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The WTO's 13th Ministerial Conference: A Failed Attempt at Remaking the Organization

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1 Minor Outcomes and Major Process Challenges

The World Trade Organization's 13th Ministerial Conference (MC13), held in Abu Dhabi on 26 February–2 March 2024, was primarily about setting the WTO on a remake course, through which some of the main developed Member States aimed at eventually expanding the rule-making agenda of the organization while 'flexibilizing' the basis of decision-making underpinning the WTO's negotiation function. The post-MC13 period is expected to witness a continuation of these attempts that would unfold in multiple forms and negotiation areas, with a view towards changing the organization's practices and its decision-making methods. In this context, developing countries are still fighting for outcomes on longstanding negotiation mandates of importance to them and which the WTO has failed to deliver thus far, including a permanent solution on public stockholding programmes and a review of special and differential treatment.

MC13 has been characterized as a failure in delivering on the main longstanding negotiation issues on its agenda, mainly agriculture and fisheries subsidies.[1] It also failed to deliver substantive outcomes on the new negotiation mandates agreed at MC12, namely dispute settlement reform and WTO reform more broadly. What resulted was a shallow ministerial outcome document and inconsequential decisions on dispute settlement reform and special and differential treatment.

The MC13 outcomes also included a decision pertaining to a work programme on small economies that does not extend beyond the mandated work that existed prior to MC13,[2] and a decision pertaining to transition

periods for countries graduated from the least-developed-country (LDC) category[3] which offers continued benefit from the application of the special procedures involving LDCs set out in Article 24 of the Dispute Settlement Understanding and provides for eligibility to be considered for LDC-specific technical assistance and capacity building for a meagre three years after graduation. However, the graduating LDCs are not offered the continued benefit from the more substantive list of special LDC provisions in WTO agreements and decisions which they have been calling for and which remains an issue on which negotiations are supposed to continue post-MC13.[4]

MC13 also adopted a ministerial declaration on strengthening regulatory cooperation to reduce technical barriers to trade (TBT).[5] The draft declaration had been presented to the ministerial by a group of developed and developing Member States.[6] While this decision did not garner as much attention during or after the ministerial, it does set new grounds for the WTO's TBT Committee to expand its work on regulatory coherence and convergence, including on what is referred to in the declaration as "immediate and emerging regulatory challenges, including but not limited to the areas of climate change, sustainable development, digital economy, and human health…". Development-related considerations are absent from the declaration, although regulatory frameworks are closely intertwined with the level of development of a country.

The moratorium on customs duties on electronic transmissions was renewed after intense negotiations and last-minute holdouts, but with conditions distinguished from previous instances of renewal. For part of the meeting, the renewal was linked with progress on agriculture.[7] In their eventual decision, ministers agreed to "maintain the current practice of not imposing customs duties on electronic transmissions until the 14th Session of the Ministerial Conference or 31 March 2026, whichever is earlier", and decided that "the moratorium and the Work Programme will expire on that date".[8] In this regard, the MC13 decision is unlike previous ministerial decisions in that it couples the expiry of the moratorium with the expiry of the Work

Programme on Electronic Commerce, in which developing countries have increasingly shown interest.

The MC12 decision on the topic provided that "the moratorium will expire on [the said] date unless Ministers or the General Council take a decision to extend". While the MC13 decision is worded differently, there is nothing in it that precludes a decision by the WTO General Council or by ministers at MC14 to further extend the moratorium. This means that the decision emerging from MC13 does not substantively differ much from previous ministerial decisions on the matter. The difference will lie in the eventual positions to be taken by concerned Members. It was clear at MC13 that a larger number of developing countries were seriously concerned with the implications of the moratorium.

The renewal of the moratorium on TRIPS non-violation and situation complaints, which is usually linked to the renewal of the moratorium on customs duties on electronic transmissions, was handled separately at MC13. Its renewal resulted from a last-minute push from a number of developing countries that sought to put the issue on the agenda of the closing session of MC13.[9]

Pressures and oppression faced by civil society organizations

What might mark MC13 most negatively is the severe oppressive environment that the host created for civil society organizations, which were not allowed to undertake the usual work they do at WTO ministerial conferences, including engaging with delegations and the press, providing their analysis and views on the negotiation issues, and holding press briefings and other related activities during the conference.[10] Groups pointed to how they were isolated from delegations and banned from distributing papers, and registered instances when civil society participants were arbitrarily detained for handing out press releases.[11]

Professor Jane Kelsey noted in a press release that she had been to almost every WTO ministerial conference, yet "[n]ever before have I seen this level of repression of those who are registered as NGOs. This has crippled our ability to do our job of making concerns and analysis on the substance of negotiations known to delegates, and for grassroots NGOs to speak for those directly affected".[12] The WTO secretariat was perceived to have failed to live up to its responsibility to ensure that civil society had the ability to be represented at the Ministerial Conference. Civil society group representatives present at MC13 pointed out that "there is no evidence that the WTO Secretariat has worked to ensure that civil society can participate in this process in the ways they have for all past ministerials".[13]

Other procedural issues at MC13

The way procedural matters are handled at the WTO is core to the functioning and effectiveness of the multilateral trading system and plays a significant role in determining substantive outcomes in the negotiations. The latest ministerial did not differ much from previous ones in terms of the overloaded agenda that required a postponement of the closing ceremony by two additional days. This meant that talks continued without several ministers who were unwilling or unable to push back their travel plans. The holding of small meetings (or so-called "green rooms") among just a few delegations often selected by the secretariat, late-night meetings, and the inability of many delegations to effectively cover the multiple parallel meetings taking place on key negotiation issues were problematic features of MC13, as has been the case in previous WTO ministerial conferences.

Among the major procedural issues arising during MC13 was the role of the Director-General (DG) – head of the WTO secretariat – and the questions around the neutrality of her office. For example, in a press briefing on the investment facilitation (IF) agreement, which faces objections from WTO Members such as India and South Africa, the Minister of South Korea (co-chairing the IF initiative and co-sponsor of the agreement) pointed out that the WTO secretariat was trying to persuade opponents to drop the opposition

to the agreement. It was pointed out in an exchange between civil society groups and the Director-General that legally such action falls in tension with the mandate of the DG as stipulated under the Marrakesh Agreement Establishing the WTO, which requires that the DG and the secretariat's staff, in the discharge of their duties, "shall not seek or accept instructions from any government or any other authority external to the WTO … [and] shall refrain from any action that might adversely reflect on their position as international officials", thus requiring neutrality in their role as international public servants.[14]

It was reported that a number of Latin American countries found it necessary to address a letter to the Chair of MC13 and the DG to underline the importance of preserving transparency and inclusivity and the effective involvement of all WTO Members in all negotiation processes within the framework of the Ministerial Conference. They also stressed the necessity for Members to have adequate and sufficient time to properly consider any package of results intended to be submitted for approval at the Ministerial Conference.

2 The Ministerial Outcome Document and the Fight to Expand the Agenda of the WTO

The MC13 ministerial outcome document, the Abu Dhabi Ministerial Declaration, was the subject of long and challenging negotiations that commenced in Geneva and carried on to Abu Dhabi. The draft that was raised for the ministers' consideration in Abu Dhabi was significantly imbalanced.[15] It included language aimed at introducing new mandates, thus expanding the WTO's rule-making agenda, and recognition of new methods of work at the WTO that would primarily advance the interests of developed countries on WTO reform. In the negotiations held in Geneva before the Ministerial Conference, the notions of "flexible" decision making and "responsible consensus" were proposed by certain Members.[16] Such concepts would contribute towards altering the basis of the decision-making practice at the WTO, which is rooted in consensus as stipulated in the Marrakesh Agreement. This change is sought with a view to facilitating the adoption of new plurilateral agreements under the WTO, especially from among the ongoing "joint statement initiatives" such as that on investment facilitation.[17]

The paragraphs of the draft text[18] that addressed WTO reform and the future work at the WTO were replete with open-ended terminology which, if adopted, was likely to have far-reaching implications in terms of expanding the agenda of work at the WTO and bringing in fundamental changes to the institutional architecture of the WTO. The draft included very shallow language on development that merely restated existing language and failed to reaffirm longstanding mandates such as that on strengthening special and differential treatment (deriving from paragraph 44 of the Doha Ministerial

Declaration). Much of the language of importance for developing countries was relayed to an annex on which negotiations were supposed to continue at the Ministerial Conference.[19] Developing countries had to fight to ensure inclusion in the final declaration of a paragraph on the continuation of work on the existing mandate to improve the application of special and differential treatment in the special session of the Committee on Trade and Development (CTD-SS) and other relevant venues in the WTO.[20]

Reference to "different aspects of the inclusiveness agenda" was proposed repeatedly. If accepted, it would have provided a basis to argue that the WTO Members agreed to address an open-ended list of trade-related issues such as labour, climate and gender, among others.[21] There is no common understanding among WTO Members on what the term "trade inclusiveness" means. This wording could be read as overlapping with issues that are promoted through non-mandated plurilateral joint statement initiatives, such as those on women's economic empowerment and micro, small and medium-sized enterprises (MSMEs).

The European Union (EU) was keen on the use of the term "deliberate". It is a word that does not have an established meaning in the WTO and could create new reference points to justify digressing from what is provided under the Marrakesh Agreement pertaining to decision making on negotiation mandates. It would effectively bring in an additional step in the chain of putting matters on the WTO agenda and incubating negotiations without needing a mandate, including possibly matters that have previously been rejected or deferred subject to mandates. While there is nothing to stop Members having discussions among themselves, there has to be a legitimate process based on WTO rules before such discussions can be turned into negotiations that are formally covered under the WTO activities and that can avail of WTO resources and budget plus secretariat support.

The paragraphs proposed on economic empowerment and women's participation in trade and on MSMEs were much more detailed in comparison to the references made to these issues in the MC12 ministerial

outcome document. Intense discussions were held on these issues, as some Members seemed to be keen on expanding the WTO negotiation mandates to cover these issues, while others were not supportive of such a step. The final declaration provides for a footnote to the paragraphs tackling women's economic empowerment and MSMEs stating that "[t]hese are general messages on cross-cutting issues that do not change the rights or obligations of WTO Members and do not relate to any Joint Statement Initiatives".

The final declaration includes two paragraphs pertaining to responses to crises.[22] One paragraph "encourage[s] relevant WTO bodies to continue Member-driven work, aimed at supporting resilience and disaster preparedness". It recognizes the need for more work at the WTO to help build resilience and capacity to respond to challenges emanating from global and domestic crises, especially in developing Members including LDCs. While this wording does not provide for a specific mandate with clear deliverables, it could serve as a basis to pursue work on the proposal submitted by Pakistan in July 2023 entitled "WTO Action to Assist Developing Countries and LDCs in Crisis Response".[23] The second paragraph recalls the MC12 Declaration on the "WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics" and encourages the relevant WTO bodies to continue their work as directed by the Declaration.

The negotiations on the Abu Dhabi Ministerial Declaration witnessed a contentious debate on how to approach the work on trade and environment. Some Members were seeking broad language pertaining to work on trade and climate change. The DG even interfered actively in this debate, unlike usual practice whereby negotiations remain among Member States, and proposed her own language on the paragraph pertaining to trade and environment.[24] Several developing and least-developed countries opposed the inclusion of climate change issues in the WTO negotiations. It can be noted that a number of developing countries released their own ministerial declaration on the contribution of the multilateral trading system to tackling environmental challenges.[25] In this declaration, and among other elements, the signatories called "on all Members to refrain from imposing of [sic] unilateral trade-

related environmental measures that create unnecessary obstacles to trade or arbitrary or unjustifiable discrimination between countries".[26] They committed to "promote a coherent, open, member-driven, consensus-based, and inclusive approach in the discussion of trade and environment issues that arise across WTO bodies" and to "reinvigorate the discussions on trade and technology transfer, including of environmentally sound technology across multiple WTO bodies".[27] Due to the differences among the Membership, the final paragraph 15 of the Abu Dhabi Ministerial Declaration merely recalls the Marrakesh Agreement objectives, recognizes the possible contribution of the multilateral trading system towards the achievement of the UN 2030 Agenda and its Sustainable Development Goals in so far as they relate to the WTO mandate, and underscores the importance of trade and sustainable development in its three pillars – economic, social and environmental.

A major ask by developing countries, particularly the African Group, pertained to a paragraph on policy space for industrial development, which was based on the multiple proposals that the Group had presented at the WTO since MC12.[28] The African Group sought to establish a mandate to examine the effect of WTO agreements on the industrialization, economic diversification and structural transformation of developing Members, including LDCs, and to assess challenges presented by WTO rules and consider how to address them. The Group's proposals had shown how certain WTO rules, such as under the Agreement on Trade-Related Investment Measures (TRIMs) and the Agreement on Subsidies and Countervailing Measures, have constrained many developing countries from pursuing policies for economic development. The Group had underlined that developing countries and LDCs require particular flexibilities in order to build resilience and capacity to respond to compounded crises and pursue economic development. Its proposals made the point that policy space for development is a longstanding issue of concern for developing countries and LDCs, and there is an urgency to deliver in this regard.

The European Union, supported by other developed countries like Canada and Australia, attempted to negotiate a trade-off against this ask

by proposing work on "trade and industrial policy". They wanted the establishment of a temporary Working Party to organize regular dedicated discussions on this issue and "provide a forum for Members" to, among other things, examine the different types of policy tools or measures being used by Members and their impact on global trade and investment, address transparency, and whether WTO rules need to be improved or developed.[29] This in effect would have established a new mandate that would in practice involve monitoring of an open-ended category of policies and measures undertaken by WTO Members that potentially have an impact on trade and investment. This would extend beyond the policies and measures that fall under the realm of WTO rules and related commitments and commensurate obligations by Members. It would also invoke the issue of investment, which is distinct from trade, and bring it under the umbrella of a WTO body. Thus, in effect, it would bring "investment" under formal mandates given by the Ministerial Conference. The language suggested that "the Working Party, as appropriate, propose initiatives, concrete actions, or recommendations for future work", which would have given the proposed Working Party an open-ended mandate to propose new rules and disciplines on any of the issues that could potentially fall under its very broad scope of work.

Neither the proposition of the African Group nor that of the European Union made it into the final text of the Abu Dhabi Ministerial Declaration. The negotiations reflected the deep divisions of views among Members on how the WTO could contribute to issues pertaining to industrialization. The African Group and other developing countries are focused on the need for revising the application of certain existing WTO rules to developing countries and LDCs, particularly those rules that heavily impinge on their policy space and hinder their industrialization, economic diversification and structural transformation. The EU and other developed economies are focused on expanding the WTO rulebook, including on industrial subsidies.

3 Hollow Decision in the Name of "Development"

Developing countries still seek meaningful deliverables on the mandate to strengthen special and differential treatment, which derives from the 2001 Doha Ministerial Declaration (paragraph 44) and was subsequently reaffirmed in several instances, the latest of which was the MC12 ministerial outcome document (paragraph 2). The G90 developing-country grouping has over the years submitted, revised and resubmitted multiple times its proposals to strengthen and make more operational the special and differential treatment provisions in the WTO agreements.

What resulted from MC13 – in the form of a "Declaration on the Precise, Effective and Operational Implementation of Special and Differential Treatment Provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade"[30] – is effectively hollow and devoid of meaningfully operational elements. It merely "[r]equest[s] improvements in training and technical assistance" in relation to "timely engagement on SPS [sanitary and phytosanitary] and TBT matters", without identifying who carries the obligation to undertake these improvements, and "[i]nstruct[s] officials to continue work in the CTD SS, the SPS Committee and the TBT Committee, towards enhancing the implementation of S&DT [special and differential treatment] for developing Members…".

The WTO reported on its website that "Ministers adopted a Ministerial Decision that responds to a 23-year-old mandate to review special and differential treatment (S&DT) provisions for developing and least developed

countries (LDCs) with a view to making them more precise, effective and operational". The website quoted the WTO DG as saying, "This is a win for development, one that will help enable developing countries, especially LDCs, fulfil their WTO commitments, exercise their rights and better integrate into global trade."[31] Casting this decision as a "development" outcome from MC13 is a false premise and in effect undermines the potential for a genuinely meaningful outcome on this longstanding mandate.

The preparatory months pre-MC13 also witnessed an attempt by some developed countries to argue that the "development" agenda under WTO law concerns outcomes for all Members rather than being an agenda focused on developing countries and LDCs as was the case in the Doha Development Agenda. This came as part of a strong push to redefine how WTO rules relate to development and the terms of engagement on development, whereby certain developed countries wanted to move the focus to governance of domestic economies within countries rather than governance of cross-border trade. There has also been a push towards differentiation among developing countries in an attempt to restrict some of the bigger developing economies from claiming S&DT. Meanwhile, issues pertaining to the development gap and how to enable catch-up policies that help address persistent poverty and respond to the emerging need for green and sustainable transformations continue to be sidelined. This confrontation over how development concerns are tackled at the WTO is expected to continue post-MC13, influencing which negotiation issues get addressed.

4 Dispute Settlement Reform in a Stalemate

Dispute settlement reform is another mandated area where no progress was achieved at MC13. A separate decision on dispute settlement reform was released,[32] the content of which could have easily been integrated as a short paragraph in the Abu Dhabi Ministerial Declaration. It was not completely clear why a separate decision had to be issued besides the fact that it could be held up as one specific additional outcome from MC13 apart from the main Ministerial Declaration.

This decision does not provide much substantive advancement on the MC12 mandate to reform the dispute settlement function of the WTO. Notably, the decision remains silent on the restoration of the Appellate Body (AB)'s functioning, a demand by the majority of WTO Members except for the United States. While a main issue of discussion at MC13 was the launch of a formal negotiation process to fulfil the MC12 mandate on dispute settlement reform, this issue was not explicitly addressed in the resulting decision.

The criticized "informal discussions" on dispute settlement reform

Up until MC13, the issue of dispute settlement reform was tackled in an informal context. Several developing countries that participated in the "informal discussions" criticized the process that was set in place to take forward the work done under the preceding two-year US-led discussions on the matter. The informal process significantly departed from the usual practice at the WTO and raised systemic and procedural issues, particularly

because most developing countries were unable to fully and effectively participate in these discussions given the methods of work adopted.

The informal process was not based on multilateral, Member-driven, consensus-based procedures. Its facilitator was not chosen through a multilateral and inclusive selection process and thus was not formally mandated by the WTO Members. Due to the way the process was organized (including how meetings were configured and held, agendas decided, and substantive discussions pursued), multiple challenges emerged in regard to inclusivity, transparency and accountability towards the WTO Membership. It can be noted that the advancement of the work was not recorded in official written WTO reports accessible to all WTO Members, as is usual practice. While a consolidated negotiation text was sought to be drawn up, there were no written formal substantive submissions by the WTO Members based on which this text of the informal discussions was built.

Developing countries have pointed out procedural concerns and asked for commencement of a formal multilateral process, preferably conducted by the General Council and/or the Dispute Settlement Body (DSB) and guided by the DSB Chair.[33] These calls have been for long marginalized, although the MC12 mandate on reform of the WTO provided that this work shall be conducted by the General Council and its subsidiary bodies and be "Member-driven, open, transparent, inclusive, and must address the interests of all Members, including development issues".[34]

Despite the above concerns, there were attempts to proclaim the informal discussions on dispute settlement as a successful inclusive process, which in effect were attempts to normalize the informalization of WTO processes, which would be a setback for inclusive processes and for effective participation of the delegations of developing countries including LDCs. Under WTO practice, informal processes have always been seen as only a complement to formal negotiation processes that could provide additional opportunities for interaction and exchange of views among Members.

Informal processes are not supposed to be a substitute for formal processes nor a space for developing or negotiating text.

The content of the ministerial decision on dispute settlement reform

The MC13 decision on dispute settlement reform merely recalls the MC12 mandate, recognizes the work done since then, and "instruct[s] officials to accelerate discussions in an inclusive and transparent manner". It is noticeable that the decision refers to the work done so far, which is generally understood to be the work under the informal discussions, as "a valuable contribution" although the ministers did not get to review this work and most of the WTO delegations did not meaningfully engage with its content.[35]

In fact, the process of drafting text during the informal discussions was criticized by developing countries. A communication by India, Egypt and South Africa noted that "[t]he drafting process deviates substantially from the accepted practice at the WTO. The process hampers the ability of delegations that cannot actively participate in the process, from following the evolution of and contributing to the formulation of the consolidated zero text…". The same communication pointed out that "[t]he themes being discussed … under the 'informal discussions' were not intended to be a comprehensive listing of concerns of the whole membership. They were a prioritization, for further discussion, of some of the interests that had been raised during the US-led process. For instance, Special and Differential Treatment, which had been raised as an interest by several countries was not listed as a theme for further discussion".[36]

The attempt to cast the draft text from the informal discussions as "a valuable contribution" was the result of concerted efforts by some developed-country delegations, including the EU and the US, to promote the text as the basis for the continuation of the work on dispute settlement reform post-MC13. This, however, is a contentious issue because the majority of WTO Members did not take part in developing this text and its content does not reflect much

of the concerns raised by developing countries that did participate in the informal process.

In the informal discussions, the EU had promoted the addition of language on reliance on arbitration agreements under Article 25 of the Dispute Settlement Understanding (DSU) and other procedures under Article 5 of the DSU as means to address disputes while the AB remains dysfunctional. This language was primarily opposed by developing countries active in these negotiations and was not accepted. Such language would have constituted a statement of intent or a political commitment to rely on these means. Even if presented as "endeavour language", it would extend beyond merely recognizing that there are alternative mechanisms available under the DSU. Instead, such language would have been a step towards committing Members to trying to use these alternative mechanisms rather than exercising the right to appeal to the AB as set under the DSU.

Politically, it seems that such language could have been used to exert pressure on Members not to exercise their right to raise appeals to the AB for as long as the reform process is underway. It is not clear how long the reform process would take; it could extend for many years. If the ministers had accepted such language, their commitment to trying to use the referenced alternative mechanisms would apply over those years. Thus, such language could have had implications on the functioning of dispute settlement and on the potential for restoration of the AB, despite the proposing parties arguing that the language did not imply any commitment but rather was limited to a political statement of intent.

Going forward, a big question mark remains on whether the functioning of the AB will be restored and reformed, while maintaining its mandatory jurisdiction over all cases. What are the possibilities that a convergence might emerge among some big players, like the US and the EU, to move away from this model of a two-tier dispute settlement system, towards another that potentially relies on arbitration and other procedures for the second tier? One can note that the draft text that was developed under the

informal discussions attempts to expand and normalize the role of alternative dispute resolution and to position conciliation, mediation and arbitration as potential substitutes to the panel and appeal stages. Such compromise would be a major departure from the current practice, have deep systemic implications for the future of the WTO, and would be counter to how these elements were originally envisioned under the DSU.

5 The "Investment Facilitation" Debacle

The attempt to bring the Investment Facilitation Agreement, which resulted from an unmandated plurilateral joint statement initiative, under the umbrella of the WTO as an Annex 4 plurilateral agreement might be the MC13 story that could have carried the most systemic implications for the future of the WTO.

The proponents of the initiative attempted to increase political pressure and build on the hype of the Ministerial Conference to force through a decision that would bring the IF Agreement under the WTO. They organized a high-level event on 25 February, on the evening preceding the official commencement of MC13, in which they made public the text of the agreement.[37] The report posted on the WTO website about the event states that "[t]he significant milestone in WTO history of finalization of the IFD Agreement [Investment Facilitation for Development Agreement, the formal title of the agreement] was marked at a ministerial event … on the eve of the Ministerial Conference".[38] This statement is not completely accurate since the IF Agreement had no formal linkages with the WTO agenda of negotiations at that point.

While a number of WTO Members had taken part in the negotiations under the IF joint statement initiative, those negotiations were not based on a WTO mandate. To the contrary, the WTO Membership had collectively agreed a negative mandate under the July 2004 General Council Decision,[39] whereby the Council agreed that investment among other issues will not form part of the Work Programme and that no work towards negotiations on

these issues will take place within the WTO during the Doha Round. While certain Members might dismiss this decision or undermine its relevance and question its applicability, the reality is that there is no WTO mandate to negotiate investment facilitation and the 2004 decision has not been revoked.[40]

Besides the 25 February ceremonial event, a draft ministerial decision was presented to MC13 invoking Article X.9 of the Marrakesh Agreement in order to add the IF Agreement to Annex 4 of the Marrakesh Agreement. This Annex contains the WTO plurilateral agreements that apply to WTO Members only if they opt in to those agreements, unlike the multilateral agreements of the WTO that apply to all Members.

At MC13, India and South Africa spoke against the draft decision when it was presented at the working session on development during the third day of the Ministerial Conference. India also circulated a written statement which included a "formal objection by India within the meaning of footnote 1 of Art. IX:1 of the Marrakesh Agreement Establishing the WTO, to any proposal to include the adoption of the Investment Facilitation for Development Agreement as an issue for consideration and action within the agenda of, or as an agenda or sub-agenda item of, the 13th Session of the WTO Ministerial Conference".[41]

Proponents of the initiative attempted to cast the tensions over the IF Agreement and its relation with the WTO as a disagreement among developing countries. For example, the US Trade Representative was reported to have cited divisions among developing countries on the investment deal which was strongly supported by China but opposed by India[42] and South Africa.[43] The EU claimed that it "played a leading role in delivering outcomes that will integrate developing countries more firmly into the global trading system", referring to "a deal to facilitate investment and support development".[44] Back in Geneva, during the last General Council meeting held in February 2024, the DG had questioned India and South Africa for their opposition to bringing the IF Agreement under the

umbrella of the WTO while praising the agreement.[45] The DG embarked on strong accusative statements against the two delegations, claiming that their stand would result in taking away investment opportunities from poorer countries.[46]

In light of the opposition from India and South Africa at MC13, the issue of adopting the IF Agreement as a WTO agreement was left open, with an indication that this will further be discussed in Geneva.

No justifications for claiming the IF Agreement as a developmental agreement

The claims about developmental outcomes resulting from the IF Agreement do not stand on any strong grounds. While proponents argue that signing up to the IF disciplines would enhance a country's ability to attract foreign direct investment (FDI), studies show no conclusive evidence on such a correlation and that it is unlikely that the IF disciplines would have a significant impact on investment flows.[47] The authors of a brief released by Boston University's Global Development Policy Center on the matter note that "[i]f even IIAs [international investment agreements] … have not catalyzed investment, it is unlikely that an agreement … like the Investment Facilitation … Agreement would have a significant impact on investment flows". The authors point out in regard to the IF Agreement that "to the extent that developing countries are weighing expected costs against promises that increased investment will spur development, they should know that there is little academic evidence to back these promises".[48] Instead, studies show that factors of primary concern to investors include size and growth potential of markets, infrastructure development, and availability of resources (natural resources and abundant labour).[49]

While the stated objective of the IF Agreement is to "facilitat[e] the flow of foreign direct investment between Members/Parties, particularly to developing and least developed country Members/Parties, with the aim of fostering sustainable development",[50] the way the substantive disciplines

have been designed does not effectively serve this objective. Instead, these disciplines could expose developing and least developed countries to extensive burdens of implementation, especially because the institutional and administrative approaches required by the disciplines are generally based on practices applied in developed countries.

Overall, the disciplines focus on the obligations of host States of investors and keep largely unaddressed any real or hard requirements for home States. There is nothing in the text that would require home States of investors to properly regulate the conduct of their nationals abroad so as to avoid developmental harm that might emerge through their investments and to hold them to account in case they are involved in harmful activities. Furthermore, the text includes weak corporate social responsibility language that reinforces a voluntary approach to responsible business conduct.

The disciplines cover measures directly or indirectly related to investment, in all sectors (services and non-services), and over most of the life-cycle of the investment from establishment, acquisition and expansion to operation, management, maintenance, and sale or other disposal of an investment (rather than just the supply of a service as under the General Agreement on Trade in Services (GATS)). The scope is very broad and the text lacks a definition of "investment". This would allow an expansive interpretation of the scope that extends beyond FDI that provides economic and developmental value, and might cover portfolio investments and other kinds of assets including intellectual property.

This, coupled with a broad "most-favoured nation" (MFN) clause that does not clarify "likeness" of investors and investments in connection with their developmental impact, means that the proposed IF disciplines do not provide grounds for differentiation between investments that add value for development and those that don't. In effect, this would impede the ability of governments to privilege sustainable investments. This also falls in tension with governments' need for policy and regulatory tools to be able to align investment with sustainable transformations in the economy.

At the same time, special and differential treatment provided for under the disciplines effectively boils down only to transition periods. The disciplines do not provide any guarantee of access to financial and technical assistance to alleviate the burdensomeness of implementation. The claims of developmental benefits in relation to the IF Agreement have also not been tested and are not justified by any existing empirical evidence. Thus, in terms of establishing a reformed standard for governing international investment that is in line with sustainable development, the IF Agreement does not take us in the right direction.[51]

The key issue concerns how the WTO rulebook gets expanded

The question of the relationship of the IF Agreement with the WTO poses fundamental systemic challenges that pertain to the legal architecture of the WTO and the approaches to expanding the rules that come under the umbrella of the WTO, even as plurilateral agreements. This ought to be of concern to all WTO Members, including those that are comfortable with the substantive content of the IF Agreement.

Unlike the regime of the General Agreement on Tariffs and Trade (GATT) that preceded the WTO, the latter set in place rules that establish multilateral oversight over how the WTO rules are expanded and what issues come under its umbrella, whether as multilateral or plurilateral agreements. WTO Members have been entrusted with pursuing and advancing "an integrated, more viable and durable multilateral trading system", as reflected in the preamble of the Marrakesh Agreement.[52] This system was intended to put an end to the fragmentation that had characterized the previous system under the GATT. This is the crucial context within which Annex 4 agreements ought to be developed and adopted.

Historically, the expansion of the issues that are brought under the ambit of the WTO has been a crucial matter for the Membership, as set out in Article III.2 of the Marrakesh Agreement relating to the specific functions of the organization. This article provides that on matters going beyond those

covered under the annexed agreements, "further negotiations among [WTO] Members concerning their multilateral trade relations" and "a framework for the implementation of the results of such negotiations" are to be decided by the Ministerial Conference. In the case of the IF Agreement, there was no such multilateral oversight. To the contrary, as noted above, the WTO Membership had collectively agreed a negative mandate pertaining to addressing investment and that has not been revoked.

There is also no precedent for adopting Annex 4 WTO agreements through the route of Article X.9 of the Marrakesh Agreement. The existing Annex 4 agreements (Agreement on Trade in Civil Aircraft and Agreement on Government Procurement, in addition to the terminated agreements on dairy and bovine meat) were carried forward from the Uruguay Round negotiations. Thus, relying on Article X.9 to bring the IF Agreement under the WTO would be precedent-setting.

Article X.9[53] sets three specific conditions: first, that the concerned agreement be "a trade agreement"; second, that "parties to a trade agreement" present a request to the WTO Members to add the agreement to Annex 4; and third, that consensus among WTO Members is achieved. Each of these legal conditions should be met, whereby major systemic implications could emerge as a result of the way these requirements are applied.

Regarding the first condition, there are major question marks on whether the IF Agreement fulfils the characteristics of a trade agreement. Trade agreements generally have a market access dimension pertaining to the movement of goods and services or are facilitative of such market access by establishing disciplines on measures affecting the movement of goods and services across borders. Where investment is addressed under the WTO rules (such as under the WTO Agreement on Trade-Related Investment Measures (TRIMs) and GATS), WTO Members limited the scope of these rules to those aspects that are trade-related.[54] In contrast, the IF Agreement relates to facilitating investment rather than facilitating trade and does not purport to be trade-related, as per the TRIMs Agreement. The IF Agreement makes

no reference to trade except recognizing in the preamble the complementary nature of trade and investment. It covers "measures adopted or maintained by a Party relating to investment activities of investors of another Party"[55] and thus covers measures directly or indirectly related to covered investments. As the agreement lacks a definition of "investment", it could be interpreted as covering even portfolio investments and speculative assets that have no relation with production and movement of goods and services.

An expansive interpretation of what qualifies as "trade agreement" under Article X.9 of the Marrakesh Agreement would mean that this article could become a back door for bringing under the umbrella of the WTO disciplines on a wide range of economic issues that might be only loosely argued as related to trade (for example, labour, gender, human rights etc). This trajectory would not be consistent with the original intent and design of the WTO as reflected in the preamble of the Marrakesh Agreement.

Regarding the second condition, there is a major question pertaining to whether the Members presenting the request qualify as "parties" to the IF Agreement. In this context, it is important to consider what distinguishes a co-sponsor of an initiative or a country negotiating an agreement from a "Member party" to the agreement, including the legal requirements that should be fulfilled for a country to become a Member party to the agreement.

The latest communications on the issue of adding the IF Agreement to Annex 4[56] are presented as coming from "Members parties" to the agreement. Yet, these communications only refer to the "list of co-sponsors" of the plurilateral Joint Ministerial Declaration on investment facilitation.[57] A list of Members participating in negotiating an agreement or co-sponsoring an initiative cannot be equated with a list of "Members parties" to an agreement.

The requirements to become a "Member party" of the IF Agreement can be found under the Vienna Convention on the Law of Treaties (VCLT), which applies to all international treaties, and under the IF Agreement itself. The VCLT requires that a country expresses consent to be bound by the treaty in

accordance with the provisions of the concerned agreement. Article 45.1 of the IF Agreement provides that consent to be bound by the agreement is to be expressed through acceptance of the treaty by depositing the instrument of acceptance with the depository after fulfilling the domestic requirements for those purposes.[58]

The States listed as presenting the request to add the IF Agreement to Annex 4, while being co-sponsors of the initiative and participants in negotiating the agreement, have not taken the steps required for their legal status to evolve to a "Member party" to the agreement. The latter would entail that they fulfil their domestic procedures that allow them to submit their instrument of acceptance with the depository (which is the WTO DG, in the case of the IF Agreement). Furthermore, these States will become "parties" to the agreement only when the agreement enters into force. In the case of the IF Agreement, this requires the deposit with the WTO DG of 75 instruments of acceptance.[59]

Equating presence on the list of co-sponsors or negotiating parties to the IF Agreement with notification of acceptance of the agreement would in effect bypass States' domestic processes for the acceptance of the agreement. If acceptance results in the State being bound, it must follow the completion of the State's domestic processes for adoption of a treaty. There is no evidence that any WTO Member had completed its domestic acceptance processes at the time of presenting to the ministers at MC13 the request to add the IF Agreement to Annex 4.

There are also legal issues embroiled in the capacity of the DG to serve as depository of the IF Agreement. Legal scholar Anthony Aust points out that where the chief of an international organization is proposed to act as depository of an international agreement, "he or she will not normally agree to be depository of a treaty with which his or her organization has no substantial connection".[60] In this regard, the question arises of whether the WTO DG was requested to act as depository before her office was referenced in the IF Agreement text. If that was the case, it remains unclear

on what basis the DG assessed that there was a "substantial connection" between the WTO and the IF Agreement. While there are WTO Members that seek to establish such substantial relation, at the time of finalizing the IF text such a relationship was still a contested issue.

Finally, the third condition under Article X.9 of the Marrakesh Agreement provides that new plurilateral agreements can only be added to Annex 4 exclusively by consensus. This means that a decision to adopt the IF Agreement under Annex 4 can be undertaken only if there is consensus among the WTO Members, and cannot be adopted by a vote. This condition reflects the intention to keep the expansion of the number of plurilateral agreements under the multilateral oversight and collective control of the WTO Membership, which is in line with the objective reflected in the preamble of the Marrakesh Agreement to "advance an integrated, more viable and durable *multilateral* system" (emphasis added).

Dismissing or mishandling any of these elements under Article X.9 of the Marrakesh Agreement will set a bad precedent that will carry major systemic challenges for the future of the WTO.

6 The False Story on Services Domestic Regulation

The MC13 coverage trumpeted a breakthrough on services domestic regulation (SDR) and the entry into force of new disciplines in this area.[61] This was hailed by the proponents of this plurilateral joint statement initiative. The WTO DG added this item to the list of achievements at MC13. Yet, it is not accurate to present the entry into force of these disciplines as an outcome of MC13. This is yet another case of an outcome from an unmandated plurilateral joint statement initiative and its relationship with the WTO legal architecture which poses long-term systemic implications for the WTO and the expansion of rules that come under the umbrella of the WTO.

The nature of the plurilateral services domestic regulation disciplines

The concerned disciplines, in the form of a Reference Paper on SDR,[62] resulted from negotiations under an unmandated plurilateral joint statement initiative. Yet, they tackle a set of issues that the WTO Membership had agreed to address under a multilateral mandate built into Article VI.4 of the GATS. The Membership had entrusted the fulfilment of this mandate to the WTO Working Party on Domestic Regulation (WPDR).

According to a note published by the Chairperson of the plurilateral joint statement initiative on SDR, the agreed disciplines relate to existing rules under Part II of the GATS and are "designed to improve Members' regulatory frameworks",[63] thus interacting with or expanding Part II of the GATS that covers "general obligations and disciplines". Part II of the GATS is unlike

Parts III and IV that deal with "specific commitments" and "progressive liberalization" through negotiation of specific commitments to be set out in schedules. Changes to Part II or to how its disciplines operate must be introduced through a process of amending the GATS, rather than through inscriptions in the Members' individual schedules of commitments.

According to the Chairperson's note, the disciplines also introduce new "regulatory practices" related to licensing, qualifications and technical standards.[64] These general disciplines relate, inter alia, to processing of applications,[65] transparency,[66] and enquiry and contact points.[67] They expand the meaning of "objective and transparent criteria" contained under GATS Article VI.4 for measures relating to technical standards and licensing and qualification requirements and procedures.[68]

The disciplines further introduce new provisions pertaining to recognition of professional qualifications[69] and apply new rules pertaining to authorization fees, examinations and procedures,[70] as well as administration of authorizations when it comes to gender issues.[71] There are significant new obligations for engagement with other Members and their "interested parties" and rights to comment on proposed laws and regulations, and potentially procedures and administrative rulings, of general application.[72]

Given this content of the disciplines, they in effect amend existing or add new general rules of application under the GATS. The fact that the disciplines will apply only to services that Members have committed in their schedules – and any other services sectors the concerned Member has added to its schedule – does not alter their character as general obligations and disciplines. Indeed, a number of rules in Part II of the GATS only apply to scheduled commitments, including Articles VI.1 and VI.5 on "domestic regulation", Article VIII on "monopolies and exclusive service suppliers", and Article XI on "payments and transfers".[73]

Objections to the adoption of these disciplines through GATS schedules of commitments

Proponents of the plurilateral joint statement initiative attempted to adopt the disciplines through unilateral action using their individual GATS schedules of commitments. They based their action on Article XVIII of the GATS on "additional commitments",[74] the procedures for Certification of Improvements of Schedules of Specific Commitments (S/L/84) and the Procedures for Implementation of Article XXI of the GATS (S/L/80).

India and South Africa had presented objections to such action, raising issues pertaining to the legal basis and the effect of the proposed modifications, particularly their interaction with existing rights and obligations under the GATS and the Marrakesh Agreement.[75] In effect, the proposed action to adopt the disciplines unilaterally through GATS schedules of specific commitments, and without multilateral oversight and consensus on that matter, would undermine the WTO multilateral mandates and be a misuse of the GATS schedules and Article XVIII, which will consequently undermine the Marrakesh Agreement's rules for amendment of agreements.

The attempt to cast the contents of the Reference Paper as elements falling under Article XVIII, and to use that article and the rules of procedure pertaining to GATS schedules to adopt the Reference Paper disciplines, is based on an interpretation of Article XVIII that is not consistent with the structure of the GATS and its distinct parts that differentiate between general obligations and sector-specific commitments. Such a precedent would enable Article XVIII to operate as an open door to bring under the purview of the GATS and the WTO innumerable disciplines on issues that were never envisioned as appropriate or relevant to the multilateral trading system, while circumventing effective multilateral collective oversight by the WTO Membership.

The limitation of GATS schedules of specific commitments

The use of GATS schedules of specific commitments is expressly limited, as per Article XX of the GATS, to specific sectoral commitments, in contrast to the nature of the disciplines contained in the plurilateral Reference Paper. Article XX provides that "Each Member shall set out in a schedule the *specific commitments* it undertakes under Part III of this Agreement. *With respect to sectors where such commitments are undertaken*, each Schedule shall specify: (a) terms, limitations and conditions on market access; (b) conditions and qualifications on national treatment; (c) *undertakings* relating to additional commitments; …" (emphasis added).

Furthermore, the Guidelines for Scheduling Specific Commitments adopted during the Uruguay Round negotiations, and again in March 2001 for the GATS 2000 negotiations (S/L/92), distinguish between specific commitments and general rules by noting that "The *GATS contains two sorts of provisions*. The first are *general obligations*, some of which apply to all service sectors (e.g. MFN, transparency) and some only to scheduled specific commitments (e.g. Article XI: Payments and Transfers). The second are *specific commitments* which are negotiated undertakings particular to each GATS signatory" (emphasis added).[76]

The scope and procedures for Certification of Improvements of Schedules of Specific Commitments (S/L/84) and the Procedures for Implementation of Article XXI of the GATS (S/L/80) clearly reflect this distinction. The objective of these procedural rules is to allow Members to correct or further liberalize their sectoral commitments in ways that do not disrupt the balance achieved in the request-and-offer negotiations and set in their schedules. The procedures do not foresee the use of the schedules of commitments to introduce new, or in effect amend existing, rules naturally belonging in Part II of the GATS.

The plurilateral adoption of new disciplines that pertain to a subject matter on which there is a multilateral mandate entrusted to a multilateral body,

and through the unilateral use of GATS schedules of specific commitments, would contribute to the fragmentation of the WTO and the erosion of the multilateral nature of its rules and institutional processes. That, in turn, would undermine the ability to pursue multilateral negotiations and deliver on multilateral mandates.

Furthermore, the unilateral use of the GATS schedules of commitments to bring under the umbrella of the GATS disciplines of a nature that interacts with and affects how the general rules under the GATS operate would set a precedent that would enable potential future misuse of GATS schedules. It could open a Pandora's box. Groups of Members could introduce controversial and potentially harmful measures that are not related to the balance of sectoral liberalization commitments.[77] Such implications carry systemic effects of importance for the future of the WTO as a multilateral organization that is custodian of the objective to develop "an integrated, more viable and durable multilateral trading system".[78]

To address these issues, it is important to return to the multilaterally mandated forum of the Working Party on Domestic Regulation where the WTO Membership could collectively engage in a meaningful discussion in good faith on the proposal to adopt the Reference Paper disciplines pursuant to the mandate of GATS Article VI.4, and to enable all Members to shape the content of the proposed disciplines and the way they will be eventually adopted.

Consultations between the modifying and objecting Members

In light of the objections led by India and South Africa, consultations among the concerned Members led to an understanding among them to the effect that the proposed certification of the disciplines to add them to the GATS schedules of commitments would not create a precedent for incorporating outcomes in the WTO, including from joint statement initiatives. This understanding resulted from efforts to find a pragmatic solution without risking the undermining of the GATS operations and its rules through

future instances of abuse of the GATS schedules of specific commitments as a backdoor to bring in disciplines that in effect amend the GATS general disciplines.

The understanding reflects the reality that Members had concerns over how the GATS schedules were being used pertaining to the plurilateral joint statement initiative on SDR, which should inform any attempt to resort to such practices in the future. The understanding resulting from the consultations also included clarifications about the effect of adopting these disciplines on other WTO Members and on the mandate under Article VI.4 of the GATS. This understanding was attached to the modifications made to the concerned schedules.

This process was undertaken in Geneva and was not addressed at MC13. By the time of MC13, these discussions were still unfolding in Geneva and had not been fully resolved among all concerned Members, with consultations still continuing. This is why it is inaccurate to characterize the resolution over the fate of these disciplines as an MC13 outcome.

The importance of reviewing the procedural rules and avoiding future abuse of GATS schedules of commitments

Sectoral disciplines, such as those under the Fourth Protocol to the GATS: Schedules of Specific Commitments Concerning Basic Telecommunications (S/L/20) and the Fifth Protocol: Schedules of Specific Commitments and Lists of Exemptions from Article II on financial services (S/L/45), resulted from negotiations that were multilaterally mandated and overseen through formally mandated institutional processes, and were adopted in schedules of commitments in accordance with multilateral decisions. These protocols contained obligations and commitments specific to one sector, and only to that sector, and did not purport to adopt general rules of application, unlike the Reference Paper on services domestic regulation. The use of schedules of specific commitments to adopt the protocol disciplines was multilaterally agreed. There is no precedent, however, for using schedules of commitments

to adopt disciplines of a general nature that apply across all sectors, as has been pursued by the proponents of the plurilateral Reference Paper on SDR.

It is clear that there are differences between Members about the scope and application of procedures pertaining to modifying schedules of commitments, as stipulated under S/L/84 and S/L/80. The modifications proposed by some Members are different from what was anticipated in the year 2000 when S/L/84 and S/L/80 were adopted. Moreover, the legal legitimacy of adopting general disciplines – such as those contained in the Reference Paper on SDR – as additional commitments in a Member's schedule through the use of S/L/84 and S/L/80 remains a matter of dispute. For these reasons, it is important to pursue a review of the objectives and procedural rules governing changes to GATS schedules that is informed by the context of the GATS and the Marrakesh Agreement. Such a review is required in order to avoid misuse of these rules and procedures in the future. Paragraph 5 of S/L/84 and paragraph 24 of S/L/80 provide the opportunity for any Member to request the WTO Council for Trade in Services to review these procedures in a constructive, forward-looking manner.[79]

7 The Way Forward Post-MC13 in the Context of a Clash of Visions Over the Future of the WTO

There is a major divergence, if not clash, in the visions that WTO Members hold for the role and future of the organization. On one hand, there is a group of Members, mainly from among developing countries, that insist on protecting the fundamentals of the multilateral system, its principles and rules, as established under the Marrakesh Agreement. This seems to be driven by a conviction that a functioning multilateral system, despite the need to correct underlying flaws in its rules that were designed mainly by developed-country custodians of the precedent GATT regime, remains the adequate and necessary forum to enable trade-offs and thus deliverables that could meet the interests of Members at different levels of development.

On the other hand, there is a group of Members that want to see the organization and its decision-making methods 'flexibilized' as a means of getting more of their specific interests reflected in the WTO agenda, irrespective of the lack of collective interest or consensus among the rest of the Membership. This could be part of what has been described as a "pattern of hegemonic powers shifting the goalposts and seeking to change the rules when faced with adverse consequences of systems they impose on developing countries". If this road is travelled, this would set the grounds to revert towards a system more akin to the pre-WTO regime, which would allow for more plurilateral deals among those of similar economic capacities or interests and where 'club dynamics' will dominate. This would come to replace the focus on delivering for all Members at different levels of development while strengthening a truly multilateral system.

There are also a significant number of WTO Members who are generally silent on matters that do not directly affect their commercial interests.

Negotiations pre- and post-MC13 have to a large extent been shaped by these divisions as well as tensions, or 'trade wars', among the bigger players. This reality could bring the institution to a complete stalemate and state of irrelevance.

At the same time, there is an increasingly activistic approach by the WTO secretariat and its Director-General. They seem to be playing a role that is facilitative of the attempts to expand the rule-making agenda at the organization. This is despite the lack of a collective will by all Members that fulfils the requirement of consensus, which has been the basis for decision making at the WTO since its establishment.

In a context where rules can be set aside or ignored, and where the relevance and success of the organization is judged simply by whether it can 'deliver', irrespective of the underlying principles and objectives and related rules that the organization was built on, the reality gets shaped by power. In such a context, the potential for realizing the interests of the smaller Members will be further eroded. The defence of the multilateral system and its potential for continued relevance will lie in the collective action of developing countries, many of which currently remain in the silent majority in regard to the attempts at systemic change of the WTO.

Endnotes

1 Biswajit Dhar, Ranja Sengupta and Abhijit Das (11 March 2024), "Key Takeaways from the 13th Ministerial Conference of the WTO", available at: https://www.madhyam.org.in/key-takeaways-from-the-13th-ministerial-conference-of-the-wto/

2 See outcomes from MC13, document WT/L/1188; WT/MIN(24)/33, available at: https://www.wto.org/english/thewto_e/minist_e/mc13_e/documents_e.htm

3 See outcomes from MC13, document WT/L/1189; WT/MIN(24)/34, available at: https://www.wto.org/english/thewto_e/minist_e/mc13_e/documents_e.htm

4 As listed in Annex 2 of the document WT/GC/W/807/Rev.2.

5 See outcomes from MC13, document WT/L/1190; WT/MIN(24)/35, available at: https://www.wto.org/english/thewto_e/minist_e/mc13_e/documents_e.htm

6 Australia, Brazil, Canada, China, Colombia, Ecuador, Egypt, the European Union, Hong Kong China, Israel, Jamaica, Japan, Jordan, Kazakhstan, the Republic of Korea, Kuwait, Macao China, Myanmar, New Zealand, Nicaragua, Norway, Pakistan, Paraguay, Peru, the Philippines, Singapore, Switzerland, the United Kingdom, the United States, the Bolivarian Republic of Venezuela, the African Group.

7 "On a possible extension of a decades-long moratorium on placing tariffs on digital trade, [the US Trade Representative] said: 'Maybe it can be unlocked ... if agriculture is unlocked.'" Reported by Reuters, Emma Farge, 29 February 2024.

8 See document WT/MIN(24)/38; WT/L/1193, available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/38.pdf&Open=True

9 For the first time, the Chair of the ministerial conference referred to an explicit link between the extension of the two moratoriums. This was reflected in a statement by the Chair before the formal closing session which was webcasted and accessible to observers of the conference.

10 "Activists allege 'heavy-handed' UAE restrictions at WTO talks", available at https://www.france24.com/en/live-news/20240228-activists-allege-heavy-handed-uae-restrictions-at-wto-talks

11 "WTO: NGOs call for 'freedom of speech' to be restored at MC13", *SUNS* #9955, 28 February 2024, available at: https://www.twn.my/title2/wto.info/2024/ti240228.htm

12 Press release issued by Professor Jane Kelsey on 28 February 2024.

13 "This is my 11th MC and I've never seen anything like this level of repression. The WTO Secretariat has insisted that it is working towards clarifying things with the host country. But we see no evidence that the DG [WTO Director-General] – who is widely known as a person who, shall we say, can get her way when she wants – is insisting on our rights being restored," said Deborah James, facilitator of the Our World Is Not for Sale (OWINFS) global network of civil society organizations (CSOs). See "WTO Loses Legitimacy as Affected Communities, CSOs Shut Out of Normal Participation at MC13 in Abu Dhabi", press statement, 28 February 2024, available at: https://www.ourworldisnotforsale.net/2024/2024-02-28_R_repression.pdf. See also other press statements by OWINFS at: https://ourworldisnotforsale.net/2024-02-26_R_free_speech and https://www.ourworldisnotforsale.net/2024-03-01_R_collapse#9

14 See Article VI.4 of the Marrakesh Agreement, available at: https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm#articleVI. See also: https://twitter.com/OWINFS/status/1763082017728508165 and "WTO D-G abuses authority to try to get WTO-illegal Investment Facilitation adopted at MC13", OWINFS press release, 27 February 2024, available at: https://ourworldisnotforsale.net/2024/2024-02-27_R_DG.pdf

15 See Draft Abu Dhabi Ministerial Declaration, document WT/MIN(24)/W/12, available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/W12.pdf&Open=True

[16] It was reported that the draft ministerial declaration discussed on 8 February 2024 included the following suggestions: "[We reaffirm the value of [our consistent practice of] taking decisions through a transparent, inclusive, [[flexible, (Canada)] [constructive, (Jamaica)] [responsible (Singapore)]] consensus-based, Member-driven process]. (India)." Source: Ravi Kanth, "WTO: Attempts to bring in 'responsible' consensus in MC13 ADMD", *SUNS* #9944, 13 February 2024.

[17] See, for example, Inu Manak and Manjari Millere, "Responsible Consensus at the WTO Can Save the Global Trading System", available at: https://www.cfr.org/blog/responsible-consensus-wto-can-save-global-trading-system. In this blog post, the US Ambassador to the WTO María Pagán was reported to have described "responsible consensus" as "the ability to say yes to something that maybe I don't care that much about, but it doesn't hurt me. And I'm not gonna hold it back as a chip … until I get … what I want".

[18] See paragraphs 4, 6 and 15 of the text WT/MIN(24)/W/12, available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/W12.pdf&Open=True

[19] See the annex together with an explanatory note of the content of the draft ministerial declaration (WT/MIN(24)/W/12/Add.1), available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/W12A1.pdf&Open=True

[20] See paragraph 8 of the Abu Dhabi Ministerial Declaration, available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/DEC.pdf&Open=True

[21] Paragraph 15 of WT/MIN(24)/W/12 read: "…[We welcome further work by Members to hold thematic discussions on trade inclusiveness [insofar as they relate to Members concerning their multilateral trade relations]. Such thematic sessions shall be under the overall supervision of the General Council, which should report, as appropriate, to the Fourteenth Session of the Ministerial Conference.]"

[22] See paragraphs 21 and 22 of WT/MIN(24)/DEC, available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/DEC.pdf&Open=True

[23] Communication by Pakistan, JOB/GC/347.

[24] See alternative from the Director-General on page 12 of the explanatory note/annex to the draft ministerial declaration, WT/MIN(24)/W/12/Add.1. Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/W12A1.pdf&Open=True

[25] Communication from Argentina, Bangladesh, Barbados, Plurinational State of Bolivia, Brazil, Cabo Verde, Colombia, Ecuador, Egypt, Honduras, Indonesia, Kazakhstan, Panama, Paraguay, Peru, South Africa, Uruguay, Bolivarian Republic of Venezuela, and the African Group, WT/MIN(24)/28, 29 February 2024, available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/28.pdf&Open=True

[26] Ministerial Declaration on the contribution of the multilateral trading system to tackle environmental challenges, WT/MIN(24)/28.

[27] Ibid.

[28] See, for example, the submissions "Policy Space for Industrial Development: A Case for Rebalancing Trade Rules" (WT/GC/W/868, G/C/W/825, WT/COMTD/W/270, IP/C/W/695, WT/WGTTT/W/33), "A Case for Rebalancing the Agreement on Subsidies and Countervailing Measures" (WT/GC/W/880, G/SCM/W/589, WT/COMTD/W/274), and "A Case for Rebalancing the Agreement on Trade-related Investment Measures" (WT/GC/W/896, G/TRIMS/W/173, WT/COMTD/W/284).

[29] See Draft Abu Dhabi Ministerial Declaration: Explanatory Note by the Chairperson of the General Council (WT/MIN(24)/W/12/Add.1), page 10, paragraph entitled "Trade and Industrial Policy". Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/W12A1.pdf&Open=True

[30] Declaration on the Precise, Effective and Operational Implementation of Special and Differential Treatment Provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade, available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/36.pdf&Open=True

[31] "MC13 ends with decisions on dispute reform, development; commitment to continue ongoing talks" (1 March 2024), available at: https://www.wto.org/english/news_e/news24_e/mc13_01mar24_e.htm

[32] See the Ministerial Decision on Dispute Settlement Reform (WT/MIN(24)/37, WT/L/1192), available at: https://www.wto.org/english/thewto_e/minist_e/mc13_e/documents_e.htm

[33] See: African Group submission WT/GC/W/892, Indonesia's submission JOB/DSB/6, submission by Egypt, India and South Africa JOB/DSB/7.

[34] See MC12 ministerial outcome document WT/MIN(22)/24, WT/L/1135, available at: https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm

[35] For more detailed commentary on the draft text of the informal discussions, please see: https://www.twn.my/title2/briefing_papers/MC13/Dispute%20settlement%20reform%20commentary.pdf and https://www.twn.my/title2/briefing_papers/MC13/Dispute%20settlement%20reform%20TWNBP%20MC13%20Mohamadieh.pdf

[36] See: "Dispute Settlement Body – Reflections on the reform of the WTO dispute settlement system – Joint communication from Egypt, India and South Africa" (JOB/DSB/7).

[37] "Three-quarters of members mark finalization of IFD Agreement, request incorporation into WTO", available at: https://www.wto.org/english/news_e/news24_e/infac_25feb24_e.htm

[38] Ibid.

[39] See: July 2004 General Council Decision, WT/L/579, paragraph 1(g), available at: https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm

[40] The issue of adding investment to the WTO covered agreements has a long history of requiring explicit consensus to initiate negotiations on investment. This dates back to the 1st WTO Ministerial Conference in Singapore in 1996, where investment was one of the so-called "Singapore issues" proposed by some for negotiation. A Working Group was established with an explicit caveat that this would not prejudge the launch of negotiations and that future negotiations would take place only after explicit consensus of the Members. Then the Doha Ministerial Declaration (paragraph 20) from the 4th MC in 2001 required an explicit consensus at the 5th MC in Cancun to launch negotiations on investment. There was no explicit consensus in Cancun in 2003. Subsequently, Members agreed, in the July 2004 General Council Decision, that no work towards negotiations on investment, among selected other issues, will be undertaken during the Doha Round, and more recently in the 10th Ministerial Conference held in Nairobi in 2015, they agreed that "any decision to launch negotiations multilaterally on such [new] issues would need to be agreed by all Members".

[41] Communication, dated 28 February 2024, circulated at MC13 at the request of the delegation of India. See also the submission by India (WT/GC/262) laying out the legal grounds for its opposition and the related systemic concerns, which were raised in a statement during the General Council meeting of 13–15 December 2023.

[42] Ravi Kanth, "WTO: IFD initiative 'illegal' and not part of MC13 agenda, says India", *SUNS* #9920, 18 December 2023.

[43] Reporting by Emma Farge of Reuters, 29 February 2024.

[44] Questions and answers on the WTO 13th Ministerial Conference: https://ec.europa.eu/commission/presscorner/detail/en/qanda_24_1288

[45] Ravi Kanth, "WTO: DG takes on India, South Africa over controversial IFD for MC13", *SUNS* #9947, 16 February 2024.

[46] Ibid. The DG is reported as saying: "I am looking really at you South Africa, please reflect because I owe an explanation to these countries to attract the investments that they can't due to some procedural issue … You talk about systemic issues and procedural issues, we also need to think how we can make this organization with new ways of doing things … And please give poor countries a chance to get something good going … If you see the agreement, you know what people are looking for that would enable them to get something done that countries would not normally do."

[47] See: Boston University Global Development Policy Center, Memo on the IFD Agreement's Implication for Investment Flows (25 January 2024). On file with the author.

[48] Ibid.

[49] See for example: Paulo Elicha Tembe and Kangning Xu (2012), "Attracting Foreign Direct Investment in Developing Countries: Determinants and Policies – A Comparative Study between Mozambique and China", available at: https://ideas.repec.org/a/jfr/ijfr11/v3y2012i4p69-81.html; US Agency for International Development (2005), *Foreign Direct Investment: Putting It to Work in Developing Countries*, Washington, DC: USAID.

[50] See Article 1 of the final IF Agreement text available in document WT/MIN(24)/17, at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/17.pdf&Open=True

[51] Detailed discussion of the content of the IF Agreement can be found at https://www.twn.my/title2/briefing_papers/MC13/Investment%20facilitation%20TWNBP%20MC13%20Mohamadieh.pdf and https://www.twn.my/title2/briefing_papers/MC13/Investment%20facilitation%20commentary.pdf

[52] The Appellate Body report in *Brazil—Desiccated Coconut* highlighted this objective and said that "[t]he authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system" (*Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, Appellate Body Report, 21 February 1997, at 18). The "previous system" to which it referred was the system of plurilateral Codes that came into existence after the Tokyo Round of the GATT.

[53] Article X.9 of the Marrakesh Agreement provides that: "The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4…".

[54] Article II of the Marrakesh Agreement on the "scope" of the WTO states: "1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement…". See also Article 2 of the TRIMs Agreement, which provides that the Agreement is an elaboration of existing GATT provisions.

[55] See Article 2.1 on scope in the final IF Agreement text available in document WT/MIN(24)/17, at:https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/17.pdf&Open=True

[56] See for example WT/GC/W/927 and WT/MIN(24)/W/25.

[57] See the declaration contained in document WT/MIN(24)/17/Rev.1.

[58] Article 45.1 of the IF Agreement provides that: "Any Member of the WTO may accept this Agreement. Acceptance shall take place by deposit of an instrument of acceptance to this Agreement with the Director-General of the WTO…" (text available in document WT/MIN(24)/17 at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/17.pdf&Open=True). See also Article 14 of the VCLT on "Consent to be bound by a treaty expressed by ratification, acceptance or approval" and Article 16 of the VCLT on "Exchange or deposit of instruments of ratification, acceptance, approval or accession".

[59] See Article 45.1 of the final IF Agreement text available in document WT/MIN(24)/17, at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/17.pdf&Open=True

[60] Anthony Aust (2013), *Modern Treaty Law and Practice*, Third Edition, Cambridge University Press, page 286.

[61] "New disciplines on good regulatory practice for services trade enter into force", https://www.wto.org/english/news_e/news24_e/serv_27feb24_e.htm

[62] See INF/SDR/2, resulting from plurilateral negotiations launched in 2017. See Joint Ministerial Statement on Services Domestic Regulation, WT/MIN(17)/61, available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/61.pdf&Open=True

[63] Information Note by the Chairperson, "Relationship between the Disciplines on Services Domestic Regulation Developed by the Joint Initiative and the GATS", INF/SDR/W/4, 11 May 2020. See specifically the provisions on Transparency, Enquiry Points and Recognition in the Reference Paper INF/SDR/2.

[64] INF/SDR/W/4 at [3.1].

[65] INF/SDR/W/4 at [3.2]. Article VI.3 of GATS provides for due process obligations for processing applications for authorization to supply of a service, including: a) duty to inform the applicant of the decision within a reasonable period of time after a complete submission of an application; and b) duty to provide, at the request of the applicant, information concerning the status of the application.

[66] INF/SDR/W/4 at [3.3] and [3.4].

[67] INF/SDR/W/4 at [3.4].

[68] INF/SDR/W/4 at [3.6].

[69] INF/SDR/W/4 at [3.7].

[70] INF/SDR/W/4 at [3.7].

[71] INF/SDR/W/4 at [3.7].

[72] INF/SDR/W/4 at [3.7].

[73] For detailed discussion of the content of the disciplines, see "Reference Paper on Services Domestic Regulations: Overview of main content and regulatory implications" at https://www.twn.my/title2/briefing_papers/MC12/briefings/Reference%20paper%20on%20SDR%20TWNMC12BP%20Nov%202021%20Mohamadieh.pdf and "Briefing note on Services Domestic Regulation JSI text of 27 September 2021 (INF/SDR/1)" at https://www.twn.my/title2/briefing_papers/twn/Domestic%20regulation%20TWNBP%20Oct%202021%20Kelsey.pdf

[74] GATS Article XVIII provides that "Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule". Article XVIII enables the making of specific sectoral commitments of a kind that does not come within the rules of Article XVI (on "market access") or Article XVII (on "national treatment"). The WTO secretariat explained in a 2002 paper on Article XVIII prepared for the Committee on Specific Commitments that the provision was designed to "provide a legal framework for members to negotiate and schedule specific commitments, which they would define on a case-by-case basis". See WTO Committee on Specific Commitments, "Additional Commitments under Article XVIII of the GATS", S/CSC/W/34, 16 July 2002, at [3].

[75] These objections build on the points made by the two delegations in their submission, together with Namibia, on "The legal status of 'Joint statement initiatives' and their negotiated outcomes" (WT/GC/W/819/Rev.1).

[76] Guidelines for Scheduling of Specific Commitments under the General Agreement on Trade in Services, adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001, paragraph 2.

[77] In a 2016 paper entitled "Plurilateral Trade Agreements: An Escape Route for the WTO", page 19, Mamdouh and Adlung argued that: "It would … be technically possible to inscribe quite a number of the disciplines negotiated under recent mega-regionals, such as the Trans-Pacific Partnership (TPP) Agreement, virtually unchanged into the parties' GATS schedules. Cases in point are the TPP Chapters on Electronic Commerce (Chapter 14), State-Owned Enterprises and Designated Monopolies (Chapter 17), and Transparency and Anti-Corruption (Chapter 26) insofar as they reach beyond already existing GATS provisions."

[78] See preamble of the Marrakesh Agreement, available at: https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm

[79] For example, paragraph 5 of S/L/84 provides that: "Following the lapse of three years from the date of entry into force of these procedures, the Council for Trade in Services shall, at the request of any Member, review the operation of these procedures. In such a review, the Council for Trade in Services may agree to amend this decision."

THE WTO'S 13TH MINISTERIAL CONFERENCE: A FAILED ATTEMPT AT REMAKING THE ORGANIZATION

The World Trade Organization (WTO)'s 13th Ministerial Conference (MC13), held in Abu Dhabi on 26 February–2 March 2024, was a stage where moves to reshape the governing body for international trade were played out. Spearheaded by developed countries, these efforts aim at loosening decision-making practices at the WTO in order to more easily expand the organization's ambit into new areas. Such a push could not only sideline longstanding issues of interest to developing countries but also distort the WTO's legal architecture of rules and erode its multilateral character.

This paper looks at how the attempt to remake the WTO unfolded at MC13, focusing among others on the difficult negotiations to draw up the main outcome document of the conference, and on the contentious issues of investment facilitation and services domestic regulation that were sought to be introduced into the WTO rulebook. The author also contends that this drive at remaking the organization will continue beyond MC13 and could come to have a major bearing on the very role and future of the WTO.

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