

ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



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

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(Deliberated)

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

(Deliberated)

I. Introduction

1. At the Thirty-Fourth Session of the AALCO (1995) held at Doha, Qatar, 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. The Report of the Secretariat prepared for the fifty-second Annual Session that took place in New Delhi focused on the reasons for the failure of the conclusion of the Doha round from the viewpoint of developing States in particular. The Report of the AALCO Secretariat for this year focuses on the Ninth WTO Ministerial Conference which took place at Bali in December 2013 and adopted few landmark decisions in certain critical areas of concern to the developing countries. The Report will look at the Conference and outcome of the Bali Conference from the view point of developing countries. Finally it would offer some general comments.

II. Brief Overview of the Bali Ministerial Conference:

4. The current impasse confronting the World Trade Organization’s (WTO) Doha Development Round (DDR) Negotiations has exposed serious fault lines concerning the multilateral trading system from the perspective of a number of important dimensions : (a) the

political-economy aspects of managing the global trading system and WTO's future role in view of this; (b) systemic issues that concern decision making process in the WTO ; (c) approaches and modalities that are best suited to pursuing sector-specific negotiations; and (d) ensuring developmental content of the Doha Development Round.

5. In the backdrop of the global economic downturn of 2008 and the inability of the membership to reach consensus on the full Doha Development Agenda, it was decided at the 8th Ministerial Conference held at Geneva in 2011 to focus on areas where convergence was possible. Accordingly, after deliberations amongst members in 2012, it was agreed that members would strive for an agreement on Trade Facilitation, a few areas in agriculture, development issues and issues of relevance for Least Development Countries (LDCs).

6. The Ninth (and the latest) Ministerial Conference which was held in Bali, Indonesia from 3rd December to 7th December 2013 had a range of critical issues that was of concern to the developing world. The following part of the report is devoted to addressing the most important issues that were the subject of deliberations at Bali.

A. Major Issues of Concern for the Developing Countries

i. Food Security

7. An important issue for the WTO's Bali Ministerial meeting relates to one significant aspect of food security for developing countries, which was brought up in a proposal by the Group of 33 developing countries within the framework of the Doha Round multilateral trade negotiations.

8. According to the WTO Agreement on Agriculture which was negotiated during Uruguay Round and is currently in force, public stockholding for food security purposes is included as one of the items under Green Box, with certain conditions. The Green Box (described in Annex 2 of the Agreement in Agriculture) sets out domestic support measures that are considered minimally or non-trade distorting, and WTO Members are allowed to take recourse to these measures without limitations. In fact, government spending under these measures can be increased to any extent. However in the case of public stockholding, a significant condition, causing enormous problems to Developing Countries, has been attached¹.

¹ See in general, UNCTAD (United Nations Conference on Trade and Development), 2000. Impact of the reform process in agriculture on LDCs and Net Food-Importing Developing Countries and ways to address their concerns in

9. One condition is that food purchases by the government shall be made at current market prices and sale from public stockholding shall be made at prices not lower than current domestic market price. It is also stipulated in this context that the difference between the procurement price and external reference price should be accounted for in the calculation of Aggregate Measurement of Support (AMS), or so-called “trade distorting domestic support.” This stipulation negates the objective of including “public stockholding for Food Security purposes” in the Green Box, since effectively the difference between procurement price and the external reference price is treated as a subsidy to the farmer and included in the AMS. This is especially because the external reference price has been defined as the international price prevalent on average in 1986-88. Food prices internationally, as well as domestically, have increased very significantly since then. Thus, this stipulation limits the ability of developing countries to implement schemes to assist their small farmers.

10. The main element of the G-33² proposal is that acquisition of stocks of foodstuff by developing countries with the objective of supporting low-income or resource-poor producers should not be included in the calculation of AMS. The G33 proposal³ if adopted would thus enable developing countries to formulate or implement such schemes to help their poor producers or families without the present restraints placed by the WTO agriculture rules. It would advance the cause of national food security, promotion of small farmers’ livelihoods as well as fulfilling the

multilateral trade negotiations. Background note by the UNCTAD Secretariat. TD/B/COM.1/EM.11/2. Geneva. Also see: S. Murphy, 1999, In Focus: WTO, Agricultural deregulation and food security. <http://www.wtowatch.org/library/admin/uploadedfiles/In_Focus_WTO_Agricultural_Deregulation_and_Foo.htm>

² The G33 originally comprised 33 members (hence the name) but subsequently expanded to 46: Antigua and Barbuda, Barbados, Belize, Benin, Bolivia, Botswana, Côte d’Ivoire, China, Congo, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, South Korea, Madagascar, Mauritius, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia and Zimbabwe. The G33 are also known as the ‘Friends of Special Products’ in agriculture.

³ For an elaborate background to the proposal, See, Food and Agricultural Organization (FAO), *G-33 Proposal: Early Agreement on Elements of the draft Doha Accord to Address Food Security* (Information Note: September 2013).

Millennium Development Goals of reducing hunger and poverty. It also needs to be remembered here that right to food is an integral component of the international human rights regime⁴.

11. Accordingly, this proposal needed and still needs to be considered to be worthy of support and of great importance in contributing to the success of the WTO's Ninth Ministerial Conference and to the reputation of the WTO as an organization that is concerned with development and poverty reduction. This issue is of major importance not only in terms of trade but also the livelihoods of millions of small farmers and the food security of people in developing countries. The acquisition of food stocks has always been an important instrument for development and was also used by many developed countries during their development process. It remains an important policy tool for developing countries for the following reasons:

12. *Firstly*, in the face of volatility of food stocks on the global market to day and fluctuations in global food prices, building national reserves has been widely acknowledged to be a critical part of developing countries' food security strategy. Today's global food market is structurally different from the market when the Uruguay Round was completed. In the 1990s and early 2000s, food on the global market was cheap and stocks were plentiful. It is no longer so.

13. *Secondly*, acquiring surpluses from some regions of the country and sending these supplies to other regions of the country that are food deficit has been and remains an important food security instrument for developing countries.

14. *Thirdly*, many developing countries continue to struggle with widespread rural poverty. At least 1.5 billion individuals depend on small-scale farming for their livelihoods. This remains a major issue especially when the share of the population engaged in agriculture continues to be significant and the industrial or services sectors cannot provide sufficient employment. For broad-based development to take place, countries must ensure that the living standards and purchasing power of the majority can be increased. Governments' programmes acquiring foodstuffs at administered prices are therefore an important avenue whereby resource poor farmers' incomes can be stabilized and even guaranteed.

⁴ It is pertinent to recall here that on the eve of the Ninth Ministerial Conference of WTO, the rights of developing countries to use public food reserves for food security without facing sanctions was stressed by Olivier De Schutter, the United Nations Special Rapporteur on the Right to Food.

15. Be that as it may, it needs to be understood here that currently “*Public Stockholding for Food Security Purposes*” is included in the Green Box, the category of subsidies that are minimally or non-trade distorting. There are many other items also in this Green Box, including measures to protect the environment and subsidies to farmers that are not directly tied to production, most of which are used by the developed countries, which provide very large amounts of subsidies under this Box. WTO member countries are allowed to provide all these other Green Box subsidies without limit. However only in the case of the Public Stockholding for Food Security Purposes does the Agriculture Agreement place the condition that the difference between the acquisition price and the external reference price should be accounted for in the AMS.

16. This treatment of the developing countries’ support for public stockholding is discriminatory and there is thus much logic in the G33 proposal not to count this expenditure as part of the trade distorting subsidy which goes into the calculation of AMS. Just like the treatment for other Green Box measures such as decoupled supports, insurance, environmental protection and other support instruments provided by developed countries under the ‘Green Box’, Public Stockholding for Food Security Purposes should all the more be treated as a Green Box measure without any conditions attached to it. Since the understanding in the Uruguay Round is that the developed countries would have to progressively reduce their AMS, there has been a move by the major developed economies to shift more of the supports to the Green Box, while maintaining very high levels of their overall subsidies.

17. The G33 proposal, which is also in line with the 2001 Doha Ministerial mandate and the subsequent mandate from the 2005 Hong Kong Ministerial Conference recognising the need of developing countries to safeguard food security, rural livelihoods and rural employment, was being put forward as a text that had already been agreed to by the membership, and that should be part of an “early harvest” of the Doha work programme. The G33 proposal would also provide a solution for the discrimination in the way the Agreement on Agriculture rules stipulate how the AMS is to be calculated when developing countries undertake public stockholding programmes.

ii. Trade Facilitation

18. An agreement on trade facilitation has been proposed as an outcome from the Bali WTO Ministerial Conference. WTO Members formally agreed to launch negotiations on trade

facilitation in 2004 pursuant to the July 2004 Framework Package⁵ (referred to as the post-Cancun decision). The main proponents are the major developed countries, while many developing countries have taken a defensive position. In fact the developed countries have been advocating trade facilitation for many years. It was part of the four ‘Singapore Issues’, along with Investment, government procurement transparency, and competition, which many developing countries had proposed to remove from the Doha negotiating agenda during the 5th WTO Ministerial Conference in Cancun. Eventually three of the issues were removed from the agenda through the July 2004 package whilst trade facilitation remained on the table.

19. The trade facilitation negotiations have been focused on measures and policies intended for the simplification, harmonization and standardization of border procedures. They do not address the priorities for increasing and facilitating trade, particularly exports by developing countries, which would include enhancing infrastructure, building productive and trade capacity, marketing networks, and enhancing inter-regional trade. Nor do they include commitments to strengthen or effectively implement the special and differential treatment (SDT) provisions in the WTO system.

20. The negotiations process and content thus far indicate that such a trade facilitation agreement would lead mainly to facilitation of imports by the countries that upgrade their facilities under the proposed agreement, as an expansion of exports require a different type of facilitation involving improving supply capacity and access to developed countries’ markets. Some developing countries, especially those with weaker export capability, have thus expressed concerns that the new obligations, especially if they are legally binding, would result in higher imports without corresponding higher exports, which could have an adverse effect on their trade balance, and which would therefore require other measures or decisions (to be taken in the Bali Ministerial Conference) outside of the trade facilitation issue to improve export opportunities in order to be a counter-balance to this effect.

21. Another major concern that has been voiced by the developing countries is that the proposed agreement is to be legally binding and subject to the WTO’s dispute settlement system, which makes it even more important that the special and differential treatment for developing countries should be clear, strong and adequate enough. The negotiations have been on two

⁵ J.S.Wilson, C.L. Mann and T. Otsuki, (2004). Assessing the Potential Benefit of Trade Facilitation: A Global Perspective, *World Bank Policy Research Working Paper* 3224, February 2004, Washington, D.C.

components: Section I on the obligations and Section II on special and differentiated treatment (SDT), technical and financial assistance and capacity building for developing countries.

22. The negotiation mandate established in the “Modalities for Negotiations on Trade Facilitation” of the 2004 July Package 3 was confined to “clarifying and improving” relevant aspects of trade facilitation articles under the GATT 1994 (i.e. Articles V, VIII and X GATT), with a view to further expediting the movement, release and clearance of goods, including goods in transit. Thus, the negotiations are not meant to limit or eliminate the rights and obligations of Members under the three GATT articles or to impinge on national policy and regulatory space.

Be that as it may, there are a number of major issues for the developing countries arising from the trade facilitation issue⁶.

23. Many developing countries have legitimate concerns that they would have increased net imports, adversely affecting their trade balance. While the trade facilitation agreement is presented as an initiative that reduces trade costs and boosts trade, benefits have been mainly calculated at the aggregate level. Improvements in clearance of goods at the border will increase the inflow of goods. This increase in imports may benefit users of the imported goods, and increase the export opportunities of those countries that have the export capacity. However, poorer countries that do not have adequate production and export capability may not be able to take advantage of the opportunities afforded by trade facilitation. There is concern that countries that are net importers may experience an increase in their imports, without a corresponding increase in their exports, thus resulting in a worsening of their trade balance.

24. The draft rules being negotiated, mainly drawn up by major developed countries, do not allow for a balanced outcome of a potential trade facilitation agreement. New rules under Section I are mandatory with very limited flexibilities that could allow for Members’ discretion in implementation. The special and differential treatment under section II has been progressively diluted during the course of the negotiations. Furthermore, while the obligations in Section I are legally binding, including for developing countries, developed countries are not accepting binding rules on their obligation to provide technical and financial assistance and capacity building to developing countries.

⁶ UNCTAD, “*Reflections on a Future Trade Facilitation Agreement Implementation of WTO Obligations: A Comparison of Existing WTO Provisions*”, (United nations: New York, Geneva 2011)

25. The trade facilitation agreement would be a binding agreement and subject to WTO dispute settlement. The negotiating text is based on mandatory language in most provisions, which includes limited and uncertain flexibilities in some parts. Accordingly, if a Member fails to fully implement the agreement it might be subject to a dispute case under the WTO DSU and to trade sanctions for non-compliance. The cost of non-compliance could thus be significant; and to avoid potential trade sanctions, countries may have to invest in infrastructure and incur substantial costs to comply with binding commitments. It is worth noting that several WTO Members have been already challenged under WTO dispute settlement based on the grounds established by articles V, VIII, and X of the GATT 1994.

26. Several provisions would have significant influence on national legislative processes. For example, some of the articles proposed under the agreement refer to an undefined open-ended category of ‘interested parties’ which have to be included among those which a country has to consult prior to introducing new laws or measures (Article 2 on ‘prior publication and consultation’). The reference to the category ‘interested parties’ is not in the present GATT 1994. It could include an expanded list of entities that have a direct or indirect relation to the trade transactions covered by the agreement, and do not necessarily have to be located in the territory of the Member implementing the measure.

27. Meeting the obligations is likely to involve significant costs for developing countries. The costs include human resource expenses, equipment and information technology systems, as well as other significant infrastructure expenditures. These costs would not be limited to a one-time investment and most of them are of a recurring nature, and would thus be a burden especially on low-income countries. To be balanced, a trade facilitation agreement requires strong and effective rules under Section II on SDT for developing countries, particularly the LDCs.

III. On the Outcome of the Ninth Bali Ministerial Conference

28. The Bali package comprises 10 texts covering three broad areas—trade facilitation, agriculture, and special and differential treatment for least developed countries. We examine the content and politics of each of these in turn⁷.

⁷ See in general, Fahmida “*Khatun Bali Outcome of the WTO What it Means for Bangladesh*” (Centre For Policy Dialogue : Bangladesh December 2013).

A. Trade Facilitation

29. Trade facilitation was originally proposed as an issue for negotiation by the European Union at the 1996 Singapore Ministerial Conference and was included in the work programme that launched the Doha round in 2001. The purpose of the negotiations is to review and clarify aspects of the WTO agreements that relate to the administration of trade as it crosses national borders with the intention of speeding up and clarifying customs procedures and promoting efficiency and transparency. It is understood to be a major reform of WTO agreements and to be desirable only on a multilateral—that is, all member—basis. Trade facilitation is the most substantial part of the Bali package because it contains legally binding obligations to undertake regulatory or ‘good governance’ reform. It is also the most problematic part because it perpetuates the pattern of asymmetrical bargains struck in previous rounds of WTO negotiations. Indeed, the politics that played out both before and during the Bali meeting reflected developing countries’ frustration with the stark imbalances that are likely to be exacerbated by the trade facilitation agreement and by the Bali package as a whole.

30. Heading into MC9, the draft text on trade facilitation comprised two sections. Section I deals with the rules and technicalities of trading across borders, and it was by far the most problematic with more than 50 brackets reported in the text on the eve of MC9. Indeed, six areas of disagreement were evident relating to Section I in the areas of: (i) customs co-operation, (ii) expedited shipments, (iii) customs brokers, (iv) consular fees and other ‘disproportionate’ and ‘excessive’ formalities, (v) transit disciplines, and (vi) domestic legislation. Despite the number of brackets, the issues in these areas were felt to be readily solvable if an agreement could be found in other areas of the Bali package, particularly food security.

31. Section II reflected the agreement, in principle, that developing countries should not have to comply with the provisions of Section I unless they are provided with adequate special and differential treatment (SDT), technical and financial assistance, and capacity building to mitigate the costs of implementation. It also recognized that implementation could only come in three stages ranging from that which is immediately implementable, through measures that would require a period of transition, to that which could only be implemented following the receipt of technical and other assistance. Section II was widely agreed as settled and clear of brackets, ahead of MC9. Disagreements remained, however, over the mandatory nature of the legal language proposed, the extent to which flexibilities would be incorporated into the agreement, and the appropriate balance between Sections I and II and between the trade facilitation agreement and the

rest of the Bali package. Tensions over these issues played out in dynamic ways in Bali and threatened to cleave the negotiations along north-south and south-south lines.

32. The United States, under pressure from distribution companies such as FedEx and UPS, remained the most steadfast and uncompromising advocate for a trade facilitation deal and promised a re-opening of at least some aspects of the DDA negotiations if an agreement could be reached in Bali. Indeed, the promise of a trade facilitation deal is widely held to be the only reason the United States stayed at the negotiating table. Meanwhile, splits among developing countries over the framing and flexibilities of the trade facilitation text and the use of US power and influence threatened to derail the MC9 negotiations at the eleventh hour.

33. Estimates of the gains from a concluded WTO agreement on trade facilitation vary dramatically, ranging from US\$68 billion to US\$1 trillion and proponents claim that developing countries stand the most to gain. For example, according to OECD Secretary General Angel Gurría: ‘a comprehensive WTO reform package ... could increase worldwide income by over USD 40 billion. 65% of these gains will accrue to developing countries.’ However, the bulk of the changes and the associated costs of reforming border and customs procedures will fall most heavily on developing countries, and particularly the least developed, because the agreement merely codifies and makes mandatory practices that OECD countries already apply.

34. In response to these challenges, the LDC group successfully argued that their trade facilitation commitments should be made on a ‘best endeavour’ basis unless the provision of technical assistance and capacity building for implementation was made mandatory. Others still demanded that a deal on trade facilitation was conditional, not only on the provision of aid and technical assistance to developing countries, but also on the elimination of agricultural export subsidies. The European Union led the charge among the OECD to resist the elimination of export subsidies during both the preliminary negotiations and MC9 itself, despite the fact that this was mandated to occur by 2013 in the 2005 Hong Kong Ministerial Declaration. OECD countries’ intransience on the issue of export subsidies caused a rift among developing countries over whether it should become a deal breaker in Bali. Moreover, countries such as Rwanda were unconvinced about the need for more balance in the Bali package and broke ranks with their coalition partners lending support to the US position and exacerbating tensions in the African group.

35. These issues notwithstanding, initially it appeared as though these tensions had been assuaged and an overwhelming majority of poor countries were in support of the trade facilitation

text. However, more south-south cleavages emerged as the ALBA countries stated they would not support the text when they made the following statement:

36. *What we now have before us is still unbalanced, and further paves the way towards an international order that is more unjust and less equitable ... If we were to accept what is being handed to us, we would be faced with the same problems that we have experienced in implementing the Uruguay Round Agreements.*

37. Advocating on behalf of countries such as Egypt and Uruguay that will face particular implementation challenges because of their anachronistic and cumbersome customs brokerage and consular systems, the ALBA countries insisted there be more flexibility in the implementation of the trade facilitation agreement and more balance in the overall Bali package. They eventually backed down, apparently satisfied with raising the point about persistent imbalances in the package in its statements to heads of delegations.

38. That developing countries were able to secure mandatory technical and financial support for implementing the trade facilitation agreement is an important and positive change in how multilateral trade agreements affect regulatory processes in poor countries. However, the notion that trade facilitation is a ‘win-win’ deal has become a mantra repeated by those around the WTO negotiations in an effort to build pressure behind the first multilateral agreement for almost two decades. This narrative obscures the fact that the trade facilitation agreement is of greater value to industrial countries and that developing countries will shoulder disproportionate burdens and implementation costs as they bring their regulatory systems into line with the trade facilitation agreement (irrespective of the provisions of Section II).

39. Exaggerated claims have also been made with regard to both the economic returns and job creation that are likely to result. Trade facilitation will undoubtedly help to increase exports from and between developing countries, yet it will also open their markets in problematic ways, for example to subsidized agricultural imports that undermine local producers. These risks and imbalances are not redressed or even acknowledged in other areas of the Bali package where development gains are limited to best endeavour, non-legally binding solutions. As such, the trade facilitation agreement represents business as usual at the WTO—an asymmetrical deal struck as crisis discourse rallied members to secure an ‘early harvest’, revive the DDA and save the credibility of the multilateral trading system.

B. Food Security

40. Food security remained the single most divisive and important issue in Bali. Disagreements over global imbalances in food subsidies and agriculture flexibilities available to developing countries threatened to derail negotiations, just as they had done in July 2008. Against the backdrop of soaring and increasingly volatile food prices, food security was cast by negotiators and the media alike as the focal point for a perennial and apparently irreconcilable fight between the United States and India and one which fractured the G33. A closer examination reveals much more complicated politics at play⁸.

41. At issue is the practice of public stockholding by developing countries to secure food reserves, distribute subsidized food aid to the poorest, and guarantee minimum price supports for local farmers⁹. The principal focus in Bali was on India's use of such policies, though Anand Sharma claimed to have a list of over 50 other countries with similar schemes. India's public procurement programme, the National Food Security Bill—the 'Right to Food Act'—was signed into law in September 2013 and is widely considered to be a political strategy aimed at garnering support for the ruling Indian National Congress party in an election year.

42. Under this programme, staple foodstuffs are purchased from poor farmers at a minimum price to be held in public stocks. They are then sold at highly subsidised prices to those qualifying for food support. WTO members have used such schemes for many years and consideration was made for them in the AoA. The problems that (on the surface at least) dominated Bali concern the details of the AoA in this regard.

43. The AoA limits all countries' use of agricultural subsidies, with those limits being based on the levels of subsidies that each member had in place in a reference period of 1986-1990. Developing countries generally had no subsidy schemes in place at that time and therefore their allowed level of support was bound at zero. However, subsidy schemes are permitted so long as

⁸ See in general, FAO Trade Policy Briefs on Issues Related to the WTO negotiations on agriculture, No. 16 *The Bali Package - implications for trade and food security*.

⁹ The importance of this can be understood from the fact that India's 2013 Food Security Bill mandates public procurement of foodstuffs in order to distribute subsidized grains to much of the population, combined with a minimum support price to ensure adequate incomes for farmers. This has raised concerns that India could breach the tight limits on 'trade-distorting support' applied to developing countries under current WTO rules.

their value does not rise above certain levels—known as *de minimus* limits—set at five per cent of the value of production for developed countries and ten per cent for developing countries.

44. Public stockholding schemes that rise above *de minimus* limits and contain minimum prices to be paid to farmers (rather than purchasing stocks at prevailing market prices) are considered to be trade distorting and must therefore be included in that State's calculation of its agricultural subsidies—their aggregate measures of support (AMS). The value of the subsidy is calculated as the difference between the price paid to farmers (the procurement price) and a defined reference price multiplied by the volume of eligible production. The problem raised in Bali was the stipulation of the reference price set at prevailing world prices averaged across 1986-1988. During the negotiations, India and a handful of supporters took the position that the reference price must be reset to reflect the dramatically higher food prices of the last decade. This standoff was an offshoot of a broader mobilisation effort on behalf of import sensitive countries—the G33—to safeguard food security.

45. The G33 was formed on the eve of the September 2003 Cancún Ministerial Meeting with the expressed aim to ensure that the issue of food security, rural livelihood and rural development become integral parts of WTO agricultural negotiations. It is unique among WTO coalitions in that it comprises 46 large and small import-sensitive developing countries. The G33's view is that the AoA does not provide sufficient latitude for developing countries to pursue the domestic policy measures necessary to secure national and regional food reserves and to manage price and income volatility for poor, rural households. As a first step towards addressing the problem, the G33 rallied around the fact that many developing countries, unlike their developed country counterparts, are unable to use the Special Agricultural Safeguard (SSG)—the key defensive special and differential treatment mechanism in the AoA—to protect themselves against dramatic price fluctuations and import surges because they had not “tariffed” (the process by which members agreed to convert non-tariff barriers into tariffs) during the Uruguay Round. The G33 was successful in having this imbalance included in the 2004 July Framework and members agreed at the 2005 Hong Kong Ministerial Conference that developing countries should have recourse to a comparable mechanism, called the Special Safeguard Mechanism (SSM). However, much controversy over the operationalization and technical aspects of the mechanism persisted and ultimately contributed to the collapse of the 2008 Mini-Ministerial.

46. In the months before MC9, the G33 shifted focus from protecting poor farmers in import sensitive developing countries from shocks associated with more open markets to public stockholding which aims to: (a) ensure steady flow of food to vulnerable and poor populations;

and (b) support local food production and provide stable income to farmers. In November 2012 the G33 tabled an informal proposal to address the issue.

47. They proposed that food stockholding programmes in developing countries be exempted from AMS calculations and other programmes (such as farmer settlement, land reform to promote rural development, and poverty alleviation) be classed as green box (that is, permitted) subsidies. An unofficial non-paper by a handful of G33 members in May 2013 went further to suggest that *de minimus* limits be raised and the external reference price, the volume of eligible production, and the level of a ministered prices for developing countries be adjusted to better reflect changing food security dynamics.

48. Three additional options for addressing the problem were tabled in September 2013, again by a sub-set of G33 members: (i) public stockholding could be assessed against a three-year rolling average of recent prices rather than the 1986-88 reference price; (ii) excessive inflation rates, above 4 per cent, could be taken into account when calculating the contribution of public stockholding to the AMS and; (iii) a Peace Clause which exempts public stockholding programmes from legal challenge at the WTO could be introduced ‘until a final mechanism is established to address the food security challenges of developing countries’.

49. WTO members explicitly acknowledged that import sensitive, developing countries face unique food security challenges and that they should, in principle, have the discretion to introduce public stockholding programmes during periods of dramatic food price volatility. In this spirit, members agreed to an interim peace clause that would exempt public stockholding programmes for food security purposes that exceed *de minimis* levels from legal action at the WTO for four years. It was widely criticized for leaving developing countries open to dispute under the Agreement on Subsidies and Countervailing Measures, requiring transparency obligations of poor countries generally held to be too onerous and offering little for the poorest members because members are already required by the dispute settlement body to ‘exercise due restraint’ in initiating cases against LDCs. On the eve of the Ministerial Anand Sharma, erstwhile Minister of Commerce and Industry of India announced that India had changed its position. It would not agree to the peace clause in Bali on the basis that a temporary solution was inadequate to address the food security challenges facing developing countries and to redress the historical injustices of previous multilateral agreements.

50. What resulted was a four-year peace clause that will remain in place until a permanent solution can be found. Although clearly inadequate in the long term, this move signifies a small

step-change in ministerial negotiations; collective will to revive multilateralism and secure a deal, however small and asymmetrical, triumphed over principled posturing and political retrenchment in Bali.

C. The LDC Package

51. The LDC agreement was the most finalised of the three areas being prepared for ministerial approval in Bali. In May 2013 the LDC group had submitted a document outlining the issues that they considered to be priority areas for agreement. This had four elements that they considered to be ‘possible deliverables’: (i) delivering duty-free and quota-free market access; (ii) providing preferential rules of origin; (iii) an agreement on cotton; and (iv) operationalising the previously agreed LDC services waiver through which members are allowed to grant preferential treatment to service suppliers from LDCs.

52. In the frenzied negotiations that took place in the months preceding MC9, the LDC package consisted of these four areas and was the only section of the prospective Bali agreement not to contain bracketed text. The finalisation of the LDC package alongside the finalisation of Section II of the Trade Facilitation text led to the LDC group, the week before the ministerial commenced, ‘calling wholeheartedly for a deal to be reached in Bali and for other Members to resolve any remaining issues which stand in the way’.

53. While the four issues are significant and the LDCs themselves may have been satisfied with the package on offer, doubts remain over precisely how much positive impact the agreement will have on development. The services waiver was agreed at MC8 in 2011 but has yet to be operationalised. The Bali package calls for an expediting of this process and commits the Committee on Trade in Services to undertake a periodic review of efforts to do so. On cotton, the ‘Cotton Four’ (Benin, Burkina Faso, Chad, and Mali) had proposed that a Bali agreement should include four items, of which the most substantial were DFQF access for cotton exports from LDCs from 2015 along with the immediate elimination of export subsidies in the sector. By the conclusion of MC9 these two proposals had been dropped from the LDC package, leaving only a call for greater linkages between cotton and the aid for trade agenda and the initiation of periodic reviews on implementation of the various cotton initiatives on the table.

54. The issue of DFQF was thrust to the fore of the DDA agenda at the 2005 Hong Kong Ministerial Conference when it was agreed that all members in a position to do so would provide LDCs with DFQF market access, though members for which this requirement was difficult could

provide access for 97 per cent of products originating from LDCs by 2008, before progressively moving towards 100 per cent coverage. At Bali, the agreement reaffirmed this aim and encouraged countries to do more to improve their DFQF coverage and set up an annual monitoring mechanism within the Committee on Trade and Development to assess these efforts. Finally, on Rules of Origin the agreement contains only non-binding requests for preference-giving members to adopt the more generous rules of origin practices that the LDC group had put forward and initiate work to create a more comprehensive and binding future agreement on the issue.

55. In sum, the LDC package contains a set of non-legally binding promises to fulfil commitments that were made almost a decade ago in Hong Kong. The best endeavour outcomes on preferential rules of origin, cotton, the waiver concerning preferential treatment to services, DFQF market access, and a monitoring mechanism on special and differential treatment simply do not go far enough towards redressing the imbalances in both the Bali package and in global trade more generally. Moreover, if WTO history is a guide, it remains unlikely that these measures will be implemented. Indeed, if serious effort is not directed towards development and implementation issues in the coming months, the LDC package will be words alone.

IV. The Way Forward After Bali

56. At the conclusion of the Bali ministerial, the Director General of WTO Mr. Roberto Azevêdo declared, '[f]or the first time in our history, the WTO has truly delivered ... We have put the world back into the World Trade Organization.' The Ninth Ministerial Meeting certainly marks a fundamental departure from past Ministerials. A general dose of crisis politics coupled with Azevêdo's industry produced a package encompassing trade facilitation, food security and LDC provisions which is both consistent with the spirit of the DDA and which promises to deliver welfare gains, however modest, to the world's poorest people. The widespread reaction to this outcome was, in equal measure, jubilation and skepticism. Both sentiments are understandable.

57. The gains notwithstanding, it is important to resist the euphoria that inevitably washes over the conclusion of a deal after almost two decades of fits and starts. However significant it is for reviving the credibility and negotiating capacity of the WTO, the Bali package is asymmetrical and the coalitions among poor countries have been fractured, perhaps irrevocably, which will make it more difficult for them to advance their collective agendas in future negotiations. Though poor countries will certainly benefit from all three parts of the package, the gains from trade facilitation will accrue overwhelmingly to the OECD countries. Meanwhile, the LDC package contains little of substantive value; in the absence of legally binding commitments LDCs will have

to continue their fight to convince the industrial countries to fulfil their best endeavour promises made almost a decade ago. These imbalances are characteristic of trade negotiations since the GATT was first negotiated in 1947. In the afterglow of the Bali package, it is easy to forget that competitive bargaining among unequals is what underpins the multilateral trading system. This situation is unlikely ever to yield symmetrical outcomes.

58. In this vein, the success of Bali may have a more deleterious effect; and the small, positive gains for development contained in the package may actually detract attention away from the need to fundamentally reform the multilateral trading system such that it can deliver more equitable gains for all.

59. Moreover, the agreement in Bali represents only a fraction of the work programme of the DDA, and covers the least contentious issues. WTO members have agreed, at the behest of South Africa among others, to begin work on the post-Bali agenda by July 2014. What form that will take remains unknown. Four scenarios are possible. The first and least desirable is that members let the momentum from Bali languish; they neglect to pick up the post-Bali agenda in July; and they continue the negotiation of mega regionals apace. Indeed, it is unlikely that the European Union and the United States will turn serious attention to re-opening the DDA until the TPP and TTIP are concluded which makes this scenario seem most likely, at least until 2015.

60. Second, members may decide, in setting the post-Bali agenda, that the most critical stumbling blocs in the DDA can best be overcome through the negotiation of plurilateral initiatives such as the Trade in Services Agreement. In this case, deals brokered regionally and bilaterally would then be woven together as a package if the DDA is concluded. In such a scenario, the concluded DDA would be constituted by a host of plurilaterals and only a thin universal agreement, the requisite multilateral element. Both outcomes would be regrettable because regional trade agreements and plurilaterals effectively cut the developing world out from both the negotiation and benefits of the deal.

61. Third, members may pursue the negotiation of mini-packages on 'harvestable' issues similar to what was on the table in Bali. In such a scenario, small positive gains for development are possible, provided there is sufficient political will and leadership. Finally and least likely, members may negotiate a post-Bali work programme that fundamentally re-orientes the DDA such that it better reflects contemporary conditions in the global economy (such as food price instability and the after shocks of the global financial crisis) and prioritises the needs of the WTO's poorest members.

62. In all cases, it is likely that the United States will press for some members, especially China, to ‘graduate’ from special and differential treatment and the other functions of the WTO will be bolstered in order to augment the surge in credibility resulting from MC9 and further secure the relevance of the multilateral trading system. In particular, the dispute settlement body, trade policy review mechanism, knowledge development and the made in the world initiative are likely to be the primary frontiers.

63. In sum, the Bali Ministerial is significant. Eighteen years is a long time for a negotiating forum to fail to negotiate any substantive deal and there was a real feeling among delegates and commentators that had MC9 come to nothing the WTO would have been irrevocably weakened. That a deal was made in Bali has revitalised the multilateral trade agenda and provided a degree of momentum behind the outstanding WTO issues that has been lacking since the July 2008 collapse. Moreover, there are elements of the deal that break new ground in integrating development issues more firmly into the trade agenda, such as the explicit linking of developing country implementation of the trade facilitation agreement to the provision of financial and technical assistance. However, such financial side-payments are cheap for the OECD countries and may even be free if resources can be brought in from other aid agencies such as the World Bank. More substantive concessions by the industrial world concerning their own policies—the elimination of export subsidies and providing DFQF market access to LDCs being prominent examples—continue to be resisted. It thus remains unlikely that the Bali ministerial will be the harbinger of greater effort by WTO members to prioritise or redress the continued asymmetries of the multilateral trade system.

V. Comments and Observations of AALCO Secretariat

64. The Ninth WTO Ministerial Conference was held in Bali (in December 2013) in the backdrop of uncertainties as regards the prospect of striking any deal. The Bali Ministerial proceeded with a small package of issues pulled from the broader Doha agenda (i.e, the Doha Round negotiations at the World Trade Organization which were launched in 2001 with a specific purpose: to address the development concerns of the developing countries). This included: Market access; Tariff reduction in agriculture & manufactured goods; Rules of origin; Trade in services; Trade Related Intellectual Properties (TRIPS); Special & differential treatment. However, in view of the differences among member countries on the Doha agenda a less ambitious package was dealt with in Bali. This included three areas based on negotiations in Geneva, namely Trade Facilitation, Agriculture and Cotton, and Development and LDC Issues. The Bali declaration that

was adopted at the end of the Conference includes agreements that the Members have reached as regards these three issues¹⁰.

65. On **Food Security**, it is well-known that the issue of food security is non-negotiable for the developing countries since it directly relates to the livelihood concerns of millions of subsistence farmers and food security of the poor and vulnerable sections in these societies. Accordingly, developing countries wanted to change the present WTO rules on agricultural subsidies that hinder the ability of governments to purchase and stock staple foods from farmers at Bali. It was agreed that a permanent solution involving changes to the rules would take more time, so Bali discussed an interim measure - a 'peace clause' whereby WTO legal cases will not be taken against countries having a public food stockholding programme. The issue was how long this peace clause would last. India, backed by many developing countries, wanted it to last till the permanent solution is found. The US and others wanted the peace clause to expire in four years. The final agreement was that the WTO would negotiate a permanent solution within four years, and countries will refrain from taking cases until that solution is found. This came as a victory for the developing world¹¹.

66. On **Trade Facilitation**, the Bali conference was able to adopt a trade facilitation treaty which obliges all countries to streamline their customs procedures and upgrade their technology and infrastructure so that imported goods can be cleared faster and more easily. The new obligations can be easily met by developed countries that already have the measures and technology, but are onerous on poorer countries that don't have the capacity.

¹⁰ The package also adopted some decisions on regular work. These are: TRIPS non-violation and situation complaints; Work Programme on Electronic Commerce; Work Programme on Small Economies; Aid for Trade (AFT); Trade and Transfer of Technology.

¹¹ It needs to be underlined here that the 'peace clause' agreed to at Bali has its own limitations. For example, First, it applies only to the WTO's Agriculture Agreement; countries can still sue under another agreement on subsidies. Second, the peace clause applies only to 'existing programmes'. Thus countries that have no programme and want to start one will not be covered. Third, there are cumbersome conditions, including the country providing a lot of information and notifying that it has reached its allowed subsidy limit, which may make it not worthwhile to use the peace clause.

67. The trade facilitation agreement will be of greater benefit to those countries which are net exporters as their goods will clear faster in other countries. Net importers can be expected to see their imports rising faster than their exports, with adverse effects on their trade balance, a concern raised by some developing countries. Developing countries are able to designate which specific obligations they need more time to implement, and there is also promise of technical assistance for them, but there is only a more vague and less explicit commitment to provide them with 'financial assistance'.

68. The Bali meeting also approved *decisions to assist least developed countries* on market access, rules of origin, cotton and services. However, the decisions are not binding and thus have little practical benefit. These LDC decisions should be seen as a starting rather than an end point, with further negotiations for future decisions that are more useful.

69. In the short term, although a set of Ministerial Decisions has been adopted, there is work to be completed in the WTO, such as the legal review for rectifications of a formal character with respect to the Agreement on Trade Facilitation, as well as the process for registering Category A commitments to be included in the relevant Protocol through which the TF Agreement will be annexed to the WTO Agreements, at the latest by 31st July. In addition, work related to the mechanisms relevant to the transparency aspect of the peace clause and to the negotiation of a permanent solution under the decision on food security is expected to be initiated in the relevant committees at WTO.

70. AALCO, as an Organization consisting of Member States from Asia and Africa would continue to monitor the developments that take place in this area with a view to continue to assist the developing countries in their quest for a fair and equitable multilateral trading system. Member States are encouraged to submit their concerns and comments (flowing from the post-Bali agenda) to the Secretariat of AALCO and to take an active part in the deliberations of this years' annual session. AALCO would continue to convene meetings/seminars with a view to try to identify the problems obtaining in this area and to channelize the common viewpoints of the developing countries which in turn would go a significant way in arriving at convergence on these issues.

VI. Annex I

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

(Deliberated)

SECRETARIAT'S DRAFT

AALCO/ RES/ 53/ S 13

18 September 2014

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

Having considered the Secretariat Document No. AALCO/53/HEADQUARTERS/2014/ SD/S13;

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 Ninth Ministerial Conference of WTO held in December 2013 at Bali;

Hoping that the Doha Round of Negotiations would conclude successfully in the near future;

1. **Encourages** Member States to successfully 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 provisional agenda of its Fifty-Fourth Annual Session.