

TWN'S COMMENTS ON THE REVISED DRAFT CANCUN MINISTERIAL TEXT

**Third World Network
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1. Introduction

The revised Draft Cancun Ministerial Text was issued by the Chairman of the WTO General Council “on his own responsibility” on the night of 24 August 2003. It is meant to be the basis for discussion by the WTO delegations on 25-27 August. It will most probably be the main basis for the negotiations in Cancun. The Third World Network (TWN) is very concerned about the process surrounding the revised Draft Text as well as its substance. They do not bode well for the prospects of the Cancun Ministerial Conference. There should therefore be significant changes to the Draft Text.

2. A Very Rushed and Unsatisfactory Process

TWN is most unhappy with the process surrounding the Draft. There is very little time given to delegations and the public to review and act on it. Cancun is only a fortnight away. This revised draft is the first document that contains substance as the first draft was only “skeletal” in nature. Yet it came out only Sunday (24 August) night. There is really no time for delegations to read it, send it to capital, get feedback and give their views in a few hours. The draft is to be discussed on 25 August afternoon, and then at a General Council official meeting (which has been postponed due to lateness of the draft). The issues are technical and complex and there is a lot of implications for billions of people that depends on the decisions on this draft.

It is not likely that an agreement can be reached on the contents of draft. It is thus important that there is fair play in that the views of members which do not agree to certain parts are fully reflected. Otherwise there is no level playing field those whose views have been ignored will be at a disadvantage in Cancun.

The General Council formal meeting should be extended if necessary so that members can have their say and can also propose what text to transmit to Cancun and how. The following principles should be adhered to: Different views of members must be fully reflected in the Text that will form the basis for negotiations. Delegations should submit their views or positions and that these be reflected in the revised Text in square brackets. At the very least, the views of different delegations can be placed in a compilation text in an Annex to the Cancun Text. If the route is taken of a cover letter detailing the different views, a draft of this letter should be distributed and approved by members in Geneva before Cancun.

Another major potential flaw is that the Draft may be sent on to Cancun, despite the disagreement of members with its substance, under the pretext that it is on the personal responsibility of the Chairman of the General Council. The practice of the Chairman sending a text to a Ministerial on his own responsibility started in Geneva before the Doha Ministerial. It was done despite the protests of many delegations, which insisted (to no avail) that only a draft approved by members can form the basis of negotiations. The flawed text became the basis for Doha negotiations. Many developing countries demanded after Doha that this practice be stopped. But it looks as if an attempt will be made to use this practice again, on the ground that there is no time to redraft it.

If this is the case, the whole exercise of decision-making regarding drafting and approval of the text, which is the most important aspect of decision-making in the whole process, would again not have legitimacy.

The draft that is transmitted is one that all Members should approve of. It may be that a consensus on the issues is not possible. Then the differences must be made clear in the text. The revised Text does this in only a very few areas, giving the false impression that there is agreement on most areas. This is unfair and should be rectified.

3. Major Problems with the Content of Draft

Overall, the draft is very imbalanced, with many aspects of it damaging to the developing countries' interests. On the "developmental aspects" of the Doha agenda, there is no or little gain for developing countries, i.e. TRIPS and health, implementation issues, Special and Differential Treatment (S and D), nor for the LDCs. On the core issues of "market access", the developed countries are not giving up their protectionist privileges in agriculture. But the developing countries are asked to take on new onerous obligations to open up their markets in agricultural and industrial products, with also an exhortation to participate in services liberalisation. The parts on agriculture and non-agriculture market access (NAMA) in particular are extremely damaging for development prospects.

On the Singapore Issues, there is the saving grace in this text that two options are placed in square brackets for each of the issues. The first option for each issue is to start negotiations, and an Annex is attached providing the terms of reference for conducting them. Unfortunately, these Annexes are based on the extreme positions taken from or drafted by the main proponents of negotiations, i.e. the EC and Japan. The second option states that the situation does not provide a basis for commencing negotiations, and further clarification of the issues should be undertaken. However the second option does not come with its own Annexes. Thus there is an imbalance in the Draft's structure on the Singapore Issues.

The following examines some of the key issues in the Draft.

4. TRIPS and Public Health

Para 3. The Draft refers to an Annex. The General Council on 30 August adopted the “Motta Text” of 16 December 2002 as the solution to the problem raised in Para 6 of the Doha Declaration on TRIPS and Public Health (i.e. providing access to medicines for countries with insufficient or no manufacturing capacity). It now comes with a Chairman’s statement of understanding. The Motta text itself is a compromise document, as it puts certain restrictions on the use of the “solution” i.e. a waiver of TRIPS Art. 31(f) that a compulsory licensee should produce predominantly for the domestic market (which thus limits what it can export). The Chairman’s statement accompanying the Motta text places yet another layer of restrictions.

(a) The solution is to be used to protect public health and not as "an instrument to pursue industrial or commercial policy objectives". (This introduces ambiguity as to whether or to what extent economically viable enterprises or projects are allowed, and could discourage would-be enterprises.)

(b) Members "understand" that the requirement for special packaging and/or special colouring or shaping (to prevent diversion) will not have a significant impact on the price of pharmaceuticals and shall also be applicable to active ingredients.

(c) Members wishing to use the system have to notify and provide information to the TRIPS Council on how they establish their lack or absence of manufacturing capacity.

(d) Members may bring "any matter related to the interpretation or implementation of the decision, including issues related to diversion, to the TRIPS Council for expeditious review, with a view to taking appropriate action". Members may also "utilise the good offices of the Director-General or the Chair of the TRIPS Council" to find a mutually acceptable solution when there are "concerns that the terms of the Decision has not been fully complied with". (The apprehension that their use of the system may evoke a review and action by others may be a factor discouraging use of the solution).

By placing this extra layer of “understandings”, it is may be that developing countries will find it more cumbersome, administratively and practically, to use the solution. Moreover, the restrictions, conditions and uncertainties may discourage potential generic producers and potential importers from finding it an economically worthwhile or even viable project. There are already too few cases of compulsory licensing by developing countries, and it thus remains to be seen whether this Para 6 system will actually facilitate the production, export and importation of more affordable medicines. The Motta Text of 16 December should thus be seen as a compromise which developing countries accepted, even though it had restrictions, and the 30 August statement of the Chair should be seen as another concession they have made, in order to contribute to an agreement to be reached before Cancun. It should thus not be seen as a concession by the developed countries, for which something in exchange should be expected from the developing countries.

5. Agriculture

Para 4 of the Draft deals with agriculture. However, the real "meat" is in the framework in Annex A, which is very complex technically. The Annex commits members to take certain decisions on parameters for dealing with domestic support, export subsidies and tariffs. Although the figures of commitment are not included, this framework is an architecture or structure which countries will later have to commit their agriculture policies to.

It is not possible for many delegations to comprehend fully its meaning and implications in so short a time. It is unfair that so little time is given to consider this Annex. It would be even more difficult in Cancun, where there are only a few days, for the Ministers to be able to grapple with the technical complexities when for three years the experts have not managed to agree in Geneva. It is unlikely that an agreement can be found before Cancun, and it would be unfair to subject the Ministers, who may not be familiar with the technical methodologies and details, to making momentous decisions on this crucial area in a pressure cooker situation.

If Annex A cannot be agreed to in Geneva before Cancun, that a simple decision should be taken in Cancun that Ministers take note of the ongoing negotiations and direct that the negotiations continue in Geneva.

The following are preliminary comments on Annex A:

(a) **On domestic support (Para 1):** It is highly regrettable that distortions are permitted to continue, since there are no commitments for developed countries to reduce the overall support. In fact the Blue Box subsidies are extended. There is no discipline of any kind on Green Box subsidies. The road is thus opened for continuation or even increases in overall domestic support in developed countries. In any case developed countries have already planned to shift their subsidies from the actionable Amber Box to Blue Box and especially to the Green Box subsidies.

(b) **On market access (Para 2):** **General comment:** In this crucial area, the Annex text enables developed countries to elude committing meaningful tariff reductions on products in which they have high tariffs, thus enabling high protection to be maintained. On the other hand, many developing countries are in danger of being subjected to tariff reductions that are likely to be steep in several products, under either of two schemes. This is a most unfair proposal. In principle, since there is no genuine commitment by developed countries to eliminate or significantly reduce their domestic support and export subsidies (and moreover, in market access, the developed countries would not have to commit to meaningful cuts in their high-tariff items), the developing countries should not be pressurised to reduce their tariffs further. There are already numerous cases of import surges experienced by many developing countries arising from inflow of cheap imports. They require tariff protection all the more to defend against artificially cheap and highly

subsidized imports. The Draft, however, further erodes this ability of developing countries to defend themselves through tariffs.

On Para 2.1, developed countries are asked to commit to a “blended formula” of three kinds of tariff cuts. This is basically the US-EC proposal. Part of the tariff lines (called import sensitive) will be cut by an average rate (presumably a lower rate) with a minimum cut per tariff line, with also tariff rate quotas (TRQs); part of tariff lines are subject to a Swiss formula cut; and part of tariff lines will be duty-free. This open-ended blended approach for reducing the tariffs of developed countries will allow these countries to elude committing meaningful market access given their existing tariff profiles. On the whole, the EU and US have rather low agriculture tariffs, but a minority of their tariffs are very high. Through this blended approach, they can place this minority of high tariffs in the first “import-sensitive” category that will be subjected to minor reductions.

Para 2.2 states that for tariff lines exceeding a maximum of a certain % (not specified), developed countries will reduce them to that maximum, or ensure additional market access in these or other areas, including through TRQs. The first part of this line seems to indicate a mechanism to cap the high tariffs; but the second part of this line seems to provide an escape clause in enabling the commitment to a maximum tariff not to be met by “transferring” the concession to another area.

Para 2.4 states the special safeguard (SSG) for developed countries remains under negotiation. Many developing countries have called for this special treatment for countries that tariffed their quantitative restrictions in the Uruguay Round (most of the countries enjoying this are developed countries) to be ended for developed countries. But this point is still to be negotiated.

Regarding 2.6, there is a set of formulae, committing developing countries to reduce their tariffs in three categories: The first category will have an unspecified percent of tariff lines being reduced by an unspecified average rate, with each line being cut by a minimum percentage. This first category will contain import-sensitive items and presumably will be subjected to lower tariff cuts. Only within this category will there be designated a category of Special Products (SPs) which will enjoy very limited privilege of having lower cuts and no new TRQ commitments. The second category of products (percent of tariff lines to be determined) will be subjected to higher tariff cuts of unspecified average rate and a minimum of unspecified rate for each tariff line. And presumably the their category of products will have even higher rates of reduction on average and for each line. It is likely that developing countries will be pressed into having only a small minority of their tariff lines in the first category, and the bulk of products may well fall under categories 2 and 3 and thus subjected to steeper and steeper cuts. The result is that for many countries, many of their products would have to experience tariff cuts and of these the rates would be steep.

The option is given in the Annex, that in place of tariff cuts in categories 2 and 3 above, developing countries can choose a Swiss formula approach. This is no comfort at all, as

this is a "harmonisation" formula in which products with higher duties will have to undergo steeper percentage cuts.

Many developing countries have rather high bound tariffs for a wide range of categories of products. Historically, this has been used as a means to protect their farmers from cheaper imports. Tariff protection has become even more important after the removal of quantitative restrictions (such as import bans or quotas) in the Uruguay Round. Its use is critical as a large part of the population depend on farming for a livelihood. Many developing countries were pressurized to reduce their applied tariff rates, under structural adjustment programmes. But if their bound rates are higher, they are allowed by WTO rules to raise their applied tariffs up to the bound rates, unless of course conditionalities of the IMF or World Bank forbid this. However, the proposals in the Annex, if adopted, will press down the bound tariffs of developing countries, which of course will also have effect on their applied rates.

The irony is that these formulae for developing countries are placed under a subtitle "special and differential treatment." It is really a misadvertisement as the formulae will in fact punish the developing countries, many of whose farmers are already overwhelmed by cheap imports.

This pressure for further intense liberalisation in Third World agriculture should not be accepted. Developing countries should not be subjected to further tariff reduction in food products. They should also not be subjected to reductions for all agriculture products in which developed countries are providing domestic or export subsidies. For other products that are not exempt, there should only be a simple formula of one overall average reduction. This should be accompanied by a strong Special Products (SPs) category. Developing countries shall be entitled to select the SPs with the flexibility they require. The SP category should not be restricted to a category of products, as stipulated in the Annex. These SPs should be exempt from commitments in tariffs or domestic support reductions.

Para 2.7 says the applicability of para 2.2 for developing countries will be negotiated. This is dangerous as para 2.2 states that tariff lines exceeding a maximum percent (unspecified) for developed countries shall be reduced to that maximum, or other ways of ensuring additional market access will be found. Such a commitment should apply to developed countries, but not developing countries.

On Para 2.8, the special safeguard mechanism for developing countries is most welcome. It is imperative that this mechanism can work in practice, and that developing countries can use it with flexibility to meet their needs. Its use should not be hampered by cumbersome conditions and limitation of products. The words "subject to conditions and for products to be determined" should be replaced by language that ensures that developing countries can use the mechanism in a manner that is simple, flexible and effective to meet their needs.

(c) **On export competition:** This section basically adopts the US-EC paper's approach. It reproduces that paper's lack of commitment for developed countries to eliminate their export subsidies and export credits. Indeed it is regrettable that it seems that a deal is struck here that both export subsidies and export credits can continue in parallel to each other for the same products. This is not acceptable. We should revert to the Doha mandate and ensure that all export subsidies are eliminated within a very few years, and that likewise concessional export credits be similarly disciplined.

6. NAMA (Non agriculture market access).

Para 5 and Annex B. The parts of the Draft on NAMA may contain some of the most serious damage to developing countries. Annex B contains commitments for developing countries to increase the coverage of their tariff bindings almost to 100 percent and to reduce their tariffs on industrial products at steep rates for most products. This should not be accepted, as its implementation may be very damaging for industrial development prospects in developing countries. The issues covered in Annex B have been discussed at length in Geneva and many of the points in it are unacceptable to many developing countries. However, the Chair responsible for this draft annex has marginalised the views of the developing country members and instead reproduced even more faithfully the recent joint paper of EC-US and Canada.

If there can be no agreement on Annex B in the next few days in Geneva, it should not be included in the Draft. Therefore the line in Para 5, "To this end.....this document" should be removed. Instead, Ministers should simply take note of the progress in the negotiating group and direct that it conclude its work, as in the last line of para 5.

The major problems in Annex B include:

Annex B, Para 3: "A formula approach is key": It depends what kind of formula approach. Most of the formulae proposed so far (especially those by the US and EC) in the negotiations in Geneva have damaging effects on developing countries. The line should change to: "The use of a formula approach is one of the approaches to reducing....."

Para 3: "Non-linear formula approach." The commitment to a non-linear formula for developing countries would be very damaging to their local industries. This term should be rejected. The non-linear formula is aimed at mandating very steep cuts to tariffs at the higher end, and steep cuts to tariff lines in the middle. The steep cuts can cause damage to local industries, jobs and government revenue. Indeed the use of this will be opposite to the principle of "less than full reciprocity" or S and D.

Para 4: The points in this Para on the non-linear formula should not apply as the non-linear formula itself is not acceptable. In any case, the following points should be noted:

-- 2nd tiret: It is most unfair to set the basis for commencing reductions for unbound tariffs at two times the applied rate, as proposed in this Para (2nd point). Commencing calculations of tariff cuts at this rate of two times the applied rates means that the new bound tariffs will be very near to the present applied rates and in some cases even below the present applied rates. Instead of this, developing countries must be given full flexibility to set their own bound rates when increasing their coverage of binding. (Also see comment on Para 7 below).

-- 4th tiret: The starting date for credit for autonomous liberalization should not be the the end of Uruguay Round conclusion but earlier, as many developing countries started their autonomous liberalisation through Bretton Woods institutions' structural adjustment programmes in the 1980s.

-- 5th tiret: The proposal to convert all non-ad valorem duties to ad valorem equivalents may be misplaced. Some industrial products behave like commodities and thus prone to price fluctuations and steep declines. An ad valorem duty system would thus have implications for tariff revenue and import surges if the price of the imported product falls considerably. In such cases it would not be desirable to convert non ad valorem tariffs to ad valorem tariffs.

Para 5. The option is given that countries with a binding coverage of less than (35) percent should bind (100) percent of their tariff lines at an average that does not exceed the overall average bound tariff for all developing countries, and thus be exempt from the formula. Few LDCs might be eligible. The eligible countries face a dilemma: in order to use the average rate cut, they have to bind 100 percent (or close to this) of their tariff lines. Those choosing this would lose the flexibility of having unbound tariff lines.

Para 6. The Annex also proposes that all members take part in a "sectoral tariff component" in which (through another document) it is proposed that tariffs in seven sectors be completely eliminated within a specified time-frame. This could spell the death of some of these industries in developing countries. These countries have demanded that they should not be included in any compulsory sectoral tariff elimination scheme. However Annex B insists that "participation by all participants will be important", thus ignoring the demands by developing countries that this should be kept voluntary and setting the stage for their compulsory commitment. This is unacceptable.

Para 7 implies that all developing countries have to extend their present binding coverage to at least 95 per cent. This kind of pressure should not be applied. Up to now, each member has the right to choose the level of their coverage. This flexibility should be retained. Moreover, countries should be free to choose at what rates to bind their tariff lines. Countries have deliberately left certain lines unbound for developmental reasons. This flexibility is also envisaged in the WTO since all negotiations on tariff cuts have previously applied only to bound rates. Further flexibility has also been accorded by the WTO through the allowed difference between bound and applied rates. The proposal of binding 95% of tariff lines and by using the system of determining the new bound rates

by multiplying the present applied rates by two is unprecedented in the history of multilateral tariff negotiations.

The question of erosion of trade preferences is not dealt with in the Annex. This question should be dealt with within the WTO rather than the IFIs. The WTO should set up a mechanism to address the effects of preference erosion generally suffered by the affected countries. The IFIs could contribute through funding, but should not impose further conditionalities.

With all these important issues unresolved, it is unfair to have this version of Annex B. The above concerns should be fully recognized in the text itself. Or else Annex B should be removed from the document as proposed above.

It should also be noted that in all previous Rounds of industrial tariff cuts, developing countries have never been subjected to any formula approach. Even developed countries have never come under any non-linear formula approach. Developing countries have also been free up to now to determine the coverage of their tariff bindings. It is ironic that under the rubric of a so-called Doha Development Agenda, the flexibility that had been available to developing countries is now proposed to be removed and these countries are being set up for large tariff cuts. And this despite all the rhetoric on fully taking into account the special needs and interests of developing countries, S and D and "less than full reciprocity."

The developing country members should not agree to the Annex B scheme to curb their policy space and flexibility. If Annex B is accepted, its framework (especially of non-linear formula and compulsory sectoral tariff elimination) would set an unhealthy and unfortunate precedent on which future rounds of tariff reductions would be based. Pressure to do so by the developed country members is natural and to be expected given their relatively low tariff levels in this area. It is worth noting that developed country members have taken eight rounds to bring their tariffs down gradually.

7. S and D and Implementation Issues (Paras 11, 12)

These two issues are key for developing countries in their efforts to rectify at least a little some of the imbalances of the WTO rules. The Doha Declaration recognises the importance of these issues. But we are very concerned with the implication that these two issues will be downgraded in importance, given their treatment in the current draft text. The Doha Declaration made it clear that these two issues are negotiating issues and are part of the single undertaking. Indeed, implementation issues was deliberately placed as the first item in the Work Programme in the Doha Declaration, before agriculture. The Doha text also states in Para 12 that "negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of para 47 below." As we know, para 47 is on the single

undertaking. S and D issues are part of the Decision on Implementation Issues and are thus also part of negotiations and the single undertaking.

It is imperative that this continues to be recognized and reaffirmed. Firstly, we note with concern that the subtitles for S and D and Implementation in the left hand margin of paras 11 and 12 do not have the word “negotiations” in them, unlike all the other negotiating issues in paras 4 to 10. This should be rectified. Secondly, these two issues should be restored to their previous order and placed higher up in the Document, before agriculture. Thirdly, the two paras must be revised to make it clear, as in the Doha Declaration, that they are an integral part of negotiations in the Doha Work Programme and part of the single undertaking.

8. The Singapore Issues

The text provides two options for each of the Singapore Issues. This is to be welcomed. The option of undertaking further clarification of issues has been placed for all the four Singapore issues. This option should be retained in the text to be transmitted to Cancun as it represents the view of a great number of members.

The contents of Annexes D, E, F, G are however cause for great concern. These annexes are supporting documents to decisions to launch negotiations, which is the first Option for each of the issues. None of these Annexes contain substantive modalities in any satisfactory degree. Moreover the views expressed in these are views taken only from one extreme side of the wide spectrum of views expressed in the working group processes. Indeed, looking at these Annexes would confirm that the fears of many Members are justified, that launching negotiations on these issues can lead to agreements and obligations that have very serious implications on developing countries that would constrain their development policy space.

If he were to be fair, the Chairman – if he had wanted to include Annexes to accompany the decision to launch negotiations -- should have captured the different views of members on what would constitute modalities of negotiations. The different views on the issues were clearly spelt out in the Working Groups and can be seen in the reports of the meetings. The different views were also voiced at the informal consultations of the last two months on the Singapore Issues. However, the Chairman has failed to do so and instead he has placed only the views of the EC and Japan, the proponents of negotiations, especially for the investment and competition issues.

The EC-Japan text on investment (Annex D) was only tabled at informal heads-of-delegation meetings on 22 August, and was heavily criticized by many countries. It was not agreed that it should be included in the draft Cancun Text.

The text on Competition (Annex E) is based on one of the three options put out by F. Jenny, chair of the competition working group, to a small group of delegations and not even discussed at a HOD meeting nor adopted by the HOD meetings. In fact, Mr Jenny

in an earlier paper even suggests that this option has only minority support, and he therefore put forward two other options. It is therefore strange and not acceptable that this “minority view” has now become a full Annex.

The text on transparency in government procurement (Annex F) is based on an EC paper that was floated to a small group during informal consultations the week before the Revised Cancun Draft was issued. This EC text was rejected by some developing countries present. In fact the Chair of the consultations on TGP did produce his own draft which contained positions that included more of the developing countries’ views than the EC paper, but it was not accepted either by the small group consultations. . Neither the EC nor the Chairman’s drafts were tabled at the HOD meetings. And yet the EC’s extreme draft has now surfaced as Annex F.

On trade facilitation, there is no known draft of the proponents that was tabled at the consultations or at the HOD. Yet a text with the proponents’ position has suddenly surfaced as Annex G.

There is thus an imbalance in the structure of the Draft on Singapore issues. The proponents of negotiations have their Option 1 in the Text plus four full Annexes, which they can use to full effect in Cancun. On the other hand, the large number of countries that do not want to start negotiations have only their Option 2, without having their own Annexes on what they would like to see in the further clarification of issues. Nor are their views represented in the Annexes D to G where the Chairman has only put down the views of the proponents, especially EC and Japan.

On 27 August, 13 developing countries that are in favour of Option 2 submitted a document to the WTO General Council (with a cover letter by the India Ambassador) outlining Issues for Further Clarification for each of the Singapore Issues. The countries have requested the General Council Chairman to add these four documents as Annexes to the draft text to be transmitted to the Ministers. The aim is that countries that do not want to begin negotiations can have their views reflected on what issues should be the subject of further clarification. However it is uncertain whether these alternative Annexes will actually be appended to the draft text. In any case, they should be widely distributed and studied by all.

NOTE: These comments were written by Martin Khor with the assistance of Goh Chien Yen and following discussions with Cecilia Oh, Tetteh Hormeku and Meena Raman. An updated version may be produced later.