

# **Reviving the negotiation function of the WTO a (mostly) technical story**

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# The WTO is not dead yet (but reform is needed)

1. Monitoring and surveillance still work (but not well enough)
  2. Disputes still being handled (but appeals are problematic)
  3. Many negotiations under way (but sloooow)
- The three pillars support each other, but I'll focus on the third

## Connection to the trade institute

- Is reviving the negotiation function of the WTO important for Canada?
  - Minister Ng thinks so—she was in Geneva last week
- What issues in your work **require** progress in negotiations?
- Where best can we collaborate with the Americans on new rules?

## **Caveat: revival not merely about institutional design**

- Nothing will happen in WTO unless China, EU and U.S. want it to
  - Most likely leaders
  - Biggest markets: each needed to reach critical mass on most things
- Serious domestic political constraints
  - “worker centricity” in U.S.
  - conditioning trade on values in EU
  - resistance to external “pressure” in China
- Are new trade agreements feasible even if spillovers are significant?

# Story has seven parts

1. The back story: how do we know revival is needed?
2. Internal transparency
3. Single undertaking is [essential] [an obstacle]
4. Plurilateral alternatives
5. Legal basis for plurilateral negotiations
6. What next?
7. Postscript: It's not all about Geneva

# Part 1 The back story: GATT/WTO “rounds”

Round	Dates	States	Subjects
Geneva (2), Annecy, Torqay, Dillon rounds	1947, 1949, 1951, 1956, 1960-1	About 26	tariffs
Kennedy Round	(1962) 1964-67	62	Tariffs and anti-dumping measures
Tokyo Round	1973-79	103	Tariffs, non-tariff measures (“Codes”), “framework” agreements
Uruguay Round	1986-94	123	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc
Doha Round  launched at MC4 in Doha	2001- ?	153+	agriculture, goods, services, Rules (subsidies, anti-dumping, regionalism, fisheries subsidies), development, facilitation, environment, intellectual property, dispute settlement

# The rise and decline of the Doha Round

2003 MC5 Cancun fails

2005 MC6 Hong Kong rewrites the mandate

2008 Geneva “July ministerial” fails; Doha Round on life support

2011 MC8 Geneva

... focusing on the elements of the Doha Declaration that allow Members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking.

2015 MC10 Nairobi Ministerial declaration

We recognize that many Members reaffirm the Doha Development Agenda....

Other Members do not ... as they believe new approaches are necessary ...

2017 MC11 Buenos Aires ends with no declaration

- chair notes “differences of opinion on the Doha Round”
- 4 “joint statements” (plurilateral) agreed by subsets of Members

## Some good news

- Negotiations since 1995 have produced sporadic agreements, including on a handful of Doha Round issues:
  - Some service sectors
  - Cutting red tape at the border
  - Scrapping export subsidies in agriculture, and
  - Eliminating import duties on information technology products
- But...



# Doha as a round is dead, not sleeping...

- ...though issues have not gone away
- Many culprits in the collapse\*
- Decision rule gets a lot of blame
  - Consensus
    - WTO never votes
  - Single Undertaking
    - New rules apply to everybody



\*Wolfe, Robert, (2015) 'First Diagnose, Then Treat: What Ails the Doha Round?,'  
World Trade Review 14:01 (January 2015), 7-28.

# How to improve institutional design for negotiations?

- End de facto veto on change by Members reluctant to engage in negotiations on new rules
- Limit special and differential treatment (SDT) for large economies in new negotiations
  - Reconsider “exchange rate” for developing countries
  - Break link between what a country calls itself and what access to SDT should be granted by partners
- Maintain integrity of *WTO acquis* and its benefits for all Members

## Part 2: Internal Transparency and the Negotiation Process

- How to square circle of **formal equality** of members with **practical inequality** of their willingness and capacity to participate
- Old questions:
  - Do small group meetings advance negotiations? (yes)
  - Should chair select some Members to attend consultations? (yes)
  - Do coalitions help Members with small Geneva delegations? (yes)
  - Do “green room” meetings chaired by DG help? (maybe)
  - Is a “bridge club” spanning significant players needed? (yes)
  - Do ambassadors talk past each other? (yes)
- Is an unwieldy membership part of the problem? (yes)

## Part 3: The single undertaking is dead. Or is it?

- Shorthand: Nothing is agreed until everything [on agenda?] is agreed
- Legal: “WTO Agreement shall be open for acceptance as a whole”
- Doha: ‘conduct, conclusion and entry into force of the outcome ... shall be treated as parts of a single undertaking”
- Every part of that died with Doha—especially idea that **all** Members participate in **all** negotiations
  - ”Elements for political guidance” at MC8 recognized end of single undertaking, making TFA possible at MC9

## Need for a package applies to most negotiations

- Domestic: Any deal can stir up a hornet's nest of opposition
  - Need balancing groups with something at stake
  - Think of how Biden's Build Back Better is negotiated
- Multilateral: Need elements for key constituencies in N and S
- Risks: packages create multiple entry points for veto players domestically and in Geneva

# WTO needs to get out of the consensus trap...

- ... while recognizing that all decisions are made by consensus...
- ...recalling that India's Environment Minister Bhupender Yadav got away with a last-minute demand on coal at COP 26 because of consensus. (With Chinese support)

## Part 4: Plurilateral alternatives

- Means simply talks inside the WTO among a subset of Members whose eventual outcome would be incorporated, somehow, in the WTO
  - Not self-executing: need institutional scaffolding of WTO, including notifications, committees and dispute settlement
  - Not appropriate if universal commitment needed
- Offers a mechanism for large trade powers to cooperate
  - No need to engage all WTO members: helps with problem of an unwieldy membership
  - Maintains coherence of the trading system

# Under what circumstances...?

1. Limit benefits to participants, or not?
  - a) Restrict benefits of the deal to participants
    - De jure discriminatory
    - Limits risk of free riding by non-participants
  - b) Critical mass agreements (CMA)
    - Usually means ~90% of trade in a good or service
    - And then can be MFN, with no free rider concern
2. How can a deal fit in the WTO?



# Annexes to the WTO Agreement [Also TRIPS, DSB, TPRM]

## ANNEX 1A: Multilateral Agreements on Trade in Goods

General Agreement on Tariffs and Trade 1994

GATT *Schedules* of some Members include **Information Technology Agreement**  
Agreement on Agriculture, and 10 other Uruguay Round agreements  
**Trade Facilitation Agreement**

## ANNEX 1B: General Agreement on Trade in Services

GATS *Schedules* of some Members include additional commitments on Trade in  
**Basic Telecommunications** Services

## ANNEX 4: Plurilateral Trade Agreements

Agreement on Trade in Civil Aircraft

**Agreement on Government Procurement**

International Dairy Agreement

International Bovine Meat Agreement

## Potential legal outcomes

1. Add to GATT or GATS Schedules (consensus mostly **not** needed)
  - Critical mass, MFN, binding only on participants
2. Add new Agreement to Annex 1 (de facto requires consensus)
  - Binding on all WTO Members who ratify
3. Add new plurilateral to Annex 4 (requires consensus)
  - Restrict benefits to participants, on whom it will be binding
4. Outside WTO

## Four “Joint statement initiatives” (JSIs) now underway

- Domestic regulation of services
  - Likely to conclude at MC12 on basis of a Reference Paper and new commitments in Schedules
- e-commerce, investment facilitation, MSMEs
  - Likely only progress reports at MC12
- Broad cross-section of the WTO membership
  - More than 140 out of 164 Members involved in at least one
  - EU and China in all four groups
  - U.S. only e-commerce at first, but now services domestic regulation

## **No guarantee of success...**

- Environmental Goods Agreement negotiations stalled in 2016
- Trade in Services Agreement (TiSA) failed

## ...nor of ratification

- A critical mass deal does not come into effect until a predetermined number of countries and/or share of world trade has accepted the deal
- Ten Members have still not ratified the Trade Facilitation Agreement
- Some parties have not ratified CPTPP, and U.S. pulled out
- Took eleven (11) years for the 2005 Amendment of the TRIPS Agreement to come into force

## Other proposed statements

- Agreement by a sub-set of Members seen as acceptable, if second-best
  - COVID-19 and Beyond: Trade and Health
  - Role of trade in women's economic empowerment
  - Trade and Environmental Sustainability Structured Discussions
  - Fossil fuel subsidies ministerial statement
  - Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade

## Part 5: Plurilaterals are now mainstream: are they “legal”?

- India and South Africa paper WT/GC/W/819
  - Implicit **political** argument that Members ought not to conduct plurilateral negotiations
    - Linked to claims about special and differential treatment
  - Explicit **legal** arguments flimsy: Article III:2 of WTO Agreement does not specify legal forms of negotiated outcomes or procedures
  - Real issue?
    - JSIs divert attention and negotiating resources from their own priorities
    - Takes away their leverage over agenda and outcome

## Political principles on process

- Open process of analysis and deliberation leading to a joint statement
- Consensus **is** needed to launch and to conclude negotiations that would affect rights and obligations of other Members (fisheries)
- Consensus **not** needed to start process that only creates new obligations for participants (investment facilitation)
- Providing a governance framework for new plurilateral agreements that ensures they are consistent with multilateralism would help to recognise valid concerns of Members that choose not to participate.



# Governance framework for new plurilaterals?

- Openness to participation and future accession by any WTO member
- Facilitation of participation of developing countries
- Transparency of the negotiating process
- Means of protecting rights of non-participants while avoiding free riding

For more, see Hoekman and Sabel, (2021) 'Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time,' Global Policy 12:S3 49-60.

# The stakes are high

- EU paper on WTO reform contains an implicit warning:
  - **If** no effective formula is found to integrate plurilateral agreements in the WTO
  - **Then** no other option than developing such rules outside the WTO framework
  - **Which** could fragment the system.
- What they mean: some possible agreements not suitable for inclusion in Schedules (not intended to be MFN), and so Members have to debate conditions under which consensus will not be blocked for Annex 4 option

## Outside options are real

- CPTPP, RCEP and other PTAs are effectively plurilateral
- New examples
  - Digital Economy Partnership Agreement (DEPA)
  - Agreement on Climate Change, Trade and Sustainability (ACCTS)
  - U.S. deals with EU on steel, trilateral process with EU and Japan
- Members who think that new issues should be discussed at WTO have to be sure to make the inside option possible, and attractive.

## Part 6: What next?

- New “round” improbable
- What would a revival of the WTO negotiation function look like?
  - End stalemates on old issues
  - Real negotiation on new issues
- Agreement on how to conclude plurilaterals
- Prospects?

## MC12 part of the answer

- MC12 will not be a single undertaking, unless Members hold one aspect hostage for others
  - What will be said about COVID-19?
    - TRIPS/vaccines nowhere
  - Fisheries subsidies an existential necessity
    - wide gaps remain
  - Agriculture overriding priority for many developing countries
    - cacophony of cans being kicked down the road?
  - Progress on JSIs essential for the future
  - Other joint statements commit only to new work programs
- For more see Ungphakorn and Wolfe [The WTO is regularly in crisis, but this time could be different](#) (latest update Nov 14)

## Three takeaways

- Single undertaking dead but package deals a reality
  - Is there a package emerging for MC12?
  - Will it be enough to keep WTO moving forward?
- Consensus is changed not removed
  - Who has to agree, on what?
- Will plurilaterals find a home in the WTO?
  - Services domestic regulation a conventional deal
  - Test comes when (if) other JSIs conclude with consensus for insertion
  - And if new issues are discussed in WTO

## Postscript: capitals matter too

- Do representatives of member states and officials based in capitals agree on priorities? No
- Does that matter for revival of negotiations? Yes
- Good thing Minister Ng went to Geneva to hear firsthand
- But that's a different presentation\*

\* See Hoekman and Wolfe “The Geneva Effect: Where officials sit influences where they stand on WTO priorities” updated November 12, 2021