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WORKING PAPERS

15

SINGLE UNDERTAKING: A STRAITJACKET OR VARIABLE GEOMETRY?

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PREFACE

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ACRONYMS

ASEAN	Association of South East Asian Nations
COA	Committee on Agriculture (WTO)
CTS	Council for Trade in Services (WTO)
DMD	Doha Ministerial Declaration (WTO)
EC	European Communities
GATS	General Agreement on Trade in Services (WTO)
GATT	General Agreement on Tariffs and Trade (WTO)
GNG	Group of Negotiations on Goods (Uruguay Round)
GNS	Group of Negotiations on Services (Uruguay Round)
ITA	Information Technology Agreement (WTO)
MFN	most-favoured nation
OECD	Organisation for Economic Cooperation and Development
TNC	Trade Negotiations Committee (Uruguay Round and WTO)
TRIMs	Trade-Related Investment Measures (WTO)
TRIPS	Trade-Related Intellectual Property Rights (WTO)
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
WPDR	Working Party on Domestic Regulation (WTO)
WPGR	Working Party on GATS Rules (WTO)
WTO	World Trade Organization

I. INTRODUCTION

The 1986 Punta del Este Ministerial Declaration launching the Uruguay Round provided in part as follows for:

The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis by agreement prior to the formal conclusion of the negotiations. Early agreements shall be taken into account in assessing the overall balance of the negotiations.¹

Since this was the first time that the notion of a single undertaking was formally incorporated in the GATT's lexicon (and now, post-Doha, in the WTO's), it is perhaps not surprising that it has been given a variety of interpretations. The WTO, for example, lists it as one of the principles (together with others such as participation, transparency, special and differential treatment and sustainable development) that guide the Doha Work Programme. It further goes on to describe single undertaking as follows: "Virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately."²

By paraphrasing the concept as "nothing is agreed until everything is agreed," the WTO Secretariat focuses on the outcome of the negotiations and consequently gives the concept a meaning narrower than that suggested by the Doha Ministerial Declaration. The concept as outlined in the Doha Ministerial Declaration also embraces the separate but related notions of conduct, conclusion and entry into force of the outcome of the negotiations as constituting a single undertaking. The relevant provisions of the Doha Ministerial Declaration for the purposes of this paper are reproduced in Annex I.

Paragraph 45 of the Doha Ministerial Declaration is particularly important in clarifying that the "entry into force of the outcome of the negotiations" under paragraph 47 of the Doha Ministerial Declaration, as part of the single undertaking, is subject to the decisions of the Special Session of the Ministerial Conference "regarding the adoption and implementation of those results" -- i.e. the outcome of the negotiations. Furthermore, paragraphs 49 and 50 provide part of the negotiating context in which the conduct of negotiations as part of the single undertaking under paragraph 47 should take place -- i.e. that benefits must be balanced and ensured for all participants

The characterization of the single undertaking concept, not surprisingly, varies from the popular "all or nothing", "take it or leave it", or "something for everyone" formulations; the WTO Secretariat's "nothing is agreed until everything is agreed" formulation; to the more academic -- i.e. that single undertaking is a "major structural innovation"³ or that it is a "new regime principle".⁴ In further discussing the latter idea, Robert Wolfe goes on to capitalize single undertaking on the ground that "it became a basic normative principle of the regime".⁵ Others, however, observe that "the concept of Single Undertaking will be gradually eroded and dismissed and where topics will be addressed at

¹ GATT Ministerial Declaration of 20 September 1986 (Punta del Este Declaration), Part I:B(ii),

² See WTO, *Doha Declaration Explained*, at http://www.wto.org/english/tratop_eldda_e/work_organ_e.htm

³ Craig Van Grasteeck, "U.S. Plans for a New Round: Negotiating More Agreements with Less Authority" in *World Economy* (2000).

⁴ Robert Wolfe, "Global Trade as a Single Undertaking: the Role of Ministers in the WTO" in 51:4 *International Journal* (1996).

⁵ *Ibid.*

different speeds and countries will join and negotiate market openings over differentiated time periods”.⁶

Then again, some of those closely involved with the Uruguay Round negotiations take different views. For example, the Chair of the Negotiating Group on the Functioning of the GATT System during the Uruguay Round, then-Ambassador Julio Lacarte Muro of Uruguay, advocated a single undertaking approach on the ground that widely divergent interests regarding the agenda warrant a “package” before “bargaining a final solution,” and that developing countries would benefit from a single undertaking “with several reviews conducted simultaneously and thereby allowing concessions in one area to be offset by gains in another.”⁷ The Secretary General of UNCTAD has observed that while he was “not opposed to the concept [of single undertaking],” he has suggested that developing countries had to be careful in accepting it as “we could end up again where one side has 90 per cent and the other side 10 per cent.”⁸ Representative of academic writings and of the trade policy establishment are the following observations by Professor Jagdish Bhagwati:

The Uruguay Round also must be credited with having brought about a Single Undertaking, with common rules and obligations for all members, with exceptions largely reduced to transitional periods for developing countries. We thus have a WTO, which aims to have a single set of rules to govern world trade. This is a considerable achievement, as few of us believe now, as many of us did in the 1950s through 1970s, that there should be a Special and Differential treatment for developing countries.⁹

On the other hand, in discussing the shortcomings of the WTO from the development perspective and pushing for reforms in its governance, Professor Gerry Helleiner has argued that “[a]nother casualty must be the concept of ‘single undertaking’ (originating in the Uruguay Round) in which member countries are required to agree on (and abide by) an entire set of rules, multilaterally negotiated within the WTO.”¹⁰ He suggests that more flexible arrangements for joining and/or opting out of particular agreements would be more conducive to future negotiations among a heterogeneous membership.

The policy and academic debates regarding single undertaking and its role in the WTO -- before, during, and after the Uruguay Round negotiations -- cannot, however, detract from the fact that by the end of the Uruguay Round, “the original idea of treating the negotiations as a single undertaking was subtly changed to mean that **all** results of **all** negotiations were to be applicable as a “single undertaking” to **all** contracting parties”.¹¹

The variety of meanings attributed to the concept and its implications for the WTO system has raised many questions such as those below, the answers to which remain far from clear.

- Is the concept a “new regime principle” and a new “structural innovation” as argued by some?

⁶ Luis F. de la Calle, “The Functioning of the World Trade Organization, talk presented at the WTO Symposium, 30 April 2002.

⁷ “Single Undertaking versus Separate Negotiations”, discussion paper presented at a meeting convened by the Center for International Trade, Economics and Environment, Geneva, November 1999 and reported in <http://www.business.vu.edu.au/cibre/main-tradinfo>.

⁸ Remarks reported in the 4th Report on the G-77 Meeting, Geneva, September 1999, at <http://lists.essential.org/main-intl/msg00153.html>.

⁹ Jagdish Bhagwati, “Fifty Years: Looking Back, Looking Forward”, paper written for the Symposium on the World Trading System, organised by the WTO and the Graduate Institute of International Studies, Geneva, 30 April 1998.

¹⁰ Gerald Helleiner, “Markets, Politics and Globalization: Can the Global Economy be Civilized?”, 10th Prebisch Lecture, Palais des Nations, Geneva, December 2000.

¹¹ S.P.Shukla, *From GATT to WTO and Beyond*, World Institute for Development Economics Research Working Paper No.195 (United Nations University, Tokyo, August 2000).

- In subjecting WTO members to the same rules, has the concept undermined the Special and Differential treatment and provisions?
- Does it provide any space for manoeuvre to the participants in the Doha Round?
- How do the notions of “conduct, conclusions and entry into force” in paragraph 47 of the Doha Ministerial Declaration relate to and help in understanding single undertaking?
- In the context of paragraph 47, is the provision for “early harvest” an oxymoron?
- Is single undertaking a procedural device, part tactical and part strategic?
- Does the concept of single undertaking have any legal standing or normative connotation?
- How does the notion of “overall balance” stressed in paragraph 49 of the Doha Ministerial Declaration fit into its scope?

This paper is an attempt to answer some of these questions and shed light on the considerations that led Ministers in 1986, in Uruguay, to introduce the concept of single undertaking in Part I of the Punta del Este Ministerial Declaration. The resurrection of the concept fifteen years later in paragraph 47 of the Doha Ministerial Declaration raises similar but clearly more pressing questions about its meaning and scope, given the expectation in the Doha Ministerial Declaration that the negotiations are supposed to be concluded by 1 January 2005. In particular, any possible Uruguay Round-style application of single undertaking towards the concluding phase of the Doha Round warrants a better understanding of the concept and of the responses needed to deal with it.

The first part of the paper identifies and places foremost an understanding of the meaning of the term “single undertaking”. Subsequently, a historical overview to the introduction of the concept of single undertaking in the Punta del Este Declaration is provided. It traces the evolution of single undertaking from before the Uruguay Round to its conclusion. Theories of sovereign negotiations provide some insights into the processes of issue-linkages in an enlarged type of negotiating agenda. Such a negotiating agenda is supposed to permit trade-offs and encourage coalition building in pursuit of multilateral and reciprocal exchanges. Some arguments are set forth to show that in multilateral trade negotiations, agenda setting, conduct and outcome of the processes are largely driven by trade weights, not by diplomacy.

The experience of multilateral trade negotiations during the period between Marrakech in 1994 and Doha in 2001 is discussed, noting that negotiations in specific trade sectors were conducted under the auspices of the WTO without the use of a single undertaking approach. Issues that are relevant in the context of the on-going Doha-mandated trade negotiations are also analysed. These include those relating to the processes of decision-making and agenda setting in the WTO, conditions required for any application of the single undertaking concept, and the legal characterization of such a concept in the context of the WTO.

II. SINGLE UNDERTAKING: FROM TOKYO TO MARRAKESH

The following section reviews the rationale to expand the GATT's agenda after the Tokyo Round. The pressures to launch new multilateral trade negotiations soon after the conclusion of the Tokyo Round are examined against a background of shifts in United States trade competitiveness, the institutionalization of contingent trade protectionist measures in developed countries, and the less than satisfactory outcome of the Tokyo Round. The section then discusses the manoeuvres that led to the scope and structure of the work programme launched at Punta del Este in 1986. This section concludes that a virtually non-consensual interpretation of the concept of single undertaking inserted in the draft Final Act of the Uruguay Round in 1999 facilitated the "all or nothing" imposition of the results of the negotiations on developing countries.

II.1 RATIONALIZING A NEW ROUND OF MULTILATERAL TRADE NEGOTIATIONS

II.1.1 Unbalanced agenda-setting

Multilateral trade negotiations and their conduct are central to the study and practice of the political economy of international trade. Their outcomes often determine whether countries engage in conflict or cooperation, in diplomacy-based or power-based relations.

In attempting to explain the rationale of the "grand bargains"¹² of the Uruguay Round variety (a broad agenda embracing traditional and new issues, rule-making and institution-engineering) as opposed to the limited tariff binding and tariff reduction exercises of earlier rounds, many academics and policymakers have favoured the "grand bargains" approach as welfare improving in the Pareto sense. By permitting issue linkages, trade-offs and exchanges of concessions that are expected to be self-balancing, a broad agenda provides incentives to smaller and weaker trading countries to engage in the multilateral trade negotiations process.¹³

This, however, begs the question that even accepting the rationale for a broad agenda, how broad should it be? The prelude to trade negotiations is the equally important exercise of setting the agenda. This establishes the parameters of a final package and therefore is critical in ensuring that the programme of work/agenda undertaken is seen as offering something for everyone.

While acknowledging the practical and political limitations for participants with small-sized delegations and low trade weights, it is nevertheless asserted that these could be offset through coalition building.¹⁴ For these participants, losses are to be addressed through "side payments" to ensure the stability of the negotiated outcome. In the context of multilateral trade negotiations, "side payments" may consist of promises of improved market access, unbound commitments of technical assistance, best endeavour special and differential treatment measures and longer transition periods. Such "side payments", to be sure, are not limited to multilateral trade negotiations. Major trading

¹² Sylvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations* (University of Minnesota, September 2000), at www.utoronto.ca/cis/Minnesota.pdf

¹³ See, for example, Christina L. Davies, "How International Institutions and Issue Linkage Promote Liberalization," paper presented at the 2002 Annual Meeting of the American Political Science Association, August-September 2002.

¹⁴ For example, the European Communities' efforts to block consideration of their Common Agricultural Policy led to the creation of a single-issue coalition, the Cairns Group, which included both developed, and developing countries. It was successful in ensuring that agriculture was included in the Uruguay Round agenda.

countries are also creditors and principal shareholders in the major multilateral financial institutions -- e.g. the International Monetary Fund and the World Bank. Consequently, the leverage of major trading countries over smaller countries is multiplied and helps explain why the latter generally have limited scope for meaningful participation and trade-offs in multilateral trade negotiations with broad agendas.

In reality, trade negotiations and agenda-setting are driven by domestic priorities and relative trade weights among trading partners. Relatively equal sized economies are more likely to reach cooperative solutions whereas those involving larger countries and smaller ones invariably result in uneven outcomes. Smaller countries often find it very difficult to change or influence unfavourable terms of trade even as the option of retaliation against their trading partners remains mostly notional.

An imbalance in negotiating strengths, arising, for example, from such unequal trade relations, would almost invariably result in unbalanced negotiating results. The weaker trading party would usually have to make larger concessions (relative to their capacity to make such concessions) in order to alleviate threats of retaliation from, and the more egregious consequences of protectionism in, the stronger trading partner. Actual trade policy practice shows that dominant trading countries will not behave in a benevolent fashion by providing lower rather than higher levels of trade barriers on the grounds that free trade (as a public good) will engender benefits that outweigh the costs of "free riding". Free trade is shown not to be a public good since countries can be readily excluded from its benefits. Even then, free riding continues to be a major preoccupation of the dominant trade players and is among the important reasons for seeking reciprocity.

The case for "grand bargains" is often cast in terms of the "bicycle theory," in the absence of a forward momentum provided by new initiatives to liberalise trade in a broad round, there is a risk of falling behind and giving succour to latent protectionist lobbies. Trade policies to address the concerns of import-competing lobbies are much easier to deal with because trade restrictive measures are easier to design and are instantaneous in their effect. Those designed to promote exports on the other hand depend not only on market access (and import-competing lobbies in export markets) but also on investments to mobilize supply capacities. Export-competing lobbies therefore can gain only in the context of reciprocal trade liberalization.

The conclusion that "grand bargains" can deliver greater liberalisation is not persuasive, given that much of the liberalization over the last fifty years took place in an incremental fashion and a significant component of it was autonomous and made contingent on national economic development priorities. The use of the concept of "grand bargains" in the context of multilateral trade negotiations to push forward greater trade liberalisation, indeed, ignores the fact that, as the United Nations Development Programme (UNDP) has pointed out in a new study, "the benefits of trade openness have been greatly oversold. Deep trade liberalization cannot be relied on to deliver high economic growth and so does not deserve the high priority it receives in the development strategies pushed by leading multilateral institutions."¹⁵

II.1.2 Issue linkage as a leverage-maximizing negotiating device

Linking issues is a well-honed technique of international negotiations. In the context of the multilateral trade negotiations, explicit emphasis on linking issues as a negotiating device appears to be a relatively novel approach in making trade-offs explicit among issues and negotiating areas. As has been argued by Tollison and Willet,¹⁶ many of the highly publicized cases of issue linkages appear to have been motivated by attempts by an individual country or groups of countries to extend their dominant bargaining power in one particular issue area into other areas so as to achieve maximum advantage from their entire array of international interactions.

¹⁵ UNDP, *Making Global Trade Work for People* 32 (UNDP, New York, 2002).

¹⁶ Robert D. Tollison and Thomas D Willet, "An Economic Theory of Mutually Advantageous Issue Linkage in International Negotiations", in 33:4 *International Organization* (Autumn 1979).

The influence of domestic lobbies and considerations -- rather than a desire to promote global welfare through free trade -- in linking one issue area to other issue areas in trade negotiations can best be seen in the legislative delegation of trade negotiating authority from the United States Congress to the President. The legislative process involves the packaging of issues and areas across a broad spectrum of economic interests and lobbies -- e.g. from free-traders to protectionists and from environmental and labour interests to manufacturing and farming interests. Pursuit of the domestic and foreign trade agenda through negotiations is supported by active enforcement of existing trade legislation “to challenge market access barriers to U.S. goods and services, protect U.S. intellectual property rights, ensure compliance with telecommunications agreements, and address discriminatory foreign government procurement practices.”¹⁷

II.1.3 Dissatisfaction with Tokyo Round implementation

The 1973-1979 Tokyo Round of multilateral trade negotiations under the GATT, while yielding important advances in reducing tariffs, was widely regarded as being at best modest in attaining its core objectives in dealing with non-tariff barriers. The Tokyo Round negotiations took place on the understanding that participation in the negotiations was optional and consequently each GATT Contracting Party was free to choose if and when it acceded to any of the negotiated Codes.¹⁸ Consequently, not all GATT Contracting Parties became signatories to the Tokyo Round Codes. Some, mainly developed countries, joined all the Codes. Others joined one or two Codes while many joined none at all. Reasons for the reluctance of many developing countries to accede to the Codes varied but largely revolved around the view that such Codes either did not address or were not relevant to their concerns.

The Subsidies Code, for example, was long on new procedural requirements for countervailing duty investigations but imposed very few disciplines on the use of government subsidies, particularly in the area of agriculture. A more general concern for many was the practice among the major trading countries to negotiate the substance of the Codes among themselves in non-transparent ways and to present them to other participants on a “take it or leave it” basis. The failure to address the barriers against developing countries’ textile and clothing exports raised by the 1974 Multi-Fibre Arrangement regime; the failure to bring disciplines to the agriculture sector to deal with trade-protectionist measures and agricultural subsidies in developed countries; and to deal effectively with contingent and selective safeguard measures imposed by developed countries, continued to remain major concerns of the developing countries.

Although the United States during the Tokyo Round had argued for the introduction of GATT disciplines on trade in agriculture, concerted opposition from the European Community (EC) and a number of others prevented this. As the U.S. agricultural export sector (and later its services, pharmaceutical and high technology industry lobbies) began to mount a concerted drive for the launch of a new round of market liberalization, pressures also began in GATT to require developing countries to assume obligations relating in particular to the Tokyo Round Codes. The shifts in competitive

¹⁷ Office of the United States Trade Representative, *Identification of Trade Expansion Priorities Pursuant to Executive Order 13116*, 30 April 2001, p. 13, at <http://www.ustr.gov/enforcement/super301.pdf>. These trade laws include Section 301 of the Trade Act of 1974, Section 182 of the Trade Act of 1974 (commonly known as “Special 301”), Super 301 (mandated by Executive Order 13116 of March 31, 1999), Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, Title VII (mandated by Executive Order 13116 of March 31, 1999), and various U.S. trade preference programmes.

¹⁸ Among the Codes negotiated in the Tokyo Round were: (1) a subsidies code; (2) an anti-dumping code; (3) a code on customs valuation; (4) an import licensing code; (5) a standards code; and (6) a government procurement code. In addition, three sectoral agreements were concluded covering trade in civil aircraft, an arrangement on the dairy sector and another regarding bovine meat. Finally, a “Framework for the Conduct of International Trade” that included the “1979 Enabling Clause” concerning developing countries, a decision on balance of payments measures and an understanding on dispute settlement, were likewise adopted as a result of the Tokyo Round.

position of the U.S., due in part from its perceived weaknesses in the areas of its traditional comparative advantage and its emergence as a leader of high technology and services trade, provided the intellectual underpinning for much of the academic and policy establishment in promoting a new round of multilateral trade negotiations. It was argued that as a consequence of the loss of comparative advantage in “sunset” industries, shifts to new “sunrise” sectors would be accelerated by access to new markets for which new international rules and attendant security would become necessary.

II.1.4 Dealing with free riders by “levelling” the playing field

Among the reasons put forward for the launch of a new round was the widely articulated concern with the “free rider” phenomenon. This arises from the provision of public goods: the fact that such goods are non-rival and non-excludable means that provision of the good to one individual necessarily entails its provision to or access by another and, further, that no one can be excluded from its benefits. Accordingly, in the context of the multilateral trading system, thought by some as possessing the characteristics of a public good, free riders consist of those who secure benefits in excess of the obligations they assume from the core trading precepts such as “most-favoured nation” (MFN) treatment and national treatment. Non-reciprocity and special and differential treatment, in this view of the functioning of the system, create a multi-layered and fragmented range of rights and obligations.

Against this background, the concept of single undertaking provided a neat theoretical instrument to sanitise the trading system of “free riders” and establish a level playing field through a one-size-fits-all trading regime. By requiring reciprocity of benefits among trading partners through negotiating trade-offs, a single undertaking approach to multilateral trade negotiations would theoretically allow countries to minimize free riding. In the case of bilateral negotiations, this is done by an appropriate choice of products on which concessions are given and sought. In the case of multilateral trade negotiations, this is done by a suitable choice of products to be exempted from the scope of the negotiations.

However, as Hoekman has observed,¹⁹ nations have been quite successful in minimizing free riding even outside the use of single undertaking-style multilateral trade negotiations. The wide range of measures adopted by developed countries to circumvent unconditional MFN treatment -- a core feature of the GATT/WTO system -- together with several derogations and the failure to make special and differential treatment operational has meant that the issue of free riding is in substance and practice much less of a problem than has been asserted.

On the other hand, developing countries’ assumption of virtually uncircumscribed MFN obligations has facilitated significant inroads into their domestic markets by foreign players and foreign products. At the same time, free riding by the major primary commodity importers as a result of the decline in commodity terms of trade, together with massive net financial transfers from the developing countries continues to evade the multilateral trading system and its rules. The elimination, therefore, of “free riders” in the global trading system, is dependent not on the use of a single undertaking approach to multilateral trade negotiations, but rather on the application of political will to exclude non-participants from the benefits of the system. Given the economic and political power correlations between developed and developing countries, the former are more likely than the latter to exercise and benefit from exclusionary trade policies -- whether within or outside the context of a single undertaking multilateral trade negotiations -- against non-participants in such negotiations.

¹⁹ Bernard M. Hoekman, *Trade-offs, Coalitions, and National Interests: Developing Countries Options in MTNs*, in Robert Stern, *Multilateral Trading System* (1993). Citing a 1979 study by Finger, Hoekman notes that efforts to limit concessions to products in large part from others offering concessions have been quite successful: the sum of all US imports originating from countries with whom it exchanged concessions as a percentage of total imports on which concessions were made was as high as 90 percent in the Dillon and Kennedy Rounds. Finger notes that the exclusion of free riders took the form of negotiations over “exclusion lists” and limited spillovers to 10 percent of the concessions.

II.2 PREPARING FOR A NEW ROUND OF MULTILATERAL TRADE NEGOTIATIONS: RUN-UP TO URUGUAY ROUND²⁰

II.2.1 Laying the basis for a new round of multilateral trade negotiations

Pressures to initiate a new round of multilateral trade negotiations began soon after the conclusion of the Tokyo Round and revolved around the U.S.' desire to seek additional markets for its services and agricultural exports. At the height of the recession of the early 1980s, there were initiatives in the U.S. Congress pushing for aggressive trade reciprocity, arguing that U.S. markets were fundamentally more open than those of its competitors and that, therefore, the levels of trade protection among the trading partners needed to be brought into rough balance. Concern with "free riders", "fragmentation" of the trading system and the view that the "playing field was not level" provided further ammunition to both academics and U.S. policymakers to rationalize its essentially market-opening objectives.

Developing countries opposed the launch of a new round of multilateral trade negotiations after the Tokyo Round. In early May 1984, Uruguay on behalf of developing countries submitted a joint position paper relating to the improvement of world trade relations through the implementation of the GATT work programme.²¹

The paper underscored the worsening international economic environment for developing countries and that previous rounds of trade negotiations have failed to ensure additional benefits for them.²² It pointed out that since the end of the Tokyo Round in 1979, developed countries have intensified the imposition of restrictive trade measures against developing country exports.²³ In opposing the suggestions for a new round of trade negotiations, the paper called for the implementation of past commitments undertaken by developed countries in previous rounds of trade negotiations and for the completion of the 1982 GATT work programme.²⁴

However, proposals to launch a new round, also being openly advocated by the then-GATT Director General, Arthur Dunkel, received strong support from the report of a group of eminent business and academics appointed by him in 1984.²⁵ The near-complete advocacy in the Leutwiler Report of the US position on the desirability of a new round and the inclusion of services and other new issues set the stage for OECD countries, previously divided, to come out in support of a new round.

The OECD in early 1985 proposed that a preparatory meeting be convened under GATT to fashion an agenda for the proposed round. However, India, on behalf of a group of twenty-four developing countries,²⁶ continued to express reservations about the desirability of a new round.²⁷ Instead, as a matter of priority, they stressed that confidence-building measures needed to be taken by developed countries, notably with respect to standstill and rollback of protectionist measures that had

²⁰ Much of the discussion that follows draws upon the original analysis and reporting by the South-North Development Monitor (SUNS) and its Chief Editor, Chakravarthi Raghavan, between 1986 to 1994. This remains one of the few authoritative sources of reporting on the "launch, conduct and conclusion" of the Uruguay Round from the perspective of developing countries. See <http://www.sunsonline.org>.

²¹ GATT, *Uruguay (on behalf of developing countries) – Improvement of World Trade Relations Through the Implementation of the Work Program of GATT*, L/5647, 4 May 1985.

²² *Ibid.*, para. 1.

²³ *Ibid.*, para. 2.

²⁴ *Ibid.*, para. 6.

²⁵ GATT, *Trade Policies for a Better Future* (GATT, Geneva, 1985), hereafter the Leutwiler Report.

²⁶ These were Argentina, Bangladesh, Brazil, Burma, Cameroon, Colombia, Cuba, Cyprus, Egypt, Ghana, India, Ivory Coast, Jamaica, Nicaragua, Nigeria, Pakistan, Peru, Romania, Sri Lanka, Tanzania, Trinidad and Tobago, Uruguay, Yugoslavia, and Zaire.

²⁷ GATT, *India (on behalf of 23 developing countries) – Improvement of World Trade Relations*, L/5818, 7 June 1985.

been enacted and selectively applied against developing countries since the end of the Tokyo Round. They also called for multilateral action on areas of special interest to developing countries such as textiles and clothing, tropical products, subsidies, countervailing and anti-dumping procedures against developing country exports, safeguard measures, dispute settlement, and special and differential treatment.²⁸

However, once the Association of South-East Asian Nations (ASEAN) and a number of Latin American countries came out in qualified support of a new round,²⁹ things moved very quickly. By November 1985, the GATT Contracting Parties established a Preparatory Committee “to determine the objectives, subject-matter, and modalities for participation in the multilateral trade negotiations”.³⁰ The work conducted in the meetings of the Preparatory Committee ran on essentially two tracks outside the formal GATT structures, with one consisting of key developed countries and a group of developing countries (whose work was jointly sponsored and alternatively chaired by Colombia and Switzerland), and the second consisting of a separate group of ten developing countries.

II.2.2 Expanding the negotiating agenda from goods to other areas

The issue that dominated much of the discussions in the preparatory process concerned the desirability of including services on the agenda and later, modalities for its treatment in the negotiations. For developing countries, including many who were in support of the proposed round, a central concern regarding the inclusion of services in the round was the potential for extracting concessions by linking core trade issues with non-trade issues such as services.

Unlike the actual physical flow of goods involved in trade in goods, many services and investments tend to be established and provided through a quasi-permanent presence in the host economy. The historical experiences of many developing countries with the deep reach and control of foreign enterprises in virtually every aspect of their polity and economy led most developing countries strongly to resist the inclusion of investment and services onto the negotiating agenda. For the proponents of a wider and more ambitious negotiating agenda, on the other hand, concerns regarding culture, history and policies to manage the presence of foreign services providers and investors were no more than disguised non-tariff barriers.

Once the United States and developed countries’ agenda prevailed vis-à-vis the launch of a new round of multilateral trade negotiations, the only option left to developing countries was to minimize the damage. This was achieved in part through negotiations involving some developing countries and the EC, which for different reasons had reservations about a trade round that embraced liberalization of agriculture.

The solution that was found revolved around ensuring a clear legal and institutional separation between negotiations on goods on the one hand and on services on the other. Part I of the 1986 Punta del Este Declaration was confined to trade in goods and traditional GATT issues such as tariffs and non-tariff issues, GATT Articles, the Tokyo Round Codes, dispute settlement, safeguards, and subsidies and countervailing measures. The inclusion of trade-related aspects of intellectual property (TRIPS) and trade-related investment measures (TRIMS), while opposed by many developing countries, was circumscribed by placing it in the framework of trade in goods. From the stand point of developing countries the inclusion of agriculture, tropical products, natural resource-based products, and textiles and clothing in the goods negotiations provided a degree of balance to the agenda, as did the inclusion of provisions on standstill and rollback. Part II of the Declaration concerned services where developing countries also succeeded in ensuring that a multilateral framework on services shall

²⁸ Ibid., para. 8:A to C.

²⁹ GATT, *GATT Council – Minutes of Meeting 5-6 June 1985*, C/M/190, 5 July 1985, at 4.

³⁰ SUNS, 25 January 1986, at <http://www.sunsonline.org>.

“respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations”.³¹

As noted earlier, Part I:B(ii) of the 1986 Punta del Este Declaration refers to the launch, conduct and implementation of the outcome of the negotiations as a single undertaking. Its placement in the part dealing with trade in goods was to ensure that it would not cover Part II, and hence stress the organic separation of the two negotiating mandates and areas. This separation was to be safeguarded throughout the negotiations by conducting the work on services under a separate negotiating group on services.

II.2.3 Introduction and use of single undertaking in the Uruguay Round

The concept of single undertaking first emerged in the preparatory process for the Uruguay Round at the initiative of the EC, now the European Union (EU), i.e. it was widely seen as a camouflage to protect its core interests in agriculture. But it also received support from a number of other countries, albeit for different reasons. The EC's other preoccupations related to rollback, the balance of rights and obligations (a euphemism for the unfavourable balance of trade against the EC in EC-Japan trade relations) and “globality” of negotiations. The concept of “globality” of the negotiations, i.e. the launch of the Uruguay Round as a single political undertaking, was later interpreted by the EC to support the linking of issues in trade in goods with those in trade in services in order to maximize its negotiating leverage over the entire set of negotiations. It also ensured that its concessions were properly “priced”. This interpretation of issue-linkage thus required not only organic linkages between issue areas but also the totality of negotiations.

The single undertaking concept formalized the strategy of issue-linkage but also extended the process to one that bound all the issues and all participants into a single decision. It provided the EC with an instrument to stall and, if necessary, walk away from the negotiations if the package likely to emerge did not meet its expectations. Likewise, by giving each of the participants the right to invoke the device of a single undertaking it provided, at least in theory, the wherewithal to engage in trade-offs between specific negotiating areas.

A number of developing countries, notably in Latin America, saw single undertaking as an instrument to ensure that the issue of agriculture in particular was not sidetracked in the negotiations. Earlier efforts to include agriculture in the multilateral trade negotiations had been thwarted by understandings reached between the U.S. and the EC during the Tokyo Round. Single undertaking therefore became an important tool to safeguard the “globality” of the agenda for some developing countries.

The success of a group of Latin American agriculture exporters at the Brussels Ministerial meeting in 1990, in rejecting the compromises reached primarily between industrial countries during and after the Montreal meeting in 1988, suggested that single undertaking was a two-edged weapon. Developing countries' refusal to agree to an outcome without satisfactory progress on agriculture represented, arguably, the first time that the notion of linkages and interdependence of issues in the negotiating package on goods was put to practical effect. In asserting their intention to insist on a balance in the negotiations, developing countries signalled that they were prepared to insist on “the conduct of the negotiations as a single undertaking,” believing that their negotiating interests would be better served, in the long-run, through a single undertaking approach to the negotiations than otherwise.

Soon after the launch of the Uruguay Round, it became clear that issues of interest to the developed countries appeared to be moving on a faster track as compared to those that were of interest to developing countries. Although the 1986 Punta del Este Declaration provided for a provisional or

³¹ Part II, 1986 Punta del Este Declaration.

definitive implementation of any “early harvest” agreements that may be made in the course of the Uruguay Round, the EC reportedly claimed that the only “early harvest” date of interest to it was the concluding one, i.e. 1990. It therefore became necessary for some of the developing countries directly involved in the negotiations to clarify their understanding of the ground rules for the negotiations and of the single undertaking approach.

The then-Ambassadors of Brazil and India, in separate statements to the Group of Negotiations on Services (GNS) in February 1987, observed that the launch of the negotiations at Punta del Este was a single political undertaking and as such they were bound by it. The Indian Ambassador then went on to outline four elements as constituting the overarching political globality of the entire Uruguay Round negotiating process -- as distinct from the technical and organic globality of the negotiations in goods. These, according to him, were:

- (a) The unity of time and place for the launch of the Uruguay Round at the 1986 Punta del Este meeting;
- (b) The establishment of a Trade Negotiations Committee (TNC) to oversee the work of the major negotiating bodies, i.e. the Group of Negotiations on Goods (GNG) and the Group of Negotiations on Services (GNS);
- (c) The existence of common points of time for the commencement and conclusion of the two distinct processes of: (i) negotiations on goods, and (ii) negotiations on services; and
- (d) The provision that the decisions on implementation of the outcomes of the negotiations in the two processes would be taken at two separate ministerial meetings on the pattern of Punta del Este, i.e. a GATT Ministerial Conference for the negotiations on goods, and a separate ministerial meeting of GATT Contracting Parties for the negotiations on services.

In this interpretation of the concept, there was no presumption that each decision and outcome of the GNG would be binding on each and every GATT Contracting Party. Neither was there any expectation of trade-offs between the negotiations on goods on the one hand and negotiations on services on the other hand. The legal and institutional separation of the GNG and the GNS processes mandated in the 1986 Punta del Este Declaration was expected to prevent any risk of trade-offs occurring between these two negotiating areas.

At the conclusion of the major part of the negotiations in 1991, the draft Final Act (the Dunkel text) provided for an interpretation of single undertaking that in effect required each member to accept the text on each and every subject covered therein. Although refraining from characterising the draft Final Act as an “all or nothing” text, then-GATT Director General Arthur Dunkel said in a statement of his “understanding” of the draft Final Act that it offered “a concrete and comprehensive representation of the final global package of the results of the Uruguay Round” and that “[n]o single element of the Draft Final Act can be considered as agreed till the total package is agreed”.³²

The negotiating strategy outlined by the GATT Secretariat consisted of a four-track approach: (i) intensive negotiations on market access in goods; (ii) negotiations on initial commitments on services; (iii) work to ensure legal conformity; and (iv) “work at the level of the TNC with a view to examining *whether and if it is possible to adjust the package* in certain specific areas” (italics added). The fourth track eventually became the basis for the later application of a reverse consensus rule, and clearly indicated that the text of the draft Final Act could no longer be reopened unless the TNC agreed to do so. Effectively, this meant that for developing countries, the draft Dunkel text became in fact the final text of the Final Act. Any amendments and deviations from the Dunkel text would be permitted only on the basis of consensus. The application of reverse consensus as a procedural device

³² GATT, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 20 December 1991.

consequently precluded most developing countries from meaningful participation in the concluding phase of the negotiations. Accordingly, the Dunkel text in effect became “a take or leave it proposition.” The only instances in which changes in the Dunkel text were made were with respect to areas agreed to by the major industrial countries, for which consensus in the TNC was obtained through negotiating pressure on other (including developing) countries.

Modifications to the draft Final Act text were agreed to between the major trading countries in the interval between the submission of the draft Final Act on 20 December 1991 and its adoption by the TNC on 15 December 1993 for approval by a subsequent GATT Ministerial Conference (in April 1994). This reduced the role and contribution of developing countries to that of interested spectators as the key remaining features of the agreements and their institutional underpinning, -- i.e. the creation of the WTO endowed with a comprehensive dispute settlement permitting cross-sectoral retaliation, were settled between the major developed countries. Shukla aptly describes the shift from GATT to WTO as nothing short of a paradigm transformation of the multilateral trading system.³³

³³ Shukla, *op.cit* note 11.

III. WTO NEGOTIATIONS OUTSIDE THE SINGLE UNDERTAKING: FROM MARRAKESH TO DOHA

In the view of many developed countries, the WTO's establishment was expected to provide a permanent forum for the introduction of new issues and sectors for market liberalization. Such expectation on the part of developed countries, however, was not fully realised. Negotiations in the WTO during the period between January 1995 (when the WTO came into being) and January 2002 (when effective implementation of the Doha negotiating agenda started) took place on a sector-specific basis and without any presumption of being under a single undertaking approach.³⁴

It should be noted that the Uruguay Round did not result in a levelling of the playing field between developed and developing countries as far as the global framework governing trade was concerned. While successive rounds of multilateral trade negotiations such as the Uruguay Round did manage to lower global average levels of trade protection, developed country trade barriers to products of particular interest to developing countries – such as agriculture and textiles and clothing -- continued, for the most part, to remain in place. Coupled with ongoing massive subsidization of agricultural production and export in many developed countries, the continued existence of such trade barriers in developed countries meant that the trade playing field, far from being levelled, became even more skewed against developing countries.³⁵

III.1 THE ‘BUILT-IN’ NEGOTIATING AGENDA

Since its establishment, the WTO's activities have focused on matters such as: reviews of the implementation of agreements reached in the Uruguay Round; institutional administrative work such as dealing with notification obligations; the accession of new members; institutional consolidation; and preparations for the biannual WTO Ministerial Conferences.³⁶ But more noteworthy among the WTO's activities has been the continuation or start of some multilateral trade negotiations in specific sectors after the Uruguay Round. These have included, among others, negotiations under the GATS, under the Agreement on Agriculture, and on an Information Technology Agreement.

III.1.1 Negotiations under the GATS

The GATT Ministerial Conference at Marrakesh in April 1994 mandated the continuation or start of negotiations on various services sectors covered by the GATS such as: (i) movement of natural persons;³⁷ (ii) financial services;³⁸ (iii) maritime transport services;³⁹ and (iv) basic

³⁴ Philip I. Levy, “Do we need an undertaker for the Single Undertaking? Considering the angles of variable geometry”, paper prepared for the CEPR/ECARES/World Bank Conference, Brussels, 14/15 July 2000, pp 10-15.

³⁵ In a joint paper submitted by the IMF and the World Bank to the WTO's Working Group on Trade, Debt, and Finance (WGTDF), the two institutions stated that developing countries generally face higher barriers to their exports than industrial countries. See IMF and World Bank, *Market Access for Developing Country Exports – Selected Issues*, WT/WGTDF/W/14, 18 October 2002.

³⁶ Since Marrakesh, four sessions of the WTO Ministerial Conference have been held: in Singapore (1996), Geneva (1998), Seattle (1999) and Doha (2001) The fifth session is scheduled to take place in Cancun, Mexico in September 2003.

³⁷ GATT Ministerial Conference, *Decision on Negotiations on Movement of Natural Persons*, 15 April 1994.

³⁸ *Id.*, *Decision on Financial Services*, 15 April 1994.

telecommunications.⁴⁰ These negotiations were concluded (except for maritime transport services) by 1997.⁴¹ Maritime transport services negotiations were suspended in 1996 to be resumed as part of the GATS 2000 negotiations.⁴²

Likewise negotiations were also mandated, and are currently ongoing, to develop new rules that would govern various areas relevant to trade in services. These include negotiations on emergency safeguards,⁴³ government procurement in services,⁴⁴ subsidies for services,⁴⁵ and regulatory disciplines on domestic regulation.⁴⁶ Negotiations on emergency safeguards, government procurement in services, and subsidies have been taking place in the Working Party on GATS Rules (WPGR), while discussions on domestic regulation have been taking place in the Working Party on Domestic Regulation (WPDR).⁴⁷ Both of these bodies are under the supervision of the CTS.

From the text of the GATS, the GATS rules-oriented negotiations above, i.e. on emergency safeguards, government procurement in services, subsidies, and domestic regulation are not legally linked to or form part of the negotiating package for the new GATS 2000 market access negotiations under GATS Article XIX:1. However, the CTS in special sessions in February 2000 and March 2001 decided to link these two sets of GATS negotiations by agreeing to, and establishing negotiating guidelines for, a two-phase approach: (i) the “rules-making” phase during which Members would negotiate new rules for services on subsidies, emergency safeguards, government procurement, and domestic regulation in the WPGR and WPDR; and (ii) the “request and offer” phase, where Members would negotiate further market access through special sessions of the CTS.⁴⁸

The reaffirmation by Ministers in the Doha Ministerial Declaration that the GATS negotiation guidelines adopted by the CTS in March 2001 should be the basis for continuing the negotiations, and the fact that such GATS rules-oriented negotiations have not yet been completed and are still ongoing, means that for all practical intents and purposes, such GATS rules-oriented negotiations will become part of the Doha single undertaking and subject to issue-linkage with and trade-offs from other negotiating areas.

³⁹ *Id.*, *Decision on Negotiations on Maritime Transport Services*, 15 April 1994.

⁴⁰ *Id.*, *Decision on Negotiations on Basic Telecommunications*, 15 April 1994.

⁴¹ See, e.g., *Second Protocol to the GATS (Financial Services)*, S/L/11, 24 July 1995; *Third Protocol to the GATS (Movement of Natural Persons)*, S/L/12, 24 July 1995; *Fourth Protocol to the GATS (Basic Telecommunications)*, S/L/20, 30 April 1996; and *Fifth Protocol to the GATS (Financial Services)*, S/L/45, 3 December 1997. Each of these protocols is now in force, but is individually binding only on those WTO Members that have accepted each of them.

⁴² WTO, *General Council Minutes of Meeting of 18 July 1996*, WT/GC/M/13, 28 August 1996, p. 14. The 1996 WTO Ministerial Conference in Singapore endorsed the suspension and called for the resumption of negotiations in conjunction with future comprehensive services liberalisation negotiations. See WTO, *1996 Singapore Ministerial Declaration*, WT/(MIN)96/DEC, 18 December 1996, para. 17.

⁴³ GATS, Art. X 1.

⁴⁴ GATS, Art. XIII:2.

⁴⁵ GATS, Art. XV:1,

⁴⁶ GATS, Art. VI:4,

⁴⁷ See WTO, *Working Party on GATS Rules Work Programmes*, S/WPGR/7, 25 July 2002, and WTO, *Report of the Working Party on GATS Rules to the Council for Trade in Services (2002)*, S/WPGR/8, 5 December 2002, paras. 6 and 8, for updates on the current status of the WPGR negotiations. See also WTO, *Report of the Working Party on Domestic Regulation to the Council for Trade in Services (2002)*, S/WPDR/4, 6 December 2002, for that of the WPDR discussions.

⁴⁸ WTO, *Services Negotiations formally launched*, 25 February 2000, at http://www.wto.org/english/news_e/news00_e/servfe_e.htm. See also WTO, *Guidelines and Procedures for the Negotiations on Trade in Services*, S/L/93, 29 March 2001, para. 4. Guidelines for the scheduling of specific commitments under the GATS negotiations were also adopted. See WTO, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)*, S/L/92, 28 March 2001.

III.1.2 Negotiations under the Agreement on Agriculture

Negotiations on agriculture trade liberalization were also part of the “built-in” agenda after the Uruguay Round, with Article 20 of the Agreement on Agriculture mandating the launch of new negotiations “one year before the end of the implementation period”, i.e. by the end of 1999. In early February 2000, the WTO General Council agreed to have the WTO Committee on Agriculture (COA) conduct the negotiations in special sessions.⁴⁹

The WTO Ministerial Conference at Doha, however, incorporated the separate agriculture negotiations into the single undertaking package.⁵⁰ It also established specific deadlines for various aspects of the negotiations, i.e. 31 March 2003, for the establishment of modalities for further commitments; the date of the Fifth Ministerial Conference for the submission of comprehensive draft schedules based on such modalities; and 1 January 2005 as the date for the conclusion of the agriculture negotiations as part of the single undertaking.⁵¹

III.2 SINGLE-ISSUE NEGOTIATIONS: THE INFORMATION TECHNOLOGY AGREEMENT

In addition to the “built-in agenda” for negotiations above mandated under the Uruguay Round agreements, single-issue negotiations also took place with respect to trade in information technology products and resulted in the Information Technology Agreement (ITA).⁵² In December 1996, ministers from fourteen WTO Members⁵³ issued a declaration on trade in information technology products in which they agreed to “bind and eliminate customs duties and other duties and charges of any kind ... beginning in 1997 and concluding in 2000” with respect to information technology products.⁵⁴ There are currently twenty-eight parties to the ITA.⁵⁵

III.2.3 SINGLE-ISSUE SECTORAL NEGOTIATIONS AND BROAD ISSUE-LINKED NEGOTIATIONS

These experiences have brought into sharp focus the question whether WTO serves as a forum for issue and sector-specific negotiations or whether it should aim at broad and across-the-board negotiations along the lines of the Uruguay Round (and now, the Doha) model. The former approach would provide greater flexibility to participants in so far as it would give them options to join the negotiations and assume new obligations as their circumstances and capacities permit. On the other hand, single-issue and sectoral negotiations are believed to yield a slower pace (and lower levels) of trade liberalization.

⁴⁹ WTO, *WTO Services and Agriculture Negotiations: Meetings set for February and March*, Press/167, 7 February 2000.

⁵⁰ DMD Paras. 13 and 14 in relation to Para. 47,

⁵¹ DMD Para. 14, in relation to Para. 45.,

⁵² See WTO, *1996 Ministerial Declaration on Trade in Information Technology Products*, WT/MIN(96)/16, 13 December 1996.

⁵³ These were Australia, Japan, Canada, Korea, Chinese Taipei, Norway, the European Communities, Singapore, Hong Kong (China), Switzerland, Iceland, Turkey, Indonesia, and the United States.

⁵⁴ WTO, *1996 Ministerial Declaration on Trade in Information Technology Products*, WT/MIN(96)/16, 13 December 1996, para. 2. The products covered by the agreement are listed in Attachments A and B thereof.

⁵⁵ The post-1996 acceding ITA Parties are the Czech Republic, Costa Rica, El Salvador, Estonia, India, Israel, Macau (China), New Zealand, the Philippines, Poland, the Slovak Republic, and Thailand. See http://www.wto.org/english/tratop_e/inftec_e/itscheds_e.htm for the current list of ITA Parties and their respective schedules of concessions.

As argued earlier, the drive to include new issues on the negotiating agenda derive in large part from the desires of the major trading countries to extend their corporate sector's reach in new markets. The clustering of negotiating issues, ostensibly to promote across-the-board trade-offs has, however, invariably served the interests of major trading nations, given their greater capacity to deal with the more ambitious negotiating agenda and undertake trade-offs.

Concern regarding the enlargement of the WTO's agenda, the complexity of the negotiations and the length of time taken to complete them (soon after the conclusion of the Tokyo Round, many delegations spoke of GATT "fatigue") is not limited to developing countries. For example, in his address to the second WTO Ministerial Conference in 1998, then-U.S. President Clinton pointed out that: "We should explore whether there is a way to tear down barriers without waiting for every issue in every sector to be resolved before any issue in any sector is resolved." He went on to add: "We should do this in a way that is fair and balanced and that takes into account the needs of nations large and small, rich and poor."⁵⁶

While these observations suggest a preference for sector-by-sector negotiations in which developed countries would be able to exercise greater negotiating leverage, they also suggest the desirability of addressing issues only as they ripen for trade negotiations. This points to the likely evolution of post-Doha negotiations, particularly if such negotiations extend beyond the deadlines envisioned in the Doha Ministerial Declaration. Issues left over as unresolved after the conclusion of the Doha-mandated negotiations may well constitute a new built-in agenda, with the issues to be negotiated at an area- or sector-specific pace reflecting the priorities of all the Members of WTO.

On the other hand, the possibility cannot be discounted that such unresolved negotiating issues (and new ones that may be added later) could be negotiated using a single undertaking approach. If this is to be the case, the question then arises: can an approach that necessarily requires new issues and areas to be added ad infinitum to the single package negotiating agenda not reach a point when the process would collapse under its own weight? Can reluctant Members be convinced to undertake further negotiations that may be perceived as inherently unbalanced? These are among the questions that many developing countries face as they grapple with the current negotiations even as issues from the previous Round remain unresolved.

⁵⁶ WTO document, *Statement of US President W. J. Clinton on the occasion of the fiftieth anniversary of the GATT/WTO system*, WT/Fifty/H/ST/8, 18 May 1998.

IV. SINGLE UNDERTAKING IN THE DOHA-MANDATED NEGOTIATIONS

The Doha-mandated negotiations are as ambitious and challenging as that in the Uruguay Round in terms of the coverage of issues.⁵⁷ Unlike the launch of the Uruguay Round, however, the launch of the Doha negotiations took place against a backdrop of widely shared dissatisfaction concerning the preparatory process; the procedures adopted for setting the agenda; the conduct of the Doha Ministerial Conference; and the modalities for adopting the work programme. These concerns continue to affect the negotiations as process issues have once again come to the fore in the WTO.

IV.1 PROCESS ISSUES AND THE DOHA NEGOTIATIONS

The less than consensual launch of the Doha-mandated negotiations raises questions such as whether the timeline established to complete the work can be met and whether the processes that were adopted in 1991 for dealing with the Dunkel draft text can be replicated for the current round. The following addresses some of these issues, and argues that a number of lessons deriving from the experiences of the Uruguay Round remain relevant for a balanced outcome of the negotiations.

IV.1.1 Conduct of negotiations and process issues

Paragraph 47 of the Doha Ministerial Declaration reads as follows:

With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.

Taken as a whole, the provision above suggests that single undertaking, as a concept, is in part a process and in part an instrument for packaging the outcome of the negotiations and safeguarding the inviolability of the agreements. The notion of “conduct” in paragraph 47 as a process has been further clarified in paragraph 49 of the Doha Ministerial Declaration, which states in part that “[t]he negotiations shall be conducted in a transparent manner among participants, in order to facilitate the participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations”.

The question of how the GATT, and now the WTO, operates has been the subject of extensive discussion and analysis, and has been on the agenda of the WTO now for a number of years. Especially after the WTO Ministerial Conference in Doha, WTO institutional process issues remain as major concerns of developing countries vis-à-vis their participation in the multilateral trading system. Currently, these “process” issues can be divided into three distinct, but closely linked, areas:

⁵⁷ It has been pointed out by Raghavan that the Doha work programme covering 19 issue areas is even more intrusive for national policies than the UR agenda. See Chakravarthi Raghavan, “A Development Agenda Out of Doha?” in 268 *Third World Economics* 1-15 (November 2001).

- General issues relating to the internal transparency and inclusiveness of general WTO decision-making procedures.
- Issues specifically relating to the processes to be used in the Doha-mandated negotiating agenda
- Issues specifically relating to the Geneva-based preparatory process leading up to, and including the negotiations to be undertaken at, the 5th WTO Ministerial Conference in Cancun, Mexico, in September 2003.

The “process” issues above have been raised, especially by many developing countries, as a reaction to the predominantly informal, non-inclusive, and non-transparent manner in which many major WTO decisions are discussed and finalized -- especially by the major developed country WTO Members with the support of the WTO Secretariat -- for formal approval by official WTO bodies (such as the General Council or the Ministerial Conference).⁵⁸ Indeed, the fact that issues relating to institutional decision-making and internal transparency continue to be raised up to the present by developing countries would seem to indicate that the WTO Secretariat’s description of the institution as being a “member-driven” organization, in a different sense, would not be far from the truth, i.e. the developed Members do the driving while developing country Members, despite their best efforts, get driven over.

Paragraph 49 of the Doha Ministerial Declaration provides the legal basis for defining the process to be used in the Doha-mandated negotiations -- i.e. the negotiations are to be “conducted in a transparent manner among participants, in order to facilitate the effective participation of all.” In December 2001 and January 2002, some developing countries made suggestions regarding the establishment of the TNC and the process for the Doha-mandated negotiations.⁵⁹ Section B of the General Council Chair’s Statement to the TNC on 1 February 2002, which was endorsed by the General Council during its 1 February 2002 meeting, lays down some negotiating principles and practices to be followed by the TNC and its subsidiary negotiating bodies, which include the following:⁶⁰

- A reference to paragraph 49 of the Doha Ministerial Declaration vis-à-vis transparency in the negotiations, “in order to facilitate the effective participation of all”.
- A reference to the 17 July 2000 statement of then-General Council Chair Ambassador Bryn of Norway vis-à-vis “best practices” with regard to internal transparency and participation of all Members.
- The expeditious circulation and translation into the three official WTO language of the minutes of meetings of the TNC and other negotiating bodies.
- An “overall guideline” that “as far as possible only one negotiating body should meet at the same time”. The TNC is required to keep the calendar of meetings “under surveillance” and that the constraints of smaller delegations should be taken into account when meetings are being scheduled.
- The chairpersons of the TNC and negotiating bodies should be impartial and objective; ensure transparency and inclusiveness in decision-making and

⁵⁸ For analyses and accounts of the procedural and political shortcomings of current WTO decision-making processes from the perspective of developing countries, see, e.g. Amrita Narlikar, *WTO Decision-Making and Developing Countries*, South Centre T.R.A.D.E. Working Paper No. 11 (November 2001); and Aileen Kwa, *Power Politics in the WTO* (Focus on the Global South, Geneva, November 2002).

⁵⁹ See WTO General Council, *Cuba, Dominican Republic, Egypt, Honduras, Kenya, Pakistan, Tanzania, Uganda, Zimbabwe – Establishment of the Trade Negotiations Committee (TNC) and Related Issues*, WT/GC/58, 21 December 2001; and WTO Trade Negotiations Committee, *Cuba, Dominican Republic, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, Zimbabwe – Organization of Negotiations Envisaged in the Doha Ministerial Declaration*, TN/C/W/2, 28 January 2002.

⁶⁰ See WTO Trade Negotiations Committee, *Statement by the Chairman of the General Council at the First Meeting of the Trade Negotiations Committee on 1 February 2002*, TN/C/1, 4 February 2002.

consultative processes; aim to facilitate consensus and to evolve consensus texts; and reflect consensus or different positions on issues in their regular reports to the overseeing bodies.

Intensive discussions also took place with respect to the issue of having the WTO Director-General act as the Chair of the TNC. The General Council decided to make the sitting WTO Director-General, by virtue of his official position, be the *ex officio* Chair of the TNC.⁶¹ Many developing countries during that meeting, however, said that their agreement to having the Director-General chair the TNC was conditioned on the subsequent establishment of clear guidelines that would guide the negotiating process under the TNC and its subsidiary negotiating bodies. Thus far, aside from both paragraph 49 of the Doha Ministerial Declaration and the TNC-endorsed Section B of the General Council Chair's Statement to the TNC on 1 February 2002, such guidelines have not yet been established.

It is widely understood that processes in the conduct of the WTO's work -- broadly viewed as consisting of its rules of procedures; the dissemination of documents and information; participation in decision-making; scheduling and frequency of meetings; selection of the officials to facilitate the conduct of its work; and the role of the WTO Secretariat -- have a close bearing on the capacities of developing countries to participate in and contribute to the negotiations and hence towards a credible outcome.

Notwithstanding the provisions in paragraph 49 of the Doha Ministerial Declaration and the TNC Chair's Statement of 1 February 2002 discussed above, little has been done to address developing country concerns that the processes and the conduct of the negotiations since Doha should differ significantly from the long established GATT/WTO practices. These concerns were articulated in a range of proposals that address matters such as ensuring the impartiality of the chairs of various negotiating groups including the TNC; ensuring effective participation of less-resourced developing countries through proper frequency and timing of meetings; venues for ministerial meetings; and clear rules of procedure for both the preparatory process and for the conduct of the Ministerial Conferences.⁶²

A further area of concern has been the practice of convening "informal" meetings of selected senior officials and ministers from WTO Members, i.e. the "mini-ministerials", - to deal with the Doha negotiating agenda outside the established machinery of the TNC. Theoretically, any deals or agreements arrived at by the participants theoretically do not bind Members who were not able to participate in such informal meetings. Neither are WTO Members who participate in such mini-ministerials presumed to be representing any other Member.

However, the fact that the participants of such "mini-ministerials" represent only the major industrialized countries (e.g. the U.S., EU, Canada, Japan and Australia), the big developing countries (e.g. India, Brazil, China, South Africa), and key smaller developing countries, rather than the entire WTO Membership, implies that any agreements among them becomes effective fait accompli that the non-participating WTO Members may have to either accept outright or reject with great difficulty. The holding of "mini-ministerials", then, effectively excludes a large majority of developing country Members from enjoying their rights to full participation and decision-making in the WTO. Developing countries invited to such meetings presumably take the view that the cost of exclusion from participation may exceed any benefits of inclusion.

⁶¹ See WTO Trade Negotiations Committee, *Minutes of the Meeting of 28 January and 1 February 2002*, TN/C/M/1, 14 February 2002, Para. 9, approving Agenda Item 1 of the General Council Chair's *Statement to the First Meeting of the Trade Negotiations Committee on 1 February 2002*, TN/C/1, 4 February 2002.

⁶² See, e.g., WTO General Council, *Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe – Preparatory Process in Geneva and Negotiating Procedure at the Ministerial Conferences*, WT/GC/W/471, 24 April 2002.

Judging by the practices in the Uruguay Round, however, it should come as no surprise that the process is end-loaded by design in which Quad countries, the WTO Secretariat, and a pre-selected list of participants or facilitating group of Members determine the final negotiating outcome. Such outcome, furthermore, is likely to become binding on all other WTO Members as a result of the application of a Uruguay Round-type single undertaking approach.

IV.1.2 Dealing with “early harvests”

The EU has interpreted the notion of conduct as being an integral part of the overall single undertaking commitments in a particularly self-serving manner. In a statement at the July 2002 meeting of the TNC, the head of the EU’s Directorate General of Trade stated that “at Doha we agreed that the conduct -- and not just the conclusion of the negotiations -- would be carried out as a single undertaking. But what we are seeing are different negotiations going at different speeds, or none at all. If this continues and worsens it will be harder to judge the overall balance at key points in the process, and it will make further progress even more difficult. Absence of progress in some areas will ultimately impede work elsewhere.”⁶³ In suggesting that negotiations remain neither front nor back-loaded (and thereby excluding any “early harvest”), the EU seems to suggest parity in the treatment of each issue, irrespective of its importance and weight in the Doha negotiating agenda.

The practical effect of treating each of the issues at similar speed, however, is to backload the discussions onto the concluding phase of the negotiations when the major demanders of the negotiating agenda, -- i.e. the EC and the other developed countries, would generally tend to have and exercise the greatest leverage. This is done partly through exclusion, through political pressures, and finally through the making of negotiated “side payments” in order to obtain acquiescence.

However, the Doha Ministerial Declaration makes explicit reference to “early agreements” as being an integral part of the negotiations, and that such early agreements “may be implemented on a provisional or a definitive basis.”⁶⁴ Furthermore, the conclusion of negotiations in some of the areas is subject to explicit timetables that are supposed to end before the end-date of the single undertaking negotiations on 1 January 2005. These areas include the following: (a) implementation-related issues and concerns;⁶⁵ and (b) special and differential treatment.⁶⁶

This indicates a two-track approach: (i) a fast track for the consideration of higher priority issues, particularly implementation and special and differential treatment issues; and (ii) a regular track for the other negotiating areas. However, within the regular track, an agenda as heterogeneous as the Doha negotiating agenda -- consisting of issues ranging from reviews, to rule-making, sector-specific negotiations and consideration of new and non-trade issues -- would also suggest that various negotiating areas thereunder warrant varying emphases and priorities in negotiating treatment. Thus, developing countries’ interests in the negotiations will inevitably revolve around the completion of work in areas of interest to them as soon as possible since leaving them towards the end invariably means tradeoffs in which they come off second-best.

IV.1.3 “Entry into force” of the negotiated outcomes

Paragraph 47 of the Doha Ministerial Declaration also suggests that the “entry into force” of the outcome of the negotiations is integral to the full application of the single undertaking concept. However, paragraph 47 has to be read in conjunction with, among others, paragraph 45 of the Doha

⁶³ Statement by M.P.Carl, Director General DG Trade, on behalf of the European Union, to the TNC, 18 July 2002, at http://europa.eu.int/comm/trade/speeches_articles/sp_mps08.htm.

⁶⁴ DMD Para. 47,

⁶⁵ DMD Para. 12,

⁶⁶ DMD Para. 44,

Ministerial Declaration. The latter provision lays out the institutional mechanism through which the “entry into force,” i.e. the date when the results of the negotiations become legally binding treaty obligations, of the negotiations’ outcome can be adopted and implemented by WTO Members. That is, in the language of paragraph 45 of the Doha Ministerial Declaration, “[w]hen the results of the negotiations in all areas have been established, *a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results.*” (italics added).

As the 1969 Vienna Convention on the Law of Treaties indicates, a treaty -- read broadly as including the overall single package of negotiating results from the Doha-mandated negotiations⁶⁷ -- “*enters into force in such manner and upon such date ... as the negotiating States may agree.*”⁶⁸ (italics added). Paragraph 45 of the Doha Ministerial Declaration effectively constitutes an agreement among WTO Members that decisions with respect to the modalities for the entry into force of the Doha outcomes will be made by a Special Session of the Ministerial Conference held after the conclusion of the single undertaking negotiations and establishment of the results in all of the negotiating areas thereunder.

Effectively, this means that the entry into force of the negotiated outcomes, *except* for those early agreements implemented on a provisional or definitive basis under paragraph 47 of the Doha Ministerial Declaration before the conclusion of the Doha-mandated negotiations in other areas, is not automatic upon the conclusion of the negotiations. Rather, such entry into force is subject to decisions still to be made by a Special Session of the Ministerial Conference setting out the modalities for the adoption and implementation of such outcomes by Members.

Such modalities should include provisions setting out the manner under which the results may be consented to and adopted by WTO Members and the date upon which such results enter into force as legally binding WTO obligations to be implemented by Members. However, with respect to the adoption and implementation of the Doha-mandated negotiations’ results, the WTO Agreement will require that the decisions of the Special Session of the Ministerial Conference called for under paragraph 45 of the Doha Ministerial Declaration should be arrived at by consensus, i.e. “when no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”⁶⁹ It is only when such decisions cannot be arrived at by consensus that voting, under a one Member-one vote basis, takes place.⁷⁰ In the event of voting taking place, “[d]ecisions of the Ministerial Conference ... shall be taken by a majority of the votes cast,”⁷¹ unless otherwise provided elsewhere in the WTO Agreement or in the relevant WTO trade agreements.

It is clear, however, that the decisions to be made in the Special Session of the Ministerial Conference provided for in Paragraph 45 of the Doha Ministerial Declaration will be subject to the prior interplay of political forces among Members. This means that major political decisions will already have been arrived at before the holding of such a Special Session of the Ministerial Conference. Indeed, judging by the experience of in the Uruguay Round in which the Ministerial meeting at Marrakech was entirely occupied with form, the political substance of the Ministerial-level decisions -- such as the Uruguay Round Final Act -- were already sealed earlier at the TNC in Geneva. If this experience is to be avoided, considerably greater efforts will be required at national levels to assess the balance of any outcome and to prepare the concerned Ministers to play a pro-active role in safeguarding their national interests, including challenging the use of the single undertaking concept.

⁶⁷ The term “treaty” in international law has been defined broadly as meaning “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Using this definition, both the Doha Ministerial Declaration as well as the entire package of negotiated outcomes (once written down) from the Doha-mandated negotiations can be considered as treaties under international law. See Art. 2(1)(a), 1969 Vienna Convention on the Law of Treaties

⁶⁸ 1969 Vienna Convention on the Law of Treaties, Art. 24(1).

⁶⁹ WTO Agreement, footnote 1 of Art. IX:1.

⁷⁰ WTO Agreement, Art. IX:1.

⁷¹ *Ibid.*

IV.1.4 Assessing and evaluating “balance, costs, and benefits” in the outcome

Paragraph 49 of the Doha Ministerial Declaration states in part that the negotiations “shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.” Such balance must be addressed at various stages and levels by each of the participants, especially developing countries, in the negotiations. This can be done only through the conduct of an effective, continuing, and substantive evaluation process throughout the Doha-mandated negotiations.

However, unlike during the Uruguay Round, no formal provision has been made in the Doha Ministerial Declaration for such an evaluation of the outcome of the negotiations. The 1986 Punta del Este Declaration, in the context of the effective application of special and differential treatment, provided that the Group of Negotiations on Goods shall “before the formal completion of negotiations, conduct an evaluation of the results attained therein in terms of the Objectives and the General Principles Governing Negotiations as set out in the Declaration, taking into account all issues of interest to less-developed contracting parties.”⁷²

Such an evaluation was indeed conducted in December 1993, just days before the adoption by the TNC of the draft Uruguay Round Final Act. In such an event, the evaluation of a text that had been effectively adopted two years earlier becomes more form than substance. It merely provided a perfunctory opportunity for developing countries to express their disappointment with the results to which they were already bound, thanks to surreptitious manner in which the single undertaking approach was applied in the Dunkel draft text two years earlier.

The Uruguay Round evaluation also took place in a political climate, created in the negotiations and in the media, that promised massive boosts to the global economy as a result of the liberalization of trade in goods (especially in agriculture and textiles) and services, and of reductions in export and domestic support subsidies. The GATT Secretariat’s report in support of the evaluation covered two areas:⁷³ (i) an assessment of the likely consequences of tariff and services offers in light of the present and future export performance; and (ii) a second area dealing with the implications of the new trading rules and institutions consequent upon a successful conclusion of the round, particularly on provisions for special and differential treatment.

The main conclusion of the GATT Secretariat study, which assumed average tariff reductions of 40 percent and the strengthening of the rules of the multilateral trading system, was that world trade would grow annually by US\$ 230 billion dollars by 2005. Soon after these estimates were prepared, the Director General of GATT announced new and revised GATT estimates of annual global trade gains by 2005 of US\$ 500 billion due to the “competition enhancing effects of trade liberalization and the opportunities it would offer for spreading fixed costs over large markets.”⁷⁴ He then went on to say that these gains were on the “low side” because they excluded effects such as accelerated economic growth, a healthier climate for research and development, and the development of new products.⁷⁵

Academics and official bodies such as the World Bank have also made similar econometric estimates of gains from the Uruguay Round. A common theme of these estimates, even though they vary in the assumptions made to model the gains and the scale of the benefits, has been an unambiguous claim of significant benefits accruing to the world economy. But nearly all have

⁷² 1986 Punta del Este Declaration, Part I:G

⁷⁴ “GATT says Uruguay Round Worth \$500 billion”, in *The Financial Times*, reporting on the speech of GATT Director General Arthur Dunkel to the annual World Bank/IMF meeting in Madrid in October 1994.

⁷⁵ *Id.*

conceded that the distribution of the gains is likely to be skewed in favour of developed countries.⁷⁶ However, the estimates reinforced the perception promoted in the media and elsewhere that further and deeper trade liberalisation would provide massive global welfare gains and hence persuade developing countries into accepting the draft Final Act of the Uruguay Round.

Quite likely, concerted efforts will be made again to project similar benefits from the Doha Round. However, given the lack of credibility of earlier estimates, the new studies and claims may be more circumspect. In this climate, how should developing countries deal with the challenge of evaluating Doha in a meaningful way?

Had developing countries, for example, been aware of the costs of implementing their Uruguay Round obligations, would they have viewed the benefits promoted so assiduously by the North, the GATT Secretariat, and neo-liberal economists any differently? It has been estimated, for example, that effective implementation of WTO agreements would cost each country at least US\$ 150 million each year and can exceed the annual development budget of least-developed countries.⁷⁷ The decision to adopt and implement Uruguay Round, or WTO, obligations, in effect, is a public expenditure investment decision. The question then arises, are the benefits commensurate with the costs?

The costs, moreover, go beyond those relating to implementation -- they include those associated with changes in trade and development policies such as reduction in tariffs, privatization and liberalization of financial markets. They also include economic consequences that flow from exemptions granted to developed countries for subsidizing agriculture and other sectors. UNCTAD has estimated that as a result of the implementation of the Uruguay Round agreements in the WTO, least-developed countries would lose between US\$ 163 million to US\$ 265 million in annual export earnings, while paying between US\$ 145 million to US\$ 292 million more annually in imports.⁷⁸ The cumulative losses until the end of 2000 were then estimated at US\$ 3.0 billion.

In evaluating the outcome of the Doha-mandated negotiations a useful, perhaps even essential, approach would be for countries to ask from or require the WTO Secretariat to provide an audit or estimate of at least all direct costs of the commitments they will be required to assume. Mention must be made in this regard of the United Nations General Assembly's practice of requiring the United Nations Secretariat to provide estimates of the financial implications for Member States of any General Assembly decision/resolution before its adoption. Extending this practice to the WTO will go some way towards making the process in multilateral trade negotiations (such as the Doha-mandated negotiations) more transparent and would have the added benefit of providing an on-going assessment of the negotiating balance, costs and benefits.

Furthermore, WTO Members also need to undertake on-going national-level evaluations that would look at the extent to which the current status of the Doha-mandated negotiations support, promote, or are in line with their respective national development policies and priorities. To be meaningful, such evaluation at the national level should envisage significantly greater involvement of

⁷⁶ For a critical review of the results, see John Whalley, "What Can the Developing Countries Infer From the Uruguay Round Models for the Millennium Round Positions?", CSGR Working Paper No.60/00 (October 2000). Of the agreements in the Uruguay Round, areas such as agriculture, market access in industrial goods and agreement on textiles and clothing, and the TRIPS Agreement lend themselves to econometric modelling. But even in these sectors, studies have reached diametrically opposite conclusions. Some of the models, for example show no gains from liberalization in textiles and clothing while others suggest net losses for developing countries.

⁷⁷ See, e.g., J. Michael Finger and Philip Schuler, *Implementation of WTO Commitments in Development, Trade, and the WTO: A Handbook* (2002); J. Michael Finger, "Implementation and the Integrated Framework," paper presented at the WTO Seminar on Implementation of WTO Agreements, Geneva, 26 June 2000; and J. Michael Finger and Philip Schuler, "Implementation of Uruguay Round Commitments: The Development Challenge", World Bank Policy Research Working Paper No. WPS 2215 (1999).

⁷⁸ UNCTAD, *Report to the Ad Hoc Working Group on Trading Opportunities in the New International Trading Context* (1995).

the civil society, various organs of the government and indeed of national legislatures in order to influence and complement the periodic assessments by the TNC at senior officials and Ministerial levels.⁷⁹

IV.2 IS SINGLE UNDERTAKING AN IRONCLAD REGIME PRINCIPLE?

Far from being an ironclad and “new” principle in the WTO regime, as discussed above, the single undertaking concept has evolved and has been interpreted and applied selectively in the context of multilateral trade negotiations.

IV.2.1 *The existence of plurilateral agreements in the WTO*

Although the WTO Agreement and the various agreements annexed thereto are generally universally binding on all WTO Members, the WTO also accommodates a series of plurilateral, i.e. only several States parties, agreements which are not binding on those WTO Members that are not parties to them such as the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft.⁸⁰ Indeed, the WTO Agreement leaves open the possibility of such agreements being negotiated among interested WTO Members and then subsequently included within the WTO framework.⁸¹ One such agreement is the ITA discussed above, although it has not been included within Annex 4 of the WTO Agreement. It is also clear that the Doha Ministerial Declaration has provided for some agreements and arrangements to be negotiated outside the ambit of the single undertaking, notably the “improvements and clarifications of the Dispute Settlement Understanding.”⁸² Moreover, in providing for an early harvest, both the 1986 Punta del Este Declaration and the Doha Ministerial Declaration took account of the possibility that “agreements reached at an early stage may be implemented on a provisional or definitive basis.”⁸³

The fact that even after the Uruguay Round, the WTO was able to continue negotiations on the basis of a built-in agenda and several new issues also suggests that the single undertaking concept is context-specific. In the absence of a multilateral trade negotiating round embracing a multiplicity of issues and institutional arrangements to underpin it (such as a TNC), single undertaking becomes superfluous. Indeed, even in the context of a comprehensive negotiating agenda, using a single undertaking approach may be optional.

⁷⁹ During a debate in the Indian Parliament in December 1992 to consider the 1991 Dunkel Draft, a proposal was made by Atal Bihari Vajpayee, then a leader of the Opposition Party, to constitute a Joint Parliamentary Committee, with the assistance of experts, to examine the Dunkel text and its implications for India. This proposal was made against the background of a letter written by 250 members of Parliament across party lines to the- then Prime Minister to reject the Dunkel text. Reported in <http://alfa.nic.in/1sdeb/1s10/ses5/1923129201.htm>. To be effective, however, such reviews should be carried out by national legislatures on an on-going basis and in any event *before* a final draft is submitted as a single undertaking for ratification.

⁸⁰ WTO Agreement, Art. II:3 in relation to Annex 4.

⁸¹ WTO Agreement, Art. X:9. To prevent the proliferation of such agreements, however, the addition thereof to the WTO institutional framework under Annex 4 of the WTO Agreement has to be agreed to by the WTO Members “exclusively by consensus” in a Ministerial Conference.

⁸² Doha Ministerial Declaration, para. 30.

⁸³ 1986 Punta del Este Declaration, Part I:B (ii); Doha Ministerial Declaration, para. 47.

IV.2.2 Context-specific negotiating considerations

In the period preceding the 1999 WTO Ministerial Conference in Seattle, the United States negotiators, then without a fast-track authority, were actively examining other options.⁸⁴ More recently, in the context of the preparations for the Doha-mandated negotiations, similar considerations led the Deputy United States Trade Representative to state that “[b]ased on discussions to date, it seems to us that our working assumption should be that we are aiming at a single undertaking. *If that turns out not to be the case, we will have to make adjustments along the way.*”⁸⁵ (italics added).

Such adjustments may presumably have included a modest agenda limited to a few issues and areas or even dispensing with using single undertaking altogether. The major justification for a broad agenda underpinned by a single undertaking approach, namely, that issue-addition permits negotiating trade-offs is not borne out by experiences in the conduct of earlier rounds under the GATT or subsequent negotiations conducted under the auspices of the WTO.

Indeed, the question of whether or not broad trade rounds -- such as the Uruguay Round -- are the only effective route to success in expanding multilateral trade liberalization remains a subject of much debate. As the WTO Secretariat itself has pointed out, “[r]ecent history is ambiguous” with respect to the effectiveness of multi-sector rounds versus single-sector rounds.⁸⁶ It went on to add that “[p]erhaps success depends on using the right type of negotiation for the particular time and context.”⁸⁷

Perhaps the major reason for the developing countries’ acceptance of the Uruguay Round results as a single package undertaking was the widely articulated view that any failure to accede to all its agreements would undermine the trading system, lead to unilateralism and the attendant threat of securing trade concessions in a bilateral and/or regional framework. This was underscored by the implicit threat that in the event of a failure to accept the Draft Final Act in toto, developed countries would then have the option of depositing the outcome and its instruments in a new institution – a GATT-plus – which developing countries could then join on terms established under the Uruguay Round. This prospect, more than the requirements of single undertaking in the Uruguay Round, persuaded many developing countries that their long-term interests would be better served in a multilateral regime, however onerous its costs.

IV.2.3 Is single undertaking the sole option?

What options do developing countries have vis-à-vis ensuring that their interests are well reflected in the balance of the outcomes of the Doha-mandated negotiations? A Uruguay Round-type application of the single undertaking concept would presumably preclude any option. On the other hand, could WTO Members, as sovereign States, having considered all the consequences, including costs and benefits of a likely package, be prevented from exercising the right to opt-out of some and accede to other agreements? The answer to this would depend on many considerations: with respect to the Singapore issues, for example, consensus on modalities for going forward may well accommodate an opt-in/opt-out solution leading to plurilateral arrangements. This may also be the case with respect to environment-related negotiations.

⁸⁴ See, for example, the analysis of such options in the study by Craig Van Grasteek, *op.cit.*, note 3, at 682. He has argued that “the declared US interests in ‘early harvest’ of trade agreements, suggest that the principles of the new round may bear a closer resemblance to code reciprocity than they do to the single undertaking.”

⁸⁵ Statement delivered by Deputy U.S. Trade Representative Peter Allegeir at the 25 June 2001 meeting of the WTO General Council. See US Mission to the WTO Press Releases 2001, available at <http://www.us-mission.ch/press2001/0625allegeir.htm>.

⁸⁶ WTO, *Trading into the Future*, at <http://www.wto.org>.

⁸⁷ *Ibid.*

It would also depend on each individual country's assessment of the possible systemic consequences of opting to stay out of some agreements, in particular the price it would have to pay for the choice that it exercises. The most extreme costs of exercising such a choice could be retaliation, expulsion or the creation of a "WTO-plus" institutional framework limited to those accepting the totality of the Doha outcomes. But are any of these a realistic prospect? More likely, as in the Tokyo Round, would be the denial of MFN rights and remedies with respect to future injury. However, to the extent that the choice is driven by political considerations, coalition-building in support of a less restrictive interpretation of the single undertaking concept and the denial of the application of a reverse consensus procedure could go some way towards minimizing the possible adverse fall-out from choosing to opt-out of a single package.

The negotiated package that may emerge at the end of the Doha-mandated negotiations may be smaller, similar or larger than that envisaged in the Doha Ministerial Declaration. Clearly, a smaller and less ambitious package may increase the chances of success and could well accommodate the single undertaking concept, depending on the contents of the package. The prospect of meeting the 1 January 2005 timeline for the completion of negotiations would also be enhanced. Any issues not included in a smaller and less ambitious single package could then form part of the agenda of the regular and on-going work of the WTO thereafter. The establishment of the WTO as a permanent trade discussions and negotiations forum was after all intended to serve precisely such a purpose, which it did with some success during the period between Marrakesh and Doha. This approach would then promote a series of seamless and discrete negotiations, without the burden of using the single undertaking approach. It would also bring WTO processes in line with the capacities of countries to deal with discussions or negotiations for new agreements at a pace consistent with their priorities.

V. CONCLUSIONS AND RECOMMENDATIONS

The introduction of the concept of single undertaking in the 1986 Punta del Este Declaration was the result of considerable debate and discussion about its meaning and scope, both during the preparatory process and during the Uruguay Round negotiations. Consequently, it commanded a measure of political understanding and its scope was generally accepted for most of the Uruguay Round negotiations. From a broadly consensus-based notion intended to cover only trade in goods, a new and radical interpretation of single undertaking was imposed by the Dunkel draft text of December 1991 to cover results of all negotiations as part of the single package. Thus, it was only during the final period of the Uruguay Round -- in the Dunkel draft text -- that the single undertaking approach was interpreted, with virtually no discussion, to mean that **all** results of **all** negotiations be applied as a single package to **all** parties, despite previous debates and discussions among the participants in the course of the negotiations suggesting entirely different interpretations.

In the Doha context, on the other hand, its re-emergence appears to have escaped any debate or scrutiny. This may in part reflect the manner in which the draft text of the Doha Ministerial Declaration was transmitted by the Chairperson of the General Council “under his own responsibility” to the Doha Ministerial Conference without obtaining any prior consensus as to its contents from the General Council meeting in Geneva. It may reflect, as well, the controversial circumstances under which the draft text was negotiated and subsequently adopted by Ministers in Doha.

It is important, therefore, that the meaning, scope and likely application of single undertaking at the end of the current process be fully examined and analysed, both by WTO members and by the civil society. Central to this examination must be the recognition that nowhere in the Doha Ministerial Declaration is there any expectation that each and every WTO member is legally obliged to accept, in whole or in part, the results of the negotiations in their entirety. This surely remains a matter of sovereign choice and this in the final analysis should guide the decision-making process at Cancun and at the conclusion of the negotiations in 2004. The only areas where a consensus can be said to exist relate to the *launch* of the Doha negotiations (upon the establishment of the TNC in January 2002), their *conclusion* (1 January 2005) and their *conduct* (parallel negotiations, transparent and participatory processes, and balanced beneficial outcomes). Finally, the examination must be informed by the fact that the scope and applicability of the concept of single undertaking remains to be defined and decided upon by WTO Members, rather than by the Chairman of the TNC or the WTO.

The examination should ideally take place in the framework of the TNC. Such an examination would undoubtedly help avoid a repetition of the experience during the Uruguay Round when a particular interpretation of the single undertaking approach effectively became a tool that forced developing countries to assume legal and trade obligations greater than they would otherwise have done.

V.1 SINGLE UNDERTAKING IS NEITHER A BINDING NORM NOR A NEW REGIME PRINCIPLE

Since its introduction in the 1986 Punta del Este Declaration, the scope of the single undertaking conceptual approach has been defined and interpreted in a variety of ways. As a political construct, it should come as no surprise that it is subjected to varying interpretations. Hence, it is neither “a new regime principle” nor a binding legal norm in the WTO context.

It is context-specific -- in the absence of an all-embracing agenda covering a multiplicity of issues, areas and sectors, it has little or no relevance. Inasmuch as most of the Doha work programme is in the nature of a re-negotiation and/or review of existing agreements, the notion of a single undertaking in the present context would appear to be severely circumscribed. WTO Members are, after all, already parties to these legal instruments. Consequently their acceptance of any revisions, changes, or amendments to these existing agreements must necessarily be based on consensus and on the merits of each new or amended agreement and understanding.

As the WTO evolves as an institution -- it is after all less than a decade old -- there are grounds for thinking that it can negotiate and carry out its mandated functions without using the single undertaking approach. The alternative of perpetual multilateral trade negotiating rounds, “grand bargains”, and pressures to open markets at all costs risks bringing about a collapse of the multilateral trade negotiations process under the weight of its own ambitions. The resurrection of the single undertaking conceptual approach in the Doha-mandated work programme, however, is circumscribed in a number of ways in the Doha Ministerial Declaration.

First, it excludes a number of issues -- such as negotiations on dispute settlement rules -- outside the scope of the single undertaking. Second, it provides for early agreements to be “implemented on a provisional or definitive basis.” Third, it limits the single undertaking to the “conduct, conclusion and entry into force of the outcome of the negotiations.”

Finally, in providing for the conduct of the negotiations to be transparent in order to facilitate “effective participation of all”, paragraph 49 of the Doha Ministerial Declaration suggests that the application of single undertaking will require, at the very least, the determination of “an overall balance in the outcome of the negotiations.” Exactly how such an assessment of balance is made will remain a major task and one that will have to be undertaken at the national level before decisions concerning a final negotiated package are taken. Decisions concerning adoption and implementation will also have to be taken at a political level -- i.e. through the Special Session of the Ministerial Conference provided for in paragraph 45 of the Doha Ministerial Declaration. This also provides a further opportunity to determine how the single undertaking approach is applied regarding the adoption and implementation of agreed results.

The notion justifying the Uruguay Round as a “grand bargain” in which developing countries made concessions in some areas in exchange for gains in market access and the creation of a more stable and predictable regime of rules and dispute resolution has been popularized in much of the official and academic writing on the “success” of the Uruguay Round. In reality, the imbalances in the various Uruguay Round agreements, the hidden direct and indirect costs of their asymmetric implementation, and an ambitious work programme imposed by the Doha Ministerial Declaration now raise the question of whether the procedures and processes during the Uruguay Round should be replicated in the context of the Doha Round? The answer to this question would depend on whether developing countries have been able to draw appropriate lessons and avoid any mistakes made in the previous rounds of trade negotiations.

V.2 IMPROPER CONDUCT OF NEGOTIATIONS NEGATES SINGLE UNDERTAKING

The commitment in the Doha Ministerial Declaration concerning single undertaking must be viewed in its broader meaning and context. The successful application of single undertaking, i.e. achievement of an outcome that provides an equitable balance of benefits for all the participants and supports the development aspirations of the less-developed participants, is conditional upon the satisfactory conduct of the negotiations. This means that there must be full involvement and participation by developing countries in the shaping of the negotiating agenda, in the design of the negotiated package, and in the determination of its overall balance.

As discussed earlier, the manner of the conduct of the negotiations is an integral component of the single undertaking approach taken in the Doha Ministerial Declaration. Paragraph 49 thereof requires that the negotiations “be conducted in a transparent manner among participants, in order to facilitate the effective participation of all ... with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.” Paragraph 50 of the Doha Ministerial Declaration furthermore lays down one more important parameter to rule the conduct of the negotiations, i.e. that such negotiations “take fully into account the principle of special and differential treatment for developing and least-developed countries.” Finally, paragraph 46 of the Doha Ministerial Declaration sets up a Trade Negotiations Committee under the authority of the General Council to supervise the overall conduct of the negotiations and establish appropriate negotiating mechanisms.

The conditions of both paragraphs 49 and 50 of the Doha Ministerial Declaration with respect to the conduct of the negotiations are important, especially with respect to ensuring that the negotiated outcomes contain benefits to developing countries as well as redress of existing imbalances in the global trading system. However, developments in the Doha-mandated negotiations so far suggest that these conditions have not been satisfactorily met, neither at the TNC level nor at the level of the different negotiating groups established by the TNC. The conduct of the negotiations thus far has not been transparent, participatory, balanced, nor has it fully reflected the principle of special and differential treatment. Transparency and participatory decision-making have been rendered ineffective due to the use of informal institutional mechanisms -- such as the frequent holding of “mini-ministerials” among selected Members, the holding of informal “green room” meetings and consultations among Members and the TNC Chair, and the great flexibility given to the chairs of the various negotiating groups to draft text on their own responsibility -- that effectively sideline the active participation of most developing countries in actual decision-making and the drafting of negotiating texts. The imbalance in the negotiations is reflected in the generally uneven progress of the various negotiating areas -- with generally faster progress or at least increased focus in areas of interest to the North and slower or no progress in areas of interest to the South.

Changes must be effected in the current process to ensure that the processes leading to the design of a final package have been transparent and have permitted full participation by each country’s negotiating authorities. The more active involvement of developing countries and their civil society in the current process may help to ensure that the experience of the UR is not repeated.

V.3 EVALUATING THE BALANCE OF NEGOTIATIONS

An evaluation of balance must be undertaken at the level of each country prior to any decisions being taken regarding the treatment of the package and any possible application of the single undertaking approach. Such an evaluation must address the substance of the outcome, including its overall balance of benefits and costs, and must fully involve all the national stakeholders. Unlike the perfunctory nature of the evaluation process carried out by the TNC during the concluding phase of the Uruguay Round, any evaluation of a possible package emerging out of the Doha-mandated negotiations must explicitly address the costs of implementation and its financing. The substantial direct and indirect costs entailed in assuming new obligations provide sufficient justification for national legislatures, in particular, closely to examine the implications of such costs. In conditions of extreme fiscal constraints in most developing countries, a full audit of the financial implications, including an assessment of the development implications of new obligations, must inform Ministerial Conference decisions.

It has been argued that in establishing common rules and obligations for all WTO members through the instrumentality of a single undertaking, the Uruguay Round has undermined, if not dispensed with, the special and differential measures in favour of developing countries. Far from undermining the special and differential provisions, the Doha Ministerial Declaration states, “... all special and differential Treatment provisions shall be reviewed with a view to strengthening them and

making them more precise, effective and operational.” (paragraph 44). This provision acknowledges the fact that developing countries’ needs, and their case for, special and differential treatment in the aftermath of the Uruguay Round has increased manifold. Success in achieving the objective outlined in paragraph 44 will therefore provide, for many developing countries, a litmus test of the balance in the outcome and success of the current negotiations.

Evaluation at the national level should involve all the organs of the Government, the concerned public sector agencies, and the broadest range of civil society organizations. In practice, this means that each country’s parliament or similar forum must play a proactive role in evaluating the balance before ministers make treaty commitments that will impact on national policy-making. An open and transparent assessment process will enhance the credibility of whatever commitments are then entered into by the national policy makers during the negotiations.

V.4 ENSURING THAT NEGOTIATING TEXTS FULLY REFLECT DEVELOPING COUNTRY INTERESTS

Again drawing upon the experience of the Uruguay Round, developing countries will need to examine more carefully the implications of a text purporting to be the outcome of the negotiations. In particular, they should not be required to accept a package prepared by the Chairman of the TNC and the WTO Secretariat -- invariably cleared by the Quad countries -- on a “take it or leave it basis”. Any draft text presented by the Chairman of the TNC as representing the final negotiated package may well require the application of the reverse consensus principle, i.e. any changes and amendments to the final draft will require consensus, as what had happened during the Uruguay Round when the Dunkel draft text was tabled. Indeed, safeguarding national positions and interests deriving from country-based assessment of overall balance may well warrant changes and amendments in the draft text even at a late stage. These will have to be accommodated before any final decisions are made by the Ministerial Conference about the final scope and applicability of the single undertaking under the Doha Ministerial Declaration. This will necessarily require the participants in the negotiations to review the contents of any draft negotiated package, and then tailor the set of draft agreements and decisions to the needs and priorities established by their respective national authorities. In practice this will most likely result in an outcome that will be considerably more modest in content and scope than that originally envisaged by the Doha Ministerial Declaration.

Furthermore, any negotiating areas in which no draft agreements have been arrived at by the 1 January 2005 time frame established in the Doha Ministerial Declaration need not be included in the package of outcomes of the Doha-mandated negotiations that will be subject to the decisions of the Special Session of the Ministerial Conference with respect to their adoption and implementation. Instead, such negotiating areas could be referred back to and dealt with by the regular negotiating machinery of the WTO, i.e. the General Council and the regular bodies of the WTO. Separate negotiating mechanisms can be established by the General Council to deal with such unfinished issues which would allow developing countries to join such negotiations as and when their interests and resources permit.

Finally, just as trade is a means to enhance development and growth of the members of the trading system, trade negotiations are a means to improve the balance and the functioning of the system. The undertakings assumed in Doha are important but their importance should not be exaggerated. WTO Members may have agreed to negotiate, but they are not bound to reach a final agreement at any cost. Indeed, final agreement is not an end in itself. It would be meaningful only if the outcome is balanced and consistent with development priorities. Consequently, developing countries need to assert the primacy of their own development strategies and the policies that flow from these. Trade negotiations must remain simply a tool, a corollary, of wider economic and social goals and objectives, especially of developing countries.

ANNEX I

Paragraphs 45, 47, 49 and 50 of the Doha Ministerial Declaration of the World Trade Organization, 2001

45. The negotiations to be pursued under the terms of this declaration shall be concluded not later than 1 January 2005. The Fifth Session of the Ministerial Conference will take stock of progress in the negotiations, provide any necessary political guidance, and take decisions as necessary. When the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results.
46. With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.
47. The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.
48. The negotiations and the other aspects of the Work Programme shall take fully into account the principle of special and differential treatment for developing and least-developed countries embodied in: Part IV of the GATT 1994; the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; the Uruguay Round Decision on Measures in Favour of Least-Developed Countries; and all other relevant WTO provisions.

ANNEX II

Evolution of GATT/WTO Negotiations since the Tokyo Round

AGENDA/THEME	ROUND	STRUCTURE/FORM
Negotiations on tariffs, non-tariff, systemic and sectoral issues	Tokyo Round (1972-1979)	Agreements adopted on tariff and non-tariff issues based on “code reciprocity” permitting opt-in/opt-out
Part I: Goods Part II: Services NB: Part I covered most Tokyo Round issues and several new ones, notably agriculture, intellectual property and investment.	Uruguay Round (1986-1994)	Single undertaking for Part I (Trade in Goods), but not applicable to Part II (Trade in Services) Provision for “early harvest”; Dunkel Draft (1991) extends single undertaking to all results of all negotiations to all countries.
Built-in, unfinished and new agenda: Negotiations on services, agriculture, information technology, e-commerce etc	Marrakesh-- Doha (1995-2001)	Single undertaking replaced by sector-specific negotiations permitting opt-in/opt-out “stand alone” agreements and “critical mass” approach
The so-called development agenda includes, among others, issues such as agriculture, industrial tariffs, services and environment. Treatment of Singapore issues to be decided upon at the Cancun Ministerial meeting.	Doha Round (2002-2005)	Single undertaking except for review of Dispute Settlement Understanding Provision for “early harvest”. Question: Does single undertaking also cover: 1) Singapore issues? 2) All implementation issues? 3) Some aspects of TRIPS?

Source: Author, based on GATT/WTO documents.