

# CHAPTER 1

## Reviving the negotiation function of the WTO: Why the onus falls on the three major powers<sup>1</sup>

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*Leadership is needed by the three major powers to improve the institutional design for negotiations that would maintain the integrity of the World Trade Organization (WTO) while ending the de facto veto on change held by members reluctant to engage in efforts to expand its coverage. The institutional challenge is to square the circle of the formal equality of members with the practical inequality of their willingness and capacity to participate. While the single undertaking as an aggregation and forcing mechanism is dead, and plurilateral negotiations are now mainstream, governance principles have not kept pace, and the need for issue linkage and package deals remains.*

### INTRODUCTION

One of the primary tasks of the WTO is to provide a forum for multilateral negotiations among its members. The organisation had early successes on telecommunications and financial services, and later achievements on trade facilitation, export subsidies in agriculture, government procurement, and information technology. But the attempt to conduct an ambitious comprehensive 'round' of negotiations, the Doha Development Agenda, ended in failure. The negotiation mandated by the Uruguay Round agreements on services was largely abandoned, and the agriculture negotiations, begun in 2000, are far from completion. Despite the impetus provided by inclusion in the UN sustainable development goals, the fisheries subsidies negotiations are not yet complete. Discussions about 21st century digital trade issues have been ongoing for more than 20 years, without conclusion. World trade is changing faster than the rules of the trading system. The negotiation function of the WTO is not dead, but revival is overdue.

Each round of multilateral trade negotiation under the General Agreement on Tariffs and Trade (GATT), including the Uruguay Round, only crystallised when the United States and Europe had reached a basic accommodation, which then provided the parameters for the rest of the bargains. The European Union (EU) and the US still disagree about many

<sup>1</sup> We are grateful for the helpful comments of Bernard Hoekman, Nicolas Lamp, Patrick Low, Hamid Mamdouh, and Don Stephenson.

things, notably how to pursue regulatory cooperation and the role of the Appellate Body, but solving their outstanding conflicts will not remove the central blockage in the WTO. The accession of China at the 2001 Doha ministerial was eclipsed by the launch of the ill-fated Doha Round at the same ministerial, a round undermined in part by a failure to consider whether the unfinished aspects of the Uruguay Round negotiations still made sense in light of Chinese accession (Wolfe 2015). The EU and the US should recognise that China now has a leadership role in global governance; also needed is a full acceptance by China of the obligations that role entails. Solving this triangular problem is an essential precondition for reviving the negotiation function of the WTO. Washington and Beijing need not like each other, but progress will not be made in multilateral cooperation if they are not prepared to see each other as partners, as Brussels and Beijing did while negotiating the proposed Comprehensive Agreement on Investment (CAI).

Other chapters in this book consider the substantive issues that must be on the future agenda. Our task is to focus on the negotiation process. Analysts of the WTO work with an implicit mental model of how members could reach agreements. When the process seems too slow, or fails, analysts attribute the problem to one part of their model: if the secretariat or members could do that thing differently, then the obstacles could be overcome. This reasoning is counterfactual, meaning something that has not happened but might happen under different conditions. The usual suspects include:

- Unsuitability of the WTO to address 21st century issues.
- A lack of business support in the domestic politics of key members.
- Too many small players.
- Obstruction by some members.
- Special and differential treatment.
- Absence of trust among delegates in Geneva, who we know are often not on the same page as capitals (Fiorini, Hoekman, and Wolfe, in progress).

In this paper we focus on two factors. Firstly, the need for leadership by the three major powers (EU, China, and the US), and secondly, the need to improve the institutional design for negotiations that would maintain the integrity of the WTO *acquis* and its benefits for all members, while ending the de facto veto on change held by members reluctant to engage in negotiations, let alone liberalise.<sup>2</sup> For the first factor, we need say little, although it is worth stressing that the Doha Round broke down at the informal ministerial in July 2008 when Brazil, China, the EU, India, and the US failed to agree on certain core issues, just as the Nairobi package only came together at the last minute

2 The *acquis* is the accumulated rules and practices of the WTO, which must be accepted by new members; and all members apply all agreements simultaneously with respect to all other members.

in November 2015, when these same five members reached an agreement on new rules for export subsidies in agriculture. China, the EU, and the US now account for a huge share of global trade, and many of the tensions in the trading system arise in the strained relations among them. If they signalled a zone of possible compromise, other members would know how to align themselves. So long as they remain at loggerheads, often for reasons exogenous to the WTO, the negotiation process will be slow.

For the second factor, if countries want to negotiate, they will. If the WTO is a more favourable forum than the outside options, they will negotiate there. Nobody should forget, however, that the outside options exist. The Trump administration in the United States negotiated with China on a bilateral basis. Groups of countries have concluded regional trade agreements such as RCEP and CPTPP. For some years, countries tried to negotiate a Trade in Services Agreement (TiSA) outside of the WTO. If you want new areas of commercial policy covered in a multilateral framework with transparency, committees, and dispute settlement; and if you want all members to be able to participate in those negotiations if they choose, and to know what is going on in the negotiations if they choose not to participate, for now at least, then you need the WTO. Members who think that new issues should be discussed on a multilateral basis within the WTO have to be sure that this inside option is possible, and attractive.

Would institutional reform help? The question implies two familiar themes. The first is the hypothesis that the way in which *interests* are aggregated changes outcomes. A change in WTO procedures will not alter the interests of farmers, but a change in how decisions are made will transform how those interests can be mobilised. For example, are less-than-universal agreements appropriate, should there be differentiation among developing countries, and is some sort of package of agreements feasible? The second theme is that deliberation aids *learning* and new understanding of interests, which changes outcomes. The institutional challenge is then to square the circle of the formal equality of members with the practical inequality of their willingness and capacity to participate.

The rest of this paper is structured as follows. In the next section we discuss the negotiation process and internal transparency, which constrains deliberative opportunities, followed by a brief discussion in section two of the problem of the single undertaking as an aggregation and forcing mechanism. In section three, we turn to a discussion of why plurilateral negotiations are now the mainstream approach, and in section four, we address whether plurilateral negotiations are ‘legal’ and the associated need for new governance principles. Section five concludes with suggestions on steps that members can take to improve prospects for the next WTO ministerial.

## 1. INTERNAL TRANSPARENCY AND THE NEGOTIATION PROCESS

The general perception of WTO negotiations is of episodic ministerials at which all the work is accomplished. Close observers know, however, that ministerials are the tip of an iceberg of diplomatic activity in and out of Geneva, and that is what needs reviving

– without good preparation, a ministerial cannot succeed. Do small group meetings advance negotiations, or should all informal meetings be open ended? Should the chair select some members to attend consultations, and if so, should they be the major players, the like-minded, or the principal antagonists on a particular issue? In short, who should negotiate and where?<sup>3</sup>

The WTO is a forum, not an ‘actor’, and it is member driven. Unlike the International Monetary Fund or the World Bank, it has a tiny professional staff whose role is to serve as a Secretariat to the dozens of WTO bodies. The Secretariat can prepare background papers, but negotiating proposals come from members. The WTO is a place to talk, and the talking is done by representatives of members. They talk in dozens of formal on-the-record meetings every year, and in many hundreds of more informal meetings. Sometimes they talk in ‘confessionals’, where a chair explores options with one delegate at a time. Such complexity creates practical problems for efficient negotiations. A Member that lacks the capacity to be an informed presence at every meeting is at a disadvantage, but the alternatives are not obvious. Disaggregation into multiple negotiating groups makes things simple while engaging distinct policy networks in capitals, but it increases the number of meetings that small delegations must cover. No organisation with 164 members can find consensus on sensitive matters such as agricultural reform if all discussions must be held in public, in large groups, with written records (Lamp 2017). Plenary sessions of negotiating groups are held for transparency; they provide an opportunity for all members to hear about the informal smaller group meetings where much of the work is done. In the current agriculture and fisheries subsidies negotiations, for example, ‘facilitators’ conduct such informal meetings on topics assigned by the chair of the negotiating group, and then report back to plenaries. Such meetings are not always open to all members, which leads to questions about transparency, even if the outcome of any process can only be adopted by consensus, which is inherently inclusive.

Only the largest traders can monitor and participate in all meetings. And members with small Geneva delegations may also lack the analytic capacity in their capitals to monitor and prepare instructions for all meetings. The principal ideas in most negotiating groups come from a small set of members, often submitting proposals developed with a handful of co-sponsors. The institutional design issue becomes one of structuring a process whereby the more active members can get on with negotiations without losing touch with the interests of the rest, and in a way that builds confidence in the process and the results. One solution is for members to aggregate their strength with others by forming coalitions.

The coalitions that played a large role in the Doha Round had their roots in earlier GATT rounds – indeed, in long-established multilateral practices going back to the League of Nations. Two sorts of coalitions are relevant for WTO negotiations. Coalitions based on a broad *common characteristic* (such as a region or level of development, e.g. the African

3 For more on the interaction of internal transparency and negotiations, see (Ungphakorn and Wolfe, 2021).

Group) can influence many issues, including the round as a whole, but only weakly. Coalitions based on a *common objective or interest* (such as agricultural trade e.g. the G-33)<sup>4</sup> can have a great deal of influence, but on a limited range of issues. Many of the coalitions that proliferated during the Doha Round may be less active now, which could limit future deliberative opportunities for smaller members.

A third type is more like a club than a coalition. *Bridge clubs* can be essential for breaking deadlocks, or for managing negotiations, often by building bridges between opposed positions. The first bridge club created in the Kennedy Round eventually became the Quad (US, EU, Japan, and Canada) in the Uruguay Round. That Quad no longer meets at ministerial level, but the Deputy Permanent Representatives of those members plus Australia still get together in Geneva – that grouping, however, does not include all the opposing interests. Efforts since the start of the Doha Round to create a new bridge club in various configurations spanning the new significant players in world trade all ultimately failed. The Ottawa Group is a new sort of coalition since it groups members with diverse interests and characteristics. It is not a bridge club, however. Its focus is promoting ideas on institutional reform, rather than trying to broker compromises.

Bridge clubs are run by members, but a trusted Director-General has scope to try to convene meetings of the principal antagonists, often known as a ‘green room’. The original Green Room practice, carried into the WTO, reflects three negotiating realities: first, that informality is vital; second, that the largest members must always be in the room; and third, that other interested parties should be engaged in the search for consensus. It has been problematic for more than 20 years (Blackhurst and Hartridge 2004). The key is ‘inclusiveness’ of all members and all interests; and ‘transparency’: representatives in the room must fairly articulate the views of their coalition and expeditiously and comprehensively report back on the deliberations. The chair must fairly present any results when reporting on negotiations in plenary meetings or drafting documents designed to attract consensus. Smaller countries and their NGO supporters complained profusely early in the Doha Round about the green room process and the necessity of ‘internal transparency’. Today, we still see obligatory nods to the importance of an inclusive process, but internal transparency does not seem to be mentioned, notably in India and South Africa’s complaint about the ‘joint statement initiatives’ (WTO 2021a) discussed below. This may not be a good sign.

The green room as a formal practice among ministers essentially died in July 2008 (Wolfe 2010). The dynamic of meetings with 30 or more ministers, each with one additional official, was not conducive to real engagement. Ministers, one wrote, were sitting together like sardines in chairs that are not the world’s most comfortable, while listening to speeches repeating familiar positions. Another minister told stakeholders that he had not sat down for so many hours in one day to listen and not speak since grade school. Another

4 The so-called ‘Friends of Special Products’ in agriculture is a coalition of developing countries pressing for flexibility for developing countries to undertake limited market opening in agriculture.

newcomer to the process complained that ministers admonished others for mentioning sticking points, then proceeded to mention their own. At subsequent ministerial conferences ministers still found ways to search for consensus in smaller groups, but not in anything like a green room.

More seriously, the practice has also vanished from Geneva. In a remarkably defensive speech to the General Council in July 2017 (WTO, 2017: 111), the then Director-General Roberto Azevedo said that instead of the former practice of having a green room before every General Council, since 2014 he had convened a full meeting of all Heads of Delegation where everybody could be invited and could address any topic. In effect, he decided that the Director-General has no role in seeking to broker a consensus, in helping to move negotiations forward. So instead of trying to find various configurations in which the principal antagonists on an issue could find common ground, he gave up. Perhaps we no longer hear complaints about internal transparency because Azevedo went to the inclusive extreme. There were no more worries about transparency, because there was no restricted group to be transparent about. The unfortunate result is that ambassadors are said to talk past each other in the General Council and the environment is increasingly toxic (Ungphakorn 2021). We are not aware of any bridge club meeting that currently includes China, the EU, and the US, but one will be needed.

## 2. THE SINGLE UNDERTAKING IS DEAD. OR IS IT?

Anyone who knows anything about the WTO knows that the single undertaking is dead. Not so fast. We can see three meanings of ‘single undertaking’ in the Doha declaration (WTO 2001): ‘the (1) conduct, (2) conclusion and (3) entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking’. The three parts do not stand or fall together. The Doha mandate as a single undertaking in itself is clearly dead, but the notion that the result must be some sort of package applies to most negotiations. And the WTO *acquis* remains a reality.

The single undertaking as a negotiating technique had been evolving since the Dillon Round of the 1950s. In the Tokyo Round of the 1970s it was intended in part to impose the same constraint on the membership as a whole that American negotiators faced in the US Congress, where under the ‘fast track’ process, the results of a trade deal must receive a single up or down vote with no possibility of amendment. The American problem is acute. Given the heterogeneity of Congress, any significant deal must generally have something in it for multiple diverse constituencies, but if there are any doubts about all members in Geneva being committed to all aspects of a package, the whole thing could unravel in Washington.

Studying the possibility of linkage among issues and parties in treaties and negotiations has a long tradition (Wolfe 2009). The way an issue is framed can have the effect of adding or dropping members from some aspect of the negotiations. For example, least developed countries (LDCs) were not expected to cut any tariffs in the Doha Round negotiations

on non-agricultural market access, and some other developing countries were asked to do little more than reduce the gap between their tariff commitments and the tariffs actually applied, but all were expected to join the overall consensus by not objecting to the obligations undertaken by other members. On some issues, agreement is needed only among a subset of countries, like government procurement, while on other issues, like subsidies, binding rules require everyone to participate.

Adding or dropping an issue from a negotiation is complex. Adding divisive issues can undermine negotiations, especially if it brings in more domestic opponents than supporters of an issue. Adding unrelated issues that the parties value differently can be helpful. Packages work when negotiators can find trade-offs between issues and countries – indeed, when negotiators can see the trade-offs between import-competing and export interests within a given economy. Any package also creates multiple entry points for critics, and veto players. Recent trade negotiations sometimes stir up a hornet’s nest of opposition, without anybody having enough at stake in the outcome to ensure strong support for the negotiations, let alone ultimate ratification. Every package must have something that key constituencies in developed countries and developing countries alike want, because, inevitably, packages will contain elements they will not want.

The 2013 WTO ministerial in Bali showed that a mini package is possible, if the large players want one, but it also showed that single-issue deals are hard to negotiate, even on something as useful, and as internally balanced, as the Trade Facilitation Agreement. The Bali package only succeeded with the inclusion of development issues and agriculture. And even agriculture had to have balancing issues within that micro part of the Bali mini package, a package that was adopted by consensus (in that sense Bali was a single undertaking, as was Nairobi two years later). Every part of a WTO negotiation takes place among a subset of the members, and participation in the eventual outcome of each part must represent a critical mass for the issue concerned, making most-favoured-nation (MFN) application of the results possible without major free riders.

The single undertaking may be dead, but package deals? Not so much. We will come back to the package problem in the conclusion, but first we discuss the emergence of plurilateral negotiations.

### 3. PLURILATERALS ARE NOW MAINSTREAM

With the Doha Round dead, in 2017 many countries decided to shift gears and move away from negotiations based on the working practice of consensus decision-making by all WTO members by launching plurilaterals, meaning simply talks inside the WTO among a subset of members whose eventual outcome would make use of WTO transparency and dispute settlement procedures. The so-called ‘joint statement initiatives’ (JSIs) that are now being pursued in the WTO span e-commerce, domestic regulation of services, investment facilitation, and measures to enhance the ability of micro and small and medium enterprises (MSMEs) to utilise the opportunities offered by the rules-based trading system. Most address coordination failures or entail joint efforts to identify good regulatory practices. These initiatives include a broad cross-section of the members; with a heterogeneous WTO membership, unlike the early days of the GATT, there may be no other way to discuss regulatory issues (Mavroidis and Sapir 2021: 35). The EU participates in all four groups, as does China, but the US only participates in one JSI.<sup>5</sup>

Other issues are also moving forward in a similar way. Recently, a proposed declaration on Agriculture Export Prohibitions or Restrictions Relating to the World Food Programme had to be issued as a joint statement (WT/L/1109) after being blocked by India; China was not a signatory. The Ottawa Group proposed an initiative on trade and health as a joint statement (WT/GC/223). Another group is organising ‘structured discussions’ on environmental sustainability based on a document similar to a joint statement (WTO 2020).

Whether and how the JSI negotiations can be brought to a successful conclusion is an open question, but plurilaterals are now clearly the mainstream approach. Such negotiations raise political questions about the process used, and legal questions about the variety of options for incorporating any outcomes in the WTO (Mamdouh 2021). There are two process concerns: that they can undermine internal transparency; and that ambiguity about the potential outcome creates anxiety about the process even when, in the case of the JSIs, no decisions have been made about the legal form of any outcome. Political consideration of how to launch, conduct, and conclude plurilaterals would be useful.

The first step in *launching* a plurilateral now seems to be reaching agreement on a joint statement. We think that ought to evolve from an open process of analysis and deliberation before launching negotiations on an issue, as has been the case with the current trade and health initiative and the structured conversations on sustainability as well as the JSIs. Such deliberation would be enhanced by ‘thematic sessions’ open to all members, which should include stakeholders (Wolfe 2021). The Secretariat could be asked to provide background papers, often in collaboration with other international organisations.

5 China joined the Information Technology Agreement and is in the process of acceding to the Government Procurement Agreement. China also participated in the Environmental Goods Agreement, though with a narrower list of goods than some other participants had wished and had wanted to participate in the now moribund Trade in Services Agreement (TiSA) negotiations.

The *process* of the negotiations should be sufficiently transparent that non-participants understand what is going on. The current JSIs are less transparent, at least to outsiders, than most recent WTO negotiations – outsiders, at least, cannot see what proposals have been made, for example. In e-commerce, the ‘co-convenors’ established several small groups led by facilitators. What are called ‘clean texts’ have been emerging from these groups. The Secretariat reports the fact that reports from the facilitators are discussed at meetings of the e-commerce negotiations, and the topics addressed, but the texts themselves are not made public. In his analysis of the historical background to the India and South Africa paper (see below) Lamp (2021) argues that one reason developing countries were upset with the Tokyo Round Codes, which admittedly took place in a different institutional context, was a lack of transparency in the negotiations. They were not part of the early stages and ‘in some cases (specifically, the codes on anti-dumping and civil aircraft) they did not even find out that codes were being negotiated until the final stages of the Round.’

As for the *outcome* of such negotiations, plurilaterals inside the WTO come in a number of forms (Mamdouh 2021), but two broad options are available. The first is a critical mass agreement in which participants in the negotiations incorporate the results in their schedules of commitments; such agreements come into effect when a pre-determined number of participants have circulated revised schedules.<sup>6</sup> The question is always on which issues critical mass would be appropriate, and how to define it – in terms of percentage of WTO Membership, international trade shares in the sector, or both? Critical mass could also vary by level of commitment, which can address special and differential treatment concerns. Critical mass works for tariff reductions, as for example in the Information Technology Agreement (ITA). It also worked for the Reference Paper that was a key part of the package on trade in basic telecommunications services. The approach could work for scheduling other non-tariff concessions for any regulatory domain if, once a critical mass of participants is achieved, free riding by other members of the WTO is not a concern (Hoekman and Mavroidis 2017). Critical mass agreements affect the obligations of signatories but leave the rights of non-signatory WTO members unaffected.

If the intent is to restrict the benefits of the deal to participants, the second option is conclusion under Annex 4 of the WTO Agreement, an approach that limits the risk of free riding on liberalisation by non-participants but is *de jure* discriminatory. That route requires permission from the full membership by consensus, which may now be unlikely for anything new (Hoekman and Mavroidis 2015, Adlung and Mamdouh 2018). Plurilateral negotiations are clearly a political challenge for the WTO, which has been misconceived by some members as a legal issue.

6 Technically revised schedules must be certified by participants; non-participants could block new commitments that they think violate existing rights.

#### 4. ARE PLURILATERALS 'LEGAL'?

In its first discussion paper on WTO reform (WTO 2018), Canada argued that:

*While no WTO Member should be expected to take on obligations to which it did not consent, likewise no Member should expect to be able to prevent others from moving forward in various configurations in areas where they are willing to make greater commitments which could vary from political statements to more ambitious binding agreements, e.g. plurilateral initiatives. Binding initiatives should be inclusive, open and provide clear rules for accession by other Members or eventual multilateralization.*

In a new submission on the legal status of the JSIs, India and South Africa explicitly say that the Canadian argument was wrong (WTO 2021a: 19-22). Their *political* argument is that members ought not to conduct plurilateral negotiations, which is worthy of discussion, but the legal justifications offered for this political position are flimsy at best. We have no space to go through the legal arguments in detail, so we will make only brief observations. The document says that 'Plurilateral Agreements' refers only to agreements included by consensus under Annex 4 of the treaty. But Article III:2 of the WTO treaty does not specify the legal forms that negotiated outcomes might take or the exact procedures that should be followed, which might vary depending on the subjects covered and their relation to current rules (Adlung and Mamdouh 2018: 90-2). India and South Africa also say that JSIs are inconsistent with amendment procedures, but many negotiations have been conducted among a subset of the WTO membership, who then implement the results on an MFN basis. Request and offer negotiations on market access are typical examples.

India and South Africa's detailed legal analysis confuses process and outcomes. On *process*, members would of course have to agree by consensus to launch negotiations that would affect the rights and obligations of other members, just as they would have to agree by consensus to incorporate the *outcome* of such negotiations into the WTO, either by amending an existing agreement or entering a new agreement under Annex 4 of the treaty. On the other hand, a process that only creates new obligations for the participants needs no such consensus to start talking. The explicit target of India and South Africa is the JSIs, but those *processes* have not yet reached the point of considering the legal form their eventual *outcomes* might take. The WTO treaty provides considerable flexibility on how any agreement may be concluded and offers no legal restrictions on the process members might take to get to an outcome (Mamdouh 2021).

As Canada suggested in 2018, ways can be found to ensure that the whole membership can be comfortable with plurilateral negotiations. In its new paper on WTO reform, the EU, recognising the failure of 'the single undertaking approach' calls on WTO members to reflect on ways of better integrating plurilateral agreements, notably by identifying certain principles that plurilaterals should meet if they are to be incorporated in the WTO

framework (EU 2021). These principles covering both process and outcomes could relate to openness to participation and future accession by any WTO member, facilitation of the participation of developing countries, transparency of the negotiating process, as well as means of protecting the existing rights of non-participants while avoiding free riding.

The challenge from India and South Africa may be more political than legal, but it should be addressed. Hoekman and Sabel (2021) suggest that one way to do so is through the establishment of a code of conduct that signatories of plurilateral agreements commit to apply. Providing a governance framework for new plurilateral agreements that ensures they are consistent with multilateralism would help to recognise valid concerns of non-members. Ironically, negotiating such governance principles would face the same obstacles to consensus as any other negotiation at the moment, so they suggest that it be done as a 'reference paper', to be incorporated in the schedules of the members who drafted it, with any WTO Member interested in participating in an open plurilateral negotiation or acceding to the results accepting to incorporate the reference paper into their schedules. We worry that even a reference paper might be difficult to negotiate, but all that is needed is a joint statement on governance principles and a political commitment to conduct every plurilateral in accordance with them.

The stakes are high. On the one hand, Lamp (2016, 2021) argues that the Uruguay Round single undertaking provided leverage for a 'club' of dominant traders to force recalcitrant developing countries to accept all the agreements and join the new WTO. The main concern of India and South Africa (WTO 2021a), and hence their desire to retain a veto, could be that control of the agenda of the multilateral trade regime appears to be slipping away from developing countries yet again. On the other hand, if the outside options are attractive, there is a risk that the major powers will abandon MFN. The EU paper (EU 2021) contains an implicit warning: if no effective formula is found to integrate plurilateral agreements in the WTO, there would be no other option than developing such rules outside the WTO framework, which could fragment the system. What they mean is that the outcome of some possible agreements might not be suitable for inclusion in schedules and so members must debate the Annex 4 option.

The warning applies to India, and South Africa, and to anybody tempted by their analysis, but it also applies to the three major powers. We can infer China's position from the fact that it is participating in all the current JSIs; the US position is more ambiguous since they are only a formal proponent of the e-commerce JSI, but they are said to be very active in the domestic regulation in services talks. The risk of free riding by any of the three major powers means that each of China, the EU and the US will be needed to reach a critical mass deal.

## CONCLUSION: WHAT CONCRETE STEPS CAN BE TAKEN NOW?

Nothing will happen in the WTO unless China, the EU and the US want it to, but they need support from the other members. When it is safe to do so, as the threat of Covid-19 recedes, delegates should go to lunch more often: it would help if members spent more time talking to, rather than at, each other. That might mean more bridge clubs are needed, at all levels and all areas. The trilateral meetings between the EU, Japan, and the US are far from being a substitute for a bridge club involving China, although it responds to the desperate need to find informal ways of making progress on thorny issues. The Director-General might set the tone here. Her apparent engagement with various groups of members in the fisheries subsidies negotiations is a promising start. She will need to find ways to include all the principal antagonists, who vary by issue. The three major powers are the core, but they will need to engage with others, including India as needed while avoiding the risk of any negotiation getting too big, with obstructionists in the room, hence no ability to do anything. But the three major powers should avoid the temptation, born of frustration, to follow unilateral or bilateral tracks. Even the most apparently intractable issues involving the role of the state in the economy are best discussed multilaterally (Mavroidis and Sapir 2021: 213).

More concretely, the three major powers should enter negotiations for a joint statement on governance principles for open plurilaterals starting, as suggested by Mamdouh (2021), with an analysis based on WTO experience of whether reform efforts should seek to change the rules, or the way they are understood and applied. With their leadership, other members could be induced to participate in elaborating principles that should be the basis to launch, conduct, and conclude any open plurilateral agreement, including the circumstances under which Annex 4 agreements could be expected to be acceptable. Those principles might allow everyone to agree to progress on the JSIs, even the ones where they choose not to participate. While Annex 4 agreements cannot be allowed to degrade the rights of members, non-participants should not have a veto on their inclusion in the WTO. Such a discussion of a more flexible architecture should begin at the 12th Ministerial Conference (MC12) beginning in November 2021.

Finally, while the single undertaking is dead, package deals are a negotiation reality. MC12 will need an agenda proposing a set of agreements that can attract a broad consensus. In March 2021 Brazil suggested just such a package, with nine components, including flexible geometry for WTO negotiations (WTO, 2021b); other proposals will no doubt follow. Without a forcing device, and if the results of each negotiation now underway cannot stand on their own, how can they be knit together? The major powers have asymmetric interests with respect to any single trading partner; and they tend to have asymmetric interests on any one issue. *If* the three have to be part of a deal to get critical mass, and *if* they have asymmetric interests, *then* do they have to have a package of critical mass deals to reach agreement on any one of them?

If package deals are needed, is it more feasible to bind two or more issues into one package? If so, what are the likely elements? Other chapters in this book elaborate on the possibilities. Here are three ambitious ones. China subsidises its high-tech industries partly because of export controls in OECD countries – perhaps the two issues of industrial subsidies and high-tech export controls could be linked (Zhou and Fang 2021). While some think industrial subsidies could be a standalone negotiation, it could possibly be linked to agriculture subsidies in an eventual package (Li and Tu 2020). Or an agreement on domestic support in agriculture at MC12 could be linked to conclusion of the negotiations on fisheries subsidies.

We are not naïve. These are all intractable issues; indeed, agricultural trade has long been the issue that cannot succeed on its own because reform is the most important objective for many countries while being strongly resisted in others. We mention them rather than the higher profile JSIs because the developing countries for whom agriculture is the overriding priority may not have outside options, but their continued engagement in the trading system ought to matter for everyone.

If everybody knows that a plurilateral will succeed, and if a joint statement on governance principles has been accepted by the participants, is there an incentive for recalcitrant members to try to shape the outcome, or simply stand aside, instead of obstructing it? That is a political not a legal question. The fate of the JSI approach and the prospects for reviving the negotiation function of the WTO may hinge on the answer.

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