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# From Nairobi to Confidence Building Measures in Geneva

CRAWFORD FALCONER

I visited my old stamping grounds, Geneva, briefly a week or so ago. I was a bit taken aback at what I encountered. There seemed, to me at least, to be an enormous gap in perception between wish and reality.

Don't get me wrong. Such a gap has always been present in Geneva. A serious capacity for entertaining it could even be described as an essential job requirement to function in that town. But, even allowing for that, this seemed to me uncharacteristically so.

The most fundamental reality is that the major developed economies, whatever they may say in public about it, have by now lost interest in pursuing the World Trade Organization (WTO) Round – the Doha Development Agenda (DDA) – in its present form anymore.

It is less clear with developing countries. Certainly, a very large number of these countries at least say they are committed to it and still want it to proceed.

But the major developed economies have moved on, primarily to bilateral or regional free-trade agreements (FTAs). Secondly to plurilateral agreements, the two so-called mega-regionals – the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) agreements represent a qualitative and a quantitative shift in that respect.

The TPP, which has been concluded, changes the trade landscape. It brings together Japan and the United States (US) with a cohort of other economies (representing 36 percent of global GDP we are told). No trade negotiation that big has been successfully concluded since the accession of China (and Taiwan) to the WTO 13 years ago.

People scoffed at the whole idea that it would ever happen. They are eating their words now.

The TTIP between the US and the European Union (EU) is under intense negotiation. People scoffed at the whole idea it would ever happen too. They are not scoffing now.

The advent of the TPP can only hasten the TTIP's negotiation, and there is already evidence this is happening.



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and Sustainable Development

The EU has seemingly already essentially concluded an FTA with Japan, although it appears to be lost in translation somewhere.

So, the three largest developed economies have now pretty much dealt with their core trade issues through FTAs. I leave aside the plethora of other small and medium-sized economies from Canada to Korea to Peru to New Zealand that are part and parcel of the same kinds of deal.

To someone like me that has lived and worked through the duration of the DDA, it is stunning.

This is a situation that is a million miles away from the one that prevailed at the commencement of the Doha Round. It is a million miles away even from the situation that prevailed at the decisive breakdown of the DDA in 2008.

Up to that point, the only real negotiating forum for trade negotiations among these three parties was the WTO. It had always been like that.

That is over.

There is nothing complicated about what this means for the DDA. It means that those economies simply do not need a WTO Round to deal with those issues among themselves. They have dealt with them together, outside the WTO.

Market access on agriculture? Dealt with. NAMA tariffs? Dealt with. Trade rules? Dealt with. Trade-related regulatory rules? Dealt with. Services trade? Dealt with. Foreign Direct Investment? Dealt with.

Moreover, it is much more far-reaching than simply dealing with their own issues.

A WTO Round doesn't achieve success, because there is precise mathematical reciprocity in each and every individual element. On the contrary, the whole logic of a single undertaking Round is precisely that it enables an overall package that is accepted as a totality.

The converse of course holds. Take a huge wedge of potential achievement out, and it has diminution effects that go beyond the precise parameters of the wedge that is extracted.

An illustration might help.

In crude terms, a Doha deal that involved cuts in US domestic support would have been sold, for example, in Washington, because, inter alia, the US could see that it was going to get access to the Japanese pork market and the EU beef market.

Such trade-offs are no longer possible in a Doha Round, because they have been taken care of bilaterally. And, the ramifications are not simply that you have a lesser residual Doha market access deal; you have a lesser prospect, for example, for a domestic support deal, because the total package has shrunk dramatically.

That is just an illustration. That has happened all over the DDA agenda. The NAMA and the Agricultural Agreement have actually been made.

The above speaks for itself. But, there is more. Much more

If you are not party to those agreements, you are now in a worse position, generally.

At the most basic level, the participants have preferential advantage over MFN suppliers. So, MFN suppliers are worse off. Now, it is true that many developing country members already have preferential access in any case. So, the worst that would happen to them is that previous MFN suppliers will now get closer to what they have been achieving. So, it is still worse even for them, albeit in a diminished sense.

Also, the active prosecution of FTAs, together with their successful achievement has hardened the attitude to making any multilateral concessions without full reciprocity. You don't worry so much about that if you don't do FTAs or do them kind of casually. When they come at the core of your trade negotiating strategy – as they now have – this becomes a central consideration.

So, the big three have strengthened their attachment to keeping their remaining MFN trade measures as “negotiating coin.” It was always a factor. But, it was not really a compelling consideration in 2002 or even in 2008.

It is now.

There has been a step change in unwillingness to diminish margins of preference. And, this has been intensified by their actual achievements in negotiating terms.

Just restricting it to market access alone, the FTA model works on the serious premise that the participants go to zero. Sure, there are exceptions and there are phase-ins. And, some of the former are egregious.

But, let's not kid ourselves: these liberalisation outcomes are light years away in their scope and depth from anything that was even dreamt of multilaterally, let alone what ended up in the texts of the Agriculture Agreement and NAMA in 2008. No "lesser cuts." No haggling about how much "water" is acceptable. It is real cuts to applied rates and most often all the way to zero. No argument. The only real debate is how long it takes. And, they apply to developed and developing countries.

That has utterly changed the mindset within the big three. To put it brutally: once you have acquired the taste for red meat, you aren't so ready to settle for a side salad.

And, that applies to what was contemplated in the DDA. They have simply lost whatever appetite they might have had for that.

Some might argue that that is all very well, but that only applies to themselves. It means they don't get access to developing country markets, so they will still be obliged to come to the table for them.

Wrong. Dead wrong. They simply don't rate anything that is seemingly left on offer in Doha, and they rate it even less now that they have plucked the juiciest fruit out of it via their own deals and are contemplating more plums to come.

Nothing happening in the DDA on agriculture suits them down to the ground. The big three don't particularly want to do anything to discipline their trade-distorting agricultural subsidies or their heavily protected agricultural market access sectors for that matter.

The only reason these were under negotiation in the DDA in the first place was because unsubsidised

exporters (most of which were developing countries) in groupings such as the Cairns Group and the G20 insisted on it.

And, the only reason the big three grudgingly went along with this in 2002 was because they could see that it was "the price to pay" for other things they wanted. Cotton was not put on the table voluntarily by the US in the DDA. The special terms for it were extracted at a time when there was real leverage in a live round, and there were no other serious alternatives.

But, they can now get just about all those other things – and a lot more besides – by other means. One of the beauties of FTAs from their perspective is that they simply do not deal with trade-distorting subsidies.

So, they have very little interest in putting themselves back in the dock in the DDA context on domestic support when any potential counterweights to their political pain have been extracted or evaporated.

They do occasionally complain about some developing country domestic support. But, it is not serious. It is purely tactical to provide a convenient excuse to do nothing about their own programmes. If they were seriously worried, they have ample headroom in their existing Uruguay Round commitments to seek to make a deal. Have they tried seriously to do so? Have they made a serious offer? Of course not.

As for agricultural market access, as noted above, the DDA access possibilities are seen to be tepid by comparison with what is now manifestly achievable in an FTA context. Agricultural market access for developing countries in the DDA was dominated by debate about special products, the Special Safeguard Mechanism (SSM) and even how often you might or might not be able to go above your WTO bound rate.

There is no SSM in these agreements. Nobody is haggling about how often you might be able to go above your bound rate. It's all about applied rates. They can use their own high rates as leverage in negotiations. And, one way or the other, they get a much more far reaching deal for their exports to developing countries. It's another world.

They see the draft NAMA outcomes as scarcely making any difference to applied rates in any significant markets and therefore as making no real difference to their commercial market access aspirations in those markets.

At the same time, they see that there is, in fact, no shortage of developing countries that are prepared to negotiate with them in FTAs and to undertake far more sweeping market opening than anything that was ever seriously on offer in the Doha Round.

Indeed, they have seen the very same countries that make small liberalisation offers in Geneva prepared to make much more far-reaching ones in FTAs. So, who can be surprised if negotiators put two and two together and figure out where they are going to get the better deal?

And, for those developing country partners that have not already negotiated, are in negotiation, or are on the threshold of negotiation with them, the major developed economies figure out it is only a matter of time before the rest come knocking on the door also.

So, the last thing they are going to do is give them any impression that such economies can get liberalisation in the markets of the major developed economies at a DDA discount rate as it were.

On the contrary, they will be incentivised to sit tight with their remaining market access barriers and recognise that with more and more countries joining FTAs, the outsiders have even more incentive to play ball, because they are suffering more and more competitive disadvantage.

Just look at the immediate reaction to TPP alone. Within only weeks, the governments of the Philippines and Indonesia were already publicly saying they want to join. China says it is open-minded. Indian textile and apparel manufacturers are voicing their anxiety about being competitively disadvantaged. Ditto for Thai motor vehicle component manufacturers. It will go on and on like this.

Many developing countries have been, and are, exhibiting the same revealed preference. Many are actively negotiating in these FTAs, whether

with developed countries or developed. They too are more than ever anxious to maintain their negotiating leverage. They too are, if anything, even less inclined to make market access concessions of any sort in Geneva, because they would rather exercise them in current or future FTAs.

This is the brutal reality of the so-called competitive liberalisation model.

But, there is something else (and it is rather fundamental) that needs to be taken into account. Those traditional market access barriers are still of interest to the major developed economies. They would prefer to see them gone. But, they are of much less relative interest to them than they were in the past.

What matters much more in those major developing economies are such issues as foreign direct investment (FDI) barriers, services barriers, disciplines related to state-owned enterprises (SOEs), regulatory impediments, intellectual property protection, and transparency – not to mention such areas as environment and labour.

This reflects the evolution that has occurred in the real world of trade over the past decade. And, the DDA has pretty well zero to offer in any or all of these areas. They are matters that are either outside the WTO (such as FDI) or with a DDA mandate that is lightweight (such as trade in services).

So, it is not just a matter of keeping their negotiating coin for trade-offs on subject areas that are within the DDA as described above. Actually, they have a totally different strategic perspective from that which existed at the start of the DDA. To the extent that negotiating “coin” is relevant, it is related to policy areas that are not even under serious discussion, let alone substantive negotiation in the DDA.

For all these reasons (and more), it is a serious mistake to think that there is any genuine oxygen in these negotiations at the moment. Nothing could be further from the truth.

It is true that, as late as 2013, there was a real demand at least for the trade facilitation package. There was a bit of potential to and fro then. But,



perhaps surprisingly, nobody really exercised it.

India did insist on a weak and economically insignificant undertaking, which absurdly whipped up the view that somehow the heavens would fall if it was agreed to. But, nothing really significant elsewhere in the DDA had to be paid by the US and others to get that: nothing on market access; nothing on NAMA; nothing on trade rules; nothing on export competition; and nothing on domestic support.

It is hard to disagree with the view that once agreement to that element of the DDA was achieved, the major developed economies had secured about the only thing left that they wanted out of the DDA. And they have subsequently shut up shop.

Which is where we are today.

At night on a dead end. And, let us be clear, with precious little leverage to change this state of affairs.

A bleak situation. But, why dwell on it?

Because my sense is that the way many or most are behaving, there seems to be either some kind of presumption that there is indeed some real life in this, or a sense that we can just carry on with a Kabuki play scenario, because there is nothing much really at stake anyway.

But, it is surely seriously adrift to the point of total loss. And, there is surely still a great deal at stake (not the subject of this note). But, one has no chance of improving things if one has a completely erroneous diagnosis of the situation.

I have taken a serious look at the reality. And, it is pretty sobering. But, I do stop (just) short of the view that it is completely dead.

If you took that view you could draw one of two conclusions, depending on where you sit.

On the one hand, you could take the view that the DDA is no longer fit for purpose, and it should be disposed of. Something else should be started, or we just deal with matters outside the WTO elsewhere in bilaterals or plurilaterals.

On the other hand, you could deny that characterisation of the quality of the DDA but, recognising it will not happen, want to make sure that those you view as the culprits in this exercise should be obliged to take the blame for its failure.

To which I have two objections.

First, it is not actually irrevocably gone. The very fact that participants still argue that it needs to be disposed of (or more polite words to that effect) alone tells you that it is not in fact already the case.

Second, neither of the derived conclusions will in fact work.

It is a total fantasy that there will ever be agreement to agree to dispose of it. If there had been any such prospect, it would have happened by now. To force this line only obliges others to dig their toes in ever stronger. And, in operational terms, it is not really necessary as long as nothing actually happens anyway.

It is just as much a total fantasy that any participant or any group of participants can ever make all the dirt stick on one or a few other countries. Various players have been trying that game for years, and it has never worked. The mud is everywhere. One might even add that outside the Geneva beltway in the wider world nobody actually cares that much anyway. This is sad, but true.

So, one could divine from this that, despite my sober assessment of the state of play, I still harbour the prospect, however slight, that something more can come of this DDA exercise.

I do. Which is why I would argue we should still try not to succumb to the above courses of action I see all too readily unfolding.

That said, I am guessing that the die is pretty well cast by now. So, there is not a lot that can be done to substantively improve prospects. In this case, the most one can aspire to in the short term is a matter of salvage.

In that respect, the best I can suggest is four major elements.

First, there are some tangible outcomes that need to be fronted up to in Nairobi.

Export competition seems almost doable. Developed countries have been distorting and stealing markets for decades with these instruments. In recent years this practice has, thankfully, much diminished. Formalising it by reaching a contractual agreement to refrain from it would be welcome. But, obviously, it has to be balanced.

The undertaking to reach a lasting agreement on public stockholding is not something to be brushed under the carpet.

It is long past time to have something serious to say about cotton.

Second, there is a need to accept, rightly or wrongly, that there is still major attachment in a number of quarters to the DDA. There is zero chance that it is going to be obliterated overnight. And, treating anyone that happens to feel otherwise as benighted or recidivist is just as guaranteed to create acrimony and divisiveness as unrealistic demands.

There is also a need to accept that there is zero chance of negotiating some substantive wish-list of demands as if anybody could possibly really believe that this could ever happen. All that will do is create acrimony and guaranteed failure. It will crowd out any other possibility for constructive engagement.

I can well understand that those who feel aggrieved can be driven by a powerful wish to express that grievance to the exclusion of all else.

I happen to share the view that major developed economies need to do more than they have been doing to improve the credibility and functioning of the WTO. But, this should not be left only to developed economies; major developing countries have too often looked for too easy a ride in this exercise. There is enough guilt to go around on this one.

But, if you want to change that situation, you do yourself no favours if you make it easy for the

target of your strategy to just carry on doing what they are doing, or what they have not been doing.

Nothing could be easier to deal with than a series of demands that developed economies must do a selective smorgasbord of things out of the DDA agenda. If you think you have some kind of leverage to induce them to do that, it may make sense. But, absent that leverage what does it achieve? You have absolutely no way of making it happen. So, you have a so-called strategy that is guaranteed to achieve absolute failure.

The targets can listen to all of those demands. They can even do so politely, but it will be like water off a duck's back. And, the day everybody slouches back to Geneva on their post ski-holiday crutches in late January, nothing has changed. There is complete disagreement on everything. Nothing has happened, and there is absolutely no prospect whatsoever of anything happening in the future.

If you share my diagnosis above, that is, in fact, precisely the outcome that the targets of that so-called strategy are perfectly comfortable with. It puts anybody who wants to do nothing multilaterally under no pressure whatsoever.

I can just as well understand that those who are dealing with what they see as a world that has moved on can be driven by a powerful sense of impatience with what they see as the weak, the halt, and the lame.

There is indeed a real world of international commerce beyond the Geneva auto route that creates political and economic demands that the DDA has not and, indeed cannot, meet. And the plurilateral and regional agenda has proven capable of dealing more effectively with that reality. Yet, the Geneva processes prove resolutely and stubbornly incapable of adapting to that powerful reality. And yes, there are cases of backtracking and obstructiveness to go with it that create a palpable sense of frustration.

I profess no easy answer to how that situation might be improved from here. But, any belief that this can be modified let alone transformed by just calling the whole thing off puts no real pressure on anyone. Nothing can be easier in a

consensus-based organisation than stopping that happening. And, it lends itself all-too-easily to the claim that participants' past undertakings are being reneged on.

But it is, in the end, to no good purpose to wallow in dispute and guaranteed failure, because that is all it will get you.

Third, start an honest dialogue based on a sound analysis of the real situation.

There has been too much tactical blame-shifting going on. Parties need to be much more straightforward with each other.

Those who have moved on need to be frank about that, and explain the reasons why, rather than all-too-readily just blaming the other guy for being unreasonable. That might even involve acceptance of responsibility for not living up to past commitments. Sometimes the mere fact of an honest admission can make all the difference. Those who have not moved on need to be at least ready to listen to what those reasons are rather than simply insist on their engrained version of entitlement. They need to start thinking about what might actually help reluctant partners to come around to a different view.

It is time to start a truth and reconciliation process in Geneva? Why not?

Fourth, on the back of that, I would suggest coming back to Geneva to develop what I have tentatively called medium-term confidence building measures (CBMs). This would hold out a perspective that could prove to be considerably more constructive than trying to deal with the consequences of a series of failed demands in Nairobi.

The reality will be that everyone will have to come back to Geneva. There will still be those who want the Round to be continued and concluded. There will be those who want a line drawn under it. I am guessing that neither extreme in that debate will have succeeded in persuading others of their viewpoints in Nairobi.

You will get nowhere trying to relitigate that in Geneva. So, you respect the differences. Those that want the Round to be continued and

concluded will work to that end. Meetings will be held, and work will continue. Those who don't share that view will doubtless drag their feet in those meetings. But, so be it.

Without prejudice to that view, someone (the Director-General, the Chair of the General Council, selected wise heads-whatever) is granted (or assumes) the responsibility to consult on the way ahead. I think at least this will be needed anyway. The then-Chair of the General Council, Carlos Perez Del Castillo, undertook such an exercise to great effect after Cancun in 2003. Mike Moore undertook it to great effect after the Seattle debacle ultimately getting the DDA launched on Doha.

But, I would suggest that consultation could go somewhat further, along the lines below. But, some other approach or variation could obviously work just as well or even better.

The idea is that you would seek to develop confidence-building commitments applicable, for example, over an initial period of one or two years.

Everyone knows that current (Uruguay Round-inherited bound commitments) are (in many cases) way above existing applied measures. And, of course, unless and until we reach another multilateral outcome, those bound levels are not going to reduce. For the time being, that is not going to happen.

It doesn't mean that participants stop trying. And, I am not in the business of discouraging that.

But, in the meantime, participants could try to develop CBMs in the form of undertakings which, while formally short of contractually binding commitments, can, over time, progressively build much-needed confidence that can still stabilise and improve the system.

Who knows? That may even, in time, actually make it easier than anyone currently imagines to take the final step to reach fully binding commitments.

I have in mind that you start with domestic support for agriculture and then move on to market access for agriculture and NAMA. (If,



for whatever reason, it becomes impossible to achieve a sensible outcome on export subsidies in Nairobi that is of a binding nature, it would be sensible to start there. But, let us assume that a fully contractual deal is achieved for export competition.)

Starting with domestic support for agriculture makes the most sense, because it offers the greatest opportunity in technical terms to get the CBM show on the road. In this area, the gap between applied and bound is enormous.

Consultations could be undertaken in order to achieve initial CBMs, for example on overall trade distorting domestic support, on the aggregate measure of support, or whatever seems, following consultations, the most viable vehicle to begin with.

The person undertaking the consultations would then propose the CBM.

They could arrive at, for instance (and this is purely a hypothetical example) that participants make a CBM to reduce overall trade distorting domestic support by 25 percent. That undertaking could be made for an initial period of 12 months.

That undertaking would not be a formal bound commitment. But, it would be a serious undertaking by the participants not to exceed that level during the lifetime of that undertaking. It would be understood that any party breaching that undertaking would, following immediate consultations with the aim of reversing that breach, permit all other parties to withdraw their CBMs.

I believe that, sovereign governments acting in good faith would, if they had bought the basic philosophy of trying to establish CBMs, be most loathe to be held responsible for the failure of such a serious project.

To be clear, this would not be a substitute for negotiated bound commitments coming from the DDA or an abandonment of it.

That process of negotiation would continue on its own track.

These CBMs would be arrived at in parallel. And, because they are short of binding commitments in

legal terms and would be pitched at levels that do not infringe on actual applied levels of protection or support, they would not require formal treaty undertakings from sovereign legislatures.

In addition, the CBMs even at those reduced and non-contractual levels are time-bound. The idea would be that after the expiration of the period (I would imagine either 12 or 24 months would be the realistic time period) any government would be free to withdraw the CBM if, for whatever reason, it became unable to sustain it.

But, of course, the idea is that, once governments get a bit used to this idea, and to the fact that the heavens do not fall once they have had such CBMs in place for 12 months or more, they could be open not only to extending these measures for a further period, but also to taking a further measured step forward on the same basis for another period of time.

So, you could have a further tranche of another 10 percent.

Then, you could turn to the obviously more difficult issue of market access.

Even here, it is a matter of starting small and seeing if you could work up step by step. There are a number of areas where you could use that same approach of taking CBMs that are not themselves fully contractual but are feasible due to an existing gap between applied and bound measures.

My guess is that, in this area, it would be more of a mix and match approach. Some could take straightforward steps to undertake not to raise their tariffs above a level that is still higher than their current applied levels but still somewhat lower than their Uruguay Round commitments. Others might be able to take CBMs bearing on market access other than on tariffs.

Remember, again, this is a step by step 12 month by 12 month tentative programme forward. In this area, it could even be a case of like-minded smaller and medium-sized economies coming together to make such undertaking voluntarily, reflecting this philosophy, precisely to encourage or challenge the reluctant larger ones to join the exercise.

Now is not the time to predefine all the possible modalities. The above is just meant to open the way to thinking about intermediate possibilities that create confidence and trust over time. The point is to find a way to narrow the absurdly wide gap between where things were at the end of the Uruguay Round and where they are now in the real world and to do it in a way that precludes the frequent excuse that nothing whatsoever can be done, because the only measure that can be taken that is worth anything is a fully contractually bound measure.

Yes, that is ideally where we still head for as we always have done in the past. But, the alternative

does not have to be nothing at all pending actually arriving at that point. That is where we have been languishing hopelessly for the last 13 years.

An approach of the kind suggested above would surely improve the situation by giving at least some improved stability and security together with demonstrating that sovereign states acting in a concerted way multilaterally can still arrive at tangible improvements after all. Not the best measures. But at least better measures.

That is above all what we need now, and who knows where, over time, it might lead. We know all too well where doing nothing will lead.

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