Delivering in Nairobi-and After

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ANDREA SPEAR* AND MIA MIKIC**

Highlights

Much hinges on the outcome of the World Trade Organization's Tenth Ministerial Conference in Nairobi in mid-December. The World Trade Organization (WTO) is marking the 20th anniversary of its establishment during the Uruguay Round, almost half a century after 23 countries set up its predecessor for trade in goods, the General Agreement on Tariffs and Trade (GATT). Yet the mood is far from celebratory. Admittedly, trade has not been helping the global economy much in recent times. The downbeat feeling, however, is more related to the question of the WTO's relevance, now and in future. The WTO was established in 1995 by 123 countries to seek freer and fairer trade by performing three main functions: 1) to serve as a permanent platform for negotiating on rules and market access issues; 2) to monitor implementation of the WTO Agreements, the legal ground-rules for international trade; and 3) to assist members to resolve disputes under the Dispute Settlement Mechanism. Its inability to shake off the shadow of the widely perceived 'failure' of the Doha Round (launched in November 2001) explains this sense of impotence and tests the 162 members' resolve to make the WTO work for all.

This note reviews what is at stake at the Nairobi Ministerial Conference. Key conclusions are that:

- While it is difficult to predict consensus at this stage, Tenth Ministerial Conference (MC10) is likely to produce a narrow package of outcomes, including a mix of core WTO work and elements of the Doha Development Agenda (DDA).
- Ministers are expected to endorse a forward Work Programme, including the aim to complete the Doha Round in some shape or form.
- The Ministerial Declaration may contain hints pertaining to the WTO's future. However, MC10 will not solve the deep divisions among members on core issues affecting the way forward for both the Round and the WTO. This will require a new vision for the role of the WTO in the 21st century, and new political 'will' to take it to fruition.

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Deliverables for Nairobi

The WTO is holding its tenth Ministerial Conference (MC10) on 15-18 December 2015 in Nairobi, Kenya. The lead-ups to these conferences, held every two years, always feature last-minute rushes for 'deliverables'. MC10 is no different in that sense. However, ambitions are lower than usual this year. In fact, with only a week to go before the conference started, and only a few days before officials left for Kenya, WTO Director-General Roberto Azevêdo announced on Monday, 7 December, that (apart from three minor Draft Decisions on regular WTO work that feature in every Ministerial Conference): "We currently, today, have no deliverables for Nairobi" (Azevêdo, 2015).

Being the 20th anniversary of the founding of the WTO in Marrakesh in late 1994, and the body's first Ministerial Conference in Africa, it would be a shame if MC10 were to be remembered as a 'non-event' - almost as bad as the Seattle fracas in 1999.

Box 1. The Agenda for the Tenth Ministerial Conference

What happens at the conference where the trade ministers of 162 WTO members come together to negotiate - and agree - on a Ministerial Declaration and other WTO business?

The agenda for MC10 is similar to that of previous Conferences:

**Tuesday, 15 December:**
- 1500: High-profile opening by the President of Kenya, Uhuru Kenyatta

**Wednesday and Thursday, 16 and 17 December:**
- 0900-1300 and 1400-1600: Plenary Session (pre-prepared Ministerial Statements, often delivered to a largely empty room)
- 1630-1800: Programmed activities (accessions of Liberia on 16 December and Afghanistan on 17 December)
- Meetings among Ministers and delegations on bilateral business (pre-arranged as well as spontaneous)
- Negotiating sessions (where most of the action is). The main action tends to take place in the 'Green Room' (an assembly of a more-or-less well-established group of delegations that represent different regions, interest groups, etc.).

**Friday, 18 December:**
- 1000-1200: Plenary Session
- 1200-1300: Closing Session, issuing of Ministerial Declaration.

MCs may continue an additional day or two if Ministers have not managed to reach agreement on key issues and if they expect to reach agreement by doing so.

The MC is traditionally chaired by the Trade Minister of the host country.

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1 MC9 in Bali, Indonesia in December 2013 managed to deliver the 'Bali Package' comprising the Trade Facilitation Agreement, an LDC Package and some Agriculture outcomes (undertakings on public stockholding, export subsidies, LDC cotton market access and tariff quota administration), but only after last-minute negotiations required extending the Conference by one day.

2 The Seattle Ministerial Conference disbanded in chaos, due in part to unruly protesters.

3 Two more members will officially accede to the WTO during the Nairobi MC: Liberia (163rd member) and Afghanistan (164th member).

4 The Ministerial Declaration is the main 'output' of the Conference. It typically has three parts: I. Introduction and sum-up of WTO work since the previous MC; II. The 'deliverables' for this MC; and III. Post-MC work.
State of Play

WTO Director-General Azevêdo’s announcement was a stark reality check: there were three working days left in Geneva, and no deliverables. This aligned with what WTO Ambassadors had said the previous week at the same time: “No convergence on anything important yet, and the sides are so far apart that they are unlikely to converge anytime soon.”

Nevertheless, many of them think that, like in the past, things will come together - and they will 'muddle through'. This has happened before. Key deliverables have been up in the air until the last minute (like the Trade Facilitation Agreement in Bali two years ago), but intensive negotiations at the Conference managed to produce an agreement.

But this time, a week before the conference, there do not appear to be any 'key deliverables' close to agreement, and very few items on the table that really matter in terms of Ministerial decision-making.

Nevertheless, a number of things could add substance to the Ministerial Declaration. Most of these are related to core WTO business, not to the Doha Round, where leadership and 'political will' remain the big challenges.

There are a few areas where outcomes may be plausible (where text is ready or being negotiated), and some where no text is on the table but the ideas might move forward in coming days for a variety of reasons.

Table 1: Status of 'Possible Outcomes' during the week before MC10

<table>
<thead>
<tr>
<th>Possible 'Nairobi Outcomes'</th>
<th>Status at 10 December</th>
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<tbody>
<tr>
<td>• The ‘regulars’ (e-commerce, non-violation TRIPS, small economies) that have featured in recent Ministerial Declarations:</td>
<td>Draft Decisions are ready:5</td>
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<tr>
<td>E-commerce: Continue the WTO work programme (started in 1998) and maintain the current practice of not imposing customs duties on electronic transmissions.</td>
<td>WT/MIN(15)/W/26</td>
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<tr>
<td>TRIPS non-violation: Continue discussions on whether non-violation disputes (ie, those that do not violate any WTO agreement) should apply to intellectual property, and make recommendations by MC11; extend the moratorium on non-violation complaints until MC11.</td>
<td>WT/MIN(15)/W/25</td>
</tr>
<tr>
<td>Small economies: Continue the work programme begun in 2005.</td>
<td>WT/MIN(15)/W/24</td>
</tr>
<tr>
<td>• Possibly an LDC ‘Package’ if Trade and Development Council drafting moves forward</td>
<td>Declaration text being ‘fine-tuned’</td>
</tr>
<tr>
<td>• LDC Services Waiver: The 2013 Bali Ministerial Decision ‘operationalised’ the Services waiver allowing WTO members to give preferential treatment to LDC services and service suppliers (i.e., waiving nondiscrimination clauses). The LDC Group wants further clarifications and disciplines.</td>
<td>Draft Declaration text being circulated (see TN/C/18 for report)</td>
</tr>
<tr>
<td>• LDC Rules of Origin: Simpler ROO, to facilitate the duty-free, quota-free market access</td>
<td>Reportedly close to draft Declaration text (see TN/C/17 for report)</td>
</tr>
<tr>
<td>• Duty-free, quota-free (DFQF) LDC market access issues: the package agreed several years ago covers a ‘minimum’ 97% of tariff lines; LDC's want to ensure that this does not negatively affect some countries (e.g., apparel exporters and others that may be heavily dependent on just a few tariff lines).</td>
<td>No Declaration drafting text on 7 December. Important issues outstanding - but some concessions might possibly serve as a trade-off for more difficult issues</td>
</tr>
<tr>
<td>• Rules: Transparency relating to fisheries subsidies, antidumping and countervailing measures</td>
<td>No drafts at 7 December. Several proposals, but no convergence and less-than-optimal engagement. Some</td>
</tr>
</tbody>
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5 All documents for MC10 are available at: www.wto.org/english/thewto_e/minist_e/mc10_e/mc10_docs_e.htm
Proposals have also been submitted for Decisions on Transparency in Services, including one by India for Transparency in Movement of Natural Persons (WT/MIN15/W36) and another by Australia and Canada on Transparency in Domestic Regulation (WT/MIN(15)/W/35). Domestic Regulation is at the core of the Services Agreement; this proposal would build on the Accounting Disciplines agreed by members many years ago (awaiting the end of the Doha Round to go into effect). The Transparency measures include mechanisms to respond to requests for information and disciplines for the publication of regulatory measures and for the publication of draft regulations (so service suppliers can comment before new rules go into effect). The main contention is that some members do not want to 'take on additional obligations', even though the proposed measures are basically good regulatory practices that most members have already signed onto in a variety of fora and agreements. Other members are seeking more of a 'development dimension', and yet others do not want anything on services until goods and agriculture issues are sorted out. Such arguments are familiar in most of the Doha Round negotiating fora.

The 'Real Issues'

Part of the last-minute angst seems to be due to the reluctance to deal upfront with the 'hard issues' – i.e., the Doha Round. As Roberto Azevêdo said on 7 December: "As instructed by members, the (draft Declaration) text did not provide language on the "most contentious issues" ...particularly the reaffirmation of the DDA, instructions on the way forward, and new issues. I am beginning to engage with members...on the more contentious issues. My consultations will continue after this meeting" (Azevêdo, 2015).

The first draft Declaration, prepared from text submitted by members and released on 27 November (WTO, 2015), contained 20 paragraphs in Part I (background), two in Part II (deliverables), and six in Part III (next steps). Much of Part I was dedicated to reaffirming the importance of the WTO at its 20th anniversary and highlighting development aims. Part II listed in brackets the three completed draft Ministerial Decisions (see table 2) and welcomed the extension of the TRIPs transition period for LDCs regarding obligations on certain pharmaceuticals.

While numerous members questioned the 'played down' achievements in Part I, Part III was what elicited the main reaction. Paragraph 23 stated: "We regret that it has not been possible to reach agreement on all areas of the negotiations, including Agriculture, NAMA, Services, Rules, including
fisheries subsidies, and TRIPS.” The Director-General’s update 10 days later did not say anything different. However, in the meantime Paragraph 23 was reportedly bracketed and another bracketed paragraph was added at the behest of a group led by India, China and South Africa: “We reaffirm the Doha Development Agenda (DDA), and the Declarations and Decisions adopted at Doha and at the Ministerial Conferences held since then, and further reaffirm our full commitment to conclude the DDA negotiations on that basis.” The Africa Group also contributed text along these lines.

**Table 2: Contentious Issues**

<table>
<thead>
<tr>
<th>'Contentious' Issues</th>
<th>Status at 10 December</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reaffirming the Doha Development Agenda (DDA, or Doha Round)</td>
<td>A group led by India, China and South Africa (including Indonesia, Ecuador, Venezuela and later Turkey) are pulling out all stops to get the following strong reaffirmation of the DDA in the Declaration preamble as well as in the body. China has reportedly threatened to backtrack on ITA (see Box 2) if the reaffirmation is not forthcoming (the US appears to be the main target).</td>
</tr>
<tr>
<td>Special Safeguard Mechanism (SSM)</td>
<td>The G-33 group of developing countries is the main proponent of the SSM, a trade remedy tool to allow developing countries to temporarily raise import tariffs on agriculture products in cases of import surges or price declines to mitigate price volatility risks and to balance distortions in agricultural trade. The key issue is to balance this proposal with sufficient disciplines to assuage other members’ concerns over existing commitments and current Doha Round negotiations. (see WT/MIN(15)/W/19)</td>
</tr>
<tr>
<td>'Public Stockholding' (food security stockpiling)</td>
<td>Not in the 27 November draft Declaration text, but it will be on the table at Nairobi.</td>
</tr>
<tr>
<td>Special and Differential Treatment (S&amp;D)</td>
<td>See G90 proposal listed in Table 1 (WT/MIN(15)/W/31)</td>
</tr>
</tbody>
</table>

In a well-diffused interview on 6 December, India’s Minister of Commerce and Industry said these 'contentious measures' constituted a key issue, and that they could not be left to the last minute for Ministers to sort out. India is particularly keen to get a final decision on Public Stockholding, the issue that held up agreement at MC9 in Bali in 2013. It will be interesting to see to which extent trade-offs will occur.

**Box 2. Information Technology Agreement 2 (ITA 2)**

At Nairobi, the 54 members of the WTO plurilateral Information Technology Agreement hope to announce agreement on tariff reductions for 201 additional products that make up about 7 per cent of world trade (US$1.3 trillion). The list of products covered by the Agreement had not been updated since the ITA was established in 1996, despite enormous technological advances. The 201 products include major categories such as touch screens, magnetic resonance imaging equipment, new-generation semiconductors, high-tech machine tools, GPS navigation systems and telecommunications satellites. Tariffs for most products are to be eliminated by 2019; flexibility will be offered for some of the more sensitive items. The ITA is special among plurilateral trade agreements: its commitments are on a most-favoured nation (MFN) basis, meaning all WTO members benefit; and new members can join at any time. Currently 82 countries participate, accounting for about 97 per cent of world trade in IT products.

**What about the Doha Round?**

For months this has been the big question. What to do with a Round that has not really advanced beyond the 2008 texts in many areas? A strong contingent would like to declare the 14-year-old Round closed
due to terminal deadlock. An equally strong group wants to keep it going, as we have seen above. For Nairobi, the main issue is how to deal with it in the Ministerial Declaration and thereafter. Every option below has its supporters:

- 'Ignore it.'
- 'Kill it.'
- 'Conclude it.'
- 'Rebalance it.'
- 'Split it up into manageable bits.' At a meeting of the big players in Geneva, some wanted to continue the Round as 'constructed'. Others would rather 'deconstruct' it and "engage on issues we have been negotiating under Doha, but not pursue them under the current DDA framework''.
- 'Reaffirm the Doha Mandate and recommit to full implementation of it' (as in previous MCs). Key developing countries, as we have seen above, remain adamant that a clear reaffirmation is necessary and not negotiable.
- 'Muddle through': business as usual - continue to talk, 'explore different negotiating approaches', 'develop a new work programme'. The never-ending story... *(note the word 'never-ending')*
- 'Euthanise it.' Some negotiators and other relevant people think that helping it to die in a humanitarian fashion might be a solution, since it is already more than halfway there.
- 'Reinvent it.' (the WTO 'speak' is poetically: a 'reformulated architecture'). Many developed countries see the Doha Round mandate and approach as outdated. But so many delegations are stuck in the past or in non-negotiable stances that it would be a huge challenge to garner the necessary imagination, and vision, and a clear view of the reality checks.
- 'Do something!' Would members rally around a call to 'do something, anything!', to finish off the Round quickly in some way, shape or form?

Finishing the Round is necessary so that the WTO can get on with things. But leaving out any of the major pillars: Agriculture, NAMA (non-agricultural market access), Services, will not be acceptable to members. So, could plurilateral or single-issue approaches be agreed, to replace the expected trade-offs among these pillars? It would be a 'hard sell', but it could happen; in fact, it may already be happening (e.g., if a partial export competition outcome is agreed for Nairobi). Many already agree that a 'DDA-minus' agenda may be the only realistic one in the end.

**Post-Nairobi Work Programme**

What is the most likely outcome for the Nairobi Declaration? While anything could happen - and might - insiders believe the 'muddle through' - possibly *cum reaffirm DDA' - scenario is likely, with 'instructions' to develop a work programme for the rest of the Round by a certain date (again).

Such a work programme might consist of the issues suggested on 20 October by Cabinet Secretary Minister of Foreign Affairs and International Trade of Kenya, Amina Mohamed, who will chair MC10. She proposed "a post-Nairobi work programme that is realistic, balanced and also modernises the WTO negotiating agenda. The work programme would need to include Agriculture; an outcome on cotton; an understanding on food security; Services; NAMA; trade and environment; fisheries subsidies; an expanded Information Technology Agreement; and a package for LDCs." So - in some way or another, the key issues would be mentioned in the Declaration, whether in the form of Decisions or in the form of continuing work. 'Modernising the WTO negotiating agenda' is a bigger challenge, and one that needs to be taken seriously in the coming year or two.
Regarding the future of the WTO

In the 27 November draft Ministerial Declaration, four paragraphs were of particular interest in terms of setting the scene for the focus of future WTO work.

Paragraph 10: underpins the importance of the WTO core functions and its raison d’être. "We reaffirm the importance of work in regular bodies in furthering the objectives of the WTO Agreements and in facilitating meaningful exchange of information and sharing of experiences regarding the effective implementation and operation of their provisions. We note that the WTO's trade monitoring work, including trade policy reviews, has contributed consistently to the functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members."

Paragraph 12: gives plurilateral agreements under the auspices of the WTO a more prominent place/role. "As we recognize the centrality and primacy of the multilateral trading system, we take note that the plurilateral agreements concluded under the auspices of the WTO have deepened the framework of rules."

Paragraph 13: moves toward giving the Dispute Settlement Understanding/Dispute Settlement Body more 'teeth' (which would rectify weaknesses to date and strengthen the WTO overall). "We note that the Dispute Settlement Understanding (DSU) continues to offer a means for the settlement of disputes among Members that is unique in international agreements. The system has dealt with a large and growing number of disputes, demonstrating Members' continuing confidence in it. We recognize that the increasing number and growing complexity of disputes present challenges to the system. We therefore commit to further strengthen it, including through effective implementation of the rulings and recommendations of the Dispute Settlement Body (DSB)."

Paragraph 28: starts thinking about eventual multilateralisation of common elements of FTAs - starting with the coherence agenda. "We reaffirm the need to ensure that Regional Trade Agreements (RTAs) remain complementary to, not a substitute for, the multilateral trading system. We agree to enhance the role of the Committee on Regional Trade Agreements so as to map the systemic implications of RTAs and their coherence with WTO rules. We deem it necessary to conduct a study on the systemic implications of RTAs, modalities of which will be decided by the General Council."

In addition, Paragraphs 24, 25, 26 and 27 reaffirm "the centrality of development" and that "the principles of Special and Differential Treatment and Less Than Full Reciprocity for developing and least-developed country Members shall remain integral parts of the WTO's future work". They also promise to maintain special treatment for LDCs, small vulnerable economies (SVEs) and recently acceded members (RAMs). These paragraphs are likely to be fortified in the final Declaration, in light of recent submissions by developing country groups.

**Box 3. Reinvent the WTO?**

The group of 'wise men' who considered the future of the WTO some years ago came up with some good suggestions. Some of these are still valid, but a new comprehensive evaluation and frank strategic thinking is needed to pull the whole WTO membership into the 21st century and address the issues facing today's traders and business people. The issues that drove the early WTO and its GATT predecessor - tariffs, quotas, etc - are no longer the main focus. As one person put it: "The multilateral trading system - WTO - needs a generational transition of power." Some of
the more interesting discussions in recent months have focused on the following issues.

**Should the WTO be a negotiating forum? If so, what kind of negotiating forum?**
- No more high-profile, highly political, 'be-all, end-all' Rounds
- No single undertaking
- Negotiations on 'issues' rather than big packages
- No more consensus system
- Limits on policy space and open-ended 'outs' for developing countries (these outs have limited necessary trade reforms and inhibited participation in trade and in trade negotiations)
- Limits on the 'give me' and 'Agriculture-first' culture, and on 'holding hostage' whole segments of work.

**What core work should be the focus? 'Back to the basics'?**
- Rule-making (intellectual and technical approach to create common understanding, modify mindsets and behaviour, address emerging types of trade barriers)
- Dispute settlement - with a stronger mandate and 'teeth'
- Transparency
- Multilateralising common elements of FTAs
- Accessions
- Trade Policy Reviews
- New issues.

**Trade Ministers' Involvement**
- No more high-profile, expensive, enormously time-consuming Ministerial Conferences (WTO delegates tend to drop everything and concentrate on MC preparations for almost half a year every two years).
- Rather, yearly low-key, maximum 2-day non-politicised Trade Minister get-togethers in Geneva, maybe just before the World Economic Forum Davos event in January, since many of them attend it. While Ministers like 'deliverables', this should no longer be the focus of the Conferences.

**WTO Communications**
More effective WTO public relations and communications. Publicise the positives and the successes in laymen's terms and readable articles, etc. Manage expectations strategically. Discuss challenges openly, in a non-politicised fashion. The more transparent the debate, the less incentive to engage in political 'points-making'. The transparency in the recent lead-up to Nairobi is encouraging in that sense. However, reading articles on the upcoming Ministerial from various sources, including major business associations in different countries, shows that the WTO is still very misunderstood.

**Concluding Thoughts**
It is difficult to predict consensus in Nairobi at this stage. Members are still too far apart on most of the key issues. However, if past experience is anything to go by, enough meeting of the minds should take place to complete the Declaration, even if it may appear to repeat many things - in spirit if not the letter - that were in previous Declarations. MC10 will probably produce a narrow package of outcomes reflecting both core WTO work and elements of the DDA. The forward Work Programme is likely to call on Members to complete the Doha Round in some shape or form within a designated timeframe. The Ministerial Declaration may also contain hints pertaining to the WTO's future.

However, MC10 will not solve the divisions among members on core issues affecting the way forward for both the Doha Round and the WTO. This will require a new vision regarding the role of the WTO in the 21st Century, and a new political 'will' to take it to fruition.
References


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