Exploring the Nairobi Decision on Export Competition: Are WTO Members bound by it?

Kuruvila M. Jacob[*], *Nidhi Kulkarni*[**]

I. Introduction

On 19th December 2015, the Nairobi Decision on Export Competition was adopted at the 10th WTO Ministerial Conference being held at Nairobi, Kenya. It encompassed negotiations relating to four elements - export subsidies, export financing support, agricultural exporting state trading enterprises (STEs) and international food aid. The most significant outcome was undoubtedly the agreement reached on the gradual phasing out and consequent elimination of export subsidies.[1]

Paragraph 6 mandated an immediate elimination of the use of export subsidies by all developed countries and set a deadline of 2018 for developing

[*] Student, Year III of B.A.L.L.B. (Hons.), National Law Institute University, Bhopal.
[**] Student, Year III of B.A.L.L.B. (Hons.), National Law Institute University, Bhopal.
[1] Christophe Bellmann & Jonathan Hepburn, "Evaluating Nairobi: What Does the Outcome Mean for Trade in Food and Farm Goods" International Centre for Trade and Sustainable Development (2016).

countries[2]. Members would thus be required to modify their Schedule of concessions to reflect the new undertakings made. However, certain exemptions have been provided which allow developing countries to continue providing export subsidies falling under Article 9.4 of the Agreement on Agriculture until the end of 2023, and certain other categories of products were also excluded from the obligation of immediate elimination.

Since then, only two WTO Members, Australia and the European Union have requested for modification of their schedules to reflect a "zero export subsidy" status.[3] This non-action on the part of several developed and developing Member states of the WTO has raised questions about the legal status of the Nairobi Ministerial Decision. Are Ministerial Decisions in general, and the Nairobi Decision in particular, legally binding on Member States?

Even in the past, several scholars of international trade law have deliberated over the legal value of Decisions and Declarations held under the Doha Round,[4] but no consensus has been reached. Through this essay, the authors seek to analyse the binding nature of the Nairobi Ministerial Decision; first, through the lens of the Single Undertaking Principle of the WTO in light of the decision being taken pursuant to Article IX:1 of the Marrakesh Treaty and thus, being consensus-based, and second, on the question of whether it meets the requirements of a "subsequent agreement" under Article 31(3)(a) or "subsequent practice" under Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT), and consequently decide on its status as a tool of interpretation.

II. DECISIONS BASED ON CONSENSUS & THE SINGLE UNDERTAKING PRINCIPLE

Article 20 of the Agreement on Agriculture recognizes that agricultural reforms are an ongoing process with the long-term objective of

---

[2] World Trade Organization, Ministerial Decision on Export Competition of Dec. 19, 2015, para 7, WTO Doc. WT/MIN (15)/45, WT/L/980, (2015) [hereinafter Nairobi Export Decision].

[3] Secretariat, "Export Subsidies, Export Credits, Export Credit Guarantees or Insurance Programmes, International Food Aid and Agricultural Exporting State Trading Enterprises", WTO Doc. G/AG/W/125/Rev.6 (2017).

[4] Steve Charnovitz, "The Legal Status of the Doha Declarations", 5 Journal of International Economic Law, 207, 210 (2002).

Lorand Bartels, "The Relationship between the WTO Agreement on Agriculture and the SCM Agreement: An Analysis of Hierarchy Rules in the WTO Legal System" 50 J. OF WORLD TRADE 7, 18 (2016).

James Thuo Gathii, "The Legal Status of the Doha Declaration on TRIPS and Public Health under the Vienna" 15 HARV. J.L. & TECH 311 (2002).

substantial progressive reductions in support and protection.[5] Accordingly, it was decided at the conclusion of the Uruguay Round to continue negotiations pursuant to Article 20 of the Agreement on Agriculture one year before the end of the implementation period, i.e., 2000.[6] As planned, these negotiations opened in 1999 as part of the Seattle WTO Ministerial Meeting. Unfortunately, this attempt failed, which led to the negotiations finally being commenced in Geneva in March 2000. Additionally, in Qatar in November 2001, these rounds of negotiation were subsequently included as part of the Doha Development Agenda (DDA).[7] The primary objective of the DDA with respect to agricultural reforms is substantial improvement in Market Access, reduction of – with a view to phasing out – all forms of export subsidies, substantial reductions in trade-distorting domestic support, and special and differential treatment for developing countries.[8] Thus, reduction and ultimately elimination of export subsidies was one of the cornerstones of the DDA. An important underlying principle governing the Doha Round is the "Single Undertaking Principle" which means that nothing is agreed until everything is agreed.[9] The authors aim to first, provide a brief background to the Nairobi Ministerial Conference and second, examine the binding nature of the Nairobi Export Decision in light of the Single Undertaking Principle and Article IX:1 of the Marrakesh Treaty.

A. Background to the Nairobi Decision on Export Competition

Under the WTO, negotiations are undertaken by the Trade Negotiations Committee (TNC) and its subsidiary bodies, which are regular councils and committees meeting in special sessions or specially created negotiating bodies.[10] The negotiating bodies report to the TNC, which supervises the overall

---

5 Agreement on Agriculture, Art. 20, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

6 *Ibid.*

7 Alan Swinbank, "The Challenge of the Agriculture Trade Negotiations in the WTO Doha Round", The WTO and the Regulations of International Trade 87-107, https://www.wto.org/english/tratop_e/agric_e/negoti_e.htm.

8 The agricultural text in the Doha Ministerial Council Declaration initiating the Doha Round.

9 Appellate Body Report, "Argentina – Safeguard Measures on Imports of Footwear", para 77, WTO Doc. WT/DS121/AB/R, (adopted Dec. 14, 1999); Appellate Body Report, "China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum", para 5.33, WTO Doc. WT/DS431/AB/R (adopted Aug. 7, 2014); Appellate Body Report, "Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products", para 74, WTO Doc. WT/DS98/AB/R, (adopted Dec. 14, 1999).

10 World Trade Organization, "How the Negotiations are Organized", https://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm.

conduct of their work. In 2015, consultations were held informally throughout the Nairobi Conference in parallel to the formal plenary meetings.[11] Such consultations finally resulted in draft texts of Export Competition and other agricultural reforms, which were presented at the plenary meeting on December 19th where the draft text was approved by the Ministers at the conference.[12]

Further, the Nairobi Package consists of 9 Decisions altogether out of which only 6 Decisions have been a result of the Doha Trade Negotiations. In this regard, Part II of the Nairobi Package expressly states that the Nairobi Decision on Export Competition is the result of the progress in the DDA[13] and the decision has frequently been termed as a "historic decision" as it comes nearly 50 years after a similar decision was made for industrial products.[14] It is evident that the Nairobi Decision is a part of the DDA and the Nairobi Ministerial was merely a platform to achieve the required consensus with respect to the negotiations. This brings up the following two questions: first, whether a decision taken by consensus is in itself binding and second, whether the Single Undertaking Principle is a hurdle for the effective implementation of the Decision.

B. The Nairobi Decision as a consensus-based decision

The WTO is "member-driven", with decisions taken by consensus among all member governments.[15] The Decision on Export Competition was taken pursuant to Article IX:1, which states that "[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947", and this is reaffirmed in the Preamble to the Nairobi Ministerial Declaration where the ministers have reaffirmed the practice of taking decisions by consensus.[16] Even though voting has been provided for in Article IX, in practice, voting in the WTO never takes place as decisions are taken by consensus.[17]

---

[11] WTO, Annual Report of 2016, p. 33 https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_e.pdf, accessed Dec. 30, 2017.

[12] *Ibid.*; Jones Kent, *Reconstructing the World Trade Organization for the 21st Century: An Institutional Approach* (2015).

[13] World Trade Organization, Ministerial Declaration of Dec. 19, 2015, para 23, WTO Doc. WT/MIN (15)/DEC [hereinafter Nairobi Declaration] at para 23.

[14] WTO, Annual Report of 2016, 35 https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep16_e.pdf (accessed Dec. 30, 2017).

[15] World Trade Organisation, "Whose WTO is it Anyway", https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm.

[16] Nairobi Declaration, para 3 (accessed Dec. 30, 2017).

[17] Cottier and Takenoshita, "The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response" in *Aussenwirtschaft* 179 (2003).

In this regard, decision-making by consensus is intended to respect and uphold the right of each and every Member to veto any decision.[18] In other words, consensus guarantees that every member has approved the decision and none have opposed it. Further, for the legal norms of the WTO to be effective, such norms must be accepted by all, thereby reducing the possibility of members being bound by an undesired decision taken by a few. Hence, consensus contributes to the legal security of all WTO members as well as to the binding force of its norms.[19] The decision on Export Competition being undertaken and negotiated since 2001, expresses an active consensus among members for the elimination of export subsidies and the Decision of 19th December displays passive consensus in formally adopting the legal text pursuant to Article IX:1 which employs the word 'shall eliminate'.[20] Since the decision has received consensus, active as well as passive, the decision takes the form of a legally binding WTO rule.

C. The Principle of Single Undertaking

The Single Undertaking Principle has been recognised as a cornerstone of the functioning of the WTO and essentially means that "nothing is agreed until everything is agreed".[21] It was first laid down in Part I of the Punta del Este Declaration at the commencement of the Uruguay Round.[22] The Declaration stated that the launch, conduct and implementation of the outcome of the negotiations shall be treated as part of a single undertaking. Thus, every item on the agenda is part of a whole and indivisible package and cannot be agreed to separately.[23]

This principle was introduced and is followed with the aim of maintaining a combined WTO agenda to be decided and settled upon only at the end of the negotiations.

---

[18] Joost Pauwelyn, "The Transformation of World Trade", 104 MICH. L.R. 1, 23 (2005).

[19] Celso Lafer, "Outgoing Chairman Highlights WTO's Unique Decision-Making Process", 27 WTO FOCUS 3, 3 (1998).

[20] M.E. Footer, *An Institutional and Normative Analysis of the World Trade Organization* 138 (2006).

[21] Appellate Body Report, "Argentina – Safeguard Measures on Imports of Footwear", para 77, WTO Doc. WT/DS121/AB/R, (adopted Dec. 14, 1999); Appellate Body Report, "China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum", para 5.33, WTO Doc. WT/DS431/AB/R (adopted Aug. 7, 2014); Appellate Body Report, "Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products", para 74, WTO Doc. WT/DS98/AB/R, (adopted Dec. 14, 1999).

[22] General Agreement on Tariffs and Trade, Ministerial Declaration of Sep. 20, 1986, Part 1, WTO Doc. MIN/DEC.

[23] World Trade Organisation, "How the Negotiations are Organised", https://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm (accessed Dec. 30, 2017).

The Doha Round, which commenced in 2001, used similar language as that used in the Punta del Este declaration. Paragraph 47 of the Doha Ministerial Declaration requires that the conduct, conclusion and outcome of the negotiations should form part of a single undertaking. However, it also provided that certain agreements reached at an early stage 'may' be implemented on a provisional or definitive basis.

It can consequently be ascertained that the twenty subjects which originally formed part of the Doha Agenda should be treated as a single package to be signed by each country with a single signature.[24] The Nairobi Export Decision was agreed upon in 2015 and acknowledges the continuance of the Doha Round. Paragraphs 30 and 31 expressly commit to advancing negotiations on the Doha issues, including the three pillars of agriculture.[25] It is thus evident that since Nairobi is an integral part of the Doha Round and consequently the DDA, it will only be binding on Member countries once the Doha Round is finally concluded.

While this principle might seem to cause inefficiencies, it is pivotal to the functioning of the WTO aquis. Since the WTO functions on a consensus model, which requires extensive negotiations from all members, it is essential that members participate whole-heartedly throughout a particular round. With the operation of the Single Undertaking principle, it is ensured that Members do not stop or stall negotiations once their areas of interest have been discussed and concluded.[26] It complements the consensus model of decision making to ensure active participation from all groups of countries.

III. The Nairobi Decision as a tool of interpretation of the Agreement on Agriculture

A. Subsequent Agreement under Article 31(3)(a) of Vienna Convention on the Law of Treaties

The Nairobi Decision can also be considered a tool of interpretation under the VCLT. There has been substantial discussion regarding which of the below-mentioned categories it may fall under.

---

[24] World Trade Organisation, "The Doha Round Texts — Introduction", https://www.wto.org/english/tratop_e/dda_e/texts_intro_e.htm (accessed Dec. 30, 2017).

[25] Nairobi Export Decision.

[26] J. Croome, *Reshaping the World Trading System: A History of the Uruguay Round*, 63 (2nd edn., 1999); Rodríguez Mendoza and Wilke, "Revisiting the Single Undertaking: Towards A More Balanced Approach to WTO Negotiations" in C. Deere Birbeck (ed.), *Making Global Trade Governance Work for Development: Perspectives and Priorities from Developing Countries* 486, at 499 (2011).

Article 31(3)(a) of VCLT provides that a subsequent agreement on the interpretation of a treaty may be accounted for, along with the context of the treaty, in the interpretation of that treaty.[27] According to a 2013 International Law Commission (ILC) Report, however, such an agreement shall only aid in the interpretation and application of treaty provisions and shall not necessarily be binding.[28]

For the Nairobi Decision to qualify as a subsequent agreement, it needs to satisfy the dual criteria laid down by the Appellate Body in the *US-Clove Cigarettes* case. First, the decision should have been adopted *subsequent* to the relevant agreement to be interpreted and second, the terms and contents of the decision must express an agreement between Members on the interpretation or application of a provision of WTO law.[29]

The Nairobi Decision on Export Competition is dated 19 December 2015. It is thus later in time to the adoption of the Agreement on Agriculture in 1995, and consequently satisfies the temporal requirement.

Satisfaction of the second requirement under Article 31(3)(a) is often more challenging. The ILC has described a subsequent agreement as one which *specifically* bears upon the interpretation of the treaty.[30] Lorand Bartels, in his article on Hierarchy Rules in the WTO Legal System, has unequivocally stated that with respect to Decisions adopted by Ministerial Conferences within the ambit of the WTO, a vague reference as to whether a particular measure is permitted or not is not sufficient for it to qualify as an agreement on the interpretation of that provision.[31] It is the authors' opinion that the fundamental role of treaty interpretation requires the interpreter to read and interpret the words actually used in the agreement under examination.[32]

In a previous case, the Appellate Body had considered a Ministerial Conference Decision relating to the Agreement on Technical Barriers to

---

[27] Vienna Convention on the Law of Treaties Art. 31(3)(a), Jan. 27, 1980, 1155 U.N.T.S. 33 [hereinafter VCLT].

[28] International Law Commission, "First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation", Report by the Special Rapporteur, U.N. Doc. A/CN.4/660, para 68 (2013).

[29] Appellate Body Report, "United States – Measures Affecting the Production and Sale of Clove Cigarettes", para 262, WTO Doc. WT/DS406/AB/R (adopted April, 2012).

[30] Appellate Body Report, "EC – Bananas III (Article 21.5 – Ecuador II/Article 21.5 – US)", para 390, WTO Doc. WT/DS27/AB/RW2/ECU (adopted Nov. 26, 2008).

[31] Lorand Bartels, "The Relationship between the WTO Agreement on Agriculture and the SCM Agreement: An Analysis of Hierarchy Rules in the WTO Legal System", 50 J. OF WORLD TRADE 7, 18 (2016).

[32] Appellate Body Report, "European Communities — Measures Concerning Meat and Meat Products (Hormones)", para 181, WTO Doc. WT/DS26/AB/R (adopted Jan. 16, 1998); Appellate Body Report, "United States — Import Prohibition of Certain Shrimp and Shrimp Products", para 114, WTO Doc. WT/DS58/AB/R (adopted Oct. 12 1998).

Trade (TBT) to qualify as a subsequent agreement. However, in this case, the Decision expressly referred to a provision of the Agreement and goes on to clarify the meaning of an ambiguous term within it.[33]

Article 8 of the Agreement on Agriculture states that members shall not provide export subsidies otherwise than in conformity with the Agreement.[34] Article 9 lays down certain further entitlement specifications. The Nairobi Decision does not make any reference to these provisions, suggesting that it does not seek to interpret their content.

Beyond the treaty's *interpretation*, the parties to such a subsequent agreement must purport to clarify the meaning of a treaty or indicate how it is to be *applied*.[35]

The Appellate Body in *EC Bananas III*, used 'application' to mean where the agreement specifies how existing rules or obligations in force are to be applied.[36] The term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation. Paragraph 7 of the Decision mandates that developing country members eliminate all of their export subsidies by the end of 2018, while paragraph 6 requires developed country members to eliminate them immediately. Article 9.2(b)(iv) of the Agreement on Agriculture allows developing countries to provide export subsidies to the maximum of 76 and 86 per cent of the base outlay and quantity levels, respectively. By requiring developing Members to eliminate subsidies by the end of 2018, the Decision extinguishes their right under Article 9.2(b)(iv). The Decision, thus, does not mention how the existing rules on export subsidies under the Agreement on Agriculture are to be applied but modifies them entirely by eliminating them.

B. Subsequent Practice under Article 31(3)(b) of Vienna Convention on the Law of Treaties

This section will analyse whether the Nairobi Decision on Export Competition can be classified as 'subsequent practice' under Article 31(3)

---

[33] Appellate Body Report, "United States — Measures Affecting the Production and Sale of Clove Cigarettes", para 269, WTO Doc. WT/DS406/AB/R (adopted Apr. 04, 2012).

[34] Agreement on Agriculture, Art. 8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

[35] Appellate Body Report, "United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products", para 372, WTO Doc. WT/DS381/AB/R, (adopted May 16, 2012).

[36] Appellate Body Report, "European Communities — Regime for the Importation, Sale and Distribution of Bananas" — Second Recourse to Article 21.5 of the DSU by Ecuador, para 391, WTO Doc. WT/DS27/AB/R (adopted Nov. 26, 2008).

(b) of the VCLT. Article 31(3)(b) provides that "there shall be taken into account, together with the context, any subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation." In *Japan-Alcoholic Beverages II*, the Appellate Body referred to practice within Article 31(3)(b) of the VCLT as a "concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation."[37]

The authors will examine the decision to eliminate export subsidies in light of the two primary elements of Article 31(3)(b): first, whether a concordant, common and consistent, sequence of acts or pronouncements exists, and second, whether such acts or pronouncements imply an agreement of parties regarding the interpretation of the Agreement on Agriculture.

1. A concordant, common and consistent, sequence of acts or pronouncements

"Subsequent practice" under Article 31(3)(b) is required to be a concordant, common and consistent sequence of acts or pronouncements by all WTO Members as a whole[38] and further, such practice must demonstrate a common understanding among the Members.[39] The primary requirement under this test is that all of the parties to a treaty, not just some of them, act in such a way to evidence their agreement on the interpretation of the treaty.[40] Moreover, practice under Article 31(3)(b) has a wide scope which includes official statements or manuals, diplomatic correspondence, press releases, transactions, votes on resolutions in international organizations.[41] Such a common understanding is expressed and confirmed from the DDA, culminating in the Nairobi Decision on Export Competition. The WTO Members in the DDA confirmed their commitment to the "reduction of, with a view of phasing out, all forms of export subsidies"[42] This commitment was

---

[37] Appellate Body Report, "Japan — Taxes on Alcoholic Beverages", para 24, WTO Doc. WT/DS8/AB/R, (adopted Oct. 4, 1996), pp. 12-13; Ian Sinclair, *The Vienna Convention on the Law of Treaties* 137 (1984).

[38] Appellate Body Report, "United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services", para 194, WTO Doc. WT/DS285/AB/R (adopted April. 07, 2005).

[39] *Ibid.*

[40] Ian Sinclair, *The Vienna Convention on the Law of Treaties* 137 (1984).

[41] *Vienna Convention on the Law of Treaties: A Commentary* 555 [Oliver Dörr & Kirsten Schmalenbach (eds.), 2012].

[42] World Trade Organization, Ministerial Declaration of Nov. 14, 2001, para 13, WTO Doc. WT/MIN (01)/DEC/1, 2002.

further reaffirmed by the decision adopted by the General Council (2004),[43] Agricultural Negotiations – Status Report of 2005,[44] the Hong Kong Ministerial Declaration (2005)[45] and the Bali Ministerial Decision (2013). Finally, in the Nairobi Export Decision, members, pursuant to Article IX:1 of the Marrakesh Treaty, arrived at a consensus to eliminate export subsidies altogether by 2018. Moreover, consensus to eliminate export subsidies had been reached in the early 2000s by the members and what remained was to decide the date of elimination of such subsidies.[46] All these decisions strongly indicate a "consistent, common and concordant" practice among members with respect to the elimination of export subsidies.

2. The acts or pronouncements must imply an agreement of parties regarding the interpretation of the Treaty

The word 'agreement' in Article 31(3)(b) refers to an agreement that may be manifested by conduct, i.e., the acts or pronouncements must imply an agreement between the parties regarding the interpretation of the Treaty. An 'agreement' in Article 31(3)(b) would include an acceptance, even one that is implicit in the absence of any disagreement.[47] The 'agreement' in question cannot refer to the interpretation of the Agreement on Agriculture because that would in its essence mean that such a subsequent practice is essentially modifying/amending Article 8 and 9.2 of the Agreement on Agriculture to extinguish the benefits as provided in them. On the other hand, the Nairobi Decision may qualify as a subsequent agreement for the purposes of interpreting WTO Member Schedules.

A member's WTO Schedule forms an "integral part" of the WTO Agreement according to Article II:7 of the GATT 1994 and is therefore within the ambit of covered agreements within the DSU.[48] In *EC-Computer Equipment*, the Appellate Body averred that the Member Schedules represent both the commitments made by one member and a common agreement

---

[43] World Trade Organization, General Council Decision of Aug. 1, 2004, paras 17-26, WTO Doc. WT/L/579, 2004.

[44] Committee on Agriculture, "Agriculture Negotiations — Status Report Key Issues to be Addressed", 6, WTO Doc. JOB (05)/126, 2005.

[45] World Trade Organization, Ministerial Declaration of Dec. 18, 2005, para 6, WTO Doc. WT/MIN (05)/DEC, 2005.

[46] Joseph A. McMahon, *The WTO Agreement on Agriculture: A Commentary* 240 (2006).

[47] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009).

[48] "Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes", Arts. 1, 2, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). [hereinafter "DSU"].

among all members.[49] In light of this, interpretation of the schedules establishes the common intention of the Members[50] with respect to the export subsidy entitlements in a member's Schedule.

It is interesting to note that only around 25 members had export subsidy entitlements at the time of the Nairobi Ministerial Conference in 2015.[51] Two countries, Australia and European Union, have already requested the modification of their schedules,[52] out of which the WTO has approved Australia's modification.[53] Another crucial point that must be noted is that all decisions at the WTO are taken by consensus, and this consensus-based decision-making indicates the common intention of all WTO members to eliminate export subsidies as evidenced by the Doha Negotiations up until the Nairobi Export Decision.

This common intention of the members has arguably led to the crystallisation of a common agreement on the elimination of export subsidies within Member Schedules by amending the same to this effect. Thus, the Decision to eliminate export subsidies can be considered as a subsequent practice under Article 31(3)(c) of the VCLT interpreting the Member Schedules rather than the Agreement on Agriculture, itself.

IV. CONCLUSION

The Nairobi Package of 2015 is considered as a milestone in the WTO trade negotiations which have spanned over 15 years. The decision relating to the elimination of export subsidies was especially significant since it marked a conclusive consensus on a topic which was a bone of contention since the very beginning of the trade talks. Even though the ministers successfully arrived at the Nairobi Decision on Export Competition during the 10th Ministerial Conference, the central point of deliberation is whether the decision constitutes a legally binding decision.

---

[49] Appellate Body Report, "European Communities — Customs Classification of Certain Computer Equipment", para 109, WTO Doc. WT/DS62/AB/R (adopted Jun. 5, 1998).

[50] *Ibid.*

[51] Food and Agricultural Organisation, Trade Policy Technical Notes, "World Trade Organization (WTO) Agreement on Agriculture: Export Competition after the Nairobi Ministerial Conference" (May 16, 2017).

[52] WTO Secretariat, "Export Subsidies, Export Credits, Export Credit Guarantees or Insurance Programmes, International Food Aid and Agricultural Exporting State Trading Enterprises", WTO Doc. G/AG/W/125/Rev.6 (2017).

[53] Report by the Chairperson, Report (2017) on the Activities of the Committee on Agriculture, WTO Doc. G/L/1194, p. 1 (Nov. 9, 2017).

The text of the Decision, which includes phrases such as "shall immediately eliminate"[54], shall eliminate"[55], and "shall continue"[56], indicates the binding nature of the text. Yet, a Member cannot be brought before the Dispute Settlement Body for the non-implementation of the Decision as the Dispute Settlement Body only has jurisdiction to entertain matters concerning the covered agreements.[57]

Additionally, the Nairobi Decision on Export Competition is also bound by the principle of Single Undertaking and can neither be seen as an interpretation of the Agreement on Agriculture under Article 31(3)(a) of VCLT in the form of a subsequent agreement nor Article 31(3)(b) of VCLT as subsequent practice. However, though the decision does not interpret the Agreement on Agriculture, it may be viewed as interpreting another covered agreement – the WTO Member Schedules – as subsequent practice obligating all members having export subsidy entitlements to amend their respective schedules.

An impasse as to whether developing Members are in fact obligated to eliminate export subsidies by the end of 2018 could prove fatal unless the WTO Ministerial Conference or the Dispute Settlement Board clarifies the legal status of the Nairobi Decision on Export Competition vis-à-vis the Agreement on Agriculture. It is noteworthy that even in the 2017 Ministerial conference held in Bueno Aires, no clarifications were provided. Neither has the recently concluded mini-ministerial held in Delhi taken any affirmative steps in this regard. This is problematic because as per the World Bank global economic growth forecast for the coming years, the growth rate for developed as well as developing countries is set to decline.[58] Consequently, this creates a possibility of members re-introducing export subsidies and thereby, distorting trade[59] and in effect rendering the Decision infructuous. The WTO organs such as the Ministerial Conference or the Dispute Settlement Body must at the earliest clarify the legal status of the Decision to prevent the decade long negotiations on export subsidies from being rendered futile.

---

[54] Para 6, Nairobi Export Decision.
[55] Para 7, Nairobi Export Decision.
[56] Para 8, Nairobi Export Decision.
[57] Art. 1, DSU; Art. 2, DSU.
[58] Shawn Donnan, "Global Economic Growth has Peaked, says World Bank", *Financial Times* (Jan. 10, 2018) https://www.ft.com/content/4b9e6190-f55e-11e7-88f7-5465a6ce1a00 (accessed Jan. 30, 2018).
[59] Eugenio Díaz-Bonilla and Jonathan Hepburn, "Export Competition Issues after Nairobi in Evaluating Nairobi: What Does the Outcome Mean for Trade in Food and Farm", International Centre for Trade and Sustainable Development (2016).