What does success look like for MC13?

By:

Jane Kelsey

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The host of every WTO Ministerial Conference has a difficult task. Almost half the ministerials since 1995 have not produced a substantive declaration and Members have often been unable to deliver on the outcomes where one was agreed.

This Ministerial will be especially difficult. The United Arab Emirates (UAE), as hosts, will desperately want a “successful” MC13 that enhances the legitimacy and ownership of WTO outcomes by all the membership. At the very least that means no walkout and agreement on some kind of declaration.

The prospects for even a low-ambition outcome seem slim. The WTO is totally fractured internally, its “rules-based” processes have (been) broken down, all three core functions (negotiations, implementation and dispute settlement) are dysfunctional, and it lacks social license externally with the ongoing failure to adopt an effective TRIPS waiver in the wake of the Covid 19 pandemic.

Having attended two-thirds of the WTO's ministerial conferences, I have been reflecting on why they have failed. In most cases it comes down to an abuse of process and bullying by more powerful Members, sometimes with collusion from the chair and the secretariat, leaving developing countries with two choices: capitulation or denial of consensus.

Developing country Members have repeatedly accepted, in good faith, promises that their priorities will be addressed to correct the systemic biases in the Uruguay Round agreements. First, the development acquis was embedded in the Marrakesh Agreement establishing the WTO and its processes. Then there was the now-moribund Doha "Development" Round. In other ministerials, such as Cancun in 2003 and Hong Kong in 2005, developing countries have expressed their frustration by exercising their power collectively to say "no". Despite the fact that these promises have not been delivered, developing countries are the ones being scapegoated for the existential crisis that has enveloped the WTO.

Remembering this historical context is crucial as we anticipate the MC13. Following the collapse of the Cancun ministerial in 2003, Aileen Kwa from the South Centre interviewed a number of developing country delegates and published their experiences as Power Politics in the WTO. The report recorded how "real decisions are made in backrooms by informal caucuses whose members are not determined by formal rules and votes but by informal agreement among significant players", noting "this non-transparent, non-accountable system of decision-making is one of the elements that has contributed to the crisis of legitimacy of the WTO."

That behaviour has not changed. Instead, it has got worse. Power politics are explicit in every facet of the lead-up to the MC13. Developing countries, especially those with small delegations, are scrambling to keep up with what is happening on multiple fronts, let alone to have their voices heard and acted upon in agenda setting, documentation and decisions. Here are just three examples.

In the MC12 Outcome Document, Members made a commitment "to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024". But the path for

achieving that is now an “informal” reform process initiated by the United States, the very country that has brought the dispute settlement system to the point of collapse. The WTO’s formal mandates, and bodies with the mandate to debate and adopt such reforms, have been sidelined until some unspecified “appropriate” time when debate will be effectively foreclosed. That end point is unavoidable because they will need consensus to amend the Marrakesh Agreement and the Dispute Settlement Understanding.

In similar vein, the proponents of the controversial plurilateral negotiations, or Joint Statement Initiatives (JSI), that were launched following the MC11, aim to bypass the WTO’s formal multilateral processes. Despite having no mandate, and overlapping or inconsistent with existing mandates and procedures, these negotiations have been resourced by the Secretariat and legitimised by the Director-General. In the case of Services Domestic Regulation, the proponents are mis-using GATS schedules so as to avoid formal amendment of the GATS knowing there is no consensus to do so. Where formal processes are unavoidable, as with the proposed adoption of the Investment Facilitation Agreement as a plurilateral agreement under Annex 4, its powerful proponents, notably China, have been pressuring developing country politicians back in their capitals so as to isolate the dissidents.

A third example is the selective process designed by the chair of the General Council and the Director-General that serves a similar exclusionary function to the old Green Rooms. The recent Senior Officials Meeting (SOM) allocated Members to particular issues that prevented effective participation in discussing other matters of crucial importance to them. There is no formal record. The outcomes document from the SOM was prepared on the chair’s own authority, with objections of many developing country participants that it was unbalanced and did not properly reflect their views. Despite that, the Director-General is using it as the framework for the draft ministerial statement from the MC13, and plans similar problematic meetings in the intervening three months.

Some developing countries and LDCs have participated in these abuses of process. “Divide and rule” may sound cliched, but it nevertheless holds true. Calling the Investment Facilitation JSI “for Development” is especially cynical, unless one includes China’s role as its lead champion. We have yet to see whether Nigeria gets anywhere with its proposals that would effectively make

developing country and LDC compliance with key data obligations in the e-commerce JSI voluntary, but don't bet on it. It has barely rates a mention in commentaries, compared to the US's about-face on data localisation rules.

Many more developing countries have challenged these procedural hurdles and substantive biases, to no avail. In mid-July, the African Group – constituting one quarter of the WTO's Membership - circulated two papers setting out inclusive processes and balanced agendas for institutional reform and dispute settlement. Both seem to have vanished into the ether.

The 13 July 2023 paper "A Development Perspective on Institutional Reforms at the World Trade Organization" (WT/GC/W/895) set out a comprehensive principles-based approach to WTO reform, recalling the MC12 mandate that work towards the necessary reform of the WTO "must be Member-driven, open, transparent, inclusive, and must address the interests of all Members, including development issues." They proposed a Working Group to report to the General Council on matters of institutional reform, and functioning and effectiveness of various bodies, with a list of the kinds of reforms they think need to be addressed.

The African Group paper on Dispute Settlement Reform (WT/GC/W/892) made restoration of the Appellate Body an absolute priority. But it also reiterated a long-outstanding list of development concerns about the Dispute Settlement Mechanism that have been ignored over many years, including third parties, cost, compliance and enforcement. Again, the African Group set out procedural means to ensure the whole membership can participate in these crucial discussions and decisions. By contrast, recent "reform" proposals seek to prioritise new issues on WTO committees' agendas over such old issues unless the items are constantly updated, meaning they are never likely to be addressed.

These power plays are being finessed through a set euphemisms whose vague meanings avoid the need to explicitly address their purpose: the deliberate disintegration of the WTO as a multilateral Member-driven consensus-based organisation.

"*Reform by doing*" is an agenda driven by powerful states through processes that seek to bypass core principles, bodies, procedures that were part of the

original Uruguay Round bagain, without formally amending them. That *modus operandi* is being facilitated by the Director-General and the Secretariat who are seriously overstepping their mandated role in a Member-driven organisation. As a consequence, development priorities and developing country voices are marginalised and their issues are ignored.

"*Responsible consensus*" is another euphemism which featured in the Chair's SOM summary in July 2023. The aim is to amend the Marrakesh Agreement rules and longstanding practice on consensus decision making by de facto means, through applying political pressure on countries not exercise their right to dissent. Those who stand firm are deemed to be "irresponsible". The principal targets are India and South Africa, who are routinely demonised as recalcitrants that are obstructing the rest of the Membership.

That rhetoric belies two important realities. First, a large number of developing countries have expressed concerns about developed country manipulation of the WTO since 1995, but have been ignored and often worn down by developed countries simply ignoring them. The clearest example is how developed countries have killed off the mandated Doha Development Round by simply refusing to engage. Despite this dismal track record, developing countries and LDCs continue to press their collective positions and expectations - the July 2013 statements from the Africa Group on institutional reform and dispute settlement strongly reiterated the centrality of consensus decision making through the mandated bodies.

The second reality comes back to power politics. Some developing country Members and LDCs are reluctant to speak out, especially given the pressure on politicians back in capital. In an institution riven by inequalities of economic and geopolitical power, and unequal resources, larger developing countries like South Africa and India provide the balance. That seems to be precisely why they are being targeted.

Recently, vague references to the "*deliberative function*" of WTO bodies have also appeared. This seems to be another means for introducing unmandated topics and subjects outside the authorised scope of the WTO bodies.

Where does this situation leave the MC13? For the UAE, as host and chair, "success" might simply involve navigating the question: "Whose side are you

on?” by developing and maintaining a modicum of trust in the process before, during and after MC13 and in implementation of the outcomes; managing the existing fractures and not making them worse; ensuring everyone feels they are being heard, but especially developing countries who have expressed very clear views about reform that have been ignored; and establishing processes and agendas for WTO reform that are sourced in the foundational principles of the multilateral organisation set out in the Marrakesh Agreement.

But that is not where the preparatory process is heading. Developing countries’ have articulated an ambitious version of “success” that would see the MC13 initiate a new phase of real multilateral reform based on principles that are grounded in the Marrakesh Agreement. That includes reform that is genuinely Member-driven, based on consensus decision making, ensures special and differential treatment that goes beyond technical assistance and phase-in periods, operates through the mandated bodies to exercise their specified responsibilities, and maintains the distinctive roles of the Ministerial Conference, General Council, Trade Negotiations Committee, and Secretariat.

Yet it is clear from recent developments that there is no political will among the major players to restore genuine multilateralism, let alone to address the long list of outstanding promises to developing countries to address their priorities.

Put bluntly, the agenda that is being pre-scripted for the MC13, and the processes by which it is being developed, is a coup by powerful states, and the WTO’s executive staff, to re-write the WTO acquis without complying with the Marrakesh Agreement, the organisation’s own constitution. They need to answer honestly whether they actually want a genuinely multilateral institution or see instead to establish a 21st century version of the old GATT regime in which powerful states set the agenda and the rules, exercise a power of veto over dispute outcomes, and decide the terms on which developing countries could join.

For the MC13 to endorse the latter would nail the lid on the coffin of multilateralism and permanently relegate the voices and issues of developing countries and LDCs to the periphery of the WTO. That is not a legacy the UAE would want to be responsible for. So it will have to assume the high ground and be guided by the constitution of the organisation set out in the Marrakesh

Agreement. If that is to be amended, there are formal means to do so. Unless and until that occurs, the “rules-based” World Trade Organisation needs to play by its own rules, and deliver on the promises made to developing countries during the Uruguay Round and beyond.

At best, this will result in an ongoing paralysis. The alternative is a existential crisis that is terminal. Given those prospects, the question that really requires our attention is not “what does success look like” for the WTO at the MC13. It is whether the WTO can ever be a viable multilateral institution that provides a balanced and equitable form of global rule-making in a highly fractured and volatile world where geopolitics explicitly prevails.

And addressing those systemic questions is essential before we talk about specific challenges, such as the MC13’s approach to the existential climate emergency, following on from the COP28 that is about to start in Dubai.

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* Jane Kelsey is Professor Emeritus of Law at the University of Auckland in Aotearoa New Zealand. She is a frequent commentator on international trade and development and a consultant to Third World Network and others on these issues

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