doha Ministerial Conference also saw the WTO members introduce measures to blunt the market power of the large firms in the pharmaceutical industry that they exercised using their patent monopolies. And, finally, India and other developing countries argued for freer mobility of labour in global services trade, and to therefore provide an opportunity to their workforce to benefit from trade.

8. Since 2000, over 40 TPP agreements have been signed. Before that, the number was a measly four¹. In sharp contrast to the DDA, the TPP, along with TTIP, has set the stage for the countries who advocate the free trade, but not without defects especially for developing countries. For example, the emphasis in these agreements is on opening markets without paying any attention to removing the distortions in the markets caused by subsidies and other export incentives. This implies, for instance, that the bane of agricultural subsidies granted by the United States and the European Union that has distorted the global commodity markets and has hurt small farmers in developing countries can continue unchecked. The DDA was given the mandate to critically look at the farm subsidies given by the United States, which had increased from \$61 billion in 1995 to \$ 140 billion in 2012 and is threatening to increase further after the 2014 Farm Bill, but with the coming of the new trade arrangements like the TPP, the United States' subsidies regime would remain unchallenged, paving the way for consolidation of the large traders in commodity markets worldwide.

9. At the same time, the TPP has put the clock back on making the patents and other intellectual property laws to strike a better balance between the interests of the monopoly rights of the owners of intellectual property and the users of the proprietary products. The TPP has proposed to swing the balance in favour of the former, which raises the spectre of increasing the prices of proprietary products, whose immediate impact would be felt in the area of healthcare products, especially of medicines. In recent years, there has been a spate of cases of unfair use of monopoly rights by the pharmaceutical firms, which has left the authorities even in the United States in a quandary.

10. Clearly, the Regional Trade Agreement bandwagon has gathered speed in recent years. Developing Countries will have to formulate their strategy keeping in mind developments both in and out of the WTO. In this sense, the Nairobi Ministerial assumed immense significance. Due to this, the days and months leading up to the WTO's Tenth Ministerial Conference in Nairobi were tense and indeed over the last several years there has been an increasingly sharp divide amongst member countries, both over the content of various specific deliverables, as well as on the future course of multilateral negotiations at the WTO. This in turn led to a sharp divide in opinions about the future of the DDA and whether or not it remains relevant.

III. **Outcome of the Nairobi Ministerial Conference**²

¹ Available at www.catchnews.com/.../wto-ministerial-in-nairobi-key-issues-what-s-at-st...

² Hanna Deringer, "*The WTO Ministerial Conference in Nairobi – What are the results?*", Available at: <http://ecipe.org/blog/the-wto-ministerial-conference-in-nairobi-what-are-the-results/>; Rob Davies, "Outcome of the 10th WTO Ministerial Conference held in Nairobi, Kenya from 15 to 19 December 2015", Available at: https://www.thedti.gov.za/parliament/2016/MC10_outcomes.pdf ; Also see: <http://www.olivegreens.co.in/blog/highlights-of-tenth-ministerial-conference-of-wto-in-nairobi-15-to-19-december-2015>.

11. The Tenth WTO Ministerial Conference, which was held in Nairobi from 15th to 19th December 2015 had witnessed five days of intense negotiations and 162 members of the WTO came to a deal to push the agenda, and crucially reassert their relevance. There were a number of significant decisions made by the member countries at Nairobi.

12. The ‘Nairobi Package’ contains six ministerial decisions, including three decisions pertaining to agriculture. Additionally, three decisions were adopted under the regular work of the General Council on electronic commerce; implementation of the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS), and a work programme for the advancement of small economies. Furthermore, members also endorsed the Declaration on the Expansion of Trade in Information Technology (ITA-II).

Agriculture

13. The first was a decision on a *Special Safeguard Mechanism* (SSM) for developing country members (allowing them to temporarily raise tariffs in cases of import surges). The decision recognizes the right of developing country members to have recourse to a SSM. The issue of SSM would be further discussed amongst the members, and delinked from the issue of market access. Put differently, no definite agreement was reached in the area of special safeguards mechanism (SSM) for protecting developing country farmers against import surges that they were pushing for.

14. The second decision was on *public stock holding for food security purposes*. These negotiations will be held in the Committee on Agriculture in dedicated sessions and in an accelerated time-frame, distinct from the agriculture negotiations under the DDA. SSM and public stockholding are important issues for developing and net food importing countries and it is significant that going forward these issues will be taken up for an early resolution. While there may not have been any binding commitment at Nairobi, but the recognition of the importance of these issues is significant.

15. The third decision was on *export competition*. Disciplines have been imposed on measures affecting export competition, including export subsidies. All Member Countries have to eliminate export subsidies within a given time frame, with some relaxation for developing countries to comply. In other words, according to the Nairobi Declaration approved at the conference, developed members shall immediately eliminate their scheduled export subsidies while the developing country members shall do so by 2018. However, to ensure that the rules do not interfere with local food security initiatives, the ministers also agreed on another package to protect state-sponsored initiatives from being classified under the new deal. The ministers agreed the food security initiatives would allow food stockpiles until 2017. The decision was taken to ensure that the food security initiatives do not compromise the broader deal of ensuring the playing field in agricultural trade is level to allow all players to compete equitably. While on paper the decision to eliminate export subsidies sounds remarkable, over the years most developed countries have eliminated or significantly reduced such subsidies.

Cotton

16. The decision related to cotton includes three agriculture elements, viz, market access, domestic support and export competition. On market access the decision calls for cotton from LDCs to be given duty-free and quota-free access to the markets of developed countries- and to those of developing countries declaring that there are able to do so from 1st January 2016. The domestic support part of the cotton decision acknowledges member's reforms in their domestic cotton policies and stresses that more efforts remain to be made. As regards export competition for cotton, the decision mandates that developed countries prohibit cotton export subsidies immediately and developing countries do so by 1st January 2017.

LDC Issues

17. Decisions were adopted in favour of the LDCs on preferential rules of origin for LDCs and on preferential treatment in favour of services and service suppliers of LDCs to increase LDC participation in services. The endeavour is to facilitate trade by the LDCs and help them increase their share in world trade. The decisions in favour of LDCs are in line with the WTO's constant effort to make the global trading order more inclusive and to help LDCs reap the benefits of trade.

18. Barring the three major areas of issues, the Member countries also reaffirmed their commitment to the Work Programme on Small Economies. The objective of the programme, which is carried out in dedicated sessions of the Committee on Trade and Development, is to address the trade-related issues facing small economies and to help them integrate into the multilateral trading system. An important commitment was undertaken regarding e-commerce. WTO members would continue the practice of not imposing customs duties on electronic transmissions until the next session of the Ministerial Conference in 2017.

19. Further, the TRIPS Council would be asked to continue its discussions on whether non-violation disputes should apply to intellectual property, and to make recommendations to the next Ministerial Conference to be held in 2017. In the meantime, WTO members would refrain from bringing such cases to the dispute settlement system.

20. The Nairobi Ministerial also witnessed the endorsement of the second phase of the Information Technology Agreement (ITAII) by 53 WTO members that calls for tariff eliminations on a large number of information technology (IT) products. As a result of these negotiations, approximately 65 per cent of tariff lines will be fully eliminated by 1st July 2016. Most of the remaining tariff lines will be completely phased out in four stages over three years and by 2019 almost all imports of the relevant products will be duty free. The elimination of high tariffs on IT products will boost global trade and expand annual global GDP by \$190 billion. This indeed is one of the most significant outcomes of the Nairobi Ministerial Conference.

21. However, Nairobi fell short on a number of fronts. As mentioned above, the no permanent solution was arrived at on the issues of SSM and public stockholding for food security. The impact of elimination of export subsidies is not likely to be significant either. More profoundly, Member Countries agreed to disagree on whether the DDA can remain the basis for ongoing negotiations. The general consensus based approach to decision making in the WTO

made way for an express division in views. The Nairobi Ministerial Declaration highlighted that some countries prefer ‘new approaches’ to achieve results at the multilateral level. Other members reiterated that the WTO negotiations must address outstanding issues within the confines of the DDA agenda.

IV. Comments and Observations of the AALCO Secretariat

22. Since the conclusion of the Nairobi Ministerial, there have been assessments aplenty as to what was gained and lost through the decisions that the Ministers have agreed to at Nairobi. In all fairness, the results at Nairobi were perhaps the best that could be achieved given the circumstances. However, the outcome of the Nairobi Ministerial could only be described as “modest”. From the view point of the Secretariat of AALCO, the reasons for this modest outcome are as follows:

23. *Firstly*, the five-page declaration adopted at the Nairobi meeting, which also marked the 20th anniversary since the establishment of the WTO, underlined the crucial importance of the multilateral rules-based trading system and reaffirmed the principles and objectives, set out in the Marrakesh Agreement Establishing the WTO. As such this is a welcome reaffirmation. This is because a large majority of developing countries have serious stakes in a multilateral trading system, notwithstanding the spate of regional trade agreements. A rules-based system that is multilateral has much to offer to them.

24. *Secondly*, Nairobi Ministerial Declaration concluded with no clear path forward for the Doha Development Agenda (DDA). While the Nairobi Declaration clearly affirms the WTO as an important consensus-driven multilateral institution, the Nairobi Declaration explicitly states that there is no consensus on continuation of the Doha Development Agenda (reflecting an ongoing wide division among members on the issue). That the Doha Development Agenda stands non-reaffirmed is cause for concern for the collective interests of the developing countries of Asia and Africa. This is because the DDA was put forward as an agenda to re-work several of the key agreements keeping in view the development concerns of the developing countries. Without the Doha framework and an explicit reaffirmation of the DDA, developing countries will be in a tough position again in the WTO to negotiate the agenda to their benefit in the years to come. More so because, since the WTO work programme is decided through consensus, the future of DDA does seem to be in jeopardy³.

³ In this context, the comment of the United States Trade Representative (USTR), Michael Forman, that the WTO members “have been freed to consider new approaches to pressing unresolved issues” assumes significance. This statement implies that select groups of countries would work for advancing of the trade liberalisation agenda in select areas, without involving the larger membership of the WTO. Available at: <http://www.ft.com/cms/s/0/2f9a7ee4-a190-11e5-bc70-7ff6d4fd203a.html#axzz45rqsZCR7>

25. This would mean that the so-called “plurilateral approach⁴” is likely to be given great importance in the years to come. This is the approach which is currently being followed informally by countries (the second phase of liberalisation of trade in information technology products, or ITA-II, is one such example), but there is a possibility that this approach could be mainstreamed in future. Such a development would surely deal a terminal blow to multilateralism, which is expected to be the spirit of the WTO. It is therefore of critical importance that trade rules must meet the larger objective of development, which faces an existential threat. The task for the Asian–African States is to face up to this challenge.

26. *Thirdly*, the outcome of Nairobi Ministerial as regards the issue of SSM and public stock holding for food security are disappointing. It is worth reminding here that Public stockholding programs constitute the first line of defense for developing countries against price shocks, production volatility, and food insecurity and that there is a need to find a permanent solution to this issue that is vital for the food security needs of developing countries. But the Nairobi outcome leaves a lot to be desired. For example, the demand to safeguard the interests of poor farmers and food security programmes (led by India) was not taken very seriously at Nairobi. To find a permanent solution to the public stockholding issue for food security purposes, it was proposed at Nairobi that either the Member States amend the formula to calculate the food subsidy cap of 10 per cent, which is based on the reference price of 1986-88, or allow such schemes outside the purview of subsidy caps. But this was not acted upon. The importance of issues like the special safeguard mechanism, as well as the need for a permanent solution on the issue of public stockholding for food security, have consequently been merely reaffirmed, without much progress in the Nairobi negotiations.

27. *Fourthly*, a centrepiece of the Nairobi Package is the Ministerial Decision on Export Competition including a commitment to eliminate subsidies for farm exports. This is important due to the fact that a number of countries are currently using export subsidies to support agriculture exports. The Nairobi decision would eliminate these subsidies and prevent governments from reverting to trade-distorting export support in the future. While the developed countries must cease export subsidies with immediate effect, the developing countries have until 2018, and the least developed countries and food importers until 2030. Even while saddling them with the burden of doing away with all export subsidies in the coming years, the Nairobi has all but ended the development framework of the Doha Round within which negotiations have been taking place.

28. *Fifthly*, the Nairobi declaration repeats the promise of Doha, to secure for the developing countries, and especially the LDCs, a share of world trade corresponding to their development needs. Accordingly, the package on LDC issues for the least-developed countries includes non-binding rules for preferential rules of origin and implementation of preferential treatment in favour of LDC services and services suppliers in services trade.

⁴ A plurilateral agreement is a multi-national legal or trade agreement between countries. In economic jargon, it is an agreement between more than two countries. Both TPP and TTIP are referred to as plurilateral agreements within the framework of the WTO.

29. The Secretariat of AALCO will follow the developments that would take place in the next Ministerial meeting of WTO with a view to analyze the outcome and report to the Member States of AALCO.

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

**SECRETARIAT'S DRAFT
AALCO/ RES/ DFT/55/ S 13
20 May 2016**

The Asian-African Legal Consultative Organization at its Fifty-Fifth Session,

Having considered the Secretariat Document No. AALCO/55/HEADQUARTERS (NEW DELHI) /2016/ SD/S 13,

Having heard with appreciation the introductory statement of the Secretary-General on the agenda item,

Recognizing the importance and complexities of issues involved in the successful conclusion of the WTO Doha Development Agenda,

Taking note of the decisions adopted at the Tenth Ministerial Conference of WTO held in December 2015 at Nairobi,

Expressing concern about the indecisiveness of the Nairobi Ministerial Declaration on the continuing relevance of the Doha Development Agenda to the future ministerial negotiations,

1. **Encourages** Member States to complete negotiations mandated under the Doha Development Agenda, taking fully into consideration the special development concerns of developing and least-developed country Members of WTO and the original purpose of the Doha agenda;
2. **Requests** the Secretary-General in consultation with Member States, subject to the availability of necessary resources, to organize seminars or workshops to facilitate the exchange of views by Member States on issues currently under negotiation within the WTO and capacity building programs; and
3. **Decides** to place this item on the agenda of an Annual Session of AALCO as and when required.