

REFLECTIONS ON MC13: THE PRESENT AND FUTURE OF THE WTO

BRIEFING PAPER 78 - MARCH 2024

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KEY POINTS

- The outcomes of the latest WTO Ministerial Conference (MC13) were modest, given the ambitious negotiating agenda and the lack of interest of key trade players in furthering multilateral trade rules.
- MC13 thus underscores the need to rethink the identity of the WTO to reflect how and why its Members negotiate to further trade cooperation in a divided world.
- MC13 also emphasises that ministerial conferences are only the tip of the iceberg of WTO negotiations. Consequently, instead of looking ahead to MC14 to make progress on trade issues, the focus should be on the current day-to-day work of delegates in Geneva.

INTRODUCTION

From 26 February to the early hours of 2 March 2024, ministers from all WTO Members met in Abu Dhabi to take stock of the past two years of negotiations and agree on the items in the MC13 agenda. Despite the high level of ambition, expectations were low given the current geopolitical context permeated by wars, trade tensions, inward-looking policies and upcoming elections in key countries like India and the US. These circumstances give rise to interests that may conflict with traditional notions of multilateral cooperation, for instance: domestic growth, protecting domestic markets and jobs, national security, strategic partnerships and friendshoring. The WTO does not exist in a vacuum and depends on what its Members are willing to do and concede. When governments' priorities lie elsewhere, very little can be achieved in the WTO.

MC13 OUTCOMES

WTO Members agreed on a ministerial declaration, which by itself is a political win – it shows the WTO is alive and Members recognise the value of negotiating outstanding issues.

The accession of two new Members – Comoros and Timor-Leste – shows the importance of the WTO, particularly for smaller economies seeking integration in global trade. Additionally, WTO Members decided on rules to support a smooth transition for countries graduating from

the least-developed country (LDC) category.¹ LDC is a classification created by the United Nations (UN) based on economic, social and environmental criteria to identify countries needing preferential trade concessions.² The agreed rules grant a phase-in period for countries to adjust to new obligations after their graduation. For instance, for three years after the UN General Assembly's decision on the LDC's graduation becomes effective, the graduated LDC would benefit from continued relaxed rules in dispute settlement. During the same period, the graduated LDC will also be eligible for LDC-specific technical assistance and capacity building under the WTO's Technical Assistance and Training Plan. The WTO Secretariat and Members are also instructed to continue discussing unaddressed disciplines wherein support measures could be extended, such as under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and the Trade Facilitation Agreement (TFA), issuing any recommendations by December 2024.

Members agreed on extending the moratorium on the application of customs duties on electronic transmissions until the next ministerial or 31 March 2026, whichever comes first. By then, Members will have to reach a consensus on a permanent solution for e-commerce tariffs or each Member can unilaterally and non-reciprocally choose to apply the moratorium. The moratorium began in 1998 as part of the Declaration on Global Electronic Commerce.³ Members agreed to continue their practice of not imposing customs duties on electronic transmissions, that is, a provisional moratorium until they could reach a permanent solution. This means that governments should not apply tariffs to e-books and streaming services and other intangible imports entering their territory. The moratorium should be renewed every two years, otherwise it would expire. The difficulty in extending the moratorium has been increasing with each ministerial conference due to concerns over the lack of clarity on the meaning of electronic transmissions, digital industrial policy, loss of revenues due to structural shifts in the trading system, and loss of policy space.⁴ On the other hand, these concerns are challenged by some studies⁵ and are in stark contrast to the ongoing informal negotiations on e-commerce, whereby some Members have proposed making the moratorium permanent.⁶ At MC13, objections came mostly from India, South Africa and Indonesia.⁷

India and South Africa, the main critics of the WTO joint initiatives (JIs), lifted their objections to the certification of schedules of commitments in services of 27 co-sponsors to Services Domestic Regulation (SDR). This means that the SDR rules have formally entered into force, despite some objections around the certification of the schedules of other co-sponsors and

¹ World Trade Organization, WTO Smooth Transition Support Measures in Favour of Countries Graduated from the LDC Category, WT/MIN(24)/34, 4 March 2024.

² UNCTAD, UN list of least developed countries. Available at <https://unctad.org/topic/least-developed-countries/list>. Last accessed on 20 March 2024.

³ World Trade Organization. Declaration on global electronic commerce, WT/MIN(98)/DEC/2, 25 May 1998.

⁴ Rashmi Banga, Growing trade in electronic transmissions: implications for the South, UNCTAD Research Paper 29, UNCTAD/SERV.RP/2019/1/Rev.1.

⁵ Hosuk-Lee Makiyama, ECIPE, The Economic Losses from Ending the WTO Moratorium on Electronic Transmissions, March 2019

⁶ World Trade Organization, WTO Electronic Commerce Negotiations – Draft Chair Text, INF/ECOM/85 15 January 2024.

⁷ World Trade Organization, Moratorium on customs duties on electronic transmissions: Need for clarity on its scope and impact. Communication from India and South Africa, WT/GC/W/833, November 2021; World Trade Organization, Work Programme on Electronic Commerce. Communication from India and Indonesia, WT/MIN(24)/W/7/Rev.1, 23 February 2024.

not all co-sponsors having added their new SDR commitments to their schedules. In particular, the UK's schedule faces challenges from Russia regarding the legal status of the UK's schedules post-Brexit.⁸ Currently, disciplines on SDR have become legally binding for 45 WTO Members as part of the commitments set out in their services schedules. However, this change of position by India and South Africa is a symbolic gesture that considers the reality of WTO dynamics. Since the new commitments in services add no obligations to – nor harm – the WTO Members outside of the JI on SDR, there are no legal grounds for challenging them before the WTO Dispute Settlement System (DSS). Additionally, opposing the certification would not restrain the proponents of the JI on SDR from applying their SDR commitments. India and South Africa have not changed their stance on the JIs more broadly. They still challenge the formal incorporation of the JIs rules into the WTO as Annex 4 agreements, as exemplified by the discussions on the Investment Facilitation for Development Agreement (IFDA) (see below).

⁸ Peter Ungphakorn, 'Objections dropped on services regulation say nothing about other plurilaterals', TradeβBlog, 28 February 2024.

Joint Initiatives and Annex 4 Agreements

The WTO's de facto rule of taking all decisions by consensus (despite the existence of voting procedures), has hindered meaningful legislative activity with very limited exceptions. As a result, Members willing to deliver on new topics are unable to do so, given different viewpoints and the possibility of vetoing decisions. Thus, in recent years, WTO Members have engaged in a variety of creative forms of law-making, mainly comprising informal, structured discussions – the joint initiatives (JIs).

At MC11, in 2017, groups of like-minded WTO Members co-sponsored joint statements on e-commerce, investment facilitation for development (IFDD), micro, small and medium-sized enterprises (MSMEs) and Services Domestic Regulation (SDR). Discussions under each have been progressing steadily with the IFDD and SDR disciplines ending recently. However, the JIs proponents are now facing the issue of how to integrate the new rules into the WTO regulatory framework. Article X:9 of the Marrakesh Agreement establishes that a plurilateral agreement can be added to its Annex 4 (and, therefore, becomes binding WTO law) by consensus. This means that while membership in these agreements is optional, they can only enter into force if all WTO Members so agree.

India and South Africa continue to block consensus for integrating the JIs into Annex 4 of the Marrakesh Agreement. As a result, proponents of the JIs have had to think of creative ways to incorporate the legal disciplines within the WTO legal framework. One such breakthrough came in the JI on SDR. These rules entail obligations to streamline qualification, licensing, and technical requirements, procedures and standards to simplify compliance with regulations on services trade and reduce their trade restrictiveness. The new commitments are contained in a “[reference paper](#)” (INF/SDR/2). The SDR co-sponsors modified their schedules of commitment on services, following the guidelines provided in the Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments (S/L/84), and have included the obligations in the reference paper as “additional commitments”. This process does not require non-JI members to concede anything or accept new obligations. The commitments must be applied on a non-discriminatory basis, which means that non-parties will also enjoy the benefits from streamlined procedures granted by the amended schedules.

Another option would be to turn the new rules into open plurilateral agreements, which are not regulated by the Marrakesh Agreement and do not require consensus. This means that, while the new obligations would only bind the governments adopting the JI agreements, the benefits would be extended to all WTO Members following the most-favoured nation (MFN) principle.⁹

⁹ L. Alan Winters and Bernard Hoekman, ‘WTO reform: Plurilateral Agreements’, UKTPO blog post, 13 January 2022. Available at: <https://blogs.sussex.ac.uk/uktpo/2022/01/13/wto-reform-plurilateral-agreements/>

Instead of highlighting the success of MC13, the outcomes listed above reveal its shortcomings. The lack of convergence on key issues of the negotiating agenda – agriculture, fisheries, and the reform of the dispute settlement system (DSS) – put a strain on the WTO negotiating function.

Agriculture has been a thorny issue at the WTO, particularly due to public stockholding for food security. This allows governments to stockpile and distribute agricultural products by way of government support – known as a minimum support price. At the Bali Ministerial in 2013, Members agreed to a [peace clause](#) not to initiate disputes regarding public stockholding programmes in developing countries until a permanent solution is found. India has been the loudest proponent of a permanent solution while its farm support is arguably highly trade-distorting. However, the permanent solution proposed by India was not acceptable to other Members, including the United States. In addition, agriculture negotiations also suffered from a lack of agreement over other matters, including market access. All these issues combined led to no outcome on agriculture at MC13, and, thus, the peace clause remains in effect.

Fisheries subsidies negotiations also failed. At MC12, Members agreed to the first tranche of the agreement whereby disciplines on subsidies for illegal, unreported and unregulated (IUU) fishing and overfished stocks were introduced. The Fisheries Subsidies Agreement (FSA) is a first of its kind at the WTO, as it stands at the intersection of sustainability and trade. It is awaiting the minimum number of ratifications to enter into force. Meanwhile, Members must complete the negotiations on the third and most critical pillar, i.e., subsidies for overcapacity and overfishing.

Subsidies that lead to overcapacity and overfishing are the most harmful from a sustainability perspective, and put pressure on Members to conclude negotiations on this topic as soon as possible. However, several issues prevented reaching a consensus. These involved, first, the disciplines on distant water fishing, with heavy subsidisers opposing the flat prohibition and instead proposing to subject them to sustainability-based flexibilities. Second, the provisions of special and differential treatment (SDT) for developing countries are controversial. The pending negotiations involve several issues: the length of a possible transition period for graduated LDCs; de minimis exemptions based on the developing country's share of global marine capture fishing; the transition period during which other developing countries would be exempt from the discipline; and the non-application of SDT to large subsidiser developing countries.

Finally, the WTO Appellate Body has been inoperative since 2020, raising discussions on reform of the WTO DSS more broadly. The US has repeatedly blocked the appointment of new Appellate Body members claiming the Appellate Body was overstepping its mandate as set by the Dispute Settlement Understanding (DSU). At MC12, Members agreed to deliver a reformed and fully functional DSS by 2024. The only statement on DSS reform emanating from MC13 related to taking stock of the progress made and accelerating discussions to meet the deadline. The reform discussions were taking place informally in Geneva, headed by the then Guatemalan Representative Marco Molina. A nearly 50-page draft consolidated text of the discussions was made public a few days before MC13, highlighting that the biggest

issue remaining was whether to have an appellate mechanism in the WTO. A two-tier review mechanism is non-negotiable in the eyes of many WTO Members, whereas some others find it more desirable. The confidentiality of the discussions makes it difficult to track the exact fault lines and their sources. Members have nine months to deliver on the MC12 mandate that would restore a fully functional DSS by the end of 2024. Yet, reaching an outcome by then seems unlikely.

With so many conflicting interests, questioning whether the WTO is fit for purpose has become a common topic of discussion. At the same time, the future of the WTO is under intense scrutiny. Our reflections add two main arguments to the debate. Firstly, of all the crises the WTO currently faces, the biggest – from which all the others stem – concerns its identity. This means that we need a new normative framework to comprehend the WTO decision-making process, as well as how and why Members negotiate. Secondly, MC13 says more about the present than the future of the WTO.

Changing identity: A new normative framework for the multilateral trade regime

What we understand by international trade today is not the same as it was in 1995. As a result, how and why countries negotiate trade has also changed. When the WTO was created, the main goal was to secure market-access concessions through shallow integration. Nowadays, WTO Members are discussing broader issues that affect trade and are impacted by it, such as fisheries, plastic pollution and data governance. These matters were traditionally the preserve of domestic regulatory policies and, consequently, politically sensitive. They also steer the trade regime toward regulatory cooperation and coherence, requiring new ways of negotiating multilateral trade rules and settling trade disputes.

In this context, one important step is strengthening the bond between multilateral decision-making and domestic stakeholders. This has been a long-standing challenge in the WTO decision-making system to address behind-the-border measures. Members cannot deliver on these new issues at a higher level without taking into account the human aspect of trade. When people's concerns revolve around making ends meet, due to successive economic crises, a pandemic, and wars – while domestic inward policies try to answer these needs – Members should consider ways to bring multilateral negotiations closer to domestic constituents. Closing this gap will allow the WTO to assess the impact of new disciplines and gather support for them, improving the legitimacy of existing discussions and possible outcomes. This is crucial to prevent the spread of trade-distorting policies and introduce new rules and topics to the WTO regime.

Mini-ministerials, for instance, are a good tool to improve the participation of ministers in the discussions, bringing the negotiations in Geneva closer to domestic debates and interests.¹⁰ These meetings involve a representative group of WTO Members and are not formally part of the WTO framework. The goal of mini-ministerials is to find convergence to build consensus, rather than making decisions. WTO committees and the JIs have also played an important role in connecting delegates, government officials, domestic regulators, civil society and the

¹⁰ Robert Wolfe, 'Informal Political Engagement in the WTO: Are Mini-Ministerials a Good Idea?' in John Curtis and Dan Ciuriak, Trade policy research 2004 (Dept of Foreign Affairs and International Trade 2004) 56–57.

private sector by promoting thematic sessions¹¹ and informal meetings where expert stakeholders inform the discussions. Delegates can then better assess the impact of rules and the challenges in implementing them by analysing the evidence gathered. The negotiations of the Trade Facilitation Agreement (TFA) provide another example: delegates and experts visited key ports and capitals to assess the impact of the proposed measures on countries.¹²

Similarly, the power dynamics in the WTO have changed. Emerging economies using WTO rules and procedures in their favour are challenging the structural power of traditional players, such as the US and the EU. While India and China largely seek to defend the status quo against new concessions, the US and the EU are growing critical of the multilateral trading system. However, the latter countries can no longer pre-cook deals ahead of a ministerial conference without the support of the former Members. For example, MC13 revealed that the EU proposal on trade and industrial policy, to discuss government programmes granting subsidies to key industries, was blocked by India and South Africa.¹³ These countries argue that industrial policy is a broad term encompassing elements that do not affect trade and could limit policy space.¹⁴

During MC13, a group of more than 60 developing countries, including Brazil and South Africa, expressed support to promote a dialogue on trade and environment in the WTO, as opposed to unilateral measures. They issued a ministerial declaration highlighting how the multilateral trading system can help address environmental challenges.¹⁵ This document is a strong response against unilateral policies, such as carbon adjustment mechanisms, which those countries fear have protectionist effects. Yet, such initiative was not supported by China and India. This shows that emerging economies cannot find a middle ground, unlike during the height of the G20 (the WTO coalition of developing nations). This coalition allowed developing countries to protect their development interests in agriculture negotiations. The strategy adopted by the G20 leaders – Brazil, India, and later on China – to preserve its cohesion contributed to the success of the coalition, especially during its earlier years.¹⁶ Indeed, the G20 power stemmed first from the concerted position among its leaders and the reconciliation of the different needs of its members through intra-group deals.¹⁷ Brazil –

¹¹ Robert Wolfe, 'Informal Learning and WTO Renewal Using Thematic Sessions to Create More Opportunities for Dialogue' (2021) 12 *Global Policy* 30.

¹² Manzoor Ahmad, 'Trade Facilitation - Negotiations towards a Win-Win Outcome' in Pradeep S Mehta and others (eds), *Reflections from the frontline: developing country negotiators in the WTO* (Published by Academic Foundation in association with CUTS International 2012) 125.

¹³ European Commission, 'EU secures results at WTO Ministerial but important work remains to reform global trade rulebook', 1 March 2024.

¹⁴ Business Standard, 'WTO MC13: India Blocks EU Proposal to Link Trade with Industrial Policy' (4 March 2024) <https://www.business-standard.com/economy/news/india-blocks-eu-proposal-to-link-trade-with-industrial-policy-at-wto-mc13-124030400933_1.html> accessed 14 March 2024.

¹⁵ World Trade Organization, 'Ministerial Declaration on the Contribution of the Multilateral Trading System to Tackle Environmental Challenges, WT/MIN(24)/28'.

¹⁶ Ujal Singh Bhatia, 'G20 - Combining Substance with Solidarity and Leadership' in Pradeep S Mehta and others (eds), *Reflections from the frontline: developing country negotiators in the WTO* (Published by Academic Foundation in association with CUTS International 2012) 240.

¹⁷ Amrita Narlikar and Diana Tussie, 'The G20 at the Cancun Ministerial: Developing Countries and Their Evolving Coalitions in the WTO' (2004) 27 *World Economy* 947, 960–961; Vinod Rege, 'Developing Countries in the WTO Negotiations: Moving from the Margins to the Middle' in Pradeep S Mehta and others (eds), *Reflections from the*

favouring market access and liberalisation in agriculture – and India – adopting a defensive stance in the sector –¹⁸ found a middle ground to accommodate their differences.¹⁹ Their cooperation was beneficial for both countries beyond agriculture negotiations. Coordinating with India gave Brazil credibility as a leader of the Global South in the WTO. Likewise, India relied on Brazil to strengthen its resistance against developed Members, for often the country found itself isolated given its negotiating positions.²⁰ However, after the Doha deadlock, Brazil and India, by then consolidated as major trade players, have departed from their previous cooperation. Their relationship was rather fragile due to mutual suspicion.²¹ With no common threat to their positions, Brazil and India appear to have little incentive to coordinate efforts. Instead, coordination has given place to rising geopolitical tensions.²²

The WTO was designed to work for a handful of relatively homogenous Members making the decisions. The growing number of key players in the WTO challenges negotiations. This is particularly true when Members focus on their divergences instead of trying to bridge their conflicting interests. Countries perceive different threats to the multilateral trading system – some think departing from formal procedures and the Doha Development Agenda (DDA) may weaken their policy space and the WTO. Others believe that the failure to act to regulate pressing issues will render the institution irrelevant. Still, other Members see the WTO as a threat, disengaging from multilateral rulemaking. As the section below argues, Members need to find new ways to cooperate.

The present and future of the WTO

There are several trade issues that Members should attempt to deliver by MC14. These include: reforming the DSS, securing the minimum number of ratifications required for the FSA to come into force, agreeing on the second wave of rules on fisheries, finding convergence on agriculture and environmental issues, incorporating the JIs rules into the WTO rulebook, and improving disciplines on subsidies and national security to address growing concerns over industrial policies and trade conflicts. Yet, instead of looking at MC14, the focus should be on the two years of preparation that lead up to it.

Ministerial conferences are only the tip of the iceberg of WTO negotiations.²³ The day-to-day activities of committees and meetings in the WTO reveal an immense amount of work that usually goes unnoticed. Emerging literature has focused on the different tools that guide and

frontline: developing country negotiators in the WTO (Published by Academic Foundation in association with CUTS International 2012) 30–32.

¹⁸ Kristen Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (Stanford University Press 2016) 84–85.

¹⁹ Roberto Azevêdo and Braz Baracuh, 'Agriculture - At the Centre of DDA Negotiations' in Pradeep S Mehta and others (eds), *Reflections from the frontline: developing country negotiators in the WTO* (Published by Academic Foundation in association with CUTS International 2012) 61.

²⁰ Hopewell (n 18) 85–86.

²¹ *ibid* 86–87.

²² Gregory Shaffer, *Emerging Powers and the World Trading System: The Past and Future of International Economic Law* (1st edn, CUP 2021) 70.

²³ Xinquan Tu and Robert Wolfe, 'Reviving the Negotiation Function of the WTO: Why the Onus Falls on the Three Major Powers' in Bernard M Hoekman, Xinquan Tu and Dong Wang (eds), *Rebooting multilateral trade cooperation: perspectives from China and Europe* (CEPR Press 2021) 31.

are developed through Members' deliberation in WTO committees.²⁴ For example, specific trade concerns (STCs) are a soft law mechanism developed as an alternative to initiating a dispute before the WTO DSS. Members resort to STCs in the TBT and SPS committees to discuss and request more information about a specific measure that may be in breach of WTO obligations. This routine work is also present in the WTO negotiations and is more important than ever to overcoming political divergences and promoting a pragmatic turn. Indeed, negotiations in the WTO happen in a plethora of configurations and places, ranging from coffee breaks and bilateral talks, to General Council and committee meetings, also covering informal meetings such as in the context of coalitions and small groups.

Consensus is at the core of the WTO decision-making system, in which a decision will only be adopted if none of the WTO Members vetoes it. Even with the criticisms and challenges faced by the consensus rule, most of the WTO Members agree that this principle promotes an inclusive and legitimate decision-making process. Removing consensus would limit the space for Members to express their interests and needs. It would also underline the gap between winners and losers. In this context, seeking alternatives in the WTO can yield important changes. The Marrakesh Agreement offers Members leeway to develop new practices and find creative solutions to overcome negotiating challenges. For instance, there is little regulation in the WTO regarding the functioning of its committees. In fact, they have evolved mostly through Members' practices when deliberating, without the need for consensus.

In the negotiating function, the Nairobi Ministerial Declaration paved the way for the inclusion of new topics in the WTO negotiations and the pursuit of new approaches to conduct them.²⁵ Despite a focus on the remaining Doha issues, some countries were willing to identify and discuss other trade topics – the launch of multilateral negotiations depending on consensus.²⁶ Such a stance meant that WTO Members could start addressing topics outside the DDA or the WTO built-in agenda, no longer fully accepting Doha's negotiating methodology. Some Members shared the understanding that the WTO should promote novel approaches to advance trade negotiations.²⁷ This further shows the interest of some countries in holding continuous negotiations in the daily work of the WTO, instead of the simultaneous negotiating processes of interdependent topics in a trade round.²⁸ Likewise, the Nairobi Ministerial

²⁴ Marianna B Karttunen, *Transparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown* (CUP 2020); Fabian Bohnenberger, 'What Is the "Regular Work"? Constructing and Contesting Everyday Committee Practices in the World Trade Organization' [2021] *Review of International Political Economy* 1; Wolfe, 'Informal Learning and WTO Renewal Using Thematic Sessions to Create More Opportunities for Dialogue' (n 11); Robert Wolfe, 'Reforming WTO Conflict Management: Why and How to Improve the Use of "Specific Trade Concerns"' (2020) 23 *Journal of International Economic Law* 817; Kateryna Holzer, 'Addressing Tensions and Avoiding Disputes: Specific Trade Concerns in the TBT Committee', vol 2018/11 (World Trade Organization 2018) WTO Working Papers 2018/11 <<https://www.wto-ilibrary.org/content/papers/25189808/229>> accessed 17 July 2023; Henrik Horn, Petros C Mavroidis and Erik Wijkström, 'In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees' [2013] *Research Institute of Industrial Economics IFN Working Paper n. 960*, 2013; Columbia University Law School, *The Center for Law & Economic Studies Working Paper n. 494*; A Lang and J Scott, 'The Hidden World of WTO Governance' (2009) 20 *European Journal of International Law* 575.

²⁵ Rudolf Adlung and Hamid Mamdouh, 'Plurilateral Trade Agreements: An Escape Route for the WTO?' [2017] WTO Working Paper ERSD-2017-03 1, 3; Bernard M Hoekman and Petros C Mavroidis, 'MFN Clubs and Scheduling Additional Commitments in the GATT: Learning from the GATS' EUI Working Paper RSCAS 2016/06 1, 15.

²⁶ World Trade Organization, 'Nairobi Ministerial Declaration, WT/MIN(15)/DEC' para 34.

²⁷ *ibid* 30–31.

²⁸ Rege (n 17) 47.

Declaration stressed that, notwithstanding the primacy of multilateral efforts, in the past Members have successfully used plurilateral formats in the WTO.²⁹

In this context, Members have developed two important negotiating tools: the critical mass and ‘open plurilaterals’. In the absence of consensus, WTO Members use critical mass to reach substantive rules by implementing the outcomes of a given negotiation, while allowing more Members to join later. To achieve critical mass, an initiative warrants the support of a broader membership, taking into account both the number of participants and their global market share.³⁰ Critical mass is not regulated by WTO rules and its outcomes fall under a plurilateral alternative that does not require consensus. This constitutes the ‘open plurilaterals’³¹ or ‘unconditional plurilaterals’,³² as opposed to the ‘exclusive plurilaterals’³³ in Annex 4. Only Members participating in these efforts are bound by the new rules, whereas the MFN principle applies to any advantage granted thereof.³⁴ Hence, the new commitments should not violate existing WTO rights and obligations, and any WTO Member could join the initiatives at any point. This rationale was used for the approval of the [Reference Paper on basic telecommunications](#), which sets regulatory principles for the telecommunications sector. Through certification, more than 90 Members incorporated this document into their schedules of commitments on services.³⁵ Likewise, 82 participants - accounting for 97% of world trade in IT products³⁶ - committed to eliminating tariffs on the covered products by concluding the [Information Technology Agreement \(ITA\)](#). The rules were implemented through the certification of individual tariff schedules for the relevant goods.³⁷

Flexibility is crucial for the function and relevance of the WTO, as demonstrated by two recent examples. Firstly, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) preserves the two-tier process in the WTO DSS for any country joining the mechanism. This is particularly relevant since a permanent solution for the Appellate Body crisis seems unlikely in the near future, given the different interests at stake in the DSS reform talks and the US presidential election. Secondly, the JIs have introduced discussions on pressing issues that need multilateral regulation. The novelty brought by the JIs is not limited to the substance of the negotiations. These initiatives have sparked discussions on a wide array of negotiating tools such as the above-mentioned critical mass, open plurilaterals and schedules of commitments. Far from undermining the consensus rule and the multilateral nature of the WTO, these efforts show that the WTO can use different deliberative and negotiating tools that complement each other to deliver on trade issues.

²⁹ World Trade Organization, ‘Nairobi Ministerial Declaration, WT/MIN(15)/DEC’ (n 26) para 19.

³⁰ Adlung and Mamdouh (n 25) 5.

³¹ *ibid* 8.

³² Brendan Vickers, ‘The Relationship between Plurilateral Approaches and the Trade Round’ [2014] E15Initiative. International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 3.

³³ Adlung and Mamdouh (n 25) 5.

³⁴ Hunter Nottage and Thomas Sebastian, ‘Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law’ (2006) 9 JIEL 989, 1013–14; Adlung and Mamdouh (n 25) 8.

³⁵ Adlung and Mamdouh (n 25) 8.

³⁶ World Trade Organization, ‘Information Technology Agreement’

<https://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm>; Members agreed on the expansion of the ITA in the Nairobi Ministerial: World Trade Organization, ‘Ministerial Declaration on the Expansion of Trade in Information Technology Products WT/MIN(15)/25’.

³⁷ Adlung and Mamdouh (n 25) 8.

In sum, despite the expectations of a 'reform Ministerial', reports show that little was discussed on WTO reform at MC13. Examining what Members are currently doing with some level of success in Geneva may guide the reform the WTO really needs.

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FURTHER INFORMATION

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ISBN 978-1-912044-44-3

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