

Chapter 2

Revisiting WTO Reform

*Rorden Wilkinson**

2.1 Introduction

WTO reform is once again a matter of debate. While this debate is far from new, current interest is distinguished by the breadth of agreement among WTO members that change has to occur, and the extent of member involvement in shaping and seeking agreement on specific proposals.

The reasons for this widespread engagement are clear. The WTO's negotiating function has proven unable to deliver a far-reaching multilateral deal since the organisation was established. The WTO's maiden round of trade negotiations – the Doha Development Agenda (more commonly known as the Doha Round) – produced only modest outcomes after 14 years. And resolutions remain elusive to longstanding issues such as agricultural subsidies, food security and cotton; disagreements about how to move forward in areas such as e-commerce; and rules designed to take account of real-world changes in production and consumption.

Complicating matters further, the status of the Doha Round is itself ambiguous. The decision at the WTO's 2015 Nairobi Ministerial Conference to respect different positions on the future of the Doha Development Agenda led to diametrically different interpretations. For some, the Nairobi outcome was seen as an abandonment of the Round in all but name and an opening of the way for (largely) plurilateral negotiations in areas of specific interest. For others, it was genuine recognition that the negotiations had reached a point of impasse but that Doha remained the enduring programme of work (Froman, 2015; Prabhu, 2017).

Other events have added weight to calls for reform and underpinned concerns that, without meaningful adjustment, the future of the WTO – and the global trading system – is imperilled (Isaac, 2018). A series of protectionist trade measures implemented in March 2018 by the Trump administration – and responded to by key trading partners – has placed the system under considerable pressure. The effective functioning of the WTO's dispute process has been tested by US refusal to agree replacement appointments to the Appellate Body because of perceived derogations from agreed rules and creeping judicial overreach. And, perhaps most significantly,

* Rorden Wilkinson is Professor of Global Political Economy and Deputy Pro-Vice-Chancellor for Education and Innovation at the University of Sussex, and a Fellow of the UK Trade Policy Observatory (UKTPO). The views expressed in this essay are those of the author and do not necessarily represent those of the Commonwealth Secretariat.

the Trump administration has called into question US membership of the WTO (Donnan and Baschuk, 2018).

It is not just unilateral and retaliatory trade actions that have generated cause for concern. Established regional trade arrangements have been subject to significant realignment – in Europe with the UK's exit from the EU; and in North America with the renegotiation of the North American Free Trade Agreement (NAFTA) and its replacement with the US–Mexico–Canada Agreement (USMCA) (Thrush, 2018). Nascent regional initiatives have also come under pressure. Two of the opening acts of the Trump presidency were to put on hold negotiations for the Transatlantic Trade and Investment Partnership (TTIP) and to withdraw from the Trans-Pacific Partnership (TPP) Agreement. Suggestions have since been made that the TTIP could be revived (Bravo and Chatterley, 2018). Meanwhile, the remaining members of the TPP agreed a revised version, known as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (Schott, 2018).

There are other reasons why reform of the WTO may be desirable. The basic arrangement of negotiations has remained largely undisturbed since the multilateral trading system was created in 1947. The WTO's legal framework requires updating to deal with – among others – complex supply chains and contemporary production and consumption patterns (Froman, 2015; also Drezner, 2015). The relationship between the Sustainable Development Goals and the multilateral trading system has been muddled by the ambiguity of the Doha Round. WTO rules and work programmes are not well aligned to deal with particular social and environmental issues. Business and civil society interests are not well integrated into the trading system, relying on the lobbying of members and their advocacy, or working via representations on the side-lines of ministerial conferences and at WTO Public Forums (see Hannah et al., 2017 for more on this). And the WTO Secretariat remains relatively small and underfunded in comparison with other international organisations, and its remit (and capacity to act) is narrowly defined.

All of that said, the system is still some way from the precipice. It continues to function despite the many pressures it faces; support remains robust among the vast majority of WTO members; and 76 WTO members (including the USA) have recently signalled their intention to begin meaningful negotiations on the trade-related aspects of e-commerce (WTO, 2019). So, while it may be an exaggeration to suggest – as a European Commission Concept Paper recently did – that the multilateral trading system 'is facing its deepest crisis since its inception' (European Commission, 2018), these and other events have nonetheless combined to generate broad agreement that now is the time to have a long hard look at how the system functions and the role the WTO plays as its principal custodian. As the G20 Leaders' Buenos Aires Declaration put it, 'We recognize the contribution that the multilateral trading system has made... [But] The system is currently falling short of its objectives and there is room for improvement' (European Council, 2018).

This chapter contributes to debate about reform of the WTO. Its purpose is to identify key areas where reform ought to take place but where attention is not currently

focused. It begins by putting the current calls for reform into context by briefly recounting a little of the history of the multilateral trading system. The aim of this is to show how key aspects of the system's character have given rise to fundamentally different experiences of, and perceptions about, the purpose, shape and direction of the trade agenda; how they underpin continuing dissatisfaction with the functioning of the multilateral trading system; and how, in the absence of an approach to reform that differs from most of the proposals currently being made, this is likely to continue to be the case. The chapter then identifies where meaningful action could be taken and highlights where significant oversights exist. It suggests that, while many of the proposals are laudable in themselves, they are likely to have an impact only at the margins; and their net effect will be to preserve the institution largely as it is, with the consequence that system malfunction and member frustration will continue to be features of the multilateral trading system in the medium term. The final section offers some concluding comments.

2.2 Reform redux

This is not the first time an overhaul of the WTO has been an item vying for members' attention. Pressure to address system omissions and oversights has been evident since the Uruguay Round was concluded and the WTO established; and demands for reform have been expressed openly since. Yet, despite the weight and frequency of these calls and the introduction of small adjustments along the way, a meaningful process of reform has yet to be put in place. As former WTO Director-General and European Commissioner for Trade, Pascal Lamy, put it as far back as 2001, 'We [have] failed to... set the WTO on the path to much-needed reform.'

Calls to reform the multilateral trading system are not unique to the WTO era either; nor are the complaints being made novel. In many cases, they are echoes of frustrations with aspects of the system's functioning that have been evident since the WTO's predecessor institution, the General Agreement on Tariffs and Trade (GATT), was first negotiated. Pressure to revise and update global trade rules was a feature of GATT business during (and between) each of its negotiating rounds. And at least two attempts were made to put a different system in place – first in 1956 through a process of codification that would have resulted in the creation of the Organization for Trade Cooperation (USCIB, 1955; Bronz, 1956); and second by establishing what was considered at the time a rival trade body in the form of the United Nations Conference on Trade and Development (UNCTAD) (Gardner, 1964; Weintraub, 1964; Cordovez, 1967) – before a third finally succeeded and resulted in the establishment of the WTO.

Importantly, it was the prospect of significant institutional augmentation that was instrumental in bringing the Uruguay Round to a successful conclusion (Wilkinson, 2015). However – and crucially for understanding some of the enduring frustrations of many of the WTO's developing country members – the agreement was reached on the understanding that certain unresolved anomalies (particularly with regard to agriculture) would be addressed once the new institution was up and running. These anomalies were not addressed. It is this lack of remedial action, coupled with the

sheer amount of time that has passed since the issues were first raised, that lie at the heart of much developing country frustration.

If calls for reform are not new, nor are the kinds of responses they have elicited. Many of the modifications, adjustments and enhancements currently being proposed have been countenanced before; those that have been implemented have all too often enabled only temporary blockages in negotiations to be resolved; and very few have been designed to address the system omissions, problematic behavioural practices or core concerns that were drivers of frustration in the first place. The result is that reforms have tended either to preserve existing ways of operating or else to put in place adjustments that have subsequently proven unpopular with those very members that were proponents and proposers of change in the first place. We might think of the difficulties of translating the democratisation of negotiating processes among WTO members during the past three ministerial conferences (MC 9–11) into similarly democratic outcomes (Wilkinson et al., 2014, 2016; Ismail, 2017; Hannah et al., 2018a); the current enthusiasm for plurilateral negotiations as a solution to the stasis of multilateral endeavours (Wilkinson, 2017); and the nostalgia in some quarters for GATT era dispute settlement as three such examples (BRIDGES, 2018).

There is also little to suggest that current proposals will disrupt these patterns anytime soon. This would be a major deviation from the ‘muddling through’ and ‘development-by-bricolage’ manner in which the multilateral trading system has evolved. Returns to existing ways of operating have simply tended to prevail. But the absence of more substantive approaches that thoroughly revise how the system functions is precisely why crises and calls for reform have been – and are likely to continue to be – features of multilateral trade politics (Wilkinson, 2006).

In short, current interest in WTO reform may differ from previous debates in its intensity and the extent of member engagement, but it is unlikely to be unique in terms of the effect any reform may have – that is, unless longstanding path dependencies are broken. What the history of the multilateral trading system so far shows is that the sum of all reform efforts to date has been to leave largely undisturbed a system of operation that would not be unfamiliar to the early observers of the GATT.

2.3 Causes, consequences, responses

Why is this the case? What accounts for the tendency towards system preservation? Some of the answers here lie in the way the system has evolved and the engine that has been harnessed to drive forward the development of the multilateral trading system. These are worth noting because it is here that we can find some of the roots of the differing perceptions about the purpose and function of the system, which are key complicating factors in debates about WTO reform.

The bricolage problem

Some of the reasons why the multilateral trading system needs reforming and why meaningful change has been so hard to bring about can be found in the way the system has evolved over time. Particularly important here are the roles of compromise, happenstance, opportunism and unintended consequence.

It is worth recalling that the multilateral trading system was the product of a response to blockages in the post-World War II negotiations for the International Trade Organization (ITO). By the time the 1947 Havana Conference on Trade and Employment was convened, it was clear that divergent positions had emerged and the chances of salvaging the ITO project were slight. The response of the USA and the UK – as the lead architects – was to begin a round of negotiations that eventually produced the GATT. Meanwhile, continuing disagreements about the content of the ITO Charter eventually led to abandonment of the organisation. And, by default, the GATT was elevated to the role of steward of the nascent multilateral trading system.

What matters here is that the multilateral trading system emerged through happenstance and opportunism. The GATT was originally intended to be a provisional agreement drawn from Chapter IV of the ITO Charter designed to begin the process of liberalising trade among a limited group of 23 contracting parties. It was not designed to be an all-encompassing set of rules governing global trade as the ITO had been. However, these features set the tone for the development of the institution over time.

The contracting parties that acceded to the GATT after it was created often did so with dramatically different interests to the founding 23. Once the first rounds of accession had taken in the remaining industrial states, those that acceded were increasingly newly created, post-colonial states. Despite the growth in the number of signatories, GATT negotiations seldom involved or were binding on all of the contracting parties. Areas of significant economic concern to large groups of contracting parties were excluded (such as agriculture) or else subject to quota systems and other controls (e.g. textiles and clothing) for long periods of time (Heron and Richardson, 2008; Scott, 2017). Custom and diplomatic practice substituted for substantive procedure. And processes of reform and institutional development invariably took the form of augmentation and extension rather than substantive change and evolution – the outcome of the Uruguay Round and the creation of the WTO included.

The result was a process of institutional evolution that drew from and built on happenstance; did not occur in accordance with a clear plan or vision; largely preserved the character of the original agreement and the advantages that the first contracting parties accrued; and pieced a system of rules, norms, customs and procedures together as if it were a bricolage.

The nature of negotiating

The problems embedded in this bricolage have been compounded by the way bargains are reached among WTO members. The multilateral trading system itself, the trade opportunities it affords, the rules governing the conduct of negotiations and the procedures for the administration of the system – among many other things – are all outcomes of competitive negotiations. Because the negotiations are competitive, and member interests are determined by the advantages they seek to accrue and the concessions they aim not to give away, the resulting outcomes tend to reflect the capability of members to realise strategic gains while protecting areas of special interest (Lang and Scott, 2009; Steinberg, 2009). In other words, the interests of more powerful, economically more significant and more capable members usually prevail.

Understanding that this system is the product of – and generates outcomes that result from – negotiations between members varying dramatically in size, economic significance and negotiating capacity is important. It helps explain why reform tends not to change fundamentally existing ways of operating; and it means that the interests of the industrial states more often than not lie in supporting proposals for reform that make adjustments to suit their purposes but that leave the system largely intact. This does not preclude outcomes emerging that bring genuine system-wide benefits, but it does mean they are likely to be agreed only as part of an overall outcome that reflects prevailing relations of power.

This system characteristic has two noteworthy consequences. First, the competitive and adversarial nature of trade negotiations ensures they are frequently politically charged and prone to crises. These crises provide moments – often over extended periods of time – in which outcomes are negotiated and bargains agreed, which in turn act to move the system forward but tend to do so only in keeping with existing patterns. A common feature of periods of crisis is that they give rise to debates about institutional reform; and the outcomes of these debates can help bring wider agreements across the line – as they did with the Uruguay Round. Second, reform processes offer both positive and negative opportunities. Positive opportunities are those that address system malfunction and specific iniquities. Negative opportunities are those seek to recapture lost or claim new advantages. For some, the pressure to ‘graduate countries’ from Special and Differential Treatment, as well as those specifically targeting China, are seen in this regard (Tsuji, 2018).

Differences of perception

A third complicating element is the difference in perception about the purpose of the WTO that exists across the membership. These differences derive from the interests of members. The way they clash is instructive when considering why seemingly unbridgeable divides exist. And they are important in explaining how the multilateral trading system bricolage has evolved as well as what influences proposals and responses in reform debates.

The divide in member perceptions over the purpose of the WTO lies along a spectrum from those that see the organisation as a narrow mechanism for administering a set of agreed rules, to those that see its contribution as more than just international commercial regulation. Some members – largely developing countries – see the WTO as a mechanism for correcting anomalous trade rules and obstacles to development; and they value multilateralism as a means of negating the power disadvantages they encounter in bilateral trade deals. Other members – such as the EU – see the multilateral trading system as a system of governance and a source of law and precedent. In this understanding, trade governance does not have clearly defined limits and spills over into trade-related areas. This is quite different from those who perceive the multilateral trading system to be a commercial space defined by narrow contractual arrangements (bilateral, regional and multilateral), and the WTO – and its dispute settlement mechanism particularly – to be a narrow technical machinery for overseeing the application of rules and obligations, and not a source of jurisprudence. This view most closely approximates that currently expressed by the Trump administration.

These differences in perception matter because they frame the way members engage in debates about reform; they inform the proposals they generate and the potential outcomes to which they agree; and the distances between these positions explain why striking a deal on a substantive and meaningful programme of reform is so difficult to achieve. Thus, the focus of reform for many developing countries is on achieving better and more effective participation, improved trade outcomes and the resources to build capacity. For the EU, reform tends to focus on deepening existing commitments and harmonising trade practices globally. For the USA – particularly under the Trump administration – reform of the WTO is about rolling back on any provisions seen as restricting or disadvantaging US economic activity and its capacity as to act as a sovereign entity.

It would be a mistake to assume that these positions are new. Developing countries have always sought to use the multilateral trading system as a mechanism to unpick enduring iniquities. The EU has consistently favoured increased legalisation and the extension of trade governance into related areas. And the USA has always worried about a system of trade governance encroaching on its sovereignty and bleeding beyond narrow commercial arrangements. These positions were all on display during the ITO negotiations. They have been throughout the history of the multilateral trading system. And they are very much in evidence today.

The trouble with rounds

These factors are compounded by the use of big-ticket negotiating rounds as the means of pursuing market openings and further regulation. At least two issues are worth highlighting here. First, rounds come with an expectation that big market access or other gains must be negotiated. The smaller everyday gains that can be made from on-going, technical and piecemeal negotiations do not suffice. This is a problem at the aggregate level, where the expectation is that a concluded round will produce significant global benefits. It is also a problem at member level, where all negotiating teams are expected to bring home gains that outweigh those of their competitors.

Second, rounds do not take place in isolation from the history of trade negotiations. Rather, they unfold in relation to the outcome of a previous round or rounds. This means that delegations approach any new negotiation mindful of what has gone before, cognisant of any prior inequities and determined to improve on any previous deal *relative* to the gains – perceived or otherwise – of their competitors. The result is that the outcome of one round inevitably shapes the way future negotiations unfold.

This ‘iterated’ form of bargaining predictably accentuates the degree to which members are placed at loggerheads with one another. For developing countries, the asymmetries of previous rounds ensure they approach new negotiation seeking to rectify past anomalies (and, as time goes by, more determinedly so). While this position has also been the case for a number of industrial countries, their primary position is one of seeking to protect sectors of decreasing competitiveness and political sensitivity as well as opening up new areas of commercial opportunity.

Thus, the problem is that, in approaching a new round, those seeking some kind of rectification are encouraged to agree to new concessions in return for remedial action.

This is the logic of any bargaining-based system. Yet, it is because of the requirement to offer something in return for that which is received – coupled with existing power inequalities between participating states – that asymmetries in outcome have been compounded by successive GATT/WTO rounds.

The point here is that the use of exchange as the mechanism of liberalising (and governing) trade among members of vastly different capabilities in institutional confines that have traditionally favoured the already powerful has produced bargains that are of dramatically different value to participating states. As negotiations take place in bursts over time, the inequities of one negotiation influences others; and, as it is only in reciprocating for concessions received that a round can hope to reach a conclusion, it is only through a process of exchange that past anomalies can be redressed. Yet it is precisely because each exchange is asymmetrical that, as negotiations take place over time, the imbalance of commercial opportunities among participating states is exacerbated rather than attenuated. While it may be the case that least developed countries are often relieved of the requirement to reciprocate, this itself is not unproblematic precisely because their lack of significance in world trade excludes them from influencing in any way the shape of the negotiations.

The consequence is that one asymmetrical bargain has been produced after another (Gowa and Kim, 2005). However, it is only when all of the negotiations are taken as a whole – that is, viewed over the lifetime of the multilateral trading system – that the extent of the asymmetries can be appreciated. Moreover, it is only when perceived in this way that it can be appreciated how entrenched and embedded in the bricolage the imbalance in the distribution of trade opportunities has become. It is this feature that has steadily ground down the negotiating function of the WTO and that underscores the necessity of a programme of reform.

2.4 The art of reform

The preceding discussion is intended to provide a lens through which to observe and understand debates about reform of the WTO. The key ‘take-away’ points are:

- Debates about reform of the multilateral trading system are neither new nor novel.
- They have often been bound up with moments of institutional crisis.
- Those debates that have produced outcomes have tended to do so as component elements of wider deals.
- Reform outcomes, like every other aspect of the system, result from competitive negotiations among members differing dramatically in size, economic significance and negotiating capacity.
- The system is a product of these competitive negotiations most often played out in (and exacerbated by) big-ticket rounds.
- The multilateral trading system has evolved via a series of compromises in which dominant interests have tended to prevail and that have resulted in a bricolage-like character.

- Moments of debate about reform – like all competitive negotiations – comprise both positive and negative opportunities.
- Member interests tend to be selfish rather than common.
- Perceptions of the purpose of the WTO – and thus the focus of reform – differ significantly among members.

The problem here is that many of these issues have become a focus of attention. They have generated debate about how they can be solved. But they have often been explored in isolation. Thus, the solution to the problem of negotiating in rounds is presented as a move to smaller group negotiations. However, this runs the risk of excluding members that are not sufficiently weighty in global trade to get a seat at the table. For developing countries, the means of correcting past anomalies is to focus on those aspects of the multilateral trading system that are not fit for purpose; but doing so requires that a hold is put on forward movement in other areas, which would not be attractive to the industrial countries. The solution to the deadlock in the dispute settlement mechanism is to fettle aspects of its functioning so it appeases the Trump administration but does not disrupt its smooth function or ignore the accumulated body of trade jurisprudence. And the solutions to the lack of attention to issues such as e-commerce, gender and the environment all too often focus on well-meaning statements of intent but not on substantive action. So, how to move forward?

The case for a FOWTO

One way forward may lie in looking back at how previous blockages were overcome. In preparing for the Uruguay Round, the GATT contracting parties established a negotiating group on the Functioning of the GATT System (FOGS). Its purpose was to enhance how the GATT operated as a negotiating body; refine its role as an arbiter of trade disputes; improve its notification, surveillance and dispute settlement functions; examine its institutional structure; and increase its contribution to achieving greater coherence in global economic policy-making. However, it was not until the market access and other commercial aspects of the Uruguay Round negotiations were faltering that contracting parties realised agreement could be reached in making improvements in almost all of these areas.

It is here that a potential solution may lie. If we treat the creation of the WTO as one moment in an on-going process of institutional development, then the creation of a group that explores the Functioning of the WTO System (FOWTO) would be entirely appropriate. The group could pick up on the unfinished business of the Uruguay Round, focus attention on areas of pressing need and divert attention towards system reform and continual improvement, crucially taking a panoptic view of the balance of endeavours.

What might this process entail? While this is for WTO members to consider and design, it could nonetheless comprise:

- A thorough and forensic review of the manner in which trade deals are negotiated;
- Developing a set of rules governing the conduct of negotiations that enable the representation of all interests;

- Lending clarity to the substantive agenda of negotiations and specifying how they will unfold;
- Enabling parties to the negotiations to establish a clear sequence of realisable aims;
- Requiring all members to make the process, progress and substance of the negotiations transparent;
- Developing measures that allow for a process of arbitration to intervene in instances where differences of interpretation and/or blockages exist, and which allow for redress;
- Offering technical assistance on the practice, substance and organisation of negotiations to smaller, less able, developing delegations; and
- Outlawing practices that give members undue advantages over their competitor states.

To really capitalise on the gains these endeavours could bring, a move away from highly pressured big-expectation rounds towards less ambitious, piecemeal negotiations that operate on a continuing and continual basis could also occur. Seeing negotiations as on-going and continuous programmes of work on manageable issues would have utility in removing blockages and reducing political tensions. These could also be run as individual projects in ‘task and finish’ groups overseen by the Secretariat. Ministerial Conferences could then move away from being pressured negotiating points in the WTO calendar towards events focused on reviewing a programme of work and its delivery. And getting rid of this lumpiness would help remove the WTO’s version of ‘boom and bust’ by making Ministerial Conferences more mundane, ordinary and expected.

There are other areas that require focus, and which would bring important gains. The key to any reform is to find a way to negate the divisions that arise from the divergent interests of members and to create incentives for cooperation. Equally as important is a process that clarifies the purpose of the multilateral trading system so members have a clear and shared understanding of the value and role of the WTO. This could be achieved through the negotiation of a Ministerial Declaration on the role of the WTO and the part members play in making the system function, akin to the Declarations of Understanding negotiated during the Uruguay Round. This kind of clarification could go some way towards reconciling the tensions between narrow functionalist and technically oriented understandings of the organisation and those that see it much more broadly. It would also be useful in sorting out the relationship with – and delineating the relations between – the WTO and other international organisations. An allied endeavour would be to clarify once and for all the status of the Doha Round.

The very real need to deal with social and environmental sensitivities notwithstanding, attention in the immediate term should focus less on expanding the trade agenda and more on getting right what the WTO does. This should include – but not be limited to – clarifying dispute settlement functions, procedures and outcomes; and

expanding the trade policy surveillance, review and research and analysis functions of the Secretariat. Delivery should be a system mantra. Too many negotiations and agreements are either not, or only partially, implemented, or else they do not fulfil their promise. Had this been the case after Uruguay, many developing country concerns would have been addressed. It would also mean that more would have already been made of the trade facilitation agreement.

A conscious effort needs to be made to get ahead, in a substantive and meaningful way, of new trade agendas. Thought should also be given to the representation of public debate in the WTO. Recent research on Ministerial Conferences and the Public Forum, for instance, shows that the business and diplomatic communities are well represented but that public participation has fallen off considerably (Hannah et al., 2018b). A properly constructed FOWTO could provide a meaningful answer to the reform conundrum.

2.5 Conclusion

Although the current conjuncture provides a potentially fruitful opportunity to attend to aspects of the WTO's functioning and organisation, there is a risk that a shift in gear towards a reform mode might prove satisfactory only in that it translates pent-up frustration into action and speaks only to the politics of the day and not the solutions required of tomorrow. It does not guarantee that such a shift would bring about the kind of analysis, reflection and action required to address the deeply rooted problems that generate the afflictions of the multilateral trading system.

It is also worrisome that current debate about WTO reform lacks innovation and risks resulting in little change. This is because it does not allow more foundational questions and concerns to be raised. In turn, this lends thinking about reform of the multilateral trading system a path-dependent quality and ensures that all too often proposals are aired and discussed that either attempt to recover lost functionality or else implement modest adjustments to the existing system. While incremental evolution is in principle a reasonable way to bring about measured reform, the bricolage-like qualities of the multilateral trading system require more than just minor adjustments, particularly if it is to be enhanced. This suggests that, rather than persisting with piecemeal approaches to reform, we need think a little more about taking the system apart, preserving what is good and discarding the ill and then putting it back together in a way that enables trade-led growth to occur in a manner that offers greater equity of opportunity across the board and substantial corrective action for those that have been negatively affected by the system's past functioning. As George Orwell reminded us in 1946, 'The imagination, like certain wild animals, will not breed in captivity.' Why would we imagine that thoughts about reform of the WTO would do otherwise?

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