

# STRATHMORE LAW JOURNAL

VOLUME 2, NUMBER 1, AUGUST 2016



**Strathmore University**  
**Press**

Strathmore Law School  
Madaraka Estate, Ole Sangale Road  
P.O. Box 59857 00200  
Nairobi - KENYA  
Tel. + 254-703-034601  
[editor.sup@strathmore.edu](mailto:editor.sup@strathmore.edu)  
[www.press.strathmore.edu](http://www.press.strathmore.edu)  
[www.law.strathmore.edu](http://www.law.strathmore.edu)  
Twitter: @strathmorelaw

## Recent developments

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# Chronicles of the Doha Wars: The battle of Nairobi – Appraisal of the Tenth WTO Ministerial

*Mihir Kanade\**

### Introduction

The Tenth Ministerial Conference of the World Trade Organisation, held in Nairobi, Kenya, from 15 to 19 December 2015, was no normal business. It could not have been. One just has to picture the backdrop. When Kenya's President, Uhuru Kenyatta, opened the first ever World Trade Organisation (WTO) Ministerial Conference to be held on African soil, he knew that the Doha Development Agenda (DDA)<sup>1</sup> ceremoniously agreed upon in 2001, and of which his country had been an ardent promoter, would be put under the guillotine. So much was made abundantly clear by Michael Froman, the United States of America Trade Representative (USTR), in an op-ed published in the *Financial Times* just two days prior to the Conference.<sup>2</sup> In this piece suggestively entitled 'We are at the end of the line on the Doha Round of trade talks', Froman argued that 'Doha was designed in a different era, for a different era, and much has changed since', and that 'it is time for the world to free itself of the strictures of Doha', before concluding presciently that 'Nairobi will mark the end of an era'.<sup>3</sup>

<sup>1</sup> 'World Trade Organisation: The Doha Round' [https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm) on 25 March 2016.

<sup>2</sup> 'Michael Froman: We are at the end of the line on the Doha Round of trade talks' *Financial Times*, 13 December 2015 [www.ft.com/cms/s/0/4ccf5356-9eaa-11e5-8ce1-f6219b685d74.html](http://www.ft.com/cms/s/0/4ccf5356-9eaa-11e5-8ce1-f6219b685d74.html) on 25 March 2016.

<sup>3</sup> 'Michael Froman: We are at the end of the line on the Doha Round of trade talks'.

\* Head of Department, International Law and Human Rights, and, Director, Human Rights Centre, United Nations mandated University for Peace, Costa Rica

It was in this context that Kenyatta's chosen Chair for the Conference and Kenya's Cabinet Secretary for Foreign Affairs and International Trade, Amina Mohamed, got down to business. As Mohamed later admitted, the prospects were daunting.<sup>4</sup> On the one hand, a mere 'chairperson's statement', instead of a negotiated ministerial declaration, would have signified failure. On the other hand, 'as the first African chairperson of a WTO Ministerial Conference and the first to be held in Africa, it felt like the metaphoric Atlas carrying the weight of the world and more importantly how it would impact Africa, other parts of the developing world and the global economy'.<sup>5</sup>

The Conference closed with a Ministerial Declaration<sup>6</sup> and the 'Nairobi Package'<sup>7</sup> comprising a series of six Ministerial Decisions on agriculture, cotton and issues related to least developed countries (LDCs). WTO's Director-General, Roberto Azevêdo, concluded with optimism that, similar to two years ago in Bali, the WTO had once again delivered 'major, multilaterally-negotiated outcomes' at Nairobi.<sup>8</sup>

But, of course, not everyone was enthused. In her closing plenary statement, India's Commerce Minister, Nirmala Sitharaman, expressed 'disappointment' at the DDA not being re-affirmed in the Ministerial Declaration.<sup>9</sup> In that sense, the agenda set forth by Froman appeared to have fructified. Indeed, an editorial in the *Financial Times* took precious little time to declare the death-knell for the DDA and the Doha Round itself.<sup>10</sup> In its obituary, laden with celebratory overtones, the editorial stated, 'after a death scene so drawn-out it would have done credit to a Victorian melodrama, the curtain has finally come down on one of the longest-running farces in global policymaking. The so-called Doha round, the programme of multilateral trade talks that started

<sup>4</sup> 'Amina Mohamed: The 10th WTO Ministerial Conference in Nairobi -A successful turning point for the multilateral trading system' *The World Post*, 7 January 2016 [http://www.huffingtonpost.com/ambassador-amina-mohamed/the-10th-wto-ministerial-\\_b\\_8859162.html](http://www.huffingtonpost.com/ambassador-amina-mohamed/the-10th-wto-ministerial-_b_8859162.html) on 25 March 2016.

<sup>5</sup> 'Amina Mohamed: The 10th WTO Ministerial Conference in Nairobi'.

<sup>6</sup> World Trade Organisation, *Nairobi Ministerial Declaration*, WT/MIN (15)/DEC, 19 December 2015.

<sup>7</sup> World Trade Organisation, *Nairobi Package*, Tenth WTO Ministerial Conference, 15 to 19 December 2015, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/nairobipackage\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/nairobipackage_e.htm) on 25 March 2016.

<sup>8</sup> 'World Trade Organisation: DG Azevêdo's address to the MC10 closing ceremony' 19 December 2015 [https://www.wto.org/english/news\\_e/spra\\_e/spra108\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra108_e.htm) on 25 March 2016.

<sup>9</sup> 'Business World: India disappointed with WTO Declaration at Nairobi meeting' 20 December 2015 <http://businessworld.in/article/India-Disappointed-With-WTO-Declaration-At-Nairobi-Meeting-/20-12-2015-89553/> on 25 March 2016.

<sup>10</sup> 'Financial Times: The Doha Round finally dies a merciful death' 21 December 2015 <http://www.ft.com/intl/cms/s/0/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879.html?siteedition=intl> on 25 March 2016.

in 2001, was last week declared dead by WTO members after nearly a decade spent comatose'.<sup>11</sup>

So, how should the outcome of Nairobi be interpreted? What does it really mean for developing countries and LDCs? Is the DDA dead and buried? More importantly, what do these developments mean for the future of the WTO and of multilateralism in the regulation of trade?

## Appraisal of the decisions

### *Subsidies for farm exports*

Probably, the most important outcome of the Conference was a Ministerial Decision on Export Competition, which includes a commitment to eliminate subsidies for farm exports.<sup>12</sup> As is well-known, export subsidies are severely detrimental to the multilateral trading system since they are specifically designed to be trade distorting. This decision is, therefore, a welcome development since it requires developed countries to eliminate export subsidies in agriculture immediately (except for some agricultural products). Developing countries have been given until 2018, while LDCs have until 2023, to eliminate export subsidies in agriculture. Under the agreement, developing countries will keep the flexibility to cover marketing and transport costs for agricultural exports until the end of 2023, while LDCs will be able to do so until 2030. In addition, the Decision also includes detailed provisions seeking to limit what benefits agriculture exporters can receive through financial support, rules seeking to ensure that agricultural exporting state trading enterprises do not operate in a manner that circumvents any other disciplines contained in this Decision, and rules to ensure that food aid does not affect domestic production negatively. In this context, DG Azevêdo remarked in his closing speech that 'today's decision tackles the issue once and for all. It removes the distortions that these subsidies cause in agriculture markets, 'thereby helping to level the playing field for the benefit of farmers and exporters in developing and least-developed countries'.<sup>13</sup>

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<sup>11</sup> 'Financial Times: The Doha Round finally dies a merciful death'.

<sup>12</sup> World Trade Organisation, *Ministerial Decision on Export Competition*, (WT/MIN (15)/45), 19 December 2015.

<sup>13</sup> 'World Trade Organisation: DG Azevêdo's address to the MC10 closing ceremony'. Emphasis added.

Unfortunately, that may not be true. Despite the positive development on the elimination of export subsidies, it is noteworthy that none of the domestic agricultural subsidies have been eliminated by this Decision. Domestic subsidies by developed countries are in fact the most trade-distorting since they result in crop overproduction at artificially cheaper costs, which then get exported to or dumped onto poorer countries at lower-than-market prices, many times driving local farmers out of business and destroying livelihoods. Indeed, it is elimination of these forms of subsidies by the developed countries which has been at the forefront of issues raised by the poorer countries in the DDA, especially since the European Union (EU) has already eliminated export subsidies. In that sense, the agreement on elimination of export subsidies does not really address the core concerns of developing countries and LDCs; it merely puts a tighter lid on already existing practices.

### *Public stockholding for food security purposes*

The ability to ensure public stockholding for food security purposes has been an important element of the national policy space which developing countries and LDCs have been fighting for at the WTO. At the insistence of India, the Bali Ministerial Decision of 2013 permitted developing countries to continue food stockpile programmes, which would otherwise risk being in breach of the WTO's domestic subsidy cap, until a permanent solution is found by the 11<sup>th</sup> Ministerial Conference in 2017.<sup>14</sup> At Nairobi, Ministers adopted a Ministerial Decision on Public Stockholding for Food Security Purposes reaffirming the Bali Decision and further requiring members to 'engage constructively to negotiate and make all concerted efforts to agree and adopt a permanent solution on the issue of public stockholding for food security purposes'.<sup>15</sup> In pragmatic terms, the only decision adopted on public stockpiling was to adopt a decision later.

### *Special safeguard mechanism for developing country members*

Another important area of concern for developing countries and LDCs has been the ability to protect domestic agriculture producers in times of un-

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<sup>14</sup> World Trade Organisation: The Bali decision on stockholding for food security in developing countries' 27 November 2014 [https://www.wto.org/english/tratop\\_e/agric\\_e/factsheet\\_agng\\_e.htm#whatwasagreedinbali](https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm#whatwasagreedinbali) on 25 March 2016.

<sup>15</sup> World Trade Organisation, *Ministerial Decision on Public Stockholding for Food Security Purposes*, (WT/MIN (15)/44), 19 December 2015.

predictable import surges from developed countries. In that respect, the Nairobi Package contains a Ministerial Decision on a Special Safeguard Mechanism (SSM) for Developing Countries.<sup>16</sup> It reaffirms Paragraph 7 of the Hong Kong Ministerial Declaration recognising that developing members will have the right to temporarily increase tariffs in the face of import surges by using an SSM. The Decision also states that members will pursue negotiations on an SSM for developing country members in dedicated sessions of the Committee on Agriculture in Special Session ('CoA SS').

In the words of one commentator, this Decision is 'a concrete commitment to have meetings to decide on more meetings with every constructive proposal of the developing world likely to be rejected by the rich countries in those meetings'.<sup>17</sup>

### *Cotton*

For a long time now, the four major cotton-producing West African countries, Benin, Burkina Faso, Chad and Mali (also known as the Cotton 4 or C4) have been demanding an end to the massive domestic subsidies granted by the United States of America (US), which have resulted in loss of livelihoods for thousands of cotton producers in the C4, who cannot benefit from similar subsidies from their impoverished governments. In this context, the Nairobi Conference adopted a Ministerial Decision on Cotton,<sup>18</sup> which stresses the vital importance of the cotton sector to LDCs. A closer look at the Decision, however, reveals progress only on peripheral issues rather than on the substantive bone of contention.

The Decision includes provisions with respect to market access, domestic support and export competition. On the first element of market access, the Decision calls for cotton from LDCs to be given duty-free and quota-free access to the markets of developed countries from 1 January 2016. Developing countries declaring that they are able to do so may also give such market access. On the third element of export competition for cotton, the Decision requires developed countries to prohibit export subsidies for cotton with im-

<sup>16</sup> World Trade Organisation, *Ministerial Decision on Special Safeguard Mechanism for Developing Country Members*, (WT/MIN (15)/43), 19 December 2015.

<sup>17</sup> 'Biraj Patnaik: How Sitharaman served up India instead of using WTO high table to block US agenda' *The Wire*, 25 December 2015 <http://thewire.in/2015/12/25/the-ugly-american-and-compliant-indian-17894/> on 25 March 2016.

<sup>18</sup> World Trade Organisation, *Ministerial Decision on Cotton*, (WT/MIN (15)/46), 19 December 2015.

mediate effect. Developing countries are required to do so no later than 1 January 2017.

It is, however, the agreement, or lack thereof, on the second element – domestic support – which puts a damper on any progress on the first and third elements described above. In the Ministerial Decision, members merely ‘acknowledge the efforts made by some Members to reform their domestic cotton policies and which may contribute to the objective of reduction of the trade distorting domestic subsidies for cotton production’.<sup>19</sup> They further ‘emphasise however that some more efforts remain to be made and that these positive steps are not a substitute for the attainment of our objective’.<sup>20</sup> While ensuring market access for cotton products and eliminating export subsidies is a welcome step, lack of an agreement on the elimination of domestic subsidies on cotton, particularly by the US, continues to be the main stumbling block in addressing the issue. What does this mean for the C4? As has been poignantly pointed out by Patnaik and Wise:

the C4 can expect to see continued US cotton subsidies estimated at \$1.5 billion per year, which will increase US exports 29% and suppress cotton prices 7%. This will cost the C4 an estimated \$80 million per year in lost cotton revenues. That is more than 300 times the gains last year from market access under US Africa Growth and Opportunity Act, which totalled just \$264,000.<sup>21</sup>

### *Decisions specifically to benefit LDCs*

The Ministerial Conference also adopted two separate decisions specifically aimed at benefitting LDCs. The first decision on Preferential Rules of Origin for LDCs<sup>22</sup> expands upon the Bali Ministerial Decision of 2013, which had incorporated a set of multilaterally agreed guidelines to help make it easier for LDC exports to qualify for preferential market access. The Nairobi Decision goes further and provides more detailed directions on specific issues such as methods for determining when a product qualifies as ‘made in an LDC’, and when inputs from other sources can be ‘cumulated’ into the consideration of origin. Many of these provisions are, however, couched in non-binding terms. For instance, the

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<sup>19</sup> World Trade Organisation, *Ministerial Decision on Cotton*, para 7.

<sup>20</sup> World Trade Organisation, *Ministerial Decision on Cotton*, para 8.

<sup>21</sup> ‘Biraj Patnaik and Timothy Wise: Don’t buy the spin: The WTO talks in Nairobi ended badly and India will pay a price’ *Scroll.in*, 24 December 2015, <http://scroll.in/article/777647/dont-buy-the-spin-the-wto-talks-in-nairobi-ended-badly-and-india-will-pay-a-price> on 25 March 2016.

<sup>22</sup> World Trade Organisation, *Ministerial Decision on Preferential Rules of Origin for Least-Developed Countries*, (WT/MIN (15)/47), 19 December 2015.

Decision calls on preference-granting members to merely *consider* allowing the use of non-originating materials up to 75% of the final value of the product, and to *consider* deduction of any costs associated with the transportation and insurance of inputs from other countries to LDCs.

The second decision specific to LDCs extends the current waiver period (agreed upon in 2011 for a period of 15 years) under which non-LDC WTO members may grant preferential treatment to LDC services and service suppliers.<sup>23</sup> The period now stands extended until 2030. Again, none of this, including the very grant of preferential treatment to LDCs in services, is binding on non-LDC members. Indeed, the main reason why the extension of four years was agreed upon was merely ‘due to the extended period between the adoption of the waiver in December 2011 and the notification of preferences in 2015’.<sup>24</sup> In other words, this decision does not add any benefits for the LDCs; it merely ensures that the benefits to be accrued under the 2011 decision are not undone because of delays in notifications of preferential treatment by non-LDC members.

### *Information technology agreement*

The Conference also resulted in an agreement between members representing major exporters of information technology (IT) products on a timetable for eliminating tariffs on various products.<sup>25</sup> The benefits of this agreement will be enjoyed by all WTO members who will get duty-free access to the markets of the members who eliminate tariffs on these products. As part of the deal, two-thirds of tariff lines were to be fully eliminated by 1 July 2016, and complete elimination of all tariff lines is expected by 2019.

While this will be beneficial for technology-exporting countries, it may in reality not affect most of the countries at the forefront of the DDA. This is also because the agreement applies only to countries which opt in, and most likely, only those who export technology will do so. Thus, indeed, only 22 countries opted in, which did not include any African country.

<sup>23</sup> World Trade Organisation, *Ministerial Decision on Implementation of Preferential Treatment in Favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade*, (WT/MIN(15)/48), 19 December 2015.

<sup>24</sup> World Trade Organisation, *Ministerial Decision on Implementation of Preferential Treatment in Favour of Services*, para 1.1.

<sup>25</sup> World Trade Organisation, *Ministerial Decision on the Expansion of Trade in Information Technology Products*, (WT/MIN (15)/25), 16 December 2015.

*The central role of WTO in global trade talks and the fate of the DDA*

This aspect is by far the most significant development to emerge from the Nairobi Conference. While it may appear on first blush that the role of WTO in global trade talks may be distinct from the consideration of the specific issues under DDA, they turned out to be intricately connected, nay, almost coterminous. Indeed, in his op-ed forewarning about the fate of DDA, Froman directly connected the deadlock in the Doha Round with the emergence of preferential trade agreements, ironically led by his own country. He reminded everyone that the US had ‘recently concluded the Trans-Pacific Partnership, which raises standards and tackles emerging issues across nearly 40 per cent of the global economy’ and that ‘the US and the EU are moving forward with the world’s largest bilateral agreement’.<sup>26</sup> With these regional trade agreements (RTAs) led by the US put forth as proof for the fact that ‘trade initiatives outside the WTO have become the norm’, Froman then goes on to argue that the Doha Round must be buried if multilateralism has to have a chance of succeeding.<sup>27</sup> The best description of this stand is provided by Chakravarthi Raghavan, who is quoted as stating that ‘the US/EU arguments to abandon Doha because of the deadlock reminded him of the story of a son convicted for murdering his parents to get at their property who asks the court for leniency on the grounds that he was an orphan!’<sup>28</sup>

Regretfully, while the Nairobi Ministerial Declaration insisted on the ‘pre-eminence of WTO as the global forum for trade rules setting and governance’<sup>29</sup> and on the ‘need to ensure that RTAs remain complementary to, not a substitute for, the multilateral trading system’,<sup>30</sup> it refrained from reaffirming the DDA and its mandate. The Declaration, in fact, acknowledged that members ‘have different views’ on how to address the future of the Doha Round negotiations, and that while many members reaffirm the DDA, ‘other Members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations’.<sup>31</sup> At the same time, the Declaration loosened the lid on the question of whether the WTO should consider new issues beyond those contained in the DDA, even without resolving those first. Unsurprisingly, a compromise arrangement was arrived at, which included

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<sup>26</sup> ‘Michael Froman: We are at the end of the line on the Doha Round of trade talks’.

<sup>27</sup> ‘Michael Froman: We are at the end of the line on the Doha Round of trade talks’.

<sup>28</sup> Patnaik, ‘How Sitharaman served up India instead of using WTO high table to block US Agenda’.

<sup>29</sup> World Trade Organisation, *Nairobi Ministerial Declaration*, para 3.

<sup>30</sup> World Trade Organisation, *Nairobi Ministerial Declaration*, para 28.

<sup>31</sup> World Trade Organisation, *Nairobi Ministerial Declaration*, para 30.

an acceptance that WTO members may raise new issues at the WTO: however, a consensus would be required for launching these new negotiations.<sup>32</sup>

There are two implications of this Declaration. Firstly, it has opened up the opportunity for developed countries to place new issues relating to further liberalisation on the agenda, even if the Doha issues are not negotiated upfront. Of course, developing countries will need to agree to negotiate these new issues, but the Declaration has now officially provided developed countries with the legal justification for elevating non-Doha issues to the same level as Doha issues. Secondly, and more importantly, it has provided the opportunity for developed countries and their policy think-tanks (including media outlets such as the *Financial Times*) to claim that DDA is dead and buried, and it is time now to move on to further liberalisation. Developing countries and LDCs will need to put up a collective front in order to ensure that the DDA and its issues are not relegated to the back-burner. The Declaration contains some language which may yet salvage the situation. Despite the concessions on new issues, it states that ‘nevertheless, there remains a strong commitment of all members to advance negotiations on the remaining Doha issues’ and that ‘this includes advancing work in all three pillars of agriculture, namely domestic support, market access and export competition, as well as non-agriculture market access, services, development, Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and rules’.<sup>33</sup>

## Final word

It is worthwhile highlighting that the DDA did not give birth to the development mandate of the WTO; the International Agreement Establishing the WTO itself did. Indeed, its Preamble explicitly mentions sustainable development as an institutional objective of the WTO.<sup>34</sup> The WTO’s Constitution clarifies that free trade is not *the* end, but is only a means to achieve an end – that end being sustainable development. The adoption of the ambitious 2030 Agenda and the accompanying 17 Sustainable Development Goals (SDGs) by world leaders in September 2015 has, for the first time, provided shape and texture to this institutional objective of the WTO. SDG 17.1, in particular, requires the promotion

<sup>32</sup> World Trade Organisation, *Nairobi Ministerial Declaration*, para 34.

<sup>33</sup> World Trade Organisation, *Nairobi Ministerial Declaration*, para 31.

<sup>34</sup> Preamble, para 1, *Agreement Establishing the World Trade Organisation*, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994).

of ‘a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the WTO, including through the conclusion of negotiations under its DDA’.<sup>35</sup> If the conclusion of negotiations under DDA is what the world leaders agreed is required for sustainable development, it is clear that the Nairobi Declaration, adopted just three months later, cannot be interpreted to mean that the DDA is dead and buried, as the lip sync-ing of the Froman song by the *Financial Times* would have us believe. Developing countries and LDCs must remain vigilant against such attempts; for it would be impossible to later exhume and reconstruct the skeleton of the DDA limb by limb.

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<sup>35</sup> SDG 17.1, UNGA, *Transforming our world: The 2030 agenda for sustainable development*, A/RES/70/1, 25 September 2015.