

# WORKING PAPER

International Trade

## Can the Trading System Be Governed? Institutional Implications of the WTO's Suspended Animation

ROBERT WOLFE

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## Author Biography

Robert Wolfe is Professor in the School of Policy Studies at Queen's University in Kingston, Ontario where he is director of the Master of Public Administration teaching program. Dr. Wolfe was a foreign service officer for many years, serving abroad in Bangladesh and in the Canadian Delegation to the OECD in Paris. Since joining Queen's in 1995, he has published widely on Canadian trade policy and on the World Trade Organization. His most recent publications are 'Decision-Making and Transparency in the "Medieval" WTO,' in the *Journal of International Economic Law*; 'See You in Geneva? Legal (Mis)Representations of the Trading System,' in the *European Journal of International Relations*; 'Canada's Adventures in Clubland: Trade Clubs and Political Influence,' in *Canada Among Nations 2007: What Room for Manoeuvre?*; and, a book edited with Mark Halle, *Process Matters: Sustainable Development and Domestic Trade Transparency*.

## Abstract

Do the difficulties in reaching an agreement in the Doha round signal the need for institutional reform of the World Trade Organization (WTO)? Members face great difficulty in undertaking needed renovations and new agreements through negotiations, even as the organization goes about its daily work as usual. This paper is structured by two hypotheses, that the way in which *interests* are aggregated changes outcomes; and that deliberation aids *learning*, which changes outcomes. The paper shows that WTO decision-making principles, dominated by the *Single Undertaking* and *consensus*, are essential given the nature of the membership and the political saliency of the issues, which has implications both for what is discussed (the agenda) and how (process). New rules apply to all, which means that voice for all Members matters. While exit is difficult, any Member can deny consensus, in principle if not in practice, which creates more roles for small groups and coalitions, and a common need for transparency. The paper concludes that procedural improvements by themselves will not solve intractable policy disagreements, but the lessons now being learned in the Doha Round on how to manage traditional negotiations involving many more Members within a changing global power structure might pay off in a subsequent round. Nevertheless the engagement of thousands of officials in the WTO process continues to shape collective management of the global trading system, even when revisions to the treaty prove elusive.

## 1. Introduction

Does the World Trade Organization (WTO) need to be fixed? The effort to launch and conclude the Doha Round of multilateral trade negotiations (formally the Doha Development Agenda) has stumbled from one ministerial conference to another. At the end of June 2006, after missing one self-imposed deadline after another, ministers from about 30 Member countries representing all the negotiating groupings went to Geneva to try to remove the impasse in the round. The discussions broke down without the issues even having been joined. Then, in July 2006, leaders at the annual G8 Summit of rich countries, meeting with some of their developing country colleagues in St. Petersburg, Russia, instructed their trade ministers to get the job done. They failed. The next day, the WTO's director-general, Pascal Lamy, recommended that the Doha Round be suspended. The daily work of the WTO, including its dispute settlement system, continued but the flagship negotiations were suspended until November, when Members agreed to resume "technical work." By spring 2007, Members had resumed full negotiations, but the prospects for a successful conclusion of this or any subsequent round seemed uncertain.

The WTO's difficulty managing a major renovation of the world trading system raises the question of whether the trading system can be governed. The question has implications for global governance generally, and for the management of negotiations in any large multilateral organization whose members must internalize the norms and practices of the system. No other organization faces a comparable problem of such a large and engaged membership, but if global governance continues to expand, others will.

The Doha Round is said to have collapsed in July 2006 because the Americans were unwilling to cut domestic subsi-



dies, the Europeans were being coy about tariff reductions for “sensitive” farm products, and the Indians refused to be realistic about their own protectionist measures. Here, I neither discuss the political economy of this behavior nor offer a trade policy analysis of the merits of each position. Political “will” is an empty concept, but it is possible that the world’s leaders did not take the tough decisions needed to advance the Doha Round because they were preoccupied in summer 2006 with the bombs that were going off in Afghanistan, Iraq, Gaza, and Lebanon, and with the worry about even bigger bombs in Iran and North Korea.

Rather than trying to explain the suspension of trade talks or the policy compromises that will be necessary to conclude the Doha Round, I ask whether the suspension signals the need for WTO institutional reform. Many people say that it is. After the failed ministerials in Seattle and Cancún, Pascal Lamy famously described the organization as “medieval.” “There is no way to structure and steer discussions amongst 146 Members in a manner conducive to consensus,” he said, when still the European trade commissioner. “The decision-making needs to be revamped” (Lamy 2003).<sup>1</sup> If the WTO is a medieval organization, however, it might be because the world is, too, and there is no cure for that (Wolfe 2005). WTO Members are at vastly different levels of development, their political and legal systems are based on divergent premises, and while they are unequally penetrated by the social and economic forces of globalization, they must cope with overlapping regulatory domains. The WTO universe

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<sup>1</sup> This widely shared concern with the functioning of the institution was a principal motivation when Lamy’s predecessor commissioned a study from consultative board of eminent experts on the future of the WTO. The analysis and recommendations on institutional design of the so-called Sutherland Report (Sutherland et al. 2004) have not been discussed within the WTO.

is certainly plural if not medieval, and the process for making legitimate decisions is inevitably untidy.

Given that untidiness, it is unrealistic to expect the WTO to be efficient in “making” new rules, but we can expect it to be effective in recognizing the emergence of new rules through the practices of the trading system. Since the multi-trillion dollar trading system is remarkably free of conflict, it seems that the WTO does indeed work rather well on a day-to-day basis. If the institutional edifice has a problem, it is that Members face great difficulty in undertaking needed renovations and new construction through negotiations, even as the organization goes about its daily work as usual. The WTO is in suspended animation. Would institutional reform help?

The question implies two familiar themes that run through this paper. The first is the hypothesis that the way in which *interests* are aggregated changes outcomes. A change in WTO procedures will not change the interests of an Iowa farmer, but a change in the decision rule – for example, the United States’ adoption of the fast-track procedure with the *Trade Act of 1974* – will change how those interests can be mobilized. The second theme is that deliberation aids *learning* and the understanding of interests, which changes outcomes. If negotiation is all about interests, then the agenda is an institutional design choice: what must be in the Single Undertaking? are less-than-universal agreements appropriate? should there be differentiation among developing countries? If learning also matters, then collective decision making that engages all Members requires consensual understanding, deliberation that legitimates effective bargaining, and domestic resonance.

I begin with some theoretical considerations about power and participation in international negotiations. I then show that

WTO decisionmaking principles have implications both for what is discussed (the agenda) and how (process). In the third section, I ask whether all of the WTO's diverse Members must be bound by every agreement. I then consider WTO modalities, followed by a discussion of the institutional design aspects of what the Single Undertaking, or the WTO agenda, must contain. After a brief discussion of the external legitimacy of the WTO, I turn to an examination of the negotiating process. In the conclusion, I return to the tension between interest and learning in the context of options for institutional reform.

## **2. Power and Participation in Negotiations**

Once upon a time, the world was dominated by a hegemon, or so goes the familiar story. It is easy enough to see the General Agreement on Tariffs and Trade (GATT) of 1948 as a public good supplied by the United States alone, but by the 1960s the GATT could be seen as a bilateral agreement with Europe. That model was still a good approximation in the Tokyo Round of the 1970s, but it was clear from the roles played by Brazil and India in shaping the launch of the Uruguay Round in the 1980s that things had begun to change. Either power was shifting into new hands, or new forms of power had emerged. The Blair House accord between the United States and the European Union was necessary to conclude the Uruguay Round, but far from sufficient. It would still be foolhardy to pretend that any round would end before the United States and the EU are ready, yet they cannot force an outcome. It follows that the notion that the Doha suspension suggests the need for institutional reform rests on two interrelated assumptions about the changing nature of global politics. First, institutional reform is said to be needed to accommodate the rise of new powers (especially Brazil, India, and China). This structural assumption leads to consideration of what is "power" in this context, who has it, how much is

enough, and how it can be exercised. The second assumption is that one manifestation of globalization is that every state now wishes to be an active participant in global governance, a change that requires a reordering of international organizations created in an earlier era.

### *Critical Mass in the WTO*

Power is a problematic concept in international relations. Traditional definitions and the hierarchical classifications of actors associated with them are not always analytically helpful in the context of the WTO, but two types of power seem especially salient. *Compulsory power*, Barnett and Duvall (2005, 14–15) argue, “can be based on material resources, and on symbolic or normative resources.” Not only states, but international organizations, firms, and civil society organizations have the means to get others to change their actions in a favored direction. The concept of *institutional power* is a reminder that the diffuse social relations that institutions shape can also constrain behavior. The challenge is identifying those two types of power at work within the WTO and knowing whether the structure of power facilitates or impedes governance.

Multilateral trade reform requires the supply of two collective goods: new rules and more open markets. No state alone can now supply either of these goods, but the systemic good of an open, liberal, multilateral trading system does not require collective supply by all 150 Members of the WTO, as long as the non-discrimination norms are respected. But how many Members are needed to provide a systemic “critical mass”? The idea of critical mass implies that the relevant process – whether a nuclear reaction or the wide diffusion of a social norm – is sufficiently large to be self-sustaining. Many applications in social science derive from Mancur Olson’s work (1965) on the provision of collective

goods. While Olson is pessimistic about the possibility of cooperation, other scholars (for example, Oliver and Marwell 2001) explore the circumstances under which a group of sufficient size can be created to supply public goods.

Critical mass implies that markets that represent a significant share of global production and consumption should help to supply the systemic public good. Yet, if current material power determined the relative hierarchy of WTO Members, it would be hard to understand the list of countries that appear to play leading roles. The original Quad (the United States, the EU, Japan, and Canada) still includes the largest markets, but they can no longer supply systemic leadership alone. China, India, and Brazil are often mentioned as the most important new powers – although only China has entered the ranks of the top traders (see Wolfe 2006). These three are not powers on the scale of the United States, but they now have the collective strength to challenge the established order (Hurrell 2006).

The provision of the public good of new rules also depends on acceptance by participants in the trading system that the rules themselves are appropriate and legitimate, which suggests that critical mass must have another dimension. The coercive power of the largest markets is now limited both by the emergence of other significant markets and by equally powerful symbolic and normative claims based on justice for developing countries in general, but especially for the poorest. The rhetoric of development, which resonates strongly with the public in the North as well as the South, often provides developing countries with the “better argument” in public debate. Given the “forum effects of talk” (Mitzen 2005), large Members must take account of what the WTO community considers acceptable reasons for action, whether they seek to promote or resist trade liberalization. The leading developing countries, in particular, are attentive not only

to their own domestic constituencies but also to audiences in other developing countries.

We now confront the implication of the assumption that institutional reform is needed to accommodate many new players in global governance. This part of the WTO picture, however, is complex and misleading. Consider, for example, that, although 99 countries nominally participated in the Tokyo Round, the WTO now has, with Vietnam's January 2007 accession, 150 Members that must be part of a consensus. At the same time, many Members either have no representation in Geneva or only a small, over-worked mission that also handles UN agencies. At most, only 40 members (counting the EU as one) play significant roles in the services negotiations, and fewer than a dozen understand the technicalities of each of the 20 aspects of the agriculture negotiations. These capacity disparities did not matter in the Tokyo Round, because developing countries could simply opt out of the bits they did not understand or that seemed inapplicable. Since the end of the Uruguay Round, however, the WTO is a Single Undertaking: all Members must accept all the obligations, in principle if not in practice. Consensus now gives every Member the ability to slow the process down, a form of institutional power of which developing countries are increasingly aware. They are also increasingly aware of the need to participate, which has put stress on the ability of the WTO process to remain effective while becoming more inclusive and transparent. The new institutional power of developing countries has also changed the nature of the debate on the agenda: what must be discussed, even if there is not much WTO can do, and what cannot be discussed, even if the WTO offers a useful forum?

Clearly, critical mass has two dimensions: when all issues are lumped together and any Member can block consensus, institutional power must be joined to compulsory power to reach

a successful outcome in negotiations. A bargain must satisfy Members whose market weight is sufficient to give effect to the deal, but it must also satisfy Members whose acquiescence is sufficient to give the deal legitimacy. Critical mass will differ on both dimensions in the Doha Round as a whole and in each negotiating area. A Member that dominates one domain might be willing to follow the lead of a like-minded Member in another. But that still requires each Member's knowing what action is needed, and then acting.

### *Agency in Negotiations*

If compulsory power were the only dimension, standard political economy approaches to understanding the WTO might be sufficient, even if they do not readily account for symbolic or normative resources. Multilateral economic negotiations are often explained by such exogenous factors as the identifiable economic interests of participants or their domestic industries or the general political and economic context. Negotiation analysis, however, turns the standard approach on its head by looking, not at exogenous *structural* factors, but at variations in endogenous factors based on *agency*. In the significant stream of literature led by John Odell, analysts assess the effects of negotiation *strategies*, whether distributive (value claiming), integrative (value creating), or mixed (see Odell 2000). In this literature, “power” is sometimes seen as the ability to walk away from a negotiation – an idea captured in the technical term, the Best Alternative to Negotiated Agreement (BATNA). A strong BATNA gives the negotiator some leverage to avoid accepting an unwanted outcome, but is less helpful for achieving a desired outcome. While staying within a utilitarian framework, other analysts note that institutions shape and influence the bargaining process, or the context in which actors pursue their strategies (Winham 2006). Indeed, the WTO's decisionmaking principles

create specific opportunities for relatively weak states to use this institutional power effectively.

In utilitarian negotiation analysis, “negotiating” and “bargaining” are interchangeable terms referring to “a sequence of actions in which two or more parties address demands and proposals to each other for the ostensible purposes of reaching an agreement and changing the behavior of at least one actor” (Odell 2000, 4). In constructivist ideas about social learning, however, negotiations comprise both bargaining and learning (see Checkel 2001). Market conditions obviously have a major influence on determining issues, actors, and strategies in international negotiations (Odell 2000, ch.3). If “traded services” were negligible, states would not create the General Agreement on Trade in Services (GATS); countries that are not large traders of such services might have little interest in such negotiations, while those with complementary export interests might be allies in negotiations, and so on. But actors first have to know that they have “interests,” that “services” can be traded and are thus a subject for bargaining. Negotiating is first a process of learning, and learning requires participation.

In utilitarian theory, based on the bounded rationality assumption that actors pursue their objectives as best they can with the limited information available to them (Odell 2006, 9–11), analysts see learning as the acquisition of new information about the context of negotiations, which allows parties to aggregate their strength with that of other actors in order to affect egocentric “gains” and “losses” for states or coalitions (Odell 2006). In other words, actors know their own BATNA but need information about the BATNA of others. In addition, by “learning,” constructivists mean not only the acquisition of new information, but an *argumentative* or *deliberative* process in which an actor’s understanding of self and others can change



(see Risse 2000, 2005; Müller 2004). This view of negotiation is one in which parties gradually articulate shared interpretations of events, which come to define both the identity of the actors, including who is legitimate, and the way actors understand their “interest,” while developing new consensual understanding of causal relationships (Haas 1990, 9, 23).

Why does learning matter? Take an example from the Tokyo Round, in which negotiating nontariff measures was difficult because, as Winham (1986, 88) reports, “they were largely undefinable, numerous, often concealed, and incomparable, and that their effects were unknown precisely but generally thought to be pernicious. Negotiators had to achieve an intellectual understanding of these measures before they could negotiate their removal.” Yet, in the Tokyo Round, countries could simply ignore issues they did not understand. In the Doha Round, many issues are much more complicated, the many new significant players in the negotiations start with less shared experience and knowledge, and the Single Undertaking requires all Members to accept complex new obligations. Despite the many provisions for special and differential treatment, many Members have implemented only weakly agreements that require sophisticated domestic regulatory frameworks. A great deal of negotiating time has been devoted to finding ways to ease the burden of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), in particular. Members are understandably wary about accepting further new obligations they do not understand or that seem distant from their policy needs. Learning, therefore, seems an essential part of the process.

For negotiation analysis, therefore, the question is not, does the WTO provide good policy advice? or, what is the political economy of a compromise? but, is the institutional design appropriate? My hypothesis is that good institutional design that con-

tributes to effective and legitimate global governance must facilitate both *bargaining* over known interests and *learning* through arguing and deliberation. The central institutional challenge is thus to square the circle of the formal equality of Members and the practical inequality of their willingness and capacity to participate. The challenge would be considerable even if it were seen only as a factor in bargaining and adjudication among Members; it is all the larger when the focus is on deliberation and learning. Moreover, it is not enough for the Geneva delegates to learn – officials and ministers in their home capitals must, too. Ministers cannot participate in every aspect of detailed negotiations, but inevitably they participate in debates at home about domestic policies that are increasingly subject to multilateral constraint.

By stressing the role of learning, I assume that the implementation of new rules is based on understanding and acceptance of new obligations. It is, moreover, a mistake to think that the WTO deals merely with trade policy as economic policy. Trade policy is about social relationships, changes in which are not decided on utilitarian grounds alone. If, as some observers claim, the difficulties of the Doha Round are associated with a trend toward increased public apprehension about globalization, then the WTO must do more than assure citizens and domestic officials that the organization is good for them – it must facilitate public deliberation about new obligations. That might be the biggest challenge of all.

If this approach is the right way to consider the institutional implications of the suspension of the Doha Round, then some of the issues most often identified in the WTO reform literature, including the Sutherland Report, are not relevant. I do not think that evolutionary action will be displaced to disputes, and dispute settlement reform is neither essential in general nor necessary to end the suspense. Equally misguided

is the view, with roots in legal positivism (Hart 1961), that, since the WTO “court” is so strong, it is essential to improve the weak “legislative” capacity of its “incomplete” legal system. Rather, as Rosendorff (2005) argues, the flexibility inherent in the system as it stands might be essential for the stability of the WTO. Nor are regional negotiations an alternative: most of the benefits that were and ultimately still are available through multilateral trade negotiations are not available in bilateral and regional negotiations; moreover, though proliferating, many bilateral deals are likely to founder on their inability to deal with the big issues that have slowed the Doha Round. Finally, while there may be a democratic deficit in the trading system, its locus is not in Geneva (see Wolfe and Helmer, forthcoming).

The central question is, therefore: does the institutional design of the organization and the negotiating process affect the outcome? One way to get leverage on this question is to ask if a particular institutional design both structures *interests* and facilitates *learning*. Power has shifted in the WTO in ways that put great pressure on its institutional design. Assembling a critical mass of market power requires many more Members and must be complemented by a critical mass of institutional power. What are the implications of this shift in power for how the WTO makes decisions?

### **3. WTO Decisionmaking Principles**

International relations scholars agree that global governance lacks centralized authority. Decentralized governance is inherently horizontal, which means that some institutional forms – including both hierarchical command and simple majority voting – are not available for making decisions. This generic reality of global governance has an air of artificiality in the trading system, however, because, unlike some international organizations, the WTO is not

an actor in itself.<sup>2</sup> The Final Act of the Uruguay Round, creating the WTO, is a contract among governments, not a constitution for a world polity. As a practical matter, Members are unlikely to implement provisions they do not accept, so consensus is fundamental. Since allowing 150 Members to pick and choose among the obligations they accept would undermine the system, the Single Undertaking is also fundamental.

In principle the WTO is indivisible, and it is the Single Undertaking that holds it together. In signing the Final Act, Members agreed that “the WTO Agreement shall be open for acceptance as a whole.” The new agreement included all of the Uruguay Round agreements, as well as the revised agreements from the Tokyo Round, and Members could accept or reject it only in its entirety. In a famous phrase, in the WTO, “nothing is agreed until everything is agreed.” This general principle, the Single Undertaking – which includes the norms of reciprocity, multilateralism, and nondiscrimination – had been enunciated in the Punta del Este Declaration of 1986: “The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking.”<sup>3</sup> Now, the Single Undertaking and the practice of building major revisions of the

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<sup>2</sup> Recent scholarship by both utilitarian (Hawkins et al. 2006) and constructivist scholars (Barnett and Finnemore 2004) seeks to understand international organizations as actors, usually by looking closely at international organizations as bureaucracies. This approach does not produce satisfying results when applied to the WTO, because the WTO has so little autonomy with respect to its Members.

<sup>3</sup> The Tokyo Round declaration of 1973 had been subtly different: “The negotiations shall be considered as one undertaking, the various elements of which shall move forward together.” In the end, this principle had no bearing on the outcome of that round (Winham 2006, 12). It can also be argued that once US negotiators were able to submit the results of the round to Congress as a single package under the “fast-track” procedure, they wanted other Members to be bound by a similar constraint (VanGrasstek and Sauvé 2006, 839).

agreements into a “round” go together. Although the General Council could take most decisions on the results of negotiations at any time,<sup>4</sup> in practice a round is needed. And so is the Single Undertaking. No other mechanism, in an organization with such a large and diffuse membership, could ensure an appropriate aggregation of issues and participants or force Members large and small eventually to accept the best deal on offer. The Single Undertaking ensures “circular logrolling” or diffuse reciprocity (Keohane 1989): everybody has to offer a concession to one Member while receiving a benefit from another, like drawing numbers from a hat to assign holiday gift giving (see Barton et al. 2006, 149). The contributions have to be reciprocal in the aggregate, because each Member needs to, and can, contribute different things to an overall result.<sup>5</sup> Diffuse everyday interaction in the trading system might be the source of WTO law, but codification is now possible only with the Single Undertaking.

If the Single Undertaking is an essential characteristic of the WTO and the central institutional constraint on the Doha Round, consensus as the decisionmaking rule is its equally essential counterpart. The considerable extent of the WTO’s legal obligations and the quasi-automatic nature of the dispute settlement system are possible only because of the political participation made possible by the consensus rule (Pauwelyn 2005). It would be pointless to have a vote that created obligations large and small sovereign states refused to implement. Consensus and the Single Undertaking simplify a complex process through forced tradeoffs, but logrolling is not necessarily based on internalized

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<sup>4</sup> And sometimes does – see WTO (2006c); and see Van den Bossche and Alexovicova (2005) on secondary law making.

<sup>5</sup> On why a big package is needed in the Doha Round and what contributions the major participants need to make, see Schott (2006, 6).

agreement or understanding. Just as holiday gift giving at the office depends on shared expectations and trust, so too does the Single Undertaking. It could not work under majority voting, and the need for consensus keeps everybody deliberating until a compromise emerges. Opportunities for deliberation are a chance to feel that you have been heard, which matters when trust is fragile.

It is surprising, in this light, how much attention the Uruguay Round negotiators devoted to crafting WTO voting rules and how much attention lawyers pay to those rules (see Van den Bossche and Alexovicova 2005; Ehlermann and Ehring 2005; Footer 2006), given the theoretical objections to voting in multiparty, mixed-motive situations in the negotiation literature (Bazerman and Neale 1992, 154–55) and the practical reality that votes are virtually unheard of in most international economic organizations, let alone in the GATT/WTO system.<sup>6</sup> The Single Undertaking might require consensus as a practical matter, just as the successful conclusion of a round depends on a single vote in the US Congress under the fast-track-procedure. Otherwise, on what would WTO Members vote? On whether to include agriculture in the Single Undertaking, or on modalities for reducing domestic support before a vote on the formula for market access?

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<sup>6</sup> For a formal discussion of why majority voting is so rarely observed in international conferences and why "unanimity" (in their use, close to what the WTO calls "consensus") is the common decisionmaking rule, see Black et al. (1998, 180-82). On consensus in the UN system, see Sabel (2006). On how consensus in the Executive Board of the International Monetary Fund can mean informal signals from the holders of enough votes for a majority, see Woods and Lombardi (2006). On the long history of unanimity or *liberum veto* as a multilateral decision rule, and why the increase in majoritarian voting on merely technical matters is unlikely to displace efforts to persuade and find compromises on major international issues, see (Claude 1971, ch7).

Practitioners and academics debate the implications of this analysis. Given the complexity of each issue, the Single Undertaking creates a high demand for consensual learning, which small delegations have trouble meeting. The problem is compounded because the linkages between, say, agriculture and services are not obvious, even for the largest delegations. Those who think the Single Undertaking a necessary mechanism wonder how to manage it; those who think it a straitjacket wonder how it can be relaxed.

#### **4. Can the Single Undertaking Be Relaxed?**

One response to the demands of the Single Undertaking would be to retreat into preferential or regional deals outside the WTO; indeed, many analysts see that route as inevitable if the Doha Round fails. Another response would be to argue that, although all deals should be under the aegis of the WTO, the Single Undertaking could be relaxed. Are less-than-universal deals feasible? Are some derogations from nondiscrimination acceptable, given the WTO's diverse membership? Three related issues arise: should there be more of what trade experts call "variable geometry"? would explicit differentiation help? and would plurilateral "clubs" be a better way to address some issues?

##### *Variable Geometry*

"Variable geometry," at the WTO, means that agreements articulate a universal principle to which all strive while allowing national implementation to differ. Indeed, the trading system depends on both *equal obligations* to ensure openness and *differential application* to accommodate national public administration. One can find many examples of such variable geometry in the WTO: in the Agriculture Agreement, for one, where tariffication and the rules on domestic support allow policy differences;

in the GATS, for another, whose “specific commitments” are scheduled from the bottom up. The Basic Telecommunications agreement’s “Reference Paper” contains principles whose implementation differ from country to country. But is more needed?

The Single Undertaking has had the consequence, not fully anticipated, that all obligations, whether or not they are appropriate to a country’s circumstances or stage of development, apply to all WTO Members. At one level, this requirement simply hardens the “most-favoured nation” (MFN) rule, thus avoiding the political problem of a fragmentary system or one in which countries or groups of countries threaten to withhold favorable treatment from others. At another level, however, strict interpretation of the Single Undertaking makes it more difficult to maintain nationally distinctive policies or internal distributive bargains – at least for developing countries, which are coming late to the normative enterprise.<sup>7</sup>

Globalization can be described as the continuing expansion of the market, both in the greater diversity of things that can be exchanged and in the increased exposure of people and places to global markets. This phenomenon also affects the less skilled in poor countries, with predictable political consequences. The embedded liberalism compromise in international trade was about safeguarding free trade abroad by protecting the ability of the welfare state at home to redistribute the benefits of openness (Ruggie 1982). Developing countries, with less money and less administrative depth than the member countries of the Organisation for Economic Co-operation and Development (OECD), are still learning how to meet these challenges.

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<sup>7</sup> Whether demands for “policy space” are reasonable is another matter; see Page (2007).



Most developing countries would benefit from more trade, but what sort of rules would help them, and at what cost? If their problems are primarily those of domestic governance, should regulatory changes identified by the WTO be at the top of their policy reform list? Some officials argue that a single set of rules for all Members is, in any event, impossible. But must recognition of this reality lead to a two-tier WTO, with two levels of obligation? Would it be better to have some formal recognition that a Member's capacity to take on rules should be linked to its stage of development? Or should there be a formal, unitary set of obligations, while allowing some rules to be "soft" – meaning subject only to surveillance – rather than "hard" ones subject to the dispute settlement system? Could the surveillance system also monitor all of a country's requests for special and differential treatment, with participation from other international organizations to ensure "coherence"? In short, consideration of variable geometry inevitably raises the hornets' nest of differentiation.

### *Differentiation*

"Developing countries," in the WTO, vary considerably, from prosperous Singapore to poor Bangladesh. Often, the implicit assumption is that a developing country is any WTO Member not also a member of the OECD. The treaty, in fact, mentions "developing countries" only in the Preamble. "Least-developed countries" (LDCs) are defined in Article XI:2, but only as countries "recognized as such by the United Nations." In practice, countries designated themselves as "developing" either when the WTO was created or as part of their accession negotiations.

Some reform is surely needed, because the existing agreements and the Doha agenda are riddled with demands for special and differential treatment. The WTO is not helped by the blanket use of "developing country," as if China and Uganda should be

thought of in the same way with respect to their ability to participate in negotiations or to undertake new obligations. (Similarly, the umbrella term “Global South” obscures more than it illuminates at the WTO.) The Doha declaration contains significant offers of technical assistance in many areas, but these efforts divert scarce WTO Secretariat resources away from support of the negotiations; those resources are, in any case, trivial compared with those of international organizations whose budgets are orders of magnitude bigger than that of the WTO (WTO 2006b).<sup>8</sup>

Differentiation is unpalatable for some developing countries, but LDCs in particular are neither able nor willing to discuss the obligations that should now be incumbent on Brazil and India, and that China is assuming as a result of its 2001 accession. Winham (2007) shows the more insidious ways in which a claim for assigning priority to “development” has undermined the inherently reciprocal basis of trade negotiations based on nondiscrimination. Special and differential treatment implies nonreciprocal concessions from OECD countries in favor of developing countries, with nothing offered in return. Now, concessions requested by OECD countries are resisted as illegitimate, and the possibility of mutually beneficial South-South bargains is not explored. It is hard to structure negotiations on this basis.<sup>9</sup>

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<sup>8</sup> A separate problem is that giving the Secretariat two roles risks organizational tension if Members see a conflict between its providing impartial analysis one moment and assistance to a subset of Members the next. The favored Members might also come to mistrust the assistance if they see the Secretariat as guardian of WTO orthodoxy (Shaffer 2005).

<sup>9</sup> One way forward would be for OECD countries to make unreciprocated concessions on duty free and quota free market access for the LDCs as a form of official development assistance. Concessions involving countries such as Brazil, India, China, and other large Members not eligible for such assistance could be offered on a reciprocal basis, while those countries, in turn, would be expected to offer nonreciprocal concessions to LDCs – as Brazil has already hinted it would do.

The official developing country rhetoric, as expressed by India, is that all developing countries are equal. In the face of such unwillingness to debate general criteria, the emerging solution is unspoken differentiation. Indeed, much of the Doha debate is really about the criteria to distinguish among three groups of Members: those to which all rules apply, those for which some requirements are relaxed, and those to which no new obligations will apply. LDCs will, in effect, get the “round for free,” especially in the way that flexibilities are built into the Non-Agricultural Market Access (NAMA) proposals. The fact that this differentiation is emerging through negotiation is a good thing. The fact that it is unarticulated might obscure it from both developing countries themselves and their civil society supporters, which does not help deliberation about the merits of the round. In the same vein, the Doha reference to “less than full reciprocity in reduction commitments” for developing countries, which echoes language going back to the Kennedy Round, also confuses the issue. Assessing the balance of reciprocity in a negotiation full of incommensurable issues is technically so complex that it is best left to the eye of the beholder (see Hoda 2001). Rather than insisting on rights for developing countries in this way, a systematic differentiation principle might put the debate on a more positive footing (for one example, see Keck and Low 2005).

### *Plurilateral Deals*

One way to give practical effect to variable geometry and differentiation is to hold negotiations under the WTO umbrella, in which only the eventual adherents to new rules would be permitted to participate. This approach has three variants: sectoral deals on goods; the new plurilateral collective requests on services; and “clubs” for new issues. All such deals depend on the critical mass concept discussed above.

It may be said that, when the proponents of a new agreement represent a critical mass, there might be no harm in proceeding with a less-than-universal deal. The critical mass concept facilitated the 1997 agreement on trade in basic telecommunications services, for example, though it is used more typically on goods. Canada and the United States have suggested that the technique might help advance sectoral negotiations. In their NAMA proposal, they state that “critical mass represents a negotiated level of participation based on the share of world trade that interested Members determine should be covered in order for those Members to be willing to reduce rates in a given sector. If the sectoral [negotiation] succeeds, all participants implement reductions on an MFN basis so all WTO Members benefit” (WTO 2005b). This approach ensures that Members with only a slight interest in a sector cannot block negotiations, yet the requirement to have a critical mass creates a high hurdle that prevents a small group from getting too far ahead of other Members. It has worked before: participants in the “zero for zero” sectoral deals of the Uruguay Round represented more than 70 percent of world trade in the sectors concerned (Hoda 2001, 38). But if this approach is perceived to be a way to exclude developing countries, it is doomed. In the Uruguay Round, the participation of developing countries in the market access sectorals was not needed, but the leading countries are now so large, and have such a large share of remaining market access barriers, that proceeding without them would be pointless. The poorest Members, in contrast, are allowed to opt out of the package anyway.

Both the notion of critical mass and the success of the 1997 telecommunications agreement are clearly part of the motivation for the second variant on the less-than-universal deal: the “plurilateral” negotiations on services (described in the next section, on modalities). Members participating in the collective requests are not plurilateral “clubs”, however, because like

the sectoral deals, the results will ultimately be part of the Single Undertaking.

In the third variant, “clubs” are typically proposed for new issues. A notable example is the Agreement on Government Procurement, one of the last relics of the Tokyo Round “codes.” Robert Lawrence (2006) proposes a sophisticated set of criteria for considering when a subject might be suitable for a club-based negotiation within the WTO but outside the Single Undertaking. In addition to theoretical arguments that call into question the supposed tradeoff between broader and deeper agreements (see Gilligan 2004), I think that all of Lawrence’s justifications ultimately fail on institutional grounds.

First, both the negotiation and the operation of clubs would be parasitic on limited WTO Secretariat resources. Second, only OECD governments are sure to have the national capacity to implement agreements in new areas, yet capturing these countries in new disciplines is rarely the point. Third, only the most advanced developing countries have the capacity even to participate in negotiations. Lawrence observes that everyone participated in the negotiations on the Tokyo Round codes, which means that “all had the ability to craft the agreement in a manner which reflected their interests.” But developing countries did not participate much, and then ignored the codes, creating the problem the Uruguay Round tried to solve. Experience with the “Singapore issues” goes in the other direction: the issues were forced off the agenda at the 2003 Cancún ministerial and out of the work program, partly for tactical reasons, but mostly because many developing country Members could not cope with the additional negotiating challenges. Fourth, given the complexity of the WTO negotiating process and the pressures for both transparency and participation in restricted meetings, it would surely be foolish to include any Member in a club process that had no intention

of accepting the results. Finally, if nonparticipants are significant actors in a domain, it might be unwise to proceed without their willing participation if it is hoped to attract their subsequent adherence.

All three plurilateral options are based on the critical mass concept and carry varying risks for both interest aggregation and learning. Where the critical mass threshold is high, a sectoral deal causes little difficulty. It would be unfortunate, however, if a sectoral or a plurilateral deal were to undermine the political dynamic of a round. Rounds work when negotiators can find tradeoffs between issues and countries – indeed, when negotiators can see the tradeoffs between import-competing and export interests within a given economy. The last element is quite important. It is hard to exert direct influence on protectionist forces in another country – a producer who wants to block imports has little reason to negotiate with foreigners. In the standard political economy arguments, therefore, the supply of protection is determined in domestic politics through bargaining between producer demand and political supply (Magee, Brock and Young 1989). But exporters are also participants in domestic politics and are interested in the market access that foreigners have to offer (Sherman 2002). Reciprocal bargaining allows foreigners to influence domestic politics, creating an incentive for exporters to trump protectionists in domestic ratification debates. It would be a pity if, for example, the United States’ becoming part of a plurilateral club on a “new” issue were to lose the lobbying power of businesses in support of a round that also included uncomfortable concessions on “old” issues. It would be equally unfortunate if a developing country dependent on a single commodity export were to participate in a sectoral deal, then lose interest in the rest of the round.

The argument against plurilateral deals goes beyond political economy or interest aggregation considerations to their effect on

learning. The appeal of a two-speed system is evident, yet it risks excluding poor countries from the negotiations while creating norms that would be difficult to change later (Hoekman 2005). If the WTO is a central component of global governance, then there are no grounds for saying that its normative framework should apply only to some states or that only some states must or can be full participants in deliberations about its evolution. Moreover, with respect to the regulatory negotiating agenda (where much of the trouble lies), the essential task is to build appropriate regulatory capacity in developing countries, then to encourage those regulators to go to Geneva to learn, to advance their interests, and to take ownership of the WTO rules. If developing countries are exempted from participation in clubs, they will forever be trying to catch up, they will not be playing their part in the continual evolution of the system and in the development of consensual knowledge about the system, and they will continue to complain about having to implement rules they had no part in drafting.

I conclude that the Single Undertaking can be relaxed, but only slightly. Before considering what issues must be on the negotiating agenda, however, it is necessary to address how issues are negotiated, or “modalities” in WTO jargon.

## **5. The Importance of Modalities**

Much of the Doha Round has been taken up with the modalities question, especially with respect to agriculture (Blandford and Josling 2006). I consider the question in three different domains: trade in goods, trade in services, and trade rules. I find that negotiations on issues included in the Single Undertaking can make more progress to the extent that the modalities are multilateral.

The first GATT negotiations were based on the procedures of the proposed 1948 International Trade Organization (ITO) treaty, which called for negotiations to be conducted on a product-by-product basis and specified that “[t]he requests for reduction of tariff on a product could be made in principle only in respect of products of which the requesting countries were individually or collectively the principal suppliers to the countries from which the concessions were asked” (Hoda 2001, 27). Negotiating on a “request and offer” basis among “principal suppliers” is multilateral only to the extent that the MFN principle extends the results to all participants, but it limits the interests of Members with large markets in negotiations with Members with small markets. Deals negotiated with “principal suppliers” do benefit small Members, which can act as free riders, but the practice also hurts them by limiting their ability to negotiate on subjects of greatest interest to them.

The possibility of a formula approach as an alternative was first discussed as early as 1953, but it was only in the Kennedy Round (1964–67) that it was agreed that the tariff negotiations for industrial products would be based on a plan of “substantial linear tariff reductions.” Hoda (2001, 30) observes,

Two main considerations led to the adoption of the linear approach. First, the item by item, request-offer method adopted in past negotiations, with its dependence on the extent to which the principal supplier was willing to reciprocate the reduction of duty in a particular product, had led to very small reductions which were in some cases worthless in commercial terms. Second, with the increase in the number of contracting parties the traditional method had become increasingly cumbersome and unwieldy.

And that was in the 1960s, when the trading system had fewer participants and covered fewer issues. The Tokyo Round of the



1970s continued the formula approach to market access. The Uruguay Round market access negotiations for goods were based on a mix of bilateral, sectoral, and formula approaches, but agriculture was formula based. The Doha NAMA and agriculture negotiations similarly must be formula based because of the increase in the number of active members: negotiations on thousands of individual tariff lines with two or three dozen significant trading partners is not feasible for any Member, however large.<sup>10</sup>

As a modality, a formula ultimately requires consensus, which allows a voice at the outset for any Member, however small, and which changes the institutional dynamic. These issues are traditional, and one might have thought they would be easily negotiable. But the legacy of the past, when developing countries were not major participants in shaping the rules, weighs heavily on a round in which everyone wants to be engaged. Here, too, the difficulty is that nobody wants to admit their country is no longer a “developing country,” with all the attendant claims for special and differential treatment. The tariff rates developing countries actually apply are relatively high, and the legal rates that are bound in their WTO commitments are often higher still. A formula approach would lead to significant nominal cuts in their tariffs, yet some still have trouble seeing why cutting their tariffs from 120 percent to 60 percent is as fair, and as good for

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<sup>10</sup> For a description of the technical complexities of the many formula approaches, see WTO (2003); see also Panagariya (2002); Francois, Martin, and Manole (2005); and Trebilcock and Howse (2005, 179ff). They can be designed to cut tariffs equally, to harmonize rates, or to cut high tariffs more than low ones. An example of the latter is the so-called Swiss formula:  $Z = AX/(A + X)$ , where  $X$  = the initial tariff rate;  $A$  = the coefficient and maximum final tariff rate; and  $Z$  = the resulting lower tariff rate at the end of the period (Goode 2003). The key is the coefficient,  $A$ . If the formula as a modality is agreed, then negotiations focus on the value of the coefficient and on whether some groups of countries or products should have a higher or lower coefficient than others.

Doha's development objectives, as cutting a developed country's tariff from 3 percent to 2 percent (Nath 2007). The formula also might not deliver the desired results in specific sectors: efforts in early 2007 to break the logjam reportedly had aspects of "reverse engineering" as US negotiators tried to work backward from a desired outcome on an EU tariff for a specific commodity to the formula that would produce such a result.

It follows, then, that a formula can be too opaque – if, for example, it is hard to see how a formula on an agricultural issue would affect farmers. Yet a formula can also be too transparent. The successful formula negotiations of the past (see Winham 2007) were conducted between relatively like-minded developed countries, and the final deals were based on behind-the-scenes bilateral bargains. The advantage of the Uruguay Round market access approach was ambiguity: until the schedules were published, everyone at home who had not been privately briefed by the negotiators could hope that their interests had been protected. The disadvantage of the July 2004 Framework approach to modalities, the approach on which negotiations foundered in 2006, is that once the coefficient is inserted into a formula, all domestic producers can calculate the effects on their interests. Those sensitive to imports can start to rally support for the designation of certain products as being too "sensitive" or "special" to be liberalized (ICTSD 2006) or for certain "flexibilities" to be exercised in their favor. Exporters watching this process at home might suspect that their hoped-for benefits in other markets are illusory. With a more transparent formula, forces wanting protection would be easy to mobilize, while those wanting liberalization might be demoralized.

Much less progress has been made on designing a truly multilateral modality for services, leading many sophisticated

observers of the GATS negotiations to conclude that the bottom-up or “positive list” approach to scheduling commitments has failed and that it is time to find an analog to the “negative list” approach implicit in traditional tariff negotiations.<sup>11</sup> Through much of the Doha Round, observers have complained that the offers on the table are inadequate – an example of what happens with a positive list when new obligations apply only to things a Member explicitly puts on the table, as opposed to a negative list that would exempt from new obligations only those things the Member explicitly takes off the table. In an effort to change the calculus, the EU has proposed numerical targets for positive commitments as benchmarks, but with limited support. In fall 2005, attention turned to other “complementary” negotiating modalities.

One problem with a standard “request and offer” negotiation in services is that it is bilateral. In the periodic special sessions of the Council for Trade in Services, a given Member might have wanted to have bilateral meetings with as many as 40 other Members. The physical impossibility of arranging so many serious meetings in a two-week period was compounded by the impossibility of ever having the right sectoral experts in the room for any one meeting. The more active members have always organized themselves in “Friends” groups – much of the negotiations for the 1997 telecommunications services agreement, for example, took place within the Friends of Telecommunications group. In effect, the Friends groups are networks of domestic experts who talk to each other about the regulation of trade in services.

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<sup>11</sup> Curiously, OECD members stopped their secretariat from pursuing new approaches to services modalities. For early work see Thompson (2001).

The groups do not include the Secretariat, and decide for themselves who can come to meetings. The challenge is finding a modality to make use of their expertise, a challenge complicated by the low level of participation by developing country experts in the groups.<sup>12</sup>

The answer was the plurilateral approach introduced in the Hong Kong Declaration (WTO 2005a). In early 2006, close to three dozen countries participated in the 21 collective requests under this provision. In the process, 15 or so Friends groups surfaced in a more transparent way than hitherto in order to prepare the requests, and then to meet collectively with representatives of the Members to which the requests were addressed. I assume that the Members making and receiving these collective requests represent an approximation of critical mass in the sector concerned. This change in modalities, in short, offers the promise of making services more negotiable, in part by enabling networks of officials who learn to see themselves in the trade context, and in part by offering a route out of the bilateral trap – even if it is still plurilateral, rather than fully multilateral. In striking contrast to the large numbers of active participants in agriculture, barely a dozen developing countries participated in any of the collective

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<sup>12</sup> The low participation is not surprising, given, as Sauvé (2007, 12) observes,

the limited number of developing country services experts available for bilateral discussions in Geneva missions and in capitals; the negotiating imbalances that flow from the limited ability of most developing countries to formulate their own requests; significant asymmetries in negotiating-relevant information available to policy officials; and the more limited extent of stakeholder consultations and private sector engagement – and presence abroad – of service suppliers from developing countries. The extensive inter-agency coordination and external stakeholder consultation machinery required to make a success of services negotiations is simply lacking or inoperative in the vast majority of developing countries.

requests, and few of those made more than a couple of requests. The good news, in contrast, is that the developing country Members that received requests then engaged in the process, with many capital-based participants attending the subsequent meetings.

The problems in finding multilateral modalities do not afflict all aspects of the Doha Round. Trade rules and domestic policies began to come to the fore in the Tokyo Round, but the decision-making structure was still pyramidal, with the largest players negotiating agreements among themselves, then discussing the results with others (Winham 1986). This “minilateral” process conserves negotiating energy, but makes it impossible for smaller countries to influence the results. Not surprisingly, therefore, most developing countries did not sign the minilateral Tokyo Round “codes.” Many of the Uruguay Round agreements were explicitly designed as new understandings of GATT rules – for example, on subsidies. These aspects of trade negotiations are inherently multilateral, but the Single Undertaking makes this reality explicit. Once a domestic policy – for example, the definition of a subsidy or of antidumping – is changed, all trading partners can take advantage of the new rules, so bilateral negotiations on rules issues are rarely successful – and rarely needed. The Doha negotiations in both the Rules group and the Trade Facilitation group were suspended along with the rest, but these inherently multilateral negotiations had been making good progress to that point, with no modalities obstacles.

## **6. What Must the Single Undertaking Contain?**

If the Single Undertaking can be relaxed, but only slightly, what institutional design criteria help to determine what it should contain? The WTO does not deal merely with simple tariffs at the border nor, at the other extreme, does it include every issue

that might for some reason be subject to the dispute settlement system. The choices are made because some *interests* must be accommodated in the package, and they are made because some issues are suitable to the institutional features of the trading system while others are not.

Many observers have tried to articulate a basis for when the WTO should add new issues to its agenda. The argument that it is useful to bring a domain within the scope of the dispute settlement system is the easiest to reject. Some reform suggestions would have the WTO agenda become much broader; others would have it be narrower and more focused. The argument against broadening is similar to the one against seeing the WTO as a “development” organization, though usually advanced by different people. The WTO, it is said, should concentrate on commercial policy and nothing else. The argument has merit, especially if the WTO is to remain simple enough for all its Members to understand. And yet, if the WTO is to focus on the way commercial transactions transmit the externalities of domestic policy decisions across borders, it requires a pretty broad agenda. If the organization’s mandate were more limited, would it still be interesting to the largest traders? And if it ceased being interesting to them, would it be interesting to anybody else?

The nature and handling of the agenda might well have affected the suspension of the Doha Round negotiations. The Doha Declaration was ambiguous in how it described the subjects for negotiation and discussion, with nobody sure what the eventual Single Undertaking would have to contain. Much of the work of the past five years has been about just that – that is, the agenda bargain is also about learning. The bargain on launching the round could be seen as a triangle: old issues involving physical trade (NAMA and agriculture, with some

rules), new or intangible issues (services and the Singapore issues), and development, with something needed at all three corners (Wolfe 2004a). The essential objective for the Doha ministerial, therefore, had been to enlarge the negotiations envisaged under the Uruguay Round's "built-in agenda" (Ostry 1997). Agriculture and services alone were not enough for a round, and progress in negotiations in those areas seemed unlikely without the possibility of broader tradeoffs in a Single Undertaking. The ideal is a balanced agenda with horizontal linkages that create a strong internal dynamic of countries that want a deal, since tradeoffs do not come in one domain alone, even if balance is needed within each domain. The addition of NAMA plus rules (subsidies and antidumping) created the basis for a round, along with a political recognition of the requirement to take account of the needs of developing countries both in the texts and in technical assistance. What Ostry has called the "asymmetry" of the Uruguay Round "grand bargain" could not be ignored.

What is surprising in retrospect is how the original Doha triangle kept being reduced. The round had been slowed by the time it took to get the Singapore issues off the table; by so-far futile efforts to respond constructively to concerns about "implementation" of Uruguay Round commitments in favor of developing countries; and by demands to improve special and differential treatment. By late June 2006, observers were saying that success hinged on breaking the "iron triangle" – getting the United States to make deeper cuts in its domestic farm subsidies, the EU to offer more agricultural market access by means of deeper tariff cuts, and Brazil and India to open wider their domestic markets for industrial goods. It is striking that the iron triangle did not include services, let alone development, and, in their last-ditch efforts, ministers never got past agriculture. Yet agriculture alone is not self-balancing, and tariffs alone are equally difficult.<sup>13</sup>

The Doha agenda might have been reduced so much in order to accommodate the interests of all Members, but it has also shrunk because some issues were institutionally unsuited to the WTO. Whether one thinks negotiating is synonymous with bargaining or requires learning, it is possible only if it engages national officials who have responsibilities in a domain, have the capacity to participate, and either know their interests or have the ability to learn about their interests. It also helps if economic and governmental actors perceive an international dimension to an issue – if they are, in fact, engaged with actors in other places, since law emerges from such interaction. Trade negotiators discover and codify the rules, but they do not engage in “rule making” out of whole cloth. The GATS is based on a sophisticated vision of the economy and the role of policy. Developing countries often do not understand the relevant sectors of their own economy or that of their trading partners well enough to make binding offers or sensible requests, because they cannot imagine the real effects of a policy change. These considerations lead me to conclude that issues should be added to the WTO agenda only if they satisfy certain criteria (see Box 1).

These criteria help to explain why the 1997 telecommunications services agreement was relatively easy to negotiate. Deliberation in Geneva can be part of how people come to see the changes under way, but it is the change in the sector that matters. Services negotiations cannot drive domestic policy change. Rather, in many developing countries, there is an endogenous dynamic

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<sup>13</sup> For an economic analysis of the merits of a broad, but not too broad, agenda, see Levy (2005). His conclusion, however, misunderstands one aspect of the Single Undertaking: as a decisionmaking principle, it requires consensus before a new package can be agreed, so the problem of excluding nonsignatories from the benefits of a new agreement does not arise.



### *Box 1. Criteria for Adding Issues to the Single Undertaking*

1. A potential new issue should be consistent with the broad WTO objectives of using trade liberalization to promote international order and global prosperity, but if it can be handled in another international organization, it should be.
2. It should be possible to negotiate in this domain using basic WTO norms and principles – especially with respect to reciprocity and nondiscrimination.
3. The issue should be possible to negotiate using a multilateral modality that allows for variable geometry and differentiation.
4. WTO obligations, however intrusive, should apply to the sector when economic or policy externalities cannot be managed unilaterally – as when markets and territory do not readily align or when transaction flows are dominated by intra-industry trade.
5. The sector should have an industrial organization and regulatory structure that are changing in ways that make international obligations practical, in principle.
6. The issue should be amenable to negotiations that engage a transgovernmental network that is willing to see the WTO as a focal point for its work.
7. The potential new rules should address governments, not other actors who cannot be subject to WTO obligations, and should engage officials in each Member country who are able to see the relevance of the WTO.
8. While compatibility with multinational norms is essential, domestic implementation of the new rules should not depend on administrative law protections for foreigners that states have yet to extend to their own citizens
9. The possibility of new rules should first be addressed horizontally in existing WTO agreements, rather than vertically in a new stand-alone agreement; plurilateral deals are rarely appropriate
10. The issue should strengthen the Single Undertaking by adding new domestic supporters of the WTO.

for the regulatory reform of telecommunications. It affects a small number of economic actors, requires few trained officials, and has highly visible benefits in increased investment in vital modern infrastructure. Endogenous regulatory reform makes it easier for a country to participate in exogenous multilateral negotiations.

By these criteria, the TRIPS agreement was a mistake. Similarly, sanitary and phytosanitary rules are problematic when

they require a developing country to have a more sophisticated food inspection system than it might otherwise choose in order to comply with consumer preferences in OECD countries. Calling the new round the “Doha Development Agenda” was seen as foolishness by officials who think the WTO is not a development organization. They do not mean that trade is irrelevant to development – quite the reverse – but that development as a discrete activity is no business of the WTO. Since that position is not sustainable when developing countries make up a substantial majority of the Members, the question is how best to include development considerations on the agenda, given the limited utility of trade negotiations as a policy instrument for promoting development. The slow progress on this set of issues might signal the virtue of an exclusively horizontal approach to differentiation. Allowing “development” to be a vertical issue with its own negotiating body might have been then-director-general Mike Moore’s greatest contribution to ending the sterile debates on “implementation” of Uruguay Round obligations after Seattle. In the long run, however, those issues should be dealt with systematically in the agreements where problems arise, by the experts concerned, leaving assistance to the competent international organizations.

Of the new issues within the ambit of the original Doha Declaration, trade facilitation readily satisfies the criteria I set out in Box 1. Competition policy, in contrast, is the most problematic, because international interaction among nascent competition authorities in developing countries is still limited,<sup>14</sup> and procurement officials usually have a domestic orientation. Consideration

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<sup>14</sup> Although the 1977 telecoms Reference Paper is a horizontal device that incorporates competition policy principles in a way that allows national variance in implementation.

of two other original Doha issues – investment, now explicitly off the table, and the environment, nominally still in play – helps to illustrate the criteria.

Investment is already covered in the agreement on trade-related investment measures (TRIMs) and in the GATS, but the available modalities for explicit investment negotiations might be as much of an obstacle to including it on the agenda as opposition from developing countries. Sauvé (2006) concludes that, with respect to investment protection, the need for recourse to investor–state dispute settlement rules out a role for the WTO. He also notes that, since two-thirds of aggregate foreign investment inflows and four-fifths of identified barriers to investment affect services, it follows that most of the relevant issues can be addressed horizontally in the GATS. Of the distortions that affect manufacturing investment, most are already covered by the TRIMs agreement or could readily be incorporated in the subsidies agreement. A WTO investment agreement might also address elements of the good governance agenda, but most of these issues are not suitable for WTO obligations.

Investment is now off the WTO agenda, and will not be put back on soon. The environment, however, still has both a committee and a Doha negotiating group. Where specific agreements have environmental implications, they can be addressed horizontally, as they are in many areas of the negotiations. But the WTO is not an environmental organization; it has no expertise in the area, it does not engage environmental officials, and its key norms are not especially suited to environmental issues. If the three paragraphs on the environment in the Doha Declaration result in anything specific, it will be last-minute window dressing (Halle 2006). Environmental worries are far from being a central concern of trade ministers, which means the issues bring little to the Single Undertaking. It is not that the

environment does not matter, but that it costs a great deal of negotiating time and capital while obscuring the ability of regular work, and the dispute settlement system, to clarify the applicability of existing rules.

It follows that another way of thinking about the WTO agenda is to ask if an issue can or should be handled elsewhere. Many WTO agreements already show explicit deference to other organizations. It is now accepted, for example, that the WTO should consider the effect on trade of domestic regulations to prevent the spread of animal diseases, but leave consideration of how those regulations accomplish their intended goal to the expertise of the World Animal Health Organization.

The Trade Policy Review Mechanism (TPRM) presents an underused opportunity for such coherence. It is not a forum for discussion of formal WTO obligations, but could be a forum for deliberation and learning. A great deal of trade-related policy is not, or should not be, subject to WTO discipline – especially, perhaps, issues on the development agenda. It might be easier to achieve the necessary transparency and coherence with the broad objectives of the trading system, not through trying to craft formal, and contentious, rules, but through open discussion in the TPRM. Possible roles for the International Monetary Fund (IMF) and the World Bank in such a process are obvious. The International Labour Organization could also be asked to comment in a TPRM on how a country is doing on core labor standards, or the World Wildlife Fund on environmental issues. Collaboration with the UN Environment Programme would make sense on multilateral environmental agreements (Palmer and Tarasofsky 2007). Progress in developing international norms for cultural promotion, with a secretariat, could also become a part of TPRM consideration of trade-related cultural policy. In addition, Members should consider how to strengthen links

between the TPRM and surveillance processes in other bodies. Deference to other organizations, international or domestic, could also mean what Nordstrom (2005) calls “outsourcing”: making use of the greater analytic capacity of organizations such as the OECD and the World Bank.

In sum, I think that assessments of the existing agenda and proposals for additions must meet the substantive criteria in Box 1. What these criteria do not address, however, is process. The Single Undertaking and multilateral modalities allow any Member to have influence because agreement is subject to consensus. Simply blocking consensus is relatively easy in principle, but shaping an outcome is more complicated. Yet, even if the WTO had the right agenda, can its processes cope? Indeed, is the issue a more fundamental one of legitimacy?

## **7. Legitimate Engagement in the WTO**

The trading system is not governable if it is not legitimate, but legitimacy for the regime as a whole does not require the same instrumental form at every node in the system. What goes on in Geneva is surely important, but so, too, is what goes on in national capitals, in the boardrooms of multinational corporations, and in the everyday practices of consumers and traders. To add to the complexity, insiders and outsiders frame the debate on legitimate engagement differently. Insiders frame it as “internal” or “external” transparency, defined by reference to events in Geneva. Outsiders frame it as part of the debate on whether global governance can be democratic, defined by reference to citizens. Given all the attention paid to external transparency, it is surprising how little of the literature on WTO reform focuses on internal transparency – the inverse of the attention negotiators devote to these issues. The two are clearly linked in the creation of a legitimate order (see Mitzen 2005). But they are also linked

by many critics who see the WTO as undemocratic, arguing that civil society cannot properly participate in the organization and that many small countries are severely disadvantaged by the WTO's practices. I address internal transparency issues in the next section; here, I ask whether the external considerations help explain the suspension of the Doha Round or point the way to essential reforms.

The Doha Development Agenda confirmed the rhetorical importance WTO Members attach to the essential democratic values of transparency and participation. That commitment, however, is merely to make information available in Geneva while convincing citizens at home that the WTO is good for them. The fact that paragraph 10 of the Doha agenda, on transparency, is not a subject for negotiations signals the sensitivity of these issues for many Members, even though the public is not clamoring for more information or a greater role. Trade policy is not a highly salient issue for most people, and the 1999 "Battle in Seattle" never resonated much except as a strange case of street violence in the latte capital of the world (Mendelsohn and Wolfe 2001). The WTO is rarely front page news even in the business section. Still, the "permissive consensus" on trade policy remains robust, understood as the freedom to act that the public has traditionally accorded governments in this realm: as long as trade policy delivers prosperity without too much domestic disruption, the public is not interested in the details (Mendelsohn, Wolfe, and Parkin 2002; Wolfe and Mendelsohn 2005).

That does not, however, let WTO off the hook, even if it is doing relatively well at providing more information on the Internet and increasing access for nongovernmental organizations (NGOs) at ministerial meetings. But I do not share the views of some observers (for example, Esty 2002) that greater engagement of civil society organizations in Geneva is needed to provide

more information to citizens at home. I do not see the merit of emphasizing public education about the facts and benefits of WTO "law" (Cho 2005), as if dispute settlement is the most important way the WTO affects its domain. I do agree, however, that having modest ambitions for the dispute settlement system helps legitimacy, what some scholars call "institutional sensitivity" (Howse and Nicolaidis 2003).

The familiar democracy frame is also inadequate because, in its obsession with Geneva, it does not consider the problem of support at home for new rules. For example, in the crucial stages of designing the proposed ITO in 1948, negotiators convinced each other but lost touch with currents of opinion at home. Their failure to prepare the ground was part of the explanation for the ITO's ultimate failure (Hampson and Hart 1995, 163). Thus, the Sutherland Report's focus on external transparency in Geneva, rather than on the responsibilities of national governments, missed the point: the legitimacy of the WTO has little to do with the few NGOs that pay it most attention. It is important to ask, therefore, whether the WTO has sufficient domestic resonance, whether the public, farm lobbies, business interests, and domestic officials in Europe, North America, and the developing countries are learning about what is at stake in the Doha Round. Transparency in Geneva and more engagement with civil society might not contribute to a more effective and legitimate WTO, but they do contribute to a more effective and legitimate national trade policy process (Charnovitz 2004). That domestic process must involve all of government, not just the trade ministry.

Transparency alone, however, is not enough. Internet access is now available everywhere, so people potentially affected by new WTO rules can easily find out if something is going on. If they lack deliberative opportunities, they might react negatively

to proposals they do not fully understand.<sup>15</sup> One aspect of domestic consultations should be greater engagement of parliamentarians in the WTO and trade policy (see Glania 2004; Mann 2004; Shaffer 2004; Berg and Schmitz 2006), although the Australian experience leads to some skepticism about the ability of such involvement to mitigate a supposed "democratic deficit" (Capling and Nossal 2003). For developing countries, especially small ones, improving the trade policy process by introducing more and better consultation is a daunting task, but Members can learn from each other. Sylvia Ostry (2004) argues that the quality of the national trade policy process should be considered in each Member's WTO Trade Policy Review. Transparency *about* the trade policy process can be as valuable as transparency *in* the process. The process matters because it helps Member countries and their citizens identify and capture the gains from trade. Using the TPRM to strengthen that process is not a grand scheme for improving the world, and it will not get the WTO or trade policy generally off the hook of demands to be more open and responsive to civil society concerns, but it is a small step the WTO can take, and one consistent with its principles and practices.

The caveat matters: increased transparency might hurt the WTO if it encourages posturing by negotiators and politicians. If constituents perceive a negotiation as purely distributive, they will be critical of a negotiator who pursues the possibility of an integrative outcome. Thompson (1998, 159) suggests that, given the natural desire to save face, "[n]egotiators who are accountable to constituents are more likely to maintain a tough bargaining stance, make fewer concessions, and hold out for more favorable agreements compared to those who are not

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<sup>15</sup> On the value of domestic trade policy consultations, see Halle and Wolfe (2007) and the literature cited there.



accountable." US, European, and Canadian agricultural groups know exactly what is going on in Geneva at any moment and publicly instruct their negotiators on what is or is not acceptable, especially on matters as clear cut as a formula coefficient. The transparency that modern governance demands undermines the privacy essential for negotiations (Stasavage 2004). It might also undermine liberalization, or force protection into less transparent forms (Kono 2006). Nevertheless, transparency is essential for deliberation, and deliberation matters for democracy as well as learning. Deliberation is especially important whenever collective decisions allow burdens to be imposed on others, which demands "public deliberative processes through which reasons can be scrutinized, debated and either revised or rejected in light of the available evidence and argument" (King 2003, 39).

If deliberation matters at home for citizens, it also matters for their representatives in Geneva. The WTO provides a forum for the legitimation of a regime, in part, by providing opportunities for voice. These opportunities affect the possibility to defend interests, of course, but they are even more important for developing consensual knowledge and for the deliberation that makes effective bargaining legitimate. Do all Members have an effective voice?

## **8. Internal Transparency: The Negotiation Process**

The general perception of WTO negotiations is of episodic ministerials at which all the work is done. Close observers know, however, that ministerials are the tip of an iceberg of diplomatic activity in and out of Geneva, and that developing countries have been increasingly insistent on having a voice in that activity. Whether the quality of that deliberation is adequate might bear on whether a better institution could have avoided the suspension of the Doha Round, given the same exogenous

factors in the world political economy and the same negotiating strategies. Should the process be bottom up or text based? 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? When should ministers be involved? The issues in this section, therefore, concern who should negotiate and where.

### *Informality in the WTO*

The WTO is a forum, not an "actor" in itself, and it is Member driven. Unlike the IMF 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 commission background papers, but negotiating proposals come from Members. The WTO is a place to talk, and the talking is done by representatives of Members: diplomats based in Geneva and officials from capitals, including ministers. Members talk at biennial ministerial conferences and in the Council for Trade in Services. They talk in regular committees that meet two or three times a year, in the negotiating groups that meet every four to six weeks, and in the dispute settlement body. They talk in hundreds of formal on-the-record meetings every year, and in many hundreds of more informal meetings (Wolfe 2004b). Some of these off-the-record meetings are held in the WTO building, others are held in the offices of delegations, or in Member countries. Box 2 is a first attempt to delineate the dimensions of all these meetings.

Such complexity creates practical problems for delegations and for efficient negotiations. Given the formal equality and practical inequality of WTO Members, the Sutherland Report notes "the need to streamline regular activity and reduce the burdens on small delegations" (Sutherland et al. 2004, 69), but then makes no

## Box 2: *Dimensions of WTO Meetings*

### 1. Formality

- a. official WTO meeting (mandated by treaty or rules of procedure)
- b. informal (multilateral: chaired by the chairperson of the regular body)
  - i. plenary of any WTO body, including "transparency forum," announced by the chair
  - ii. limited number of delegates per Member (technical experts)
  - iii. small group (selected delegates meeting with the chair)
  - iv. Green Room (20-30 heads of delegations) or Room F (20-30 delegates); Secretariat present
  - v. "fireside chat" (20-30 delegates); Secretariat not present
  - vi. bilateral (confessionals, where one delegation meets the chair)
  - vii. Friends of the chair (usually meetings of chairs called by the director-general)
- c. outside the WTO (not chaired by the chairperson of the regular body; Secretariat sometimes invited)
  - i. Bridge clubs
  - ii. Services expert groups (plurilateral)
  - iii. mini-ministerials

### 2. Transparency

- a. Documentation available to public, other members
- b. open to public (webcasting, NGO observers)/closed
- c. unofficial summary reports on WTO website
- d. official records (minutes)
- e. statement by the chair for the record, and circulated to Members
- f. informal reporting by club co-ordinators to Members not present (routinized transmission belt)
- g. no records

### 3 Membership

- a. universal/plenary/open ended
- b. limited by/to
  - i. geography
  - ii. interest
  - iii. principal antagonists
  - iv. representatives of clubs
  - v. size of room

*(next page)*

recommendations on how to do so. In a Member-driven organization, a Member that lacks the capacity to be an informed presence at every meeting is at a disadvantage, but the alternatives are not obvious. On the one hand, disaggregation makes things simple while engaging distinct policy networks; on the other hand, aggregation into a smaller number of committees forces tradeoffs while reducing the number of meetings that small delegations have to

*Box 2: Dimensions of WTO Meetings (cont.)*

**4 Level**

- a. ministers
- b. senior officials from capitals
- c. ambassadors
- d. Geneva delegation
- e. experts from capitals

**5. Chair**

- a. Chosen by Members annually, or for duration
- b. Self-selected (ministerial conference and mini-ministerial)
- c. Clubs:
  - i. Continuing (for example, Cairns, G33, G20, G10)
  - ii. Rotating (for example, African Group, LDCs, ASEAN, ACP)

**6. Purpose (in negotiation mode)**

- a. Preliminary exchange of views
- b. Arguing
- c. Bargaining
- d. Decisions (on process, texts, obligations)

**7. Domain**

- a. WTO/trading system
- b. Negotiating round as a whole
- c. Specific substantive areas
- d. Process

cover.<sup>16</sup> When the number of active participants in multilateral trade negotiations increased dramatically in the 1980s, experience confirmed the well-understood proposition that the legitimacy gained by involving large numbers of participants comes at the expense of the efficiency associated with small numbers (Kahler 1993). No organization with 150 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. It follows that little real work is done in meetings that would be at the first level of formality in Box 2. Most of the negotiating groups meet for a week at a time, but in plenary session only at the beginning and the end

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<sup>16</sup> For a description of how the 15 Uruguay Round negotiating groups were reduced to four "tracks" as the round progressed, see Winham (2006).

of the week, and then only briefly, to record statements and decisions. For transparency, the groups also meet in informal plenary sessions that provide an opportunity for all Members to hear about the informal smaller group meetings that have been taking place. Much of the work, and associated controversy about internal transparency, surrounds the smallest groups – informal bodies with no recognized standing, limited membership, and no written reports.

Only the largest WTO Members can monitor and participate in all meetings. The United States does so easily. EU Members are represented by the European Commission. Perhaps fewer than half a dozen more Members – notably Canada and Japan – have the capacity to participate actively across the board. Other leading developed and developing countries participate more actively in some areas than others. At most, 40 delegations are significant players, a reality mentioned again and again by senior members of the Secretariat and by ambassadors, including from developing countries. Agriculture is the area followed most closely, yet only about 15 delegations really play, and the principal ideas come from fewer than ten. The institutional design issue becomes one of structuring a process whereby these few can get on with it without losing touch with the interests of the rest, and in a way that builds confidence in the process and the results. And all countries must find ways to aggregate their strength with others in negotiating groupings, an innovation that has contributed to the developing country sense that they are being heard. Box 3 is an attempt to list all the known groupings of recent years. Figure 1, originally prepared by the International Centre for Trade and Sustainable Development and modified by the WTO secretariat, shows the overlapping membership of the agriculture clubs.

The list in Box 3 raises a great many questions about negotiation groupings, or clubs, with respect to what they do and how they differ (Wolfe 2007). I define a club as a group of nations

### Box 3: *Known Negotiating Groupings*

#### **Common characteristic groups**

G90†  
ACP†  
African Group†  
LDCs†  
ASEAN†  
CARICOM†  
Small and Vulnerable Economies (SVEs)  
Recently Acceded Members (RAMs)  
Small Vulnerable Coastal States (SVCS)

#### **Agriculture**

Offensive Coalitions  
Cotton-4†  
Tropical and Alternative Products Group  
Cairns Group (N/S)†  
G20 (S/S)†  
Defensive coalitions  
G10†  
G33†  
RAMs, SVEs

#### **Non-agricultural Market Access (NAMA)**

NAMA-11†  
Friends of MFN  
Friends of Ambition in NAMA  
Hotel d'Angleterre  
RAMs, SVEs

#### **Rules**

SCVS  
Friends of Fish  
Friends of Antidumping  
Negotiations (FANs)

#### **Environment**

Friends of environmental goods  
Friends of the environment and sustainable development

#### **Trade Facilitation**

Core Group/W142 group  
Colorado Group/W137 group

#### **Textiles**

International Textiles and Clothing Bureau (ITCB)

#### **Services**

G25  
ASEAN-1 (-Singapore)  
African Group, ACP, LDCs, SVEs  
Real Good Friends of GATS/Friends of Friends  
"Friends of..." (plurilateral expert groups): Audiovisual, Legal; Architectural/ Engineering/Integrated Engineering; Computer and related services; Postal/Courier including express delivery; Telecommunications; Construction and Related Engineering; distribution; education; Environmental service; Financial services; Online entertainment, Maritime transport; Air transport; logistics; energy; Services related to Agriculture, Cross-border services (Mode 1/2), Mode 3, Mode 4, MFN exemptions

#### **TRIPS**

African Group  
["Disclosure" group of developing countries?]  
Friends of Geographical Indicators  
Friends of Against Extension of Geographical Indicators

#### **Bridge clubs**

##### Agriculture and NAMA

(principal antagonists):  
G4 (U.S. EU Brazil, India)†  
G6 (add Australia, Japan)†  
NAMA caucus

##### Services

Enchilada  
General (deadlock-breaking)  
Oslo or Non-G6 (Canada, Chile, Indonesia, Kenya, New Zealand and Norway)  
Quad (Canada, EU, Japan, USA)  
Dirty Dozen (Quad plus)  
"senior officials" (25-30)  
Mini-ministerials† (25-30)

(next page)

### Box 3: *Known Negotiating Groupings (cont.)*

#### Notes:

1. † indicates groups that have met at ministerial level during the Doha round.
2. For a glossary of agriculture groups, see (WTO, 2006a). The list in this document is based both on self-identified groups and on sets of Members that have submitted joint proposals at various stages of the negotiations. The Five Interested Parties (FIPs) has ceased meeting in that form, as has, therefore, the FIPs Plus. The agriculture Quint does not seem to have met for some time.
3. The Enchilada Group incorporates Members who once met as the Core Group and then the G15.
4. Certain regional (common characteristic) groups apparently no longer actively co-ordinate in WTO except occasionally on electoral or political issues, such as observer status: ALADI, Andean Group, Arab Group, APEC, CEFTA, GRULAC, Islamic Group, Mercosur, OECS, SADC, SAPTA, SELA.
5. The once-prominent Like-Minded Group (LMG) has not been active for many years. The status of the "informal group of developing countries" is not clear.

united or associated for a particular purpose, a definition that purposely evokes a looser form of association than the common tendency to see informal groups of states working within international organizations as "coalitions" (Odell 2006). The clubs that seem such an important part of the institutional design of the Doha Round have their roots in earlier GATT rounds – indeed, in long-established multilateral practices going back to the League of Nations. Three sorts of clubs are relevant for WTO negotiations. Clubs based on a broad *common characteristic* (such as a region or level of development) can influence many issues, including the round as a whole, but only weakly. Clubs based on a *common objective* (such as agricultural trade) can have a great deal of influence, but on a limited range of issues. *Bridge clubs* can be essential for breaking deadlocks, or for managing negotiations, often by building bridges between opposed positions.

The original Quad that met regularly at ministerial level from the end of the Tokyo Round in the 1970s through the lengthy Uruguay Round negotiations to the early days of the WTO has not met at ministerial level since 1999, but it still meets infor-

mally among Geneva delegates. Efforts to craft a compromise take place, as always, in bilateral EU-US meetings, but also in newer bridge clubs. The most structured groups (such as the Cairns Group of agricultural exporting countries) require high-level recognition in capitals, especially for subordinating national strategy to joint negotiating positions; they have formal coordination and decisionmaking procedures; sometimes meet at the ministerial level; and sometimes have sophisticated analytical support. The least organized groups are loose consultative mechanisms at the technical or delegate level, often requiring authority from capitals – but they matter in the larger dynamics of building consensus and in solving substantive problems. Some groups exist because of negotiating modalities. Some are "coalitions" designed to allow actors to aggregate their strength with other actors in order affect egocentric "gains" and "losses." Others facilitate deliberation, in which participants come to a new understanding of their interests and of the collective problem, which can lead to different outcomes.

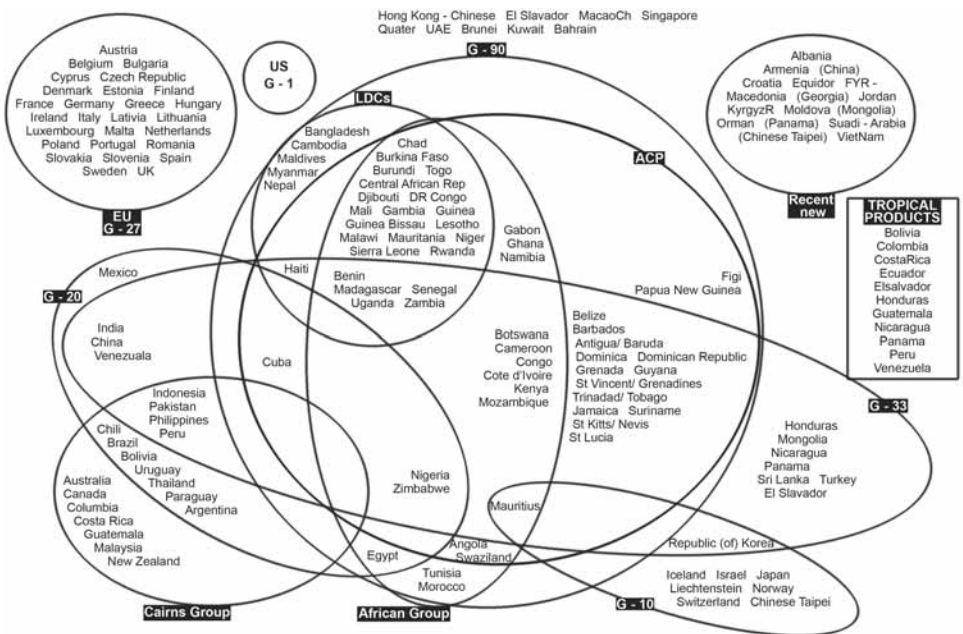
The new groupings do not always help: it is hard to move any group off a position once adopted. The most prominent, the G20, barely agreed among themselves on agriculture, and not at all on other issues. They also failed to reach a common position on NAMA, so that the rump speaks in that part of the negotiation not as the G20 but as the NAMA-11, which lacks technical support and has not been a creative force in the negotiations. Experienced chairs lament that, in the old days, open dissent allowed them to ascertain the center of gravity of a negotiation more easily; now, people toe the line and say nothing. Less important countries do not even bother negotiating, or trying to understand the issues, because bigger countries take the lead. Developing countries draw on analysis from bodies such as the United Nations Conference on Trade and Development, the South Centre, and various NGOs, but these sources of expertise vary widely



in quality, consistency, and ideology. None provides the kind of systematic consistent support that Brazil gets on agriculture from a think tank like the Instituto de Estudos do Comércio e Negociações Internacionais (ICONE) or that OECD countries get from their own bureaucracies.

The norms governing all this talk have been the subject of considerable reflection since the third ministerial conference, in Seattle in 1999, which clearly failed in part for institutional reasons (Odell 2002). Too many Members did not know what was happening, did not feel a part of the process, and did not see their issues being addressed. The difficulties were actually apparent at the WTO's first ministerial, in Singapore in 1996,

Figure 1. Membership in Agricultural Clubs



but active procedural discussions among ambassadors in Geneva began only as part of the response to Seattle (WTO 2000), since that was the first WTO ministerial with something significant at stake. Moreover, Members had painfully to learn how to *prepare* for and *organize* a ministerial conference (Pedersen 2006). The two aspects are different. When the WTO became a Single Undertaking, everybody had to engage all the time, because every aspect of the negotiations might result in new obligations for every Member. But many developing countries were not accustomed to that level of intense participation in a ministerial conference; they did not know how to prepare, how to follow all the issues, or how to build alliances – and the result was a feeling of exclusion. Efforts since then have been directed to ensuring that traditional processes are transparent while not slowing everything down to the speed of the least capable Member.

WTO insiders understand the process as a series of nested "concentric circles." In the outer ring are official WTO meetings, mandated by the treaty or by the rules of procedure; these plenary meetings are held only for the record. In the next circle are informal plenary meetings of regular bodies, under their regular chairs, held mostly for transparency purposes. The real work is done when chairs meet with limited numbers of technical experts from Members, or when chairs invite small groups of key players to explore selected issues. If discussions reach an impasse, the response, adopted from the GATT, is to convene meetings of a restricted group of Members in a "Green Room," so-called after the color of the director-general's board-room, where many such meetings were held at the invitation of Arthur Dunkel early in his term. At the 1988 Montreal ministerial, contentious issues were first discussed by small groups of officials, then by similar limited groups of ministers (see Croome 1995). This inner circle became controversial, however, only after the first WTO ministerial in Singapore, when a Green Room of 34 countries left all the other

ministers loudly wondering why they had come. Contrite promises to ensure it would never happen again led to no changes (Blackhurst 1998, 2001), and the anger erupted at Seattle in 1999. The subsequent debate on internal transparency led to new procedural understandings – see the chair's report in WTO (2000). But developing countries were unhappy with the preparation and conduct of the Doha ministerial in 2001, when final compromises were again hammered out in a Green Room, leading to further debates about WTO procedures before Cancún.

The Green Room, therefore, refers to both a real place and a specific type of meeting, whether of ambassadors in Geneva and chaired by the director-general, of sectoral negotiators and presided over by the chair of a negotiating group (for example, in agriculture, Room F, if held in the WTO building, or Fireside Chats, if convened by the chair in his or her own offices in the absence of the WTO Secretariat), or of ministers at the biennial ministerial conference (the Chairman's Consultative Group in Hong Kong).

The original Green Room practice, carried into the WTO, reflects three negotiating realities: first, that informality is vital; second, that the largest Members, especially the United States and the EU, must always be in the room; and, third, that other interested parties should be engaged in the search for consensus. The key is "inclusiveness": including representatives of all Members and all interests; and "transparency": representatives in the room must fairly articulate the views of their club and expeditiously and comprehensively report on the deliberations; and the chair must fairly present any results when reporting on negotiations in plenary meetings or drafting documents designed to attract consensus.

Part of what the many groupings in Box 3 do, therefore, is to create a claim that one of their number should represent them in

a meeting of the Green Room type. A Green Room – often 30 Members, but sometimes fewer depending on the issue or the conjuncture, with Members often represented by two or more ministers or officials – can be a large group for a negotiation, but all key players plus all groups must be represented if it is to be legitimate. In Green Room meetings of ambassadors or ministers, the Members of the original Quad are always represented, along with other leading traders, representatives of coalitions, and co-ordinators of the regional groups. Membership in a "bridge club" might be a function of a country's weight in the world or of its capacity to influence others (Malnes 1995), but smaller participants seem to be selected as a kind of "contact group" responsible for keeping others informed.<sup>17</sup> Although the procedure is controversial when used to advance negotiations, in Geneva it is used more often for transparency, and not always well – some chairs report difficulties in getting group co-ordinators to adopt a position or explain the situation to their group.

This unwritten process, based on rules everyone understands, works well enough. Since consensus is, and should be, the decision rule and since participants do not discover information about each other's preferences through iterated voting, they must have other structured forms of interaction to learn about the possibility of compromise. Most matters are settled informally because consensus forces actors to find a compromise instead of allowing a vote to decide a controversy. Paradoxically, however, a principle that advantages small Members also disadvantages them, because they are usually not part of small group informal meetings. Some NGOs and developing countries complain about such informal meetings, yet since they are a

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<sup>17</sup> For a discussion of this and other principles of delegation to small groups, see Kahler (1993, 320).

consequence of the consensus rule, the only alternative would be to insist on a formal vote. If the WTO worked this way, then the General Council would be like the UN General Assembly, where the developing country majority can win any vote it wants, but no issue of importance is ever on the agenda since the largest and most powerful Members never allow a significant issue to be decided in that way. The WTO would then need some sort of executive committee for all the reasons that the UN needs the Security Council. And as with the Security Council, all the real discussions would still take place in informal meetings among the principal players.<sup>18</sup> Creating some sort of standing consultative group – as the Sutherland Report, some governments, former officials, and many academics (including this author) have suggested – would not be an alternative. The Green Room would be replicated at a moment in time, but it would then be stuck in that formation like a fly in amber.

With the WTO's smorgasbord of issues and diversity of Members, clubs ebb and flow as the agenda evolves, which is one of the organization's great strengths – as is the ability of a chair to call a restricted meeting only when the issues are ripe. The effort to crystallize informal bodies that emerge organically might be needlessly divisive without accomplishing much. No group of Members should have to create negotiating obstacles only to get a representative in the room, and no Member should have to block consensus because it did not know what was going on.

### *Is a New Negotiating Forum Needed?*

Judging by the paltry complaints about the Hong Kong ministerial, the effort to improve the negotiation process could be

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<sup>18</sup> On informality in other international organizations, see Sureta (2003); and Prantl (2005).

judged a success. And yet the round was suspended six months later. As one senior official said, in all the procedural discussion, "[s]omewhere we forgot to negotiate." A constant refrain among negotiators, going back to before Cancún, is that there is lots of talk, but no negotiations are being joined. Over and over they observe ruefully that nobody can negotiate in public. Members lack a collective understanding of the difference between "technical" work, and isolating those matters on which a ministerial decision is needed. It is easier for ministers to endorse a difficult conclusion than to have to choose among alternatives. With the Green Room used mainly for transparency, is something else needed for negotiations? A representative Green Room or mini-ministerial might be too large to provide leadership, and the old Quad will never return. But some new grouping might be needed to conclude the Doha Round, and it might need to change either the *level* of participation or the *Members* involved.

The first approach to changing the level is to bump up thorny issues to heads of government. Former Canadian prime minister Paul Martin was convinced that an informal meeting of leaders could make a major difference on issues such as agricultural trade reform (Martin 2004). He received little support for the idea. Brazilian president Luiz Lula da Silva angled for months to have a summit devoted only to breaking the Doha logjam. He, too, received little support. In the event, on the margins of their St. Petersburg summit in 2006, the G8 leaders had a meeting with their five regular interlocutors (Brazil, India, China, Mexico, and South Africa), but managed only to tell their trade ministers to get the job done. The ministers then failed.

The effort to engage leaders is based on what people think they remember about the then G7 summit contributions to ending the Tokyo Round in 1978 and the Uruguay Round in 1993. In both cases, however, leaders did little more than ask

the Quad trade ministers to meet in advance in order to present a report at the summit. At Tokyo in 1993, leaders were able to "endorse" the progress their trade ministers had made on market access; they then encouraged others to match it, which started the Uruguay Round end game (Hoda 2001, 37). The eclipse of the Quad at the ministerial level since 1999 might have limited the contribution the summit could make, since ministers were not in a position to meet to prepare the discussion. Leaders can force co-ordination within their own government if the lack of it is the obstacle to agreement. When networks of officials and ministers are fully engaged, however, can leaders add anything? Leaders could not solve the agriculture problem from the top.

The alternative approach to changing levels is to bump things down from ministers to officials. When Robert Zoellick (then United States trade representative) and Pascal Lamy (then EU trade commissioner) dominated the WTO, they sought intimate engagement in all aspects of the negotiations. Many negotiators believe that the organization has yet to recover from the effects of the "Bob and Pascal show." As former bureaucrats, Zoellick and Lamy imagined themselves capable of being their own chief negotiators, and they acted as super technocrats with no need for lesser officials. Their engagement required other countries to engage at the ministerial level, though few ministers other than Brazilian foreign minister Celso Amorim, also a former bureaucrat, could match them. One consequence was the evisceration of the Geneva process when attention shifted to the ministerial level. Now as director-general, Lamy prefers to engage with ministers, rather than ambassadors, which is why the Geneva Green Room is used mostly for transparency, not negotiation. One result of Lamy's apparent assumption that real negotiations take place only among ministers is that chief negotiators and capital-based senior officials do not participate in a continuing process that crosses issues and stitches things together.

Many officials now look at the July Framework of 2004, which relaunched negotiations after the Cancún failure, as a poorly prepared mistake. It is both too detailed and too vague, an overly transparent straitjacket. Many people can be blamed for the process that led to such a text, but a crucial aspect is the premature engagement of ministers who did not have the time or capacity to master all the detail. A perverse consequence of the belief that ministers can settle tough issues on their own is that the moment a mini-ministerial is announced, negotiations in Geneva grind to a halt while delegations wait for the politicians to pronounce. It might be useful for the director-general to travel to capitals, as he did during the winter of 2007, because political leaders are the ones who ultimately must make the tough compromises, but going over the heads of Geneva ambassadors might harm the round.

If changing the level of participation does not help conclude the Doha Round, changing the Members involved might. The Bob and Pascal show also starred Brazil's Celso Amorim and India's trade minister Kamal Nath. These four tried to sort things out as a "new Quad," and failed. In 2004, they included Australia (representing the Cairns Group), in what became known as the "five interested parties," or FIPs. They next added Japan (representing the G10 group of agricultural importers), making a G6, which met frequently but without success. After the group's spectacular failure to resolve the modalities conundrum in summer 2006, it seemed they would never meet again. When the G4 started meeting again in 2007, they again aroused misgivings among excluded Members about a process outside the WTO that was not really multilateral.

The G6 failed in 2006, as did the G4 at their Potsdam meeting in June 2007, because none of them, and none of the



groups they represent, could advance a systemic interest. The group contains the principal antagonists, but they are all publicly committed to their positions, which makes compromises difficult. The old Quad was more effective because one participant, Canada, was not a principal antagonist. Having listened to all the others, Canada was able to put possible compromises forward quietly among senior officials in a way that could advance the negotiations. Some negotiators think it is time, therefore, to change both countries and levels.

Two Uruguay Round events are precedents for changing the countries. The first is the "café au lait" process led by Switzerland and Colombia in 1986. Known as the de la Paix Group, after the hotel where they first met, this group advanced a compromise proposal on the arrangements and subjects for the Uruguay Round that was successful in part because the proponents shared, not specific negotiating objectives, but a commitment to the importance of the round itself. The group was reconstituted in June 1988 with an informal proposal that helped energize the process, partly because of its source, the seven Members Australia, Canada, Hong Kong, Hungary, New Zealand, South Korea, and Switzerland (Croome 1995). Now a group of six Members (Canada, Chile, Indonesia, Kenya, New Zealand and Norway) are trying something similar. Senior officials, including chief negotiators and sectoral negotiators, met in Oslo in October 2006 to discuss key issues – NAMA and services, in addition to agriculture – that are blocking progress in the negotiations. None of the six belonged to the G6, but they represent many of the major different negotiating groupings at the WTO, North and South. Participants in the "non-G6" have tried not to attract attention to themselves with their subsequent meetings, making it too early to assess the eventual contribution the group might make.

### *Bottom-Up versus Text-Based Negotiations*

The top-down desire of some Members to engage ministers collides with a different WTO pathology, the demand for a bottom-up process. During 2005, the jargon of WTO negotiators began to differentiate between "bottom-up" and "text-based" negotiations. The apparent opposition might seem odd, since in the end any successful negotiation focuses on some sort of text. The roots of the distinction are in the agreement on the organization of the Doha Round (WTO 2002, 4):

- Chairpersons should aim to facilitate consensus among participants and should seek to evolve consensus texts through the negotiation process.
- In their regular reporting to overseeing bodies, Chairpersons should reflect consensus, or where this is not possible, different positions on issues.

The implications of this agreement became clearer in the months before Hong Kong, when Members said that they wanted a "bottom-up" process, meaning that content had to come from the Members, not from a chair trying to guess what compromises might be acceptable. It was too soon, they said, to move to a "text-based" process.<sup>19</sup> Many Members praised the "bottom-up" process in Hong Kong, but that praise might indicate why nothing much happened at that ministerial.

The UN is often seen as a place to register positions. The WTO, however, is not analogous; it should be seen instead as a

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<sup>19</sup> Members sometimes use a similar term for a different idea: that it can be harmful to draft a text in legal language before the negotiations are ripe.

place to reach agreements on the rules for a global economy. UN practice, familiar to some developing country diplomats who have to cover all the Geneva-based international organizations, leads to misguided demands that all views be reflected in the negotiating texts, whatever the priority attached to them. The risk of such a process was obvious in Seattle, when Members whose views made it into the draft text did not want to give up something they thought they had already "won" and could not be seen to back down. Despite the protestations of developing countries and many NGOs (Kaukab Vina and Yu III 2004), there is no virtue in a text that reflects all the views expressed in the preparatory process, as long as that process allows sufficient opportunities for deliberation.

The formulation tactic of preparing an informal single negotiating text, usually in the chair's name, is a technique often used to stimulate a move toward consensus.<sup>20</sup> As John Odell (2005, 480ff) describes it,

[t]he chair normally decides what to include in the text after considering Secretariat proposals and conducting extensive "confessionals" with delegations. The [single negotiating text] is meant as a vehicle for moving the large group toward agreement. It is informal in the sense that no delegation has approved it; it is an intermediate starting point for more talks if the parties accept it as such.

Without something on the table, and not realizing that support is limited, Members can retain ideas that have no hope of success.

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<sup>20</sup> On the evolution of a single negotiating text in the Law of the Sea negotiations as a technique of "active consensus" and the consequent requirements for a skillful chair, see (Buzan 1981).

Despite the many attempts to produce such focal points since the famous "Dunkel text" of 1991 (GATT 1991), chairs of WTO meetings are often criticized for submitting texts "on their own responsibility." It is worth recalling that 80 percent of Dunkel's text had been successfully negotiated before he tabled it, yet it was still rejected. In the most delicate areas, Members are not likely to thank a chair for proposing a formula coefficient. The "reference papers" that chairs prepared in April 2006 were immediately a subject of humorous derision for their hundreds of square brackets [denoting drafting not yet agreed], but they served to show how far apart delegations remained. Negotiators make more progress by adding to the text those things on which they agree than by trying to knock off encrustations of square brackets. Political engagement in trade negotiations is essential – indeed, having regular biennial ministerial conferences is one of the things that makes the WTO so much stronger than the GATT – but tough decisions must be well prepared for ministers with limited time and technical knowledge.

A related problem is the reluctance of negotiators in bargaining mode to reveal all their cards until others do, which limits everyone's ability to assess the size of the remaining gaps. If the chair is not allowed to draft a text, and Members cannot do it themselves, then the "bottom-up" process will lead from suspense to collapse. With the failure of the G4 to agree at Potsdam in June 2007, collapse seemed close. When this paper was completed in July 2007, it was thought that the revised modalities papers expected from the NAMA and agriculture chairs by the end of the month might well look like a chairman's text and might even include coefficients, but a prediction on whether these texts will help Members skirt the abyss is impossible.

## 9. Can the Trading System Be Governed without Institutional Reform?

If the WTO is medieval, it is because the world is, too. Is reform needed? The trading system works, and it is ruled by law. The only problem is renovation, and that is only a certain problem for those who lack patience (Wolfe 2004a). Finding a multilateral consensus among 150 participants on complex global issues will inevitably and properly be slow (Buzan 1981). Institutional design questions arise because it seems the world has changed, with power more widely dispersed and many more Members wishing, and needing, to play an active role. That power takes two forms, compulsory and institutional. Many more countries have such power, but power as such has not substantially changed. John Ruggie's (1982) central insight, derived from Max Weber, that system change depends on two forces, material power and legitimate social purpose, indicates why, in the current situation, one should expect to see change *within* the WTO but not *of* the WTO. The further assumption is that, although these changes might be due to exogenous structural forces that affect the interests of Members, their understanding of these interests is constructed in part through social interaction. The WTO constitutes who is a legitimate actor in its processes, but it is Members that constitute the WTO. Critical mass thus has two dimensions: on a given

### Box 4: *The Logic of WTO Negotiations*

- Diverse issues and Members = Single Undertaking
- Single Undertaking = consensus, not voting
- Consensus = seeking compromise informally on every aspect of the package in a bottom-up process
- Complex issues = need for learning (ministers, officials, farmers)
- Multilateral modalities and 150 Members = small groups
- Multiple groups with unequal weights = need for informal but transparent co-ordination
- Co-ordination = Green Room-type meetings

issue, the Members with the bulk of material power are essential players, yet they will be stymied if the process does not also have the legitimacy that comes with a critical mass of institutional power.

My titular question, therefore, has a curious answer. Would institutional reform have saved the Doha Round? In fact, in the WTO's typical organic evolution, it has so far. The organization as it was at Seattle in 1999 would never have launched the Doha Round, let alone carried it this far. More reform might be needed, but would-be architects should be cautious, following the advice of Ernst Haas, whose first maxim for designers of international organizations was to avoid fundamental constitutional revision in favor of the "self-designing" organization, in which states, secretariat, and NGOs can allow practices to evolve as circumstances change (Haas 1990, 201). Such humility requires institutional designers to know what they can alter at the WTO, and what they cannot.

The Single Undertaking and consensus in conjunction with ever more multilateral negotiating modalities shape the institutional environment that affects every Member's strategy. New rules apply to all, which means that voice matters: all want to participate. While exit is difficult for any country, any Member can deny consensus, in principle if not in practice. All this creates more roles for small groups and coalitions, and a common need for transparency. The logic looks something like Box 4.

What, then, is the flaw in the logic – is it the absence of a forum for bargaining, especially among senior officials, or is something else broken in the WTO? My hypothesis is that good institutional design that contributes to effective and legitimate global governance must facilitate both *bargaining* over known interests and *learning* through arguing and deliberation. Is WTO institutional design appropriate?

*If negotiation is all about interests*, then the agenda is an institutional design choice: what must be in the Single Undertaking? are less-than-universal agreements appropriate? should there be differentiation among developing countries? The criteria in Box 1 imply that the WTO agenda must be limited to issues that are consistent with the objectives and principles of liberalization, and that negotiating modalities should be based on multilateralism and reciprocity. New agreements can support change in the world economy, but only where networks of officials learn to see the WTO as relevant. New rules are easiest to negotiate as horizontal amplifications of existing agreements, rather than as new vertical agreements. The criteria in Box 1 have to be met in assessing the existing agenda and proposals for additions. Some of these criteria relate to consistency with WTO norms – things Members cannot control or alter easily; others are about how interests can be aggregated into a deal.

It might be necessary to loosen the Single Undertaking straitjacket (variable geometry, differentiation), but only slightly. Early or partial harvests are a bad idea if they decrease pressures among Members to reach a deal. For example, the 2001 Doha package included a series of interim deadlines that aimed to build confidence by resolving issues of critical concern to developing countries, especially TRIPS and public health (Ismael 2005, 55). For some smaller developing Members, not fully understanding a round's dynamic, the receipt of such a package might have reduced their motivation to look for compromises on other issues. It follows that Members should see duty free/quota free access as part of the Single Undertaking: no country should get what it wants outside the Single Undertaking while remaining in a position to block inside.

*If learning also matters in negotiations*, then collective decision making that engages all Members requires consensual under-

standing, deliberation that makes effective bargaining legitimate, and domestic resonance. Is the complicated menu of institutional forms shown in Box 2 appropriate? Small, informal meetings can serve fundamental purposes, yet too much transparency too soon can kill frank discussions – and issues need to be ripe before ministers become engaged. The distinction between interests and learning has analytic utility, but if priority must be assigned, then constructivists think learning comes first. The agenda shapes a negotiation and alters the incentive structure, but the agenda itself emerges through discussion. After five and a half years, Members are still learning about what the Doha Single Undertaking must contain. It is better to build the agenda slowly and gradually. Members expected the Doha Round to be a quick sprint compared to the Uruguay Round, then flagellated themselves when it turned into a marathon. Their unnecessary haste might even have provoked some of the institutional reform debates, as some people began to think that things were moving too fast, that they were being railroaded.

The Doha Round's suspended animation notwithstanding, it would be a great mistake to think the WTO is finished. All the difficulties in the Doha negotiations, and all the tensions around Chinese textiles, European airplanes, and US genetically modified corn also notwithstanding, the trading system centered on the WTO is actually working rather well. It might not be efficient, but it is effective. What is striking about the WTO, whether Doha succeeds or not, is the enormous effort states are making to build on their common understanding of how the trading system hangs together, which shows how it shapes their self-understanding.

At the time of writing, no sensible person would confidently predict success or ultimate failure for Doha. Both are still possible, despite the expiration of the United States' "trade promo-



tion authority" in mid-2007.<sup>21</sup> Nor would one confidently predict that the agriculture impasse is the last of its kind – that another just as severe, on an issue not yet properly joined, was not just around the corner. The broad political and economic climate might not be propitious for a deal. The political economy of the Single Undertaking might not be right. In short, a deal might not be attainable this time, even if the WTO were the ideal institution for the purpose. What is clear is that any successful outcome will require a text. If Members cannot find a way to negotiate one, Doha will fail. Lamy may yet release a consolidated negotiating text on the basis of texts prepared by the chairs of the negotiating groups, but he clearly hopes Members will do it themselves.

The complex WTO process to hammer out a Single Undertaking package for the round appears to have foundered on one issue: finding consensus on reforming global farm trade. That goal, however, is anything but simple. Any deal must accommodate the interests of large commercial farmers in Europe and Brazil as well as those of small rice farmers in the Philippines and dairy farmers in eastern Canada. The current process has emerged as a means to help everybody learn about the issues and the technical complexities of possible solutions. At its periphery, it includes consultations with farm organizations. At its core are discussions among a small group of Members on the elements of a compromise. But any compromise must go beyond farmers. Agriculture might have too many groups, while other domains might have too few either to aggregate interests or to facilitate learning. The mechanisms to ensure transparency are working, but deliberation might be inadequate, resulting in (or from) insuf-

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<sup>21</sup> Trade promotion authority is the current legal name for the fast-track procedure introduced with the Trade Act of 1974

efficient consensual knowledge about causal relations. Some, evoking the limited analytic capacity of developing countries both in Geneva and their capitals, call it the "knowledge trap": the round might simply be too complex for most Members to follow, analyze, and comprehend. It is a useful fiction to see "negotiations" as meaning meetings attended by ministers; it is also harmful. The WTO needs a more sophisticated conception of how negotiations should involve economic actors, national governments, senior officials, ambassadors – and ministers.

Procedural improvements by themselves will not solve intractable policy disagreements on major issues, nor can they substitute for the willingness of Members to engage in the give and take of negotiations. The WTO's decisionmaking *principles* might well be suited to the plural global polity, even if its *practices* must keep evolving. The lessons that GATT Contracting Parties learned in the Tokyo Round on how to negotiate domestic issues contributed enormously to the success of the Uruguay Round. Similarly, the lessons now being learned in the Doha Round – on how to manage negotiations on old issues within a different structure of power and how to ensure all Members participate in the process – might also pay off only in a subsequent round. Moreover, codification is not the agreement itself; the journey matters as much as the destination. Just as hundreds of Soviet and US officials learned how to manage their nuclear standoff during the Cold War, even if their thousands of hours of meetings resulted in a small number of agreements (Nye 1987), so the engagement of thousands of officials in the WTO process is shaping the collective management of the global trading system, even when revisions to the WTO treaty prove elusive.

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