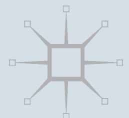
NEGOTIATION DYNAMICS OF THE WTO

AN INSIDER'S ACCOUNT

MOHAN KUMAR



Negotiation Dynamics of the WTO

"Dr. Mohan Kumar has produced a brilliant and incisive analysis of the history of the multilateral trading system from Bretton Woods to the establishment of the WTO in 1995. He brings the skills of a forensic analyst with an insider's view as a participant and the cerebral qualities of an academic with a Ph.D. from Sciences Po University (Paris). A must-read for all those interested in the functioning of the multilateral trading system."

—Mr. Hardeep Singh Puri, *Hon'ble Union Minister of State for Housing and Urban Affairs, Former Ambassador of India to Brazil and Permanent Representative at the Indian Missions in New York and Geneva, Former Indian Negotiator to GATT and UNCTAD, Author of the book* "Perilous Interventions"

"Dr. Mohan Kumar has solid credentials for writing an authoritative account of the tumultuous negotiations that led to the establishment of the WTO. He was a senior member of the delegation of India and India had so much at stake in the reshaping of the multilateral trading system that was undertaken at these talks. He shows rare insight into the underlying factors that influenced the manner in which the negotiations played out. The narrative includes also a description of the bitter debate that preceded the launching of the Doha Round. This book contains a great deal of learning for diplomats and trade policy officials of developing countries."

—Mr. Anwarul Hoda, *Former Head of the Trade Policy Division and Chief Negotiator, Ministry of Commerce, Government of India, Former Deputy Director General, WTO, Geneva*

"Dr. Mohan Kumar is one of those rare officers of the Indian Foreign Service who spent considerable time in Geneva as part of the Indian negotiating team at first the GATT and then the WTO. He was an integral part of the Indian delegation at three important Ministerial Conferences of the WTO i.e. Marrakesh (1994), Seattle (1999) and Doha (2001). He therefore brings tremendous knowledge and insight into the negotiation dynamics. His book is thus a vivid account of the intricacies and realpolitik that surrounds the multilateral negotiations. The book is also topical in view of the existential crisis facing the WTO. All in all, a must-read for anyone interested in grasping how a supposedly rules-based system operates as a power-based system during critical moments of important negotiations."

—Mr. S. Narayanan, *Former Indian Ambassador to the WTO, Geneva, Former Chief Textiles Negotiator of India*

Mohan Kumar

Negotiation Dynamics of the WTO

An Insider's Account

palgrave
macmillan

Mohan Kumar
Jindal School of international Affairs
O. P. Jindal Global University
Sonipat, Haryana, India

ISBN 978-981-10-8841-4 ISBN 978-981-10-8842-1 (eBook)
https://doi.org/10.1007/978-981-10-8842-1

Library of Congress Control Number: 2018937857

© The Editor(s) (if applicable) and The Author(s) 2018
This work is subject to copyright. All rights are solely and exclusively licensed by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.
The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.
The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

Cover credit: JESPER KLAUSEN/SCIENCE PHOTO LIBRARY/Getty Images

Printed on acid-free paper

This Palgrave Macmillan imprint is published by the registered company Springer Nature Singapore Pte Ltd. part of Springer Nature
The registered company address is: 152 Beach Road, #21-01/04 Gateway East, Singapore 189721, Singapore

To
My wife Mala who has stood by me through thick and thin
And
My children Megha and Madhav who have brought so much joy

Acknowledgements

The idea of writing a book on WTO was actually inspired by a chance remark by noted Indian economist, the late Dr. Arjun Sengupta, who heard me in the nineties speak at a conference on the concepts of "dumping" and "injury" while I was Chairman of the WTO Committee on Anti-Dumping. After listening to me, he said with apparent sincerity: why don't you write a book on WTO? Since then, I have pondered the matter.

Thanks to encouragement from my better half, I ended up doing a doctorate from Sciences Po in Paris on the subject of WTO negotiations. This book is largely, though not entirely, based on my doctoral thesis. What I have tried to do is to put my decade-long negotiating experience at the GATT/WTO in perspective. In doing so, I have tried, hopefully with some success, to be a WTO historian. At a time when the WTO faces an existential crisis, it is hoped that this book will inform and educate the public at large about the intricacies of multilateral trade negotiations.

I owe a debt of gratitude to the Dean of the Jindal School of International Affairs, Professor Sreeram Chaulia, who encouraged me in every way possible. Finally, I sincerely thank Palgrave Macmillan for publishing this book.

Contents

1 The Mother of All Rounds 1

1.1 Background 1
1.2 The Earlier GATT Rounds 2
1.3 Why a Mother of All Rounds? 6
1.4 The Punta Conference 11
1.5 Agriculture 24
1.6 Services 30
1.7 TRIPs 36
1.8 Textiles 43
1.9 NAMA 49
1.10 The Draft Final Act 52
1.11 Creating the WTO 56
1.12 Negotiating Implications of the Uruguay Round 61
1.13 Negotiation Resentment 65

2 The Millennium Round That Failed 67

2.1 Background 67
2.2 Singapore Issues 70
2.3 Preparations for Seattle 73
2.4 Labour Standards 79
2.5 Like-Minded Group (LMG) 81
2.6 Negotiating Logic Behind "Implementation Issues" 84

2.7 Negotiating Impasse 87
2.8 Why Seattle Failed? 96
2.9 Conclusion 97

3 The Development Round 101
3.1 Background 101
3.2 Internal Transparency 106
3.3 External Transparency 111
3.4 Participation of LDCs 115
3.5 Choice of Doha as Venue for the Ministerial Conference 118
3.6 The Mystery of "Development" 121
3.7 Prelude to Doha 123
3.8 TRIPs and Public Health 124
3.9 Implementation Again 132
3.10 The End Game 139
3.11 India's Position 144
3.12 Why Doha Succeeded 145
3.13 Doha Post Script 147

4 India at the WTO: Punching Above Its Weight 151
4.1 Domestic Decision-Making Structure 151
4.2 Sui Generis 158
4.3 Going It Alone 160
4.4 Punching Above Its Weight 169

5 Conclusion 177
5.1 Whither WTO? 177
5.2 Some Ideas to Revive the WTO 179

Ministry of Commerce and Industry (Vanijya Aur Udyog Mantralaya) 185

References 205

Index 211

About the Author

Dr. Mohan Kumar is Vice-Dean and Professor of Diplomatic Practice at Jindal School of International Affairs, Sonipat, India. He also serves as Vice Chairman of the Delhi-based think tank, RIS.

Kumar received his Bachelor's degree in Business Administration from the University of Madurai and his MBA from the Faculty of Management Studies, University of Delhi. He then completed his Ph.D. from Sciences Po in Paris.

Kumar was a member of the Indian Foreign Service for 36 long years until he retired as India's Ambassador to France in July 2017. Beginning 1992, Kumar was associated with first the GATT and then the WTO, for almost a decade. During this period, Kumar was India's lead negotiator in areas such as Intellectual Property Rights, Services, Rules and Textiles. He has served in multiple WTO dispute settlement panels and has chaired the WTO Committees on Anti-dumping/Technical Barriers to Trade, in addition to overseeing Moldova's Accession to the WTO. Kumar has had the unique opportunity of being an important part of the Indian negotiating team at three crucial WTO Ministerial Conferences: Marrakesh (1994), Seattle (1999) and Doha (2001).

Introduction

The Bretton Woods Conference which convened in 1944 was originally intended to draft a charter for the IMF and the World Bank. However, it was recognized at this conference that these two institutions alone would not be enough to tackle situations such as the " Great Depression". The Conference, therefore, recommended that governments seek to reach agreement on ways and means to reduce obstacles to international trade and in other ways promote mutually advantageous international commercial relations. So, the original intention was to create a third institution to handle the trade side of international economic cooperation, joining the two Bretton Woods institutions, namely, the IMF and the World Bank.

The idea was to create an organization called the International Trade Organization (ITO) at the United Nations Conference on Trade and Employment in Havana, Cuba in 1947. Even though a charter for ITO was agreed in March 1948, non-ratification by the US subsequently killed the ITO. In parallel, beginning December 1945, about 15 countries had begun talks to reduce and bind customs tariffs. By October 1947, the group which had expanded to 23 countries came up with a package of trade rules and 45,000 tariff concessions affecting $10 Billion worth of trade. A unique feature was that these tariff concessions came into effect in June 1948 through a "Protocol of Provisional Application". Thus, was born the General Agreement on Tariffs and Trade (GATT) with 23 founding members.

The following features about the GATT are noteworthy:

(a) It was not a legal organization. It remained a "provisional contract" among its members.
(b) It was far from universal in terms of membership. A handful of countries, led mainly by the developed and the industrialized world comprised its membership.
(c) GATT was hardly high-profile. It was thought of as an arcane set-up best left to technical experts who mastered customs tariffs and classification.
(d) Countries such as India, who were founding members, hardly played an influential role in the earlier GATT Rounds of trade negotiations. They were mere bystanders.

The Uruguay Round of multilateral trade negotiations launched in Punta del Este in 1986 was different and the tough discussions that took place prior to the launch of this Round were a precursor to the actual negotiations that followed. It was immediately obvious to countries such as India and Brazil that the Uruguay Round negotiations sought to change the GATT in a fundamental manner. For one thing, the sheer scope of the subjects sought to be included for negotiations was vast. Thus, subjects such as Services and Intellectual Property Rights found their way into the negotiating agenda. These impinged directly on national policy and had the potential to impact people's lives. The Uruguay Round was also, at least in part, driven by the desire of players such as the US, the EU and Japan to seek substantial market access in major developing countries such as India and Brazil. In earlier trade rounds at the GATT, the developing countries hardly played any direct role; accordingly, they were also not expected to take on onerous obligations because of "special and differential treatment" and the principle of "non-reciprocity". Right from the beginning, it was clear to Indian negotiators that this was sought to be changed in the Uruguay Round. From the viewpoint of QUAD countries (the QUAD comprised the US, the EU, Japan and Canada), there were, henceforth, to be no "free-riders".

Given the importance outlined above of the Uruguay Round, Chapter 1 traces the period from its launch in Punta del Este (Uruguay) in 1986 to the conclusion of the Round in Marrakesh in 1994 and the entry into force of the WTO on 1 January 1995. The Uruguay Round of multilateral trade negotiations was an exercise in realpolitik with the most powerful players, i.e., the US and the EU having their way,

at least most of the time, in the face of either silent acquiescence by a large majority of countries or virulent opposition demonstrated by a few. Either way, it is hard to contest the fact that the outcome of the Uruguay Round largely served the interests of the developed countries and by the same token, the outcome was unfair and unbalanced for some, if not all, developing countries.

The author argues that because of the manner in which the Uruguay Round negotiations played out and the nature of the outcome, it led to "negotiation resentment" for a certain number of developing countries.

It was against the backdrop of this continuing "negotiation resentment" that preparations were launched for a WTO Ministerial Conference in Seattle. Chapter 2 dwells on how this ill-fated conference was dogged by poor preparation, a certain degree of insensitivity by key developed countries towards the concerns of developing countries and of course, the nadir of WTO's reputation amongst the NGOs who gathered in Seattle. In retrospect, Seattle was doomed to fail. It is doubtful if the US was committed enough to success in Seattle. Ultimately, fail it did leading to what the author describes as "trust deficit" between the developed countries on the one hand and certain key developing and least-developed countries on the other.

The idea of launching a "Development Round" was in part an attempt by the powerful WTO Members to assuage the "negotiation resentment" and to overcome the "trust deficit" referred to above. Chapter 3 traces the WTO saga that began in the wake of the failure at Seattle and the difficult path that led to the launch of a new Round at Doha in November 2001. The launch of a new Round at Doha was also, in no small measure, due to extraneous factors such as the 9/11 terror attacks in New York.

The Doha Ministerial declaration (outcome of hard-fought negotiations among WTO Members) boldly proclaimed, for the very first time ever, that the needs and interests of the developing countries would be placed at the heart of the future negotiations. The author argues that this has not happened so far and this may well explain why the Doha Round is still floundering. The author concludes that in 2012 a "state of disequilibrium" characterized the negotiation dynamics of the WTO.

Chapter 4 describes in some detail India's domestic decision-making structure as well as some of the factors driving India's negotiating stance at the WTO. India's negotiating strategy at the WTO makes for

interesting research since it is a combination of national interest, idealistic principles and domestic politics. It is hoped that those who are either unclear or surprised at India's negotiating position on various issues will, after going through this Chapter, be better able to understand and appreciate India's negotiating conduct at the WTO.

The last Chapter 5 describes the current impasse at the WTO and offers some ideas to revive an institution that is so crucial for the smooth functioning of the multilateral trading system.

CHAPTER 1

The Mother of All Rounds

1.1 Background

Any effort at understanding the current negotiation dynamics at the World Trade Organization (WTO) must be preceded by a thorough assessment of what happened during the Uruguay Round of multilateral trade negotiations (henceforth referred to as just the Uruguay Round).[1] The reasons for this are given below:

1. Without any doubt, the Uruguay Round was the most comprehensive and far-reaching multilateral trade negotiations ever undertaken globally.
2. When it succeeded, it brought about the biggest reform of the multilateral trading system.
3. It resulted in the birth of a brand new international organization called the WTO.
4. Although many countries accepted the outcome of the Uruguay Round and thus became WTO Members, the truth was that actual negotiations were confined to a relatively small number of countries, in general, and a handful of developing countries, in particular.

[1] The name refers to the multilateral round of trade negotiations launched in Punta del Este, capital of Uruguay in September 1986.

© The Author(s) 2018

M. Kumar, *Negotiation Dynamics of the WTO*,
https://doi.org/10.1007/978-981-10-8842-1_1

5. It is fair to say that a large number of developing countries either did not fully grasp the nature and scope of obligations they were undertaking or were forced to undertake them under some sort of pressure.
6. The above has had a lasting effect on the functioning of the WTO. Indeed, one of the central points in this book is that the content, nature, scope and the manner in which the Uruguay Round was formulated and concluded has left an indelible imprint on the subsequent negotiation dynamics of the WTO.

1.2 The Earlier GATT Rounds

The period before the entry into force of the WTO, i.e. 1 January 1995, can be divided, for the sake of convenience, into three periods: 1947–1964, 1964–1973 and 1973–1986.

An excellent account of the early General Agreement on Tariffs and Trade (GATT) Rounds may be found in the book "The World Trading System" written by the trade guru John Howard Jackson. He cites a table in his book which is reproduced below:

Round	*Dates*	*Number of countries*	*Value of trade covered*	*Average tariff cut (%)*	*Average tariffs afterward*
Geneva	1947	23	$10 Billion	35	NA
Annecy	1949	33	Unavailable	35	NA
Torquay	1950	34	Unavailable	35	NA
Geneva	1956	22	$2.5 Billion	35	NA
Dillon	1960–1961	45	$4.9 Billion	35	NA
Kennedy	1962–1967	48	$40 Billion	35	8.7%
Tokyo	1973–1979	99	$155 Billion	34	6.3%
Uruguay	1986–1994	120[a]	$3.7 Trillion	38	3.9%

[a]Jackson, John. 1997. *The World Trading System: Law and Policy of International Economic Relations*, Massachusetts Institute of Technology

As can be seen from the table the first period, i.e. 1947–1964 saw the GATT concentrate essentially on mutually beneficial and reciprocal reduction of tariffs. The membership remained a modest 45, with the actual negotiations confined to essentially the developed countries. They would negotiate the reduction of tariffs among themselves and then apply it on a Most Favoured Nation (MFN)-basis to other countries. Developing countries neither had a significant share of trade nor did they constitute an important market for the products of the developed countries. So, in effect, their lack of participation did not make a difference.

The Kennedy Round not only continued negotiations on tariff reductions but decided to have a go at the issue of non-tariff measures (NTMs) for the first time. Two developments were noteworthy. One was the Anti-Dumping Code and this was deemed necessary to counter the protectionist sentiment prevalent at the time.[2] In effect, countries which were agreeing to reduction of tariffs in the negotiations, were using anti-dumping duties indiscriminately to nullify the advantage of tariff concessions. So, some regulation of anti-dumping was thought essential to safeguard the final outcome of the Kennedy Round tariff concessions estimated at $40 Billion.

A more important development, from developing countries point of view, was an agreement incorporated as Part IV of GATT which became effective in June 1966.[3] This goes on to state that the developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed (i.e. developing) countries. An interpretative note in the GATT adds that the developing countries should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments. Developing country negotiators (particularly those belonging to India, Brazil, etc.) who were otherwise bystanders in tariff negotiations, deserve credit for negotiating such language in the early pre-Uruguay Round days of GATT. Their main motivation was to preserve, for their countries, full policy space so that they retain the potential to go forward unimpeded on the path towards industrialization and economic growth.

The third period coincides with the Tokyo Round, arguably the first major attempt to tackle trade barriers that do not take the form of tariffs and to improve the multilateral trading system. The Tokyo Round was significant because 102 countries participated in it and they exchanged tariff reductions covering more than $300 Billion worth of trade.[4] While the Tokyo Round failed to make progress in the areas of Agriculture and Safeguards, it did break new ground with a series of new agreements on non-tariff barriers. Thus, there were "codes" on technical barriers to trade and on import licensing procedures.

[2] WTO newsletter "Focus" No: 30, May 1998, www.wto.org.

[3] Hoda, Anwarul. 2002. *Tariff Negotiations and Renegotiations Under the GATT and the WTO: Procedures and Practices*, Cambridge University Press.

[4] Ibid.

For developing countries the Tokyo Round will be remembered, above all, for the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries". This was an elaboration of the concept of non-reciprocity outlined in the Kennedy Round. The main outcome of this decision was: The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e. the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall, therefore, not seek, neither shall less-developed contracting parties be required to make concessions that are inconsistent with the latter's development, financial and trade needs.[5] Having regard to the special economic difficulties and the particular development, financial and trade needs of the least developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries and the least developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.[6] This was probably the first time when developing countries such as Brazil and India participated in the GATT negotiations in what was known as the Framework Group of the Kennedy Round.[7] This was significant for a variety of reasons. First, the sheer lack of economic clout by developing countries at the time meant that they were not in a position to make matching concessions (nor were they in a position to demand) to developed countries. Second, they did not really participate effectively in the tariff negotiations anyway. Tariff negotiations mainly happened between the developed countries themselves. Thus, at the Dillon Round, 96% of US tariffs cuts—although made on a MFN basis—were

[5] Ibid.

[6] Pre-WTO legal texts, Tokyo Round Codes, Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of November 28, 1979, www.wto.org.

[7] Hoda, Anwarul. 2002. *Tariff Negotiations and Renegotiations Under the GATT and the WTO: Procedures and Practices*, Cambridge University Press.

on imports from countries that made concessions in return.[8] Finally, a subtle distinction also appears to have been made between developing countries and least developed countries, perhaps based on both political and economic considerations.

There are two interpretations about the participation of developing countries in the GATT up to the conclusion of the Tokyo Round.[9] One interpretation is that the developing countries were repeatedly frustrated in achieving objectives and that the GATT was hostile to the interests of developing countries. The other interpretation is that the developing countries instead of participating fully and on equal terms with the developed countries, opted for "special and differential" treatment and what the author T.N. Srinivasan calls "permanent states of inferiority".[10]

It is, however, conceivable that both these interpretations are off the mark. The developing countries simply did not have the trade clout or the economic margin for manoeuvre to participate on an equal basis with the developed countries in the period circa 1979. It was, therefore, an act of pragmatism based on making virtue out of a necessity on the part of developing countries to have come up with the concept of non-reciprocity. And in what may be characterized as "belts and braces approach", the developing countries also ensured that they would not be required to make concessions that were inconsistent with their development, financial and trade needs. For countries such as India, this was important because it gave them policy space to protect its infant domestic industry and develop an industrial base over time. Indeed, in an excellent article, the authors Rorden Wilkinson and James Scott argue that while the energy of developing countries was often directed towards negotiations seeking more favourable treatment for themselves, this was a result more of the asymmetrical manner in which the GATT was deployed and a consequence of their relative underdevelopment than of a desire to freeride on the favourable trading conditions created by the concession exchanging activities of developed countries.[11]

[8] Hoekman, Bernard et al. 2002. *Development, Trade and the WTO: A Handbook*, World Bank Publication, Chapter 7.

[9] Srinivasan, T.N. 2000. *Developing Countries and the Multilateral Trading System*, Westview Press, p. 27.

[10] Ibid.

[11] Wilkinson, Rorden and Scott, James. 2008. "Developing Country Participation in the GATT: A Reassessment", *Word Trade Review, Cambridge Journals.*

It can be seen from the above that the mandate and scope of GATT, even before the launch of the Uruguay Round was in "expansion mode". Thus, from tariffs, it was already expanding into NTMs, anti-dumping, subsidies as well as some plurilateral agreements on import licensing procedures and government procurement. It was already considered important for countries to belong to GATT, as evidenced by the GATT membership of about 100 countries at the time of the Tokyo Round.

1.3 Why a Mother of All Rounds?

It is absolutely critical to understand why the Uruguay Round was thought important and necessary by its proponents. After all, the Tokyo Round left GATT Members with no lack of work to be done.[12] The results of the Tokyo Round had to be put into force—no mean task, considering that the core of the Round's results consisted of separate multilateral agreements whose main aim was to reduce or regulate non-tariff distortions of trade. In fact, a number of observers thought that there would be a long respite from major negotiations. This was not to be. Before long, the key WTO players comprising exclusively of developed countries started conceiving of a large round of multilateral trade negotiations. It is important to analyze how and why this happened so that some light is thrown on the negotiation dynamics of the WTO.

According to the author, there are broadly speaking three schools of thought explaining why the Uruguay Round was launched by a group of developed countries:

1. *The "Fundamentalist" School*: This is best exemplified by the book entitled "Recolonization" by Chakravarthi Raghavan of the Third-World Network.[13] The reasoning is straightforward, if somewhat extreme. The blurb of the book says it all: "The industrialized countries are attempting to extend their control of world trade and production through the inclusion of new areas (like services, investment & intellectual property) into the GATT framework". It goes on to say that the Uruguay Round would roll back the Third-World's gains in economic sovereignty since independence and

[12] Croome, John. 1999. *Reshaping the World Trading System*, Kluwer Law International.

[13] Raghavan, Chakravarthi. 1990. *Recolonization: GATT, the Uruguay Round and the Third World*, Third World Network, Penang, Malaysia.

usher in a new era of economic colonialism where economic power is concentrated in Trans-National Corporations (TNCs). Indeed, it predicted that the TNCs will gain unprecedented rights to set up base in the Third World and tighten their monopoly over industrial technology. Support for this school also came from the view that developed countries were dissatisfied with non-reciprocity especially as applied to "advanced" developing countries.

According to the proponents of this school, the Uruguay Round was an attempt to restructure and refashion the rules of the international trading system to make this even more favourable, than at present, to the interests and concerns of the industrialized countries. If allowed to succeed, the proponents of this school feared that it would lead to a new international economic order where the dice will be completely loaded against the developing and least developed countries.

Extreme as this sounds, there is some truth in the argument that the developed countries were indeed seeking newer markets for their products since existing markets were saturated. There was also an attempt to maintain and enhance technological superiority by making sure that rewards for innovation were guaranteed through patents, especially if one bears in mind that most, if not all, invention and innovation at the time was taking place in the developed world. Last, by seeking to include services, an area where the industrialized world held the competitive edge, the idea was to entrench the advantage further.

Lending credence to the above is an article by Gilbert R. Winham entitled "An Interpretative History of the Uruguay Round Negotiation"[14] in which he clearly argued that global trade performance was "dismal" in 1982 and "the world economy was performing poorly for developed countries…" As for developing countries, Gilbert R. Winham pointed out with remarkable lucidity to two important developments. One, by 1985, he says that "China, Hong Kong, Korea and Saudi Arabia were included among the world's top twenty exporters and importers, while Brazil and Taiwan joined the list as exporters and Singapore joined the list as an importer". More importantly, he went on to

[14] Macroiy, Patrick F.J., Appleton, E. Arthur, and Plummer, Michael G. 2005. *The World Trade Organization: Legal, Economic and Political Analysis*, Springer.

add: "Developing Countries were also becoming an increasingly important market for developed countries and by 1987 they took approximately one-third of merchandise exports from Japan, one-fourth of exports from North America, and one-eighth of exports from West Europe". He concludes: "These circumstances motivated developed countries to seek a new negotiation to incorporate developing countries more firmly into GATT rules".

As for inclusion of Services, Gilbert R. Winham's logic was impeccable. As with any process of industrialization, all countries showed a decline (between 1950 and 1980) in the workforce in agriculture and a corresponding increase in labour in industry and services. However, the decline of agriculture and the movement into services was much greater in developed as opposed to developing countries. It was, therefore, recognized that unless trade in services was expanded, there would be little prospect that trade would continue to promote growth of developed countries in the future, as it had done in the past. A further issue was that some services (financial or insurance, for example) were linked to merchandise trade in such a way that failure to liberalize the former would restrict growth of the latter. The developing countries led by India and Brazil certainly saw through this and hence, their virulent opposition to inclusion of negotiations in services at Punta del Este in 1986.

As for the inclusion of Intellectual Property Rights, the involvement of business lobbies including the "Big PHARMA" certainly lend some weight to this school of thought.

2. *The "Official" School*: This school of thought is best exemplified by John Croome (formerly of the GATT Secretariat) in his book: "Reshaping the World Trading System—A History of the Uruguay Round". In it, he points out the backdrop—both economic and political—against which the idea of launching the Uruguay Round was conceived. For instance, he paints a vivid picture of the serious deterioration of the international economic situation in 1980 characterized by widespread inflation and unemployment, monetary instability and large payments imbalances. For instance, world trade declined in 1982 for the first time since the 1930s. Add to this the traditional proclivity of the GATT/WTO Secretariat to "do its bit" to save the multilateral trading system from doom. For instance, John Croome recounts in some detail the visits and

actions of the then GATT Director General Arthur Dunkel. Not only did Arthur Dunkel in October 1980 have brainstorming sessions with his own staff but he undertook a series of visits to Asian, European and Western Hemisphere capitals to sound out the views of GATT members on the state of international trade relations and what could be done to improve them. John Croome's conclusion based on the above is that virtually everyone Dunkel talked to agreed that the trading system was drifting dangerously. He adds that although the Tokyo Round reforms and liberalization were being put into effect, the momentum that had carried governments and the world trading system based on the GATT, through successive negotiating rounds had been largely lost. Hence, the imperative need for a new Round.

This school of thought is based on the fundamental premise that the multilateral trading system (first embodied in the GATT and later in the WTO) is like a bicycle and it must keep moving forward or else it will stop and fall! In other words, forward momentum is crucial for the multilateral trading system so as to avoid backsliding into protectionism and mercantilism.

According to this theory well encapsulated by Fred Bergsten,[15] when the GATT became "largely comatose" for several years after the completion of the Kennedy and Tokyo Rounds, major protectionist efforts were undertaken and succeeded for at least a while: the establishment of the Multi-Fibre Arrangement (MFA) in the trade governing textiles and clothing; the panoply of new Voluntary Export Restraints (VERs) in autos, steel, machine tools, etc.; Import Surcharges and finally, the dreaded "Super 301" provision.

The idea, therefore, is that the Bicycle must keep moving, i.e. it is necessary to keep expanding the trade negotiations agenda to ensure that the multilateral trading system is open and free.

3. *The "Yankee" School*: There are several respected academics and experts who believe that, especially in the eighties, the only country that really mattered to the multilateral trading system was the US. Thus, Fred Bergsten referred to before,[16] argues that the

[15] Bergsten, C. Fred. 1998. *Fifty Years of the GATT/WTO: Lessons from the Past for Strategies for the Future*, Peterson Institute for International Economics.

[16] Ibid.

periodic absence of negotiating momentum has had a profound effect on the trade policy of the US, the largest and most influential member of the system. He goes on to argue that the absence of any major GATT initiative left open the risk of protectionism by the US. He provides this explanation as to why American trade negotiators are always anxious to begin a new initiative as soon as the old one ends calling it a "fundamental interplay" between external and internal policies in American trade policy.

The "Yankee School" thus essentially maintains that the driving force behind the idea of a new Round was the US. It is well known that the initial call for a new Round was made by US Trade Representative William Brock in May 1981. More importantly, the fact that the US had a huge trade deficit of $150 billion and two million jobs lost[17] seem to have been a critical factor in its wanting to launch a new Round. The American Business played an extremely significant role in pushing for two of the most controversial issues, i.e. Agriculture and Intellectual Property Rights. In Agriculture, it was clear that the US wanted the EU and Japan (among others) to cease export subsidies and other practices that were affecting US exports. In Intellectual Property Rights, the US believed it was losing out particularly in the area of drugs and pharmaceuticals in markets such as Egypt, India, Brazil and Argentina, to name a few. Lastly, the US was also concerned about GATT—illegal practices such as non-tariff barriers and subsidies which it felt were affecting its exports adversely. Thus, according to this school, the US, the trade superpower, was the driving force behind a new Round aimed at securing market access for its goods and services. Initially, the US did not have much support but gradually, the bulk of developed countries either fell in line or saw some convergence of interests.

Fred Bergsten makes it clear that US leadership was key to the launch of the Uruguay Round. Indeed, he notes that American events and initiatives played a central role in the launch of all Rounds, including the Uruguay Round. He does add, however, that the EU has been an essential partner in a de facto G-2 management of the multilateral trading system.

[17] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

Depending on one's standpoint, one could subscribe to any or more of the above three schools. Be that as it may, the weight of the evidence does point to the US as a "driving force" and market access as the "motor". The GATT Secretariat provided the "lubricant". The role of the developing countries, such as Brazil and India, was also fairly clear: it was to serve as a "brake" to the hurtling vehicle that was the Uruguay Round.

1.4 The Punta Conference

Although the Uruguay Round was technically launched in September 1986 at Punta del Este (Uruguay), the desire to launch a new Round started even as far back as 1982.[18] We have already seen US motivation at this stage to launch a Round. Two other important developments took place which pushed events inexorably towards the launch of a Round. In February 1984, US negotiator Brock brought together, for the first time in a formal sense, the "QUAD", i.e. the US, the EU, Japan and Canada. This grouping was to play a pivotal role in the GATT and then the WTO up until 2000. The clout for this grouping came from sheer value of trade, both imports and exports. It is true that for a long time in the GATT and in the WTO (until 2000), no proposal could hope to see the light of day if it did not have the endorsement of the "QUAD". Equally, if the "QUAD" endorsed a proposal, it was simply a matter of time before it would be "steamrollered" through the GATT. By the end of 1984, the "QUAD" most unambiguously sought a new Round. They found an important ally in the GATT Director General, Arthur Dunkel, who was himself absolutely convinced that "new negotiations (read Round) were both inevitable and desirable".[19] Indeed, Arthur Dunkel in November 1983 had established an Eminent Persons Group under the Chairmanship of Fritz Leutwiler which submitted a report in February 1985.[20] This group, known as the Leutwiler Group, submitted key recommendations about the multilateral trading system. Some of those recommendations are worth repeating here.

[18] Croome, John. 1999. *Reshaping the World Trading System*, Kluwer Law International.

[19] Ibid. Notice how the GATT Secretariat which was supposed to play a "neutral" role was already beginning to side with the proponents of a new Round. This early trend, some would argue became even more pronounced over time.

[20] Leutwiler, Fritz et al. 1985. *Trade Policies for a Better Future: Proposals for Action*, GATT.

One, they clearly expressed support for a new Round of GATT negotiations[21] and two, they said that the special and differential treatment received by developing countries with regard to GATT rules was of limited value and added that far greater emphasis should be placed on integrating them more fully into the trading system.[22] Three, they also suggested exploration of whether multilateral rules can be devised for services sector.[23] In May 1984, the OECD trade and finance Ministers of the developed countries put on record their belief that a new Round would be of utmost importance. In May 1985, the G-7 Heads of State and Government declared their strong endorsement of the above OECD Agreement that a new GATT Round should begin as soon as possible and added significantly: "most of us think this should be in 1986".

While all of this was happening in the run-up to the Punta meeting, it is pertinent to ask what the developing countries were doing? Well, it was clear that the vast majority of developing countries were either opposed to a new GATT Round or were plainly unenthusiastic about it. Thus, as early as 1982, the Group of 77 countries (G-77) declared solemnly that GATT involvement in subjects such as services, trade in counterfeit goods, investment and trade in high technology goods would not only be detrimental to the interests of developing countries in international markets, but would hamper efforts aimed at reforming GATT in order to adapt it more closely to the needs and interests of developing countries.

The GATT Council meeting of June 1985 turned out to be rancorous and disruptive. India, on behalf of 24 developing countries[24] expressed itself against a new Round on terms outlined by the developed countries. They argued that a number of conditions would have to be fulfilled before new negotiations commenced. These related to the now-famous "standstill" and "rollback" as well as doing away with the textiles MFA. Above all, these countries said that negotiations should focus on the concerns of developing countries and be confined to trade in goods, leaving aside new subjects alien to the jurisdictional competence of the GATT.

[21] Ibid., Recommendation 13.

[22] Ibid., Recommendation 10.

[23] Ibid., Recommendation 11.

[24] Argentina, Bangladesh, Brazil, Burma, Cameroon, Colombia, Cote d'Ivoire, Cuba, Cyprus, Egypt, Ghana, India, Jamaica, Nicaragua, Nigeria, Pakistan, Peru, Romania, Sri Lanka, Tanzania, Trinidad and Tobago, Uruguay, Yugoslavia and Zaire.

Two issues merit attention. One, decisions in GATT were always taken on the basis of consensus—defined generally as a meeting where no country present, objects to the decision being taken. With twenty-four countries objecting to a new Round, there was no consensus by a long shot for the launch of a new Round. Two, it may be quickly seen that the twenty-four countries did not possess extraordinary trade or political clout at the time. So, the developed countries were faced with two options: (1) Either pursue relentlessly the launch of a new Round that was clearly in their interest; or (2) Try and accommodate the wishes of the developing countries when it came to some of the crucial issues. In a decision that was to have huge implications for the multilateral trading system for years to come, the powerful developed countries led by the US chose the first option. The US took the lead by calling for a Special Session of GATT Contracting Parties. The fact of the matter was that out of ninety-odd countries which were members of GATT,[25] some twenty four chose to object to a Round. Thus, it could be argued that a simple majority of GATT Contracting Parties were in support (either explicit or implicit) of a new Round. Also, while it is true that all decisions in GATT were taken as a matter of practice on the basis of consensus, there were provisions in the GATT for voting (which have never been used). It is possible that the US and the developed countries were holding out the threat to the twenty-four developing countries that they could put the issue to a vote if they liked. John Croome in his book argues that those countries which remained opposed to the Uruguay Round never pushed their opposition to the point of a vote and decisions throughout the Round were always taken on the basis of consensus. The truth of the matter was that a handful of countries led by the US, the EC and Japan but which included India as well, never wanted a vote to happen in the GATT/WTO. This is because these were countries with occasionally such strong positions that even though they may not be shared by others, the positions were justified on grounds of national interest. Examples at the time were Textiles for the US, Agriculture for EC and Intellectual Property Rights for India. On any of these issues, it was highly doubtful if any of the above countries could have got even a simple majority in the GATT, much less a two-thirds majority.

[25] Timoney, Nicola. 1986. *GATT: The New Round of Trade Negotiations*, TROCAIRE, www.trocaire.org.

It was, therefore, in the national interest of these countries to allow GATT decisions to be taken only on the basis of consensus and not on the basis of a vote.

By October 1985, the Special Session of GATT Contracting Parties called by the US reached agreement on initiating a preparatory process on the proposed new Round of multilateral trade negotiations. The twenty-four countries that opposed a new Round had lost the battle. But the war had only just begun.

The negotiation dynamics at the Punta del Esta meeting in September 1986 was illustrative and the same scenario would be repeated umpteen times in the GATT/WTO. Therefore, some explanation of what happened there is in order. We noted earlier that there were twenty-four countries led by India which were opposed to a new Round. Well, by the time the Punta del Este meeting took place there were only ten countries led by India—known as the G-10.[26] How did this come about? Quite simply, either the developed countries led by the US put pressure on some of the countries to abandon their opposition to a new Round or in some cases, the envoys in Geneva would be overruled by the Trade Ministers in the Capital. The US issued repeated threats that if the new subjects were not included, then, it would be forced to walk out of the Conference. Despite this, the G-10 submitted a draft declaration for the Punta Meeting. Predictably, the G-10 draft expressed opposition to the US demand to include new issues such as Services, Intellectual Property Rights and Investment Measures. There was another text which was tabled by a group of forty countries, known as the G-40 draft put forward by Colombia. The story of how the G-40 draft came to be negotiated was indicative of things to come. Because of virulent opposition by the G-10 (reduced subsequently to nine because of Argentina changing sides), the negotiating process shifted to the EFTA (European Free Trade Agreement) headquarters out of the GATT building.[27] This process was to repeat itself at various stages of the Uruguay Round. That is, the negotiating process would simply go outside of the GATT because of opposition within and secondly, a group of developing countries would invariably be co-opted by the developed countries to create a so-called majority draft. It is because of this feature that countries such as

[26] Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia.

[27] Croome, John. 1999. *Reshaping the World Trading System*, Kluwer Law International.

the US and India (both great democracies in their own right) were disinclined to put issues to a vote in the GATT and later the WTO.

The Foreign Minister of Uruguay, Enrique Iglesias, created a small consultative Committee of twenty countries to discuss contentious issues. This was by invitation only and could be seen as the beginning of the small group process in the GATT and later in the WTO. Iglesias also used the G-40 draft as the negotiating draft: again, this was a feature that was to occur repeatedly in the GATT/WTO. Any Chairman of a negotiating group would have the discretion to use a draft of his choosing with the result that it became the reference point for subsequent negotiations.

The US delegation said on the last day in Punta del Este that they would leave the next day, regardless of whether or not there would be a declaration. But by midnight, India and the US came to an agreement[28] that the negotiation on Services would be undertaken on a separate track. In the event, the Punta del Este Ministerial Declaration was divided into Part I which comprised Negotiations on Trade in Goods, subjects for negotiations, principles governing them, TRIPs, Dispute Settlement and TRIMs. Then, there was Part II which comprised negotiations on Trade in Services. The international implementation of the respective results of Part I and Part II was to be decided by Ministers when results of the Multilateral Trade Negotiations in all areas have been established.

Winham[29] probably provides the most interesting analysis of the Punta del Este meeting. He argues that the process succeeded in the end because of the widely held perception that failure to begin a new negotiation would have harmful consequences for the GATT regime and for the prospects for continued liberalization of international trade. He, however, fails to mention that the US literally "bulldozed" many countries into accepting the new Round. He is right when he says that once the momentum in favour of a new negotiation had gathered pace, there was a fear of being isolated and blamed for the failure of the meeting. He argues that most of the G-10 countries abandoned their virulent opposition to a services negotiation during the Punta del Este meeting, until only India and an increasingly uncertain Brazil were left standing.

[28] Srinivasan, T.N. 2000. *Developing Countries and the Multilateral Trading System*, Westview Press.

[29] Winham, Gilbert. 1989. *The Pre-negotiation Phase of the Uruguay Round*, Johns Hopkins University Press, Baltimore and London.

He says, in the end, India found it impolitic to be isolated and acquiesced. Winham concludes that the will of a large majority can be ultimately persuasive in a consensual organization even in the face of a powerful and determined minority.

The above may well be accurate. But, it is important to add a caveat. The same author Winham (1989) quotes USTR Clayton Yetter during the Punta del Este meeting as saying: It was a brutal and salutary demonstration that nations comprising 5% of world trade (a reference to G-10) were not able to stop a negotiation sought by nations comprising 95% of world trade (a reference to the QUAD and others)!

In the end, the Ministerial declaration agreed upon at Punta del Este was all-encompassing inasmuch as almost all subjects of interest to the US were included within the ambit of the new Round. In fact, in a prescient article dated 10 September 1986 (just days before the Punta del Este meeting) entitled "A US strategy at the GATT Trade Talks",[30] Edward L. Hudgins listed the negotiating objectives for US team in Punta del Este. If one looks at this list and compares it with the final Punta del Este Ministerial Declaration, there are very few things which the US failed to achieve. Among those, perhaps the GATT was simply not ready for liberalizing trade in high technology items. The same could easily be said for labour standards, which the US raised for the first time.[31]

The negotiation dynamics prior to and at Punta del Este is critical to the understanding of the present-day WTO. In this context, the following are some of the notable features in the run-up to the Punta del Este Ministerial declaration:

1. The negotiations were driven all the way by the US. It would not be an exaggeration to say that the Punta del Este declaration was launched by the US and for the US. In Agriculture, it was the US which was keen to tackle the issue of subsidies, mainly to enhance its exports to the European Community or to retain its export share to the rest of the world in view of EC export subsidies. The Cairns Group came into the game later and of course, supported

[30] Hudgins, Edward L. 1986. *A US Strategy at the GATT Trade Talks*, www.policyarchive.org.

[31] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

the US in its objectives. The same can very easily be said for Services, Intellectual Property Rights and Investment Measures. In each of the subjects, it was the US which sought it in the first place and then persuaded other industrialized countries to join in, which they did willingly or otherwise.

2. Issues included in Punta del Este such as Services, Intellectual Property Rights and Investment Measures represented a paradigm shift insofar as the multilateral trading system was concerned. Hitherto, the GATT had dealt with what is known as barriers at the border, either tariff or non-tariff. For the first time, however, subjects sought to be negotiated related to the domestic regulatory and legal systems of countries.[32] Thus, there was a degree of intrusion into domestic policy space and sovereignty, never before seen in the multilateral trading system. As Sylvia Ostry, the Canadian scholar put it succinctly, the multilateral trading system was about to shift from negative regulation (what governments must not do) to positive regulation (what governments must and are obliged to do).
3. Because the scope and gamut of issues was so vast, the mere launch of the Uruguay Round took as long as some of the previous negotiations in the GATT. This was to prove prophetic since the actual negotiations to conclude the Round took much longer than anticipated. The subjects were complex, the participants were larger in number and quite simply, the decisions required to be taken by countries were intensely political in character. Negotiations were often acrimonious and outcomes decided on the basis of brute power.
4. For the developing countries, this was a whole new ball game. Hitherto in the GATT, developing countries were hardly involved in tariff negotiations. Their main objective was to ensure that “non-reciprocity” and “special and differential treatment” were maintained at all costs and benefits secured wherever possible without having to pay for it. This was about to change dramatically.

In early 1981, when William Brock took over as USTR, American trade diplomats presented him with a strategy aimed at a new Round of GATT negotiations[33]:

[32] Ostry, Sylvia. 2000. *WTO: Institutional Design for Better Governance*, Kennedy School, Harvard, www.utoronto.ca.

[33] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

- Trade in Services;
- Trade-distorting Investment Measures;
- Trade in high technology goods;
- Counterfeit Goods; and
- Transition of the more advanced developing countries into fuller compliance with GATT obligations.

This last objective of US strategy was deliberate and well thought-out. Non-reciprocity was proving to be unpopular in the US, not the least because some of the developing countries were becoming an important market for developed countries. As we saw before, developing countries took approximately one-third of merchandise exports from Japan, one-fourth of exports from North America and one-eighth of exports from West Europe.[34] As Winham says: These circumstances motivated the developed countries to seek a new negotiation to incorporate developing countries more firmly into GATT rules.[35]

The US took the lead in this regard and as is its wont, was quite direct about its goals and objectives. As far back as May 1982 at an OECD Ministerial Meeting, the USTR William Brock made a public proposal: "One idea I would like you to consider is a new Round of trade negotiations within the GATT involving an exchange of preferential tariff concessions by developed countries for developing countries whose products have been graduated out of GSP (generalized system of preferences)—or are soon to be—in return for increased commitments by these developing countries on the reduction of tariff and non-tariff barriers to their markets".[36] The irony is that this proposal emanated from World Bank which felt that something must be done to compensate unilateral trade liberalization by some developing countries in the context of World Bank-supported policy reform programmes. But rather than compensate them, the Brock proposal sought binding commitments from developing countries. This was the first sign of rejection of the principle of non-reciprocity for developing countries in the multilateral trading system.

[34] Winham, Gilbert R. 2005. *An Interpretative History of the Uruguay Round Negotiations*, Springer.

[35] Ibid.

[36] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

5. Again for the first time, a group of developing countries strongly opposed the launch of a new Round (and the new subjects such as Services and Intellectual Property Rights, in particular) in the multilateral trading system. It is true that this group, at the end of the day, comprised only ten countries (G-10) led by India and Brazil. It is also true that there was a split in the camp of developing countries since the G-48 grouping comprised both developed and developing countries.[37] Be that as it may, it is fair to say that up until the Ministerial meeting in Punta, there was considerable sympathy for the position of Brazil and India. Ernest H. Preeg acknowledges this when he says that "the biggest roadblock to the US Strategy for a new Round in any event would be the developing countries".[38]

   The US Strategy was to ensure that all countries came on board, bar Brazil and India. Ernest H. Preeg elaborates on US Strategy[39]: "The consistent advice was to hold firm on all key issues since Brazil appeared inclined to be helpful while India was more and more isolated". This "isolation" of India was a sign of things to come and in fact was a central feature of WTO negotiations right up to Doha in December 2001.

   The Punta del Este Ministerial Declaration was certainly a victory for the US and some developed countries. As for the G-10 group of countries, Ernest H. Preeg describes it as a "more or less complete stomp" since the final declaration was close to the original G-40 draft. As for negotiating strategy, one of the key members of the US delegation, Commerce Secretary Baldrige had this to say: "We came down here knowing what we wanted. Our opponents knew what they did not want. Any time you have this situation in a negotiation, you have an advantage".[40]
6. Interestingly, the assessment of key developing country negotiators was that the outcome at Punta del Este was not an unqualified success for the US and its Western allies. This assessment was

[37] Croome, John. 1999. *Reshaping the World Trading System*, Kluwer Law International.

[38] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

[39] Ibid.

[40] Ibid.

based on certain assumptions derived from a strict reading of the language negotiated in the Ministerial Declaration.[41] Thus, one of India's key negotiators and Ambassador of India to the GATT at the time, S.P. Shukla, argues that by securing a commitment that Services would be negotiated on a separate track from Goods, the US and its allies fell short of their objective of grafting services on to the existing GATT. In a similar vein, S.P. Shukla argues that both Investment Measures and Intellectual Property Rights "were tackled largely within the confines of the relevant GATT articles with the outcome that the resulting mandates were modest". S.P. Shukla thus concludes that "the outcome of the Punta del Este meeting on the new issues was far short of the objectives of the United States".[42] This is not an assessment that is readily shared by the author. As will be seen later in negotiations during the Uruguay Round, the language of the original mandate is seldom interpreted strictly by negotiators subsequently and once a subject is included in the negotiating basket, then it develops a momentum of its own. This explains why labour standards was opposed to by developing countries in Punta del Este and again in Doha several years later. In any case, the assessment of US negotiators is that their objectives at the Punta del Este Ministerial meeting were met substantially, if not wholly.

7. Another new feature of the Punta del Este negotiating dynamics was the presence of the hugely influential private sector and multinational corporations in US delegation. Thus US delegation to the Punta del Este Ministerial meeting comprised James Robinson, Chairman of the American Express Company and Edmund Pratt, Chairman of Pfizer Corporation, thereby highlighting US priority interests in Services and Intellectual Property Rights. This was an altogether new feature in trade negotiations. As we will see later, these players were not mere spectators but extremely influential not only vis-à-vis USTR but also vis-à-vis other trading partners.
8. Again for the first time, some developing countries broke ranks with their ilk and got together with other developed countries to pursue their goals and objectives. Two such examples were notable

[41] Shukla, S.P. 2000. *From GATT to WTO and Beyond*, UNU World Institute for Development Economics Research (WIDER) Publication.

[42] Ibid.

in the run-up to Punta del Este. One was obviously the famous G-48 which included developing countries such as Hong Kong, South Korea, Malaysia, Indonesia, Pakistan, Philippines. on the one hand and countries such as Chile, Colombia, Jamaica and Mexico on the other. Although for tactical reasons the US, the EC and Japan temporarily withdrew from the Group, it was obvious where their sympathies lay. The other notable example was the Cairns Group which also included both developed and developing countries with aggressive interests in agricultural exports.[43]

There is often discussion in India about how some developing countries "betray their faith" by joining hands with developed countries. The fact of the matter is that while some developing countries are indeed vulnerable to pressure from their powerful trading partners and indeed succumb to it, there are others who may believe their interests are better served by joining hands with the developed countries than by adopting strategies that might be construed as "confrontational". This feature was to run right through the entire Uruguay Round negotiations and beyond.

9. The role of the GATT Secretariat up until the Punta del Este Ministerial meeting was mainly to provide "secretarial assistance" and to "facilitate" negotiations. The advent of Arthur Dunkel as the Director General of GATT and the negotiations leading up to Punta del Este saw this change. Thus in November 1983, Arthur Dunkel established an Eminent Persons Group for which he sought neither permission nor financing from the GATT member governments.[44] The Group which submitted its recommendations more than a year later, inter alia, supported the launch of a new round, questioned special treatment for developing countries and argued for inclusion of Services in the new Round.[45] By early 1984, Arthur Dunkel became convinced that new negotiations (read "Round") were both inevitable and desirable.[46]

[43] "Cairns Group", www.wto.org.

[44] Croome, John. 1999. *Reshaping the World Trading System*, Kluwer Law International

[45] Lentwiler, Fritz et al. 1985. *Trade Policies for a Better Future: Proposals for Action*, GATT.

[46] Croome, John. 1999. *Reshaping the World Trading System*, Kluwer Law International.

> By April 1985, when the GATT Council met, Arthur Dunkel had decided to no longer "sit on the fence" on the issue of new negotiations.[47] Ernest H. Preeg in his account[48] offers a slightly different time frame but the conclusion is the same. He argues that Arthur Dunkel for a long time till early 1986 maintained a scrupulously neutral stance between the hardline views of Brazil and India and that of the developed countries. He claims that with the split among the developing countries and the triumph of G-48, Arthur Dunkel shifted to what he calls a more assertive role in support of a major trade liberalizing agreement.
>
> The trend of the Director General of the GATT (and later on WTO) Secretariat to take a keen and subjective interest in the launch, conduct and conclusion of trade negotiations was to become a constant feature of the Uruguay Round and beyond. Some observers may be inclined to justify this on the grounds that whenever a multilateral trading system is in "dire straits" it needs to be "saved" and what better person to do this than the Director General. The truth, however, is much more complicated. For one thing, it is difficult to have a common understanding of "dire straits". For another, there may not be consensus on the best way to "save" the system, even if there is agreement that it is in dire straits. More than anything else, it has the enormous effect, even if unintended, of severely prejudicing the position of a group of countries, albeit small, who legitimately oppose constant expansion of the negotiating agenda and perpetual rounds of negotiations.

Three groups of main players were to play an important role at Punta del Este and beyond. We have already seen that the US played a pivotal role in the launch of the Uruguay Round of Trade Negotiations. What drove the US was pure and simple market access whether it was for its agricultural products or for its services and pharmaceutical products. In this sense, the US was the player that had the most offensive negotiating interests when the Uruguay Round began. This offensive interest

[47] Ibid.

[48] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

centering on securing market access for its products and services was to be the defining feature of the US negotiating position during the entire Uruguay Round.

The other main player, the EU, had, inter alia, one overriding interest viz. to ensure that its CAP continues more or less unchanged. In this sense, the EU was the player that had the most defensive negotiating interests when the Uruguay Round began. It was, however, true that the EU had also significant interests relating to market access.

The group of developing countries that comprised G-10 had one primordial objective, i.e. to oppose the inclusion of "new" issues such as services, Intellectual Property Rights and Investment Measures. In this sense, the negotiating position of these countries led by India and Brazil at the beginning of the Uruguay Round was status-quoist.

While there were, of course, many other important players in the Uruguay Round, it is fair to say that the unfolding of the negotiations over the eight-year period was often the result of complex interaction between the above forces. To understand this complex interaction, five subjects are chosen below: Agriculture, Services, Trade-Related Aspects of Intellectual Property Rights (TRIPs), Textiles and Non-Agricultural Market Access (NAMA or Industrial Tariffs). Obviously, the choice of subjects is illustrative and not exhaustive. In any case, there is no attempt to give an account of the full history of the Uruguay Round negotiations from Punta del Este to Marrakesh. This has been done elsewhere and there is now quite a bit of literature available on the subject.[49] The choice of the subjects is based solely on the fact that this figured prominently in the

[49] Some notable examples are:

Croome, John. 1999. *Reshaping the World Trading System*, Kluwer Law International; Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, University of Chicago Press; Stewart, Terence P. 1999. *The GATT Uruguay Round: A Negotiating History*, Kluwer Law International; Ostry, Sylvia. 2000. *The Uruguay Round North–South Bargain: Implications for Future Negotiations*, University of Minnesota, www.utoronto.ca; Shukla, S.P. 2000. *From GATT to WTO*, WIDER Publication; Srinivasan, T.N. 2000. *Developing Countries and the Multilateral Trading System*, Westview Press; Finger, Michael et al. 2002. The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations, *The World Economy*, Blackwell; Schott, Jeffrey J. 1994. *The Uruguay Round an Assessment*, Institute for International Economics, Washington, DC.

calculations of the three main players cited above. Obviously, there were other players and needless to say, the Uruguay Round was far more than the sum of these negotiations.

1.5 Agriculture

Anyone even remotely familiar with the twists and turns of the Uruguay Round will be inclined to say by way of explanation: “It is Agriculture, stupid”. Such was the critical importance of the subject that there were times when the entire fate of the Uruguay Round lay on just one negotiating issue: Agriculture. There is little doubt that it was the US and US alone in the beginning that pushed for results in this area. The target of the US initiative was obviously the Common Agricultural Policy (CAP) of the EU. There is abundant literature about the “protectionist” nature of the CAP.[50] Agriculture came to occupy a primordial place in rural life in Europe. After World War II, food security for obvious reasons was a strategic objective for European governments subsidizing their farmers. As long as this did not affect other countries, it was tolerated. For example, during the Kennedy and Tokyo Rounds, the EU export subsidies was most prominent in dairy products. But this did not pose a challenge to US exports. The change came in the eighties when the EU started granting as part of its CAP, large export subsidies for wheat and grains. Not coincidentally, the EU also shifted from being a major importer to an exporter of grains in the same period. This was a direct challenge to US agricultural exports. This was perhaps the most compelling reason why the US took on the EU in direct confrontation over the CAP.[51] The Punta mandate in the area of agriculture was specific and detailed but could hardly be described as radical or ambitious. The real import was that the sensitive subject of agriculture was sought to be tackled at last by GATT. The language was quite cautious: “…an urgent need to bring more discipline and predictability to world agricultural trade…” or “…aim to achieve greater liberalization of trade in agriculture…”.

[50] For an excellent analysis of this issue please see following articles by:
Messerlin, Patrick A. 2001. *The Real Cost of European Protectionism*; Messerlin, Patrick A. 2002. *Nivean et Cout du Protectionism European*; Messerlin, Patrick A. 2003. *Agriculture in the Doha Agenda*.

[51] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

The US, however, would have none of this. Whether it was posturing or guided by domestic pressure, the US made a proposal—the so-called Zero 2000 proposal—calling for a total phaseout of all trade-distorting measures in agriculture, namely, domestic support, market access barriers and export subsidies over a period of 10 years. This 10-year period was negotiable, but what the US was asking in effect was a dramatic overhaul of the CAP by the EU.[52]

This maximalist demand from the US meant that right up to the time of the mid-term Ministerial meeting in Montreal in December 1988, there was little or no progress in the negotiations in Agriculture.[53] But in October 1987, the US received a shot in the arm when the Cairns Group was established.[54] The Cairns Group was novel in some ways. For one thing, it was a combination of developed countries such as Australia, Canada and New Zealand on the one hand and developing countries such as Argentina, Brazil and Uruguay on the other. Their main common interest was their agricultural exports, thus leading these countries to seek significant access in important markets. For another, it was clear from the beginning that the Cairns Group had the support of the US.[55]

As the Ministers met for the mid-term review meeting (December 1988) of the Uruguay Round, it was obvious to many that there was little or no chance of reconciling the positions of the US and the Cairns Group on the one hand and the EU and some of its allies (Japan, Korea and Switzerland) on the other. The other new feature at the GATT meeting in Montreal was the first big agricultural demonstration of Canadian dairy farmers, joined by contingents of farmers from Europe and elsewhere. This was a feature which was to repeat itself many times in the future whenever WTO Ministerial Meetings were held.

At Montreal in 1988, there was simply no meeting ground between the US and EU positions on Agriculture. This was not entirely unpredictable. What followed, however, was something dramatic and was to have a lasting impact on WTO Negotiation Dynamics. Once it became clear that Agriculture could not be settled, the US, the EU and some

[52] Ibid.

[53] Stewart, Terence P. 1999. *The GATT Uruguay Round: A Negotiating History*, Kluwer Law International.

[54] www.wto.org, "Cairns Group".

[55] Aggarwal, Rajesh. 2005. "Dynamics of Agriculture Negotiations in the WTO", *Journal of World Trade*.

others suggested that the Ministers could approve whatever was achieved in other areas of negotiations (of which there were quite a few) and leave the issue of Agriculture to be settled at a later date in Geneva. After all, the Round was not going to conclude in Montreal anyway. It was then that five of the Cairns Group members, all from Latin America, namely, Argentina, Brazil, Chile, Colombia and Uruguay, made it clear that until and unless there was an agreement on Agriculture, they would not accept anything else. This was quite an extraordinary development in the GATT at this stage. The following were the implications, in retrospect, of the actions of these five countries:

- In Punta del Este, USTR Clayton had said that countries which accounted for 5% of world trade could not hold to ransom those who accounted for 95% of world trade. Well, the above five countries accounted for even less than 5% of world trade. Yet, they succeeded in preventing “an agreement” at Montreal. John Croome in his book “Reshaping the World Trading System” says that: “For once, the pace and direction of international trade negotiations was not being dictated by the US or the European Community”. On the other hand, Ernest H. Preeg in his account in the “Traders in a Brave New World” says that the Cairns Group was “more of a Greek chorus of lament than a fully engaged negotiating party”. It is the author’s assessment that the truth is that the Cairns Group countries were tacitly backed by the US which may not have been too unhappy with the outcome, given the importance it attached to Agriculture negotiations.
- The second and perhaps more important implication, from a systemic point of view, was that the negotiating principle “Nothing is settled until everything is settled” became enshrined as the motto for the rest of the Uruguay Round. This resulted in the notion of a “single undertaking” becoming an article of faith. Countries could not “cherry-pick” what they do or do not like. They now had to accept either everything or nothing at all.
- The unintended negotiating consequence of this was that the EU too could now argue, with some justification, that it could make the necessary concessions in Agriculture only when it secures corresponding concessions in other areas. This led the EU much later to seek a “Comprehensive Round” so that it could mask the concessions it was required to make in Agriculture with potential gains it could secure elsewhere.

- For countries like India which maintained that Services negotiations was a separate and different track, it became more and more difficult since all the negotiations were getting intertwined with countries seeking a balance of concessions granted and sought in various negotiating areas. To this extent, the original Punta del Este mandate was undergoing a subtle shift. Again, the precedent was clear. Negotiating mandates could evolve over time depending on circumstances and power politics—example of "mission creep" in negotiating mandates.

Finally, when the negotiators met in April 1989 in Geneva the impasse in Agriculture was ostensibly resolved through language but not in substance. In effect, the US had to give up its goal of "removal of all trade-distorting supports to agriculture".[56] The original mandate in Punta was altered to now refer to "long-term elements and guidelines for reform" and "short-term elements" in the mid-term package that was completed in April 1989.[57] This accord on Agriculture served one important purpose, i.e. to relaunch the Uruguay Round. But, it did little else. Interpretations of the mandate in the mid-term package differed among the main protagonists, i.e. the US and EU.

When the Ministerial Conference took place in Brussels in December 1990 the main bone of contention was Agriculture.[58] Indeed, Agriculture was such an issue even outside of the negotiations that the meeting in Brussels saw a massive demonstration by some thirty thousand European farmers who were protesting any reform that would imply reduction in financial support. Between April 1989 when the mid-term package was agreed upon and the Brussels meeting in December 1990, the Geneva negotiators had not succeeded in coming up with an agreed text in Agriculture. In the absence of any text, Arthur Dunkel, the GATT's Director General stepped in and put forward a list of 20 questions under 10-odd headings. Here was an example of a "pro-active" GATT Secretariat head who was keen to see progress in negotiations. Ironically, however, it is in responding to these questions that the EU perhaps gave a clear signal that was to prove decisive in wrecking the

[56] Croome, John. 1999. *Reshaping the World Trading System*, Kluwer Law International.

[57] GATT document, MTN.TNC/11, April 21, 1989.

[58] Croome, John. 1999. *Reshaping the World Trading System*, Kluwer Law International.

Brussels meeting.[59] As compared to Montreal, in Brussels, the US and the Cairns Group (and many other delegations) had united in pressing the EU to move in Agriculture. Once the EU made it clear it could not (or would not) budge very much, the Latin American countries of the Cairns Group even threatened to walk out. Their job was made easier by Japan and South Korea which were even more hardline than the EU.[60] The general feeling after the Brussels "failure" was that the EU unwillingness to be flexible on Agriculture had contributed primarily to it. By the end of the Brussels meeting, it was common knowledge that if there was no solution to the impasse in Agriculture negotiations, then one may as well bid the Uruguay Round goodbye.

A significant development after the failure of the Brussels meeting over agriculture was the assumption of the leadership role by Arthur Dunkel. Starting February 1991 onwards, Dunkel called the shots in Agriculture negotiations. This was an important precursor to subsequent developments in the GATT/WTO negotiation dynamics. Countries were proud of calling the GATT and later the WTO, Member-driven. But here was arguably the most important area of negotiations where the referee was not a representative of a country, but an unelected international civil servant, i.e. DG of the WTO.

In fact, Arthur Dunkel went one step further when in December 1991, he submitted (on his own responsibility) the first draft of the so-called Final Act. This document, also known as the Draft Final Act (or the Dunkel Draft) was a defining moment in the negotiation dynamics of the Uruguay Round. For subjects such as Agriculture, Dunkel himself was chairing the negotiating group, so he put forward a text based on his appreciation of the negotiating positions of various players. This text on Agriculture "tended toward the stronger commitments sought by the US and the Cairns Group".[61] Predictably, the EU, in general, and France, in particular, strongly opposed the Dunkel Draft in Agriculture.

It became quickly apparent that the Dunkel Draft in Agriculture failed as a compromise package that all participants could accept. The EU had made it abundantly clear that the Dunkel Draft insofar as it pertained to Agriculture was "unacceptable" and, therefore, "needed to be

[59] Ibid.

[60] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

[61] Ibid.

modified". As opposed to the EU, the US praised the Dunkel Draft as a major step towards concluding the Round. An important aspect of negotiation dynamics at the time was that Dunkel could not have succeeded because the text pleased the US, while displeasing the EU intensely. Given the clout of the US and EU in the GATT system, there was no way the EU could have been bulldozed into acceptance. Because, the EU had tremendous clout (both political and economic), it could resist the avalanche of pressure brought on it by the Cairns Group, the US and others.

In the end, it was the bilateral "Blair House Accord" of November 1992 between the US and EU that not only settled the issue of Agriculture but to a great extent "unblocked" the Uruguay Round itself.[62] Following points are worth noting:

- Ultimately, the US and EU settled it between themselves and the rest of the GATT membership had to, willy-nilly, accept it.
- The Dunkel Draft on Agriculture would eventually be challenged by the EU. But many other countries which had serious problems with the Dunkel Draft on other issues of importance could not get the language modified. Dunkel's dictum to these countries was that if there are those who wished a change in the draft, it was incumbent on them to demonstrate a consensus in their favour—an impossible task in the GATT membership.
- The fact that the US and EU alone settled the issue of Agriculture without regard to others, indicated a "democratic deficit" in the Uruguay Round negotiations at least insofar as it pertained to negotiations in Agriculture. Indeed, the Blair House Agreement was notably mute on the demands of developing countries.[63]
- The Agreement on Agriculture achieved a great deal in terms of defining rules for agricultural trade, but little in terms of immediate market opening in spite of efforts by the US and Cairns Group. This was a testimony to the political and economic clout of the EU.[64]

[62] Stewart, Terence P. 1999. *The GATT Uruguay Round: A Negotiating History*, Kluwer Law International, Volume IV–The End Game (Part-I).

[63] Martin, Will and Winters, K. Alan. 1995. "The Uruguay Round and the Developing Economies", World Bank Discussion Papers.

[64] Ibid.

- The maze of protective import barriers which was prevalent and which distorted global agricultural trade was to be replaced by a simpler system of tariffs subject to bindings.
- But because of the way in which the non-tariff barriers were allowed to be converted into tariffs, the tariff bindings were at stratospheric levels.[65]
- So, all in all, the chief gain from the Uruguay Round Agreement on Agriculture was that it would reduce somewhat the chaotic variability of protection and subsidization that had hitherto characterized global trade in Agriculture.
- Last, but not least, it did provide a basis for future liberalization in this critical area.

1.6 Services

In retrospect, it is ironic that Services appeared more problematic for developing countries such as India at Punta del Este than say, Intellectual Property Rights or even Investment Measures. The reasons had to do with the fact that both Intellectual Property Rights and Investment Measures were anchored, albeit indirectly, in the GATT framework that was familiar to these developing countries. Services, on the other hand, was an unknown quantity at the time. Moreover, developing countries were concerned about Services in two important ways: one, they did not hold any competitive edge in this area, it was the developed countries which held all the cards; two, they feared that new rules in this area would seriously erode their domestic policy space and in fact prevent them from meeting their developmental aspirations. The result of this extreme reluctance, if not antagonism, of developing countries towards services, was that until the mid-term review meeting in Montreal, very little real progress was made by way of negotiations. On the other hand, because the subject was new and alien to the GATT system, a lot of discussion took place on issues such as definition, statistics, coverage, scope, transparency and rules for liberalization.

Because of the insistence of countries such as India and Brazil, Services negotiations took place in a separate track (at least in the initial phase) in the Group of Negotiations on Services (GNS). By the time

[65] Ibid.

of the mid-term meeting in Montreal, the issues of the negotiations in Services became clear, although it was far from settled. For instance, the services negotiations was still included as Part II of the mid-term package,[66] but it was becoming increasingly obvious that it would be an integral part of the final results of the Uruguay Round. The "separate track" of services negotiations was becoming more and more of a fiction. There is a lesson here for negotiators. No matter how the original negotiating mandate is worded, actual negotiations that follow depend on various factors. Thus, original negotiating mandates have a way of "evolving", sometimes to the detriment of certain WTO Members.

One important gain for the developing countries such as India was the acceptance of the "mobility of labour" as being part of definition of trade in services. In paragraph 4 of Part II of the mid-term package,[67] it was stated that: Work on definition should proceed on the basis that the multilateral framework may include trade in services involving cross-border movement of services, cross-border movement of factors of production (such as capital and labour) where such movement is essential to suppliers. This was an important achievement since for countries such as India, one key consideration for acceptance of the GATS was the inclusion of "mobility of labour" as part of the overall balance of rights and obligations. Considering labour was the only factor of production that developing countries had in plenty, it was important to get this included within the scope of GATS. This was a major negotiating gain for countries such as India.

The second important element of the mid-term package which assuaged, to a great extent, the concerns of developing countries was the concept of "progressive liberalization". This made it clear to developing countries that it was not a one-time act of liberalization but that there would be successive rounds of negotiations even after the Uruguay Round was concluded. Also, it was specified that progressive liberalization should provide appropriate flexibility for individual developing countries for opening fewer sectors or liberalizing fewer types of transactions or in progressively extending market access in line with their development situation.[68] The specific wording of this negotiating mandate

[66] GATT document, MTN.TNC/II, April 21, 1989.

[67] Ibid.

[68] This finally figures in the final GATS in a separate section "Part IV" entitled "Progressive Liberalization".

was such that the concept of "less than full reciprocity" and "special and differential treatment" was fully incorporated so that developing countries felt comfortable entering negotiations in this "new" area.

The package was clear about National Treatment. But, on Most Favoured Nation (MFN) it was far from clear, thanks to the hardline view of the US that MFN cannot be automatic and unconditional. The US felt it should have the discretion to grant MFN only to those countries that opened up their markets reciprocally to US exports of services.

There was one central issue that continued unresolved in the GATS negotiations at this stage. This had to do with the sectoral coverage of GATS itself. Should it cover all sectors except a few (negative list approach) or should it only cover those sectors explicitly agreed to and leave out the rest (positive list approach)? The US and EU began by arguing in favour of a negative list approach while many others including India argued for a positive list approach.

The story of how the US which was the main proponent of Services negotiations in the Uruguay Round (remember the Chairman of the American Express at the Punta meeting) came to shift its position from a negative list approach to a positive list approach is an interesting one. It was, as with much else in the Uruguay Round, determined by national interest and realpolitik.

In the area of Services, while US market was relatively more open than the rest of the world including the EU, its main interest was to export to other countries both developed and developing. So, the US was counting heavily on securing market access. But, the way the negotiations panned out, this was not to be. More than anything else, the US may have underestimated the domestic problems that it would face in opening up sectors such as maritime transport and civil aviation. As early as 1990, there were Congressmen who specifically wrote to the US Government[69] asking that the above two sectors be excluded from the purview of GATS. Similarly, the US Department of Treasury proposed[70] that financial services be treated in a separate agreement. The USTR said later that Telecoms should also be treated separately.

The above meant that by the summer of 1990, the US agreed to a Swiss hybrid proposal in which sectoral coverage in GATS would be

[69] Stewart, Terence P. 1999. *The GATT Uruguay Round: A Negotiating History*, Kluwer Law International, Volume II b.

[70] Ibid.

based on a positive list approach but that within sectors it would be a negative list approach.[71] The bottom-line was that the US decided along the way that given what it was likely to secure by way of market access from its trading partners, it was not worth its while to put meaningful offers on the table.

In fact, even by the middle of 1992 the US was insisting on excluding maritime transport altogether from GATS (an area where the EU had important interests at stake) and insisted on specific MFN exemptions in key sectors such as financial services, basic telecoms and air transport services. As one EU official put it, the services sectors the US proposed to exempt represented 75% of world trade in services. This from a country that sought inclusion of Services in the Uruguay Round in the first place.

One big problem that the services negotiations faced repeatedly in the Uruguay Round was that the Cairns Group of countries belonging to Latin America, in particular, would establish a direct link between progress in the Services area with that made in the Agriculture negotiations. And since progress in Agriculture negotiations was not forthcoming until the Blair House accord in November 1992, the negotiations in Services suffered what may be termed collateral damage. Once again, the role played by a handful of Latin American countries (such as the "walk out" in Montreal and position taken in Brussels) came into sharp focus. Agriculture, more than any other area, was to impact strongly on other negotiations in the Uruguay Round. So much so, in March 1992, USTR Carla Hills was prompted to say that "many countries had stopped participating in the Services negotiations to await the outcome of the agricultural subsidies dispute". There was no doubt in anyone's mind that Services was held hostage to Agriculture for a lengthy period of time in the Uruguay Round negotiations. This was a clever move by the Latin American countries to pursue their interests by exploiting the "single undertaking" principle and by taking advantage of the Uruguay Round negotiating dictum: "nothing is settled until everything is settled".

The following is an assessment of the outcome in the Services area from a negotiation point of view:

[71] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

1. The major accomplishment of GATS was that it succeeded in creating a framework agreement for a new subject area that was alien to GATT. This is all the more remarkable given the virulent opposition to include this subject in negotiations at the launch of the Round at Punta del Este.
2. Admittedly, the commitments undertaken by countries cannot be described as much more than standstill on existing market access.[72] It is, therefore, fair to say that GATS achieved little in terms of immediate liberalization.
3. However, by propounding successive rounds of negotiations every five years or so, there is a built-in framework for taking things forward, if members wished.[73]
4. The positive list approach, though decided upon by the US and some others for their own reasons, actually suited developing countries such as India. So did the concept of progressive liberalization and the explicit provision that developing countries get appropriate flexibility by way of opening fewer sectors or liberalizing fewer types of transactions and in line with their level of development.
5. The one issue that was of critical importance, i.e. mobility of labour, or Mode 4, although included in GATS, obviously did not make much progress. But, the issue could be pursued vigorously in future negotiations.[74]
6. All in all, Services embodied in the GATS framework turned out to be work in progress. What should be a matter of concern though is that negotiations confined only to the GATS framework refused to take off. It would appear that the only meaningful services negotiations that happen in the WTO were in the context of a "Round".
7. The last and final point about the Services negotiations which was noteworthy was the unique system of "request and offer" that lay at the heart of exchanging commitments between countries. This was unique to GATS and differed markedly from the GATT

[72] Sauve, Pierre. 1995. "Assessing the GATS—Half-Full or Half-Empty", *Journal of World Trade*.

[73] Hoekman, Bernard and Messerlin, Patrick. 2000. "Liberalizing Trade in Services: Reciprocal Negotiations and Regulatory Reform", in Pierre Sauve and Robert Stern (eds.), *Services 2000: New Directions in Services Trade Liberalization*, Brookings Institution, Washington, DC.

[74] For an excellent perspective see Zutshi, B.K. and Self, Richard. 2002. Movement of Natural Persons (Mode 4) Under GATS, Joint WTO—World Bank Symposium Held in Geneva. Both were key Services Negotiators for India and US during the Uruguay Round.

where commitments were exchanged by reciprocal concessions on the basis of negotiating modalities. It could be argued that a combination of the positive list approach and the "request and offer" method of negotiating commitments suited countries at various levels of development and signalled a less harsher way of moving towards full liberalization. On the other hand, commitments undertaken by developed countries in sectors of export interest to developing countries such as Mode 4 left a lot to be desired. On balance, GATS was a development-friendly agreement but was perhaps a little short on ambition.

8. As to why GATS turned out to be a good framework Agreement but fell short by way of ambitious market access, different explanations may be put forward. Obviously, the US at a certain point in the negotiations decided it could not offer all sectors on a MFN basis to other WTO Members especially since it felt that its market was much more open than the rest of the world.
9. As for developing countries such as India, a lot hinged on the progress of negotiations in Mode 4: i.e. Movement of Natural Persons. Once it became obvious that the US and EU would not be able to make significant concessions in this area (and the proposal for a GATS Visa fell through!), then it was difficult for countries such as India to make concessions in Mode 1 (Cross-border delivery) and Mode 3 (Commercial Presence).
10. A word on the skills displayed by the negotiators belonging to developing countries such as India and Brazil. They not only engaged right from the beginning but made sure the outcome reflected their concerns and priorities.
11. It could be argued, therefore, that the GATS is the most development-friendly of all the Uruguay Round Agreements.[75] Indeed, Pierre Sauvé argues that trade agreements do not come much more flexible than the GATS and "it is arguably the most development-friendly of all Uruguay Round pacts, as is evidenced by the fact that no GATS-related issues appeared on the laundry list of implementation concerns raised by developing countries prior to and at the WTO's Ministerial meeting in Doha, Qatar, in December 2001".[76]

[75] Sauvé, Pierre. 2002. *Trade, Education and the GATS: What's In, What's Out, What's All the Fuss About?* OECD.

[76] Ibid.

1.7 TRIPs

If there was one issue which created a North–South divide resulting in a showdown between developed countries on the one hand and some developing countries on the other, then, it was the issue of Intellectual Property Rights. The issue, apart from creating rancour during the Uruguay Round also left a bitter aftertaste for countries such as India. So much so, the issue of Intellectual Property Rights continued well beyond the Uruguay Round and lasted till the launch of a new Round at Doha.

It was unsurprising that the US in 1985 raised the issue of counterfeit goods in the GATT. This was understandable since the issue of "copying" pharmaceutical drugs and other products was widely prevalent in many countries. It was in this context that companies like Pfizer took an active interest in pushing US policy in this area. In their monumental work "Information Feudalism" written by Peter Drahos and John Braithwaite,[77] they mention that Edmond Pratt, who became CEO and Chairman of Pfizer in 1972 played a key role in pushing for Intellectual Property Rights in the GATT.[78] Edmund Pratt was to become the Chairman of the Advisory Committee on Trade Negotiations (the influential ACTN) and Pfizer with IBM co-founded the Intellectual Property Committee (IPC) which then played a key role right through the Uruguay Round. It was certainly no accident that Edmund Pratt was a member of US delegation at Punta del Este in 1986, where the Uruguay Round was launched.

If only the Agreement was confined to the original goal of addressing the legitimate issue of "counterfeit goods" then nobody would have had any serious issue with it. Alas, that was not to be.

As early as April 1986, US representative made it clear that it was their intention to discuss as part of the new Round not only counterfeit goods but better protection of patents, trademarks, copyrights, etc. The US argued[79] that on issues such as the above, GATT had the appropriate legal and institutional framework to deal with the problems, including the machinery for ensuring transparency, notification, consultation and dispute settlement. At this time, i.e. April 1986, the European Union

[77] Drahos, Peter and Braithwaite, John. 2002. *Information Feudalism*, Earthscan Publications Ltd., London.

[78] Ibid., "Chronology of Key Events".

[79] GATT document, Com (86)SR/3, April 1986.

was not entirely convinced about this issue and felt that more discussions were needed on the subject. As for developing countries such as India, they were so focused on opposing a new Round, in general, and Services, in particular, that there was not too much attention paid to US agenda of covering the entire gamut of Intellectual Property Protection in the GATT negotiations.

Of course, the US did not just raise this issue only in the GATT. Around 1985, the International Intellectual Property Alliance (IIPA) was also formed. The Intellectual Property Committee also started visiting Europe in June 1986 to explain to European business the advantages of a trade-based approach to Intellectual Property Rights. A group called "Friends of Intellectual Property" was formed in May 1986 comprising the US, the EU, Japan, Canada, Sweden, Switzerland and Australia.[80] By July 1986, the language used in GATT documents changed from "Trade in Counterfeit Goods and other Aspects of Intellectual Property" to "Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods". This change, little noticed at the time, could not have happened without some pressure being applied on the GATT Secretariat by the "Friends of Intellectual Property" led by the US.

The 1986 Punta del Este mandate on Intellectual Property Rights was not substantive and in fact, uncertainty remained until the final hours of the Punta meeting as to whether agreement could be reached at all.[81] The negotiations, according to the Punta mandate sought to do two things:

- Aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines; and
- Aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.

It was difficult to predict that the above mandate could have led to the most far-reaching Intellectual Property Rights Agreement involving

[80] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

[81] Ibid.

substantive standards requiring major overhauling of domestic legal regimes in several countries. Indeed, one of India's key GATT negotiators[82] said that the issue of Intellectual Property Rights was tackled within the confines of the relevant GATT articles and called the resulting mandate "modest". This might have been a mistake because a lot of things were happening outside of the GATT that were to change things fundamentally in terms of negotiation dynamics. Also, not enough attention was paid to the fact that the negotiations did not seek merely to clarify GATT provisions but also "elaborate as appropriate new rules and disciplines". It is one of those ironies of the Uruguay Round that the TRIPs Agreement did precisely that and did much more than specifically address the original objective of these negotiations, namely, to come up with a multilateral framework for dealing with international trade in counterfeit goods.

One of the most defining features of the TRIPs Negotiations in the Uruguay Round was that what happened outside the GATT was even more important than what happened within the GATT. For instance, thanks to the US and the activities of IPC vis-à-vis European business, the Union of Industrial and Employers' Confederations of Europe released a paper in May 1987 broadly agreeing with the US and arguing that EU's approach to the negotiations needs to be broadened to include the full range of Intellectual Property Rights.[83] This set the stage for the US to submit a detailed proposal on the subject.

In October 1987,[84] the US made a negotiating proposal which left no one in doubt about American goals in this area of negotiations:

1. GATT procedures for dispute settlement were proposed and would be enforced if necessary through trade retaliation.
2. Domestic administrative and legal measures for enforcement were dwelt at some length.
3. The US simply wanted global standards of Intellectual Property Rights protection raised to levels existing in the industrialized countries. There was no attempt to prescribe certain "minimum standards"; what was sought was "harmonization of standards" and a "one size fits all" approach.

[82] Shukla, S.P. 2000. *From GATT to WTO and Beyond*, WIDER Publication.

[83] Drahos, Peter and Braithwaite, John. 2002. *Information Feudalism*, Earthscan Publication Ltd., London.

[84] GATT document, MTN.GNG/NG11/3/14, October 1987.

The US proposal of October 1987 was followed by that of Switzerland (also October 1987) and then by Japan and the EU (also in November 1987). What followed was acrimonious debate between some developing countries led by Brazil and India and the developed countries. This was largely a "dialogue of the deaf".[85] Developing countries cogently argued why TRIPs does not belong to GATT (there was already WIPO) and why it was not even a trade issue. They frontally attacked the need for IPRs in the GATT system saying there was no intellectual or indeed any economic/trade justification.

The fact of the matter is that between October 1987 when the US revealed its intentions and say, the mid-term meeting in Montreal in 1988 and thereafter, very little actual negotiations took place. But, there was one critical development that took place, once again outside the GATT. This was the expanded Section 301 of the Omnibus Trade and Competitiveness Act of 1988 which created the dreaded "Special 301" mechanism targeting countries that did not, in the view of the US, provide adequate protection for intellectual property. Unfair trade practices included denial of intellectual property protection among other things. Throughout 1988, the IPC worked with countries such as the EU, Hong Kong, Japan. and in parallel, the US used aggressive bilateralism through "Special 301" mechanism against a host of countries. Thus, in October 1988, the US under the expanded Section 301 of the Omnibus Trade and Competitiveness Act of 1988 imposed duties on paper products, drugs and consumer electronics from Brazil. The choice of Brazil was no accident. The US view has always been that if Brazil could somehow be weakened, then India would stand isolated. US negotiators also knew that the collective leadership of Brazil and India (along with the fact that their diplomats were some of the best in the business) always had the potential to thwart the goals of the developed countries.

Against the above backdrop, the Montreal meeting took place in December 1988. We have already seen how the failure of Agriculture negotiations led to the collapse of the meeting in Montreal. The Montreal meeting, however, resulted in a text on TRIPs by the Turkish Minister Ozal who acted as a "friend of the Chair". The negotiations on TRIPs also revealed one important dynamic. For the first time in Montreal, Brazil linked its willingness to negotiate Intellectual Property

[85] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

Rights to progress in Agriculture negotiations.[86] It is true that Brazil was a member of Cairns Group and attached tremendous importance to negotiations in Agriculture. The broader truth, however, was that Brazil was much more of a trading country (and which depended on US market) than India and in this sense, its interests might have been legitimately different from that of India's. This was to be reflected right through the Uruguay Round and beyond.

But the US was taking absolutely no chances. In the beginning of 1989, the USTR on the recommendation of the Motion Pictures Association of America and the International Intellectual Property Alliance used "Special 301" mechanism to target countries including Brazil, India, Mexico, China, Egypt, Korea, Saudi Arabia, Taiwan and Thailand. The choice of countries left no one in doubt about the overriding motive, i.e. to crush remaining opposition to a broad-based TRIPs Agreement in the GATT.

At the Geneva meeting of April 1989, India was virtually all by itself. The Agreement on TRIPs at the April 1989 meeting in Geneva was everything that India and some other developing countries had argued against all along. The Agreement talked of standards, effective and appropriate enforcement mechanisms including domestic legal systems and full-fledged dispute settlement. Almost as an afterthought, the mandate added that negotiations shall also comprise the development of a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods.[87] This was almost the only thing recognizable from the original mandate at Punta del Este. It must also be said that India did not really engage in substantive negotiations on TRIPs until very late in the game in view of its violent opposition in the matter.

The above did not deter India from putting forward a proposal of its own that rested on the fundamental premise that only those practices that distorted international trade should be subject to negotiation.[88] By this time, India stood pretty much alone as can be seen from the fact that its submission to the GATT was only in its own name. In its submission, India went as far as to argue that concepts such as MFN and National

[86] Ibid.

[87] GATT document, MTN.TNC/11, April 21, 1989.

[88] GATT document, MTN.GNG.NG11/W/37, July 10, 1989.

Treatment could not apply to Intellectual Property Rights because these concepts were applicable to goods rather than the rights of persons. India finally added that countries must remain free to adopt their domestic legislation in accordance with their economic development and public interest needs. Again, for India in July 1989 to be taking this position after agreeing to the mandate in April 1989 may appear a little strange. But, one would have to factor in the huge uproar that this issue created in India. By now, Intellectual Property Rights had become a full-blown political issue in India.

In 1990, as many as five draft texts were introduced into the TRIPs negotiations. Four of these were from the developed countries: the EC, the US, Switzerland and Japan. The fifth was from a group of fourteen-odd developing countries. The developed countries, predictably, argued for a comprehensive agreement on the subject. The developing countries' submission, on the other hand, viewed intellectual property not as a property right, but rather as an instrument of public policy.

In July 1990, the Chairman of the TRIPs Negotiating Group did produce a draft with a semblance of impartiality. The developed country version was "A" and the developing country version was "B". But by the time Arthur Dunkel put out his Draft Final Act, it became obvious that the developing countries had lost out in substantive terms. The only thing they gained was the transition period.[89] Indeed, one of the features of the controversial TRIPs Agreement was that it was "arbitrated" rather than "negotiated". Three important actors in the GATT did this "arbitration". One was the crucial role played by the Chairman of the TRIPs Negotiating Group, Swedish Ambassador Lars Anell. He announced on 18 December 1991 at a TRIPs Negotiating Group meeting that "he would make the final choices for the text that would go forward in the Draft Final Act".[90] The second actor was the GATT Secretariat which helped Anell in putting forward "arbitrated" language. Last, but not least, Director General Arthur Dunkel who took responsibility for the Draft Final Act.

[89] Drahos, Peter and Braithwaite, John. 2002. *Information Feudalism*, Earthscan Publications, London, Chapter "At the Negotiating Table".

[90] Croome, John. 1999. *Reshaping the World Trading System: A History of the Uruguay Round*, Kluwer Law International.

The conclusion of the TRIPs Agreement had far-reaching implications for the multilateral trading system. These are given below:

1. All GATT/WTO Agreements generally are about removing barriers to international trade. Here was an example, for the first time, an Agreement that had the potential to impede trade. Indeed, this is why in the preamble of the TRIPs Agreement there is a reference on the need to ensure that measures and procedures to enforce Intellectual Property Rights do not themselves become barriers to legitimate trade.
2. All Agreements such as the GATT and GATS have an article entitled "General Exceptions". TRIPs is the only Agreement among all Uruguay Round Agreements that does not have "General Exceptions". Each section has an exception but this is specific and limited. In effect, the TRIPs Agreement trumps everything else.
3. In both GATT and GATS, different countries have different obligations. In the case of GATT, it is hardly anybody's case that Gabon and the US should have the same "bound rate of duty" for say, bicycles. In GATS too, the two countries could have vastly different commitments in say banking services. This is as it should be. But, in TRIPs and TRIPs alone, both Gabon and the US would have to provide the same minimum level of patent protection for a pharmaceutical product. The only condition is that Gabon gets a transition period to do it. But the minimum level of obligation is exactly the same.
4. Because patent is basically jurisdictional and hence territorial, the issue of domestic legal and administrative measures to enforce Intellectual Property Rights leads to tremendous intrusion into a country's sovereign policy space. Nowhere was this more evident than in the case of India where the country had to make the paradigm shift from process patents to product patents within a relatively short period of time. This created enormous injustice since India was late to carry out reforms and modernize its economy as compared to say South Korea. Yet South Korea was able to avail of the pre-TRIPs period to benefit from knowledge dissemination of invention while India was not.
5. The manner in which TRIPs Agreement was rammed through left deep scars for at least a few of the developing countries concerned. There was the role of multinational companies and their agenda.

There was aggressive bilateralism by the US in the form of "Special 301". The negotiations were arbitrated by the Chairman of the Group and then by Arthur Dunkel. In the end, for some developing countries it became a Hobson's choice.

6. Last but not least, developing countries were being asked to "pay" in TRIPs for very little in Agriculture by way of return. Even for India, the gain in Textiles provided the only justification for accepting the TRIPs Agreement. But as we will see next, the Textiles Agreement did not entirely meet expectations.
7. The question as to why more than a hundred nations that were large, net importers of Intellectual Property Rights signed a TRIPs Agreement that basically benefited a tiny number of countries led by the US, is one of the most "unfair" features of the Uruguay Round.[91]
8. In India, its implications for Agriculture and for pharmaceuticals alone made it the one Uruguay Round Agreement that would "threaten" the lives of ordinary people. And to top it all, it was not even a "properly negotiated" Agreement. In the end, this was a big factor contributing to "negotiation resentment" of certain key developing countries.

1.8 Textiles

One of the biggest puzzles of the multilateral trading system was that fundamental issues of mankind viz. food and clothing (agriculture and textiles) were never fully subject to GATT rules. The developed countries led by the US and EU would argue in favour of "free trade" for things like chemicals, watches, automobiles and aircrafts. But when it came to Agriculture and Textiles, the developed countries always got away by saying that these were somehow "special" and, therefore, could not be subject to the normal rules of GATT. We saw the "politics" of Agriculture in the previous section. The story of protectionism in Textiles is, in some respects, even more egregious.[92] Though hard to believe, it all began as

[91] For an explanation see: Drahos, Peter and Braithwaite, John. 2002. *Information Feundalism*, Earthscan Publications, London ("The Puzzle of TRIPs").

[92] Bagchi, Sanjoy. 2001. *International Trade Policy in Textiles—Fifty Years of Protectionism*, An International Textiles and Clothing Bureau (ITCB) Publication.

far back as 1961 during the Dillon Round of Trade negotiations when the developed countries conceived the “short-term arrangement regarding international trade in textiles”. At the time, the short-term arrangement was intended to be temporary so as to provide breathing space for the cotton textile industry in the developed countries to adjust so that the developing countries can take over based on competition and comparative advantage. The short-term arrangement was not to last more than four years but in a precursor to what was to happen repeatedly, after just one year the short-term arrangement was converted to a long-term arrangement which again was periodically renewed till 1973.

Till 1973, protectionism was confined to cotton textiles. But in 1973, the long-term arrangement gave way to the MFA which covered not only cotton textiles but also textiles made of synthetic fibres. While there is abundant literature on the broad features of the MFA and its protectionist intent, it was generally agreed that one of the things that the GATT/multilateral trading system must do is to get rid of the MFA. Indeed, the Leutwiler Report[93] in its proposals for action submitted in 1985 to Arthur Dunkel, the then GATT Director General, stated quite unambiguously: “Trade in textiles and clothing should be fully subject to the ordinary rules of the GATT”.

In spite of the above, the developed countries managed to ensure a mandate at Punta del Este on Textiles and Clothing that can only be described as weak and ambiguous. It thus spoke of negotiations “aiming” to formulate modalities that would permit the “eventual” integration of this sector into GATT on the basis of “strengthened GATT rules and disciplines”. Note that the mandate was only to “aim” for the “eventual” integration of this sector into GATT. Also note that it was to take place on the basis of “strengthened rules and discipline” which could refer to concessions even outside this negotiating group.[94]

The MFA had an extremely trade-distorting effect on trade in textiles and clothing. And there was no question that developing countries were the biggest sufferers.[95] As a result of this, the International

[93] Leutwiler, Fritz et al. 1985. *Trade Policies for a Better Future*.

[94] Croome, John. 1999. *Reshaping the World Trade System*, Kluwer Law International.

[95] Goto, Junichi. 1989. *The Multifibre Arrangement and Its Effects on Developing Countries*, The World Bank Research Observers.

Textiles and Clothing Bureau (ITCB) was founded in 1984 in Geneva by the exporting, developing countries.[96] The ITCB was to textiles, what Cairns Group was to Agriculture.

It is not the purpose of this book to trace the entire drafting history of the Agreement on Textiles and Clothing during the Uruguay Round.[97] But without the positions of the different sets of players in this key area, it is not possible to appreciate the negotiation dynamics. The US and EU were obviously very important textiles and clothing markets and hence formed a duo which had similar interests to defend. And then there was India and Pakistan (China was not yet a member of WTO) who were the crusaders of free trade in this area. Finally, there were other developing countries who while they broadly shared the goals of India and Pakistan, were not as fully committed or as ambitious as India and Pakistan in the pace and content of liberalization in this area.

For India (and Pakistan) textiles and clothing was literally, bread and butter. It constituted about 36% of total Indian exports in the late eighties and was by far the largest net foreign exchange earner for the country. Also bear in mind that when the Uruguay Round began, there was no Information Technology sector on the horizon in India and hence for India, negotiations in this sector were a "make" or "break" one.

In Montreal in December 1988, one of the issues on which there was no agreement was Textiles and Clothing. But in April 1989, as part of the mid-term package[98] there was a substantive mandate on Textiles. The mandate now envisaged "substantive negotiations" on "modalities for the integration of this sector into GATT within the time frame of the Uruguay Round". This was the clearest signal yet that this sector could be integrated eventually into GATT within a particular time frame. The problem, however, was the "modalities" which were far from clear. For India, Pakistan and other developing countries the modality was quite straightforward: just get rid of MFA restrictions over a particular period. For the US and EU, however, this was not that straightforward. Indeed, the US (later on joined by Canada) took a very different approach arguing that bilateral textile quotas be converted to global quotas,

[96] www.itcb.org.

[97] Raffaeli, Marcelo and Jernkins, Tripti. 1995. *The Drafting History of the Agreement on Textiles & Clothing*, ITCB Publications, Geneva.

[98] GATT document, MTN/TNC/11, April 21, 1989.

i.e. a single quota for global imports of a product, which would then be progressively liberalized.[99] This proposal was so egregious that almost no one else supported it. It also lacked credibility because the US Textile Lobby was arguing for perpetuation of quotas at the time.[100] More relevant for the negotiations in this sector was the stance of the EU which put forward a proposal in July 1989.[101] The EU conceded that the textiles and clothing sector would have to be integrated into the GATT within a transition period (yet to be negotiated). The EU nevertheless talked of strengthening GATT rules and disciplines in respect of tariffs, NTMs, dumping, subsidies and balance of payments—all issues that were not specific to Textiles and Clothing and being discussed in other negotiating groups of the Uruguay Round. For the first time, therefore, the EU established the notion of quid pro quo across sectors. The EU, thus, was playing a master stroke in the Uruguay Round negotiations. When it came to agriculture, the EU argued that if it had to make meaningful concessions to the US and others, it had to secure gains beyond agriculture in other negotiating areas. But when it came to textiles and clothing, the EU (later on joined by the US) did not accept the contention of developing countries that they needed "gains" in this area because they were already "paying" in other areas of the Round, viz., TRIPs and Services for instance.

In October 1989, India put forward its proposals in this key area.[102] It provided a freeze on any new restrictions (standstill), termination of the MFA forthwith, a five-year transition period for phasing out the restrictions/quotas with specified growth rates. Most important, India's proposal made it clear that there would be no "bilateral deals" and that bilateral agreements, if any, between participants shall deal exclusively with the administrative aspects of the implementation of the transitional arrangement.[103]

As will be seen below, on crucial issues, the gulf was wide between the US and EU on the one hand and India on the other.

[99] Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*, The University of Chicago Press.

[100] Ibid.

[101] GATT document, MTN.GNG/NG4/W/24, July 20, 1989.

[102] GATT document, MTN.GNG/NG4/W/28, October 13, 1989.

[103] Ibid.

1. *Product Coverage*: One fundamental issue that arose was what should constitute the product universe of textiles and clothing. Commonsense would dictate that the products under restrictions should constitute the universe and the integration into GATT should involve removal of restrictions on these products gradually over a transition period—as put forward by India. But in an amazing display of power and brazenness, the US and EU managed to secure a products coverage that was wider than MFA in that it included products of pure silk as well as those of vegetable fibres. Worse, the product universe of the Agreement on textiles and clothing included pre-cuts that were restricted under the MFA and amazingly, those that were not. According to the ITCB if one takes the imports of 1990, as much as 33.6% was not under any MFA restriction.[104] The purpose was, therefore, to inflate the product coverage to serve the illusion of liberalization in this sector. This was both unfair and unjustified.
2. *Transition Period*: It bears mentioning that protectionism in this sector of Textiles and Clothing began in the late sixties and the developed countries, for purely domestic political reasons, had put off reform in this area. By succumbing to the lobbies, both the US and EC had steam-rollered developing countries into accepting what turned out to be the biggest derogation from GATT rules. Considering they had over 30 years to reform, the very notion of transitional period for integrating this sector made no sense whatsoever. Yet the US argued for a 10-year transitional period, the ASEAN countries for a eight-and-a-half-year period and India, as we saw above supported a five-year transition period.
   In the end, the GATT Director General came down on the side of the US and suggested a 10-year transition period. India, unhappy with this, nevertheless later linked this to the transition period in the TRIPs Agreement for patents of pharmaceutical products and achieved parity there, much to America's chagrin. It is one thing for countries like India to get a 10-year transition period in TRIPs Agreement. After all, they had to carry out wholesale changes in domestic law and regulation governing pharmaceutical products, among other things. It is quite another matter for countries like

[104] Hoekman, Bernard et al. 2002. *Development, Trade and the WTO: A Handbook*, World Bank Publication.

the US and EU to get the same transition period in Textiles and Clothing, where they were being asked to give up an unfair trading practice which they were resorting to for over 30 years!

3. *Liberalization*: Liberalization of trade in textiles and clothing under the agreement was sought to be achieved through two instruments: "integration" and "growth rates"[105]: Integration was the more critical of the two because the more the percentage of products which are integrated, the more the restrictions disappear and there is potential for improved market access. It is here that the Dunkel Draft Final Act caused surprise and anger among developing countries such as India. The figures for integration (which were entirely arbitrated by Dunkel and his staff) were 16% of the total volume of imports in 1990 on 1 January 1995; 17% of the same on 1 January 1998; 18% of the same on 1 January 2002; which left a whopping 49% to be integrated in 1 January 2005. These figures were far from meaningful because of the product coverage that we saw earlier, because of the fact that 1990 was chosen rather than a year closer to the entry into force of the WTO (1 January 1995) and finally, because of the fact that the whole scheme was so back-loaded that there would be no commercially meaningful integration till the very end.

   By the year 2000, two stages of integration had been implemented by the US and EC. Even though 33% of trade has been integrated, only 6% for the US and 5% of the EC were products which were under quotas. Thus, the integration was not commercially meaningful and completely meaningless.

   Negotiations in the area of Textiles and Clothing provided another instance of contributing to "negotiating resentment" among developing countries. After all, the fact was that it was back-loaded, the liberalization was commercially meaningless and to top it all countries like India and Pakistan were made to pay by way of some sectoral market access.

4. *Strengthened GATT rules and disciplines*: As noted above, this was a patently unfair demand by the US and EU on developing countries. It is the US and EU that had maintained quotas for years and years. The theory of Comparative advantage required that India and other developing countries exported textiles and clothing

[105] Ibid.

unimpeded to the US and EU so that the latter could export all kinds of goods and capital equipment to the markets of developing countries. To turn this around and argue that India and other developing countries should open up their markets for textiles and clothing from the US and EU was both unjustified and perverse. Yet, pressure was put on India, in particular (for the reason that India was the most vocal in this area), to provide market access for the US and EU in the area of Textiles and Clothing. The GATT Director General Peter Sutherland had to conduct mid-night negotiations between the US/EU on the one hand and India and Pakistan on the other to unblock this issue in December 1993 in Geneva. The author remembers Peter Sutherland playing the role of a honest broker and at one time, chiding the US and EU for making unreasonable demands. Yet, the US and EU had their way and India and Pakistan had to make some commitments.

1.9 NAMA

NAMA, otherwise known as Industrial Tariffs, have always been an integral part of GATT and so there was no great controversy surrounding inclusion of this subject in the negotiating basket at Punta del Este. The negotiating mandate for tariffs at Punta del Este in 1986 was:

> Negotiations shall aim, by appropriate methods, to reduce or as appropriate, eliminate tariffs including the reduction or elimination of high tariffs and tariff escalation. Emphasis shall be given to the expansion of the scope of tariff concessions among all participants.

The above mandate needs to be compared with the mandate for negotiating industrial tariffs in the Tokyo Round declaration of 1973 which said that negotiations "should aim to conduct negotiations on tariffs by employment of appropriate formulae of as general application as possible".

Obviously, the negotiating mandate in Punta del Este is stronger ("shall aim" instead of "should aim") and there is a clear stipulation that "emphasis" shall be given to the expansion of the scope of tariff concessions among **all** participants (emphasis mine). Clearly, developing countries were expected to contribute significantly in the tariff negotiations. When the negotiation began with the discussion on "modality", the US advocated a request and offer approach precisely for this reason since it

felt that developed countries which participated in "formula cuts" had already cut down their tariffs and there was no justification for a "linear approach".[106] The EU, however, had a proposal to ensure that higher tariffs were subjected to deeper cuts and that there was effective participation by the developing countries.

It needs bearing in mind that countries such as India had high tariffs in the late eighties, most of it in triple figures (100% and even more). The proposals by the US and EU in the initial stage was, therefore, aimed at, inter alia, to get developing countries, in general, to reduce their tariffs significantly so as to secure market access. Generally speaking, developed countries expressed a preference for the "formula approach"—thus Switzerland proposed a formula:

$Z = 15 + X$ (where Z is the final duty and X the initial duty).[107]

At the mid-term meeting in Montreal, there was no agreement on the specific approach but there was an agreement among Ministers on the following approach[108]:

- Substantial reduction or as appropriate elimination of tariffs by **all** participants (emphasis mine);
- Substantial increase in the scope of bindings;
- Credit for bindings and appropriate recognition for autonomous liberalization since 1 June 1986; and
- Phasing of tariff reduction over periods to be negotiated.

Tariff negotiations gathered momentum after the submission of the Draft Final Act in late 1991. An accord was reached among the QUAD in July 1993 and then, bilateral negotiations intensified among others. The main objective of the developed countries vis-à-vis the developing countries was to ensure that bindings covered the maximum proportion of the latter's import trade.[109] The following table illustrates that this negotiating objective was more than achieved[110]:

[106] For an excellent treatise on the subject: Hoda, Anwarul. 2002. *Tariff Negotiations and Renegotiations Under the GATT and the WTO: Procedures and Practices*, Cambridge University Press.

[107] Ibid.

[108] Ibid.

[109] Ibid.

[110] Martin, Will and Winters, L. Alan, 1995. "The Uruguay Round and the Developing Economies", 307, Word Bank Discussion Papers.

Tariff bindings on industrial products (Percentages)				
	Tariff lines		*Imports*	
	Pre	*Post*	*Pre*	*Post*
Developed countries	78	99	94	99
Developing countries	21	73	13	61
Transition countries	73	98	74	96
Total	43	83	68	87

It is clear from the preceding table that the scope of tariff bindings for developing countries increased from 21 to 73%, if you consider it as a proportion of imports. Either way, it is staggering and both the US and EU achieved their negotiating objective of enhancing participation by developing countries in the tariff negotiations. This was a first in the GATT, considering the previous Rounds in which the developing countries were bystanders.

If one were to assess the negotiations in terms of average tariff cuts, then the picture in the following table emerges[111]:

Country	*Trade-weighted average tariff (percentages)*		*Average tariff cut (percentages)*
	Pre-Uruguay Round	*Post-Uruguay Round*	
Developed countries	6.3	3.9	38
Developing countries	15.3	12.3	20
Economies in transition	8.6	6.0	30

Source Hoda (1994)

It will be seen that even if one takes the average tariff cut, the developing countries contributed fairly significantly. The only caveat is that bound tariffs prevalent in developing countries were already high and several countries by 1993 had carried out autonomous liberalization based on economic reforms, that the applied rates of duty were considerably lower and were set to go even lower.

The assessment[112] was that the overall depth of cut accomplished in the Uruguay Round exceeded those achieved in both the Kennedy and

[111] Schott, Jeffrey J. 1994. *The Uruguay Round: An Assessment*, Institute for International Economics, Washington, DC.

[112] Ibid.

the Tokyo Rounds. Developing countries contributed, particularly by increasing the scope of bindings. Nevertheless, the Uruguay Round tariff negotiations failed to achieve substantial cuts in peak tariffs, particularly in the textiles and apparel sector.[113] In the end, the gains for developing countries were not significant, except for the fact that it was in their interest to bring down their tariffs as part of economic reforms. Indeed, for India, the economic reforms undertaken by the Government in 1991 made it a lot easier to accept the Uruguay Round outcome. There are still those who feel that without the reforms of 1991, India may have found it difficult, if not impossible, to accept the Uruguay Round outcome.

1.10 The Draft Final Act

We have seen how the Uruguay Round negotiations dragged on because of differences in agriculture but also because the lack of agreement in this area prevented agreement being reached in other critical areas such as TRIPs, Textiles and Services. This was primarily because of the principle of "single undertaking" enshrined in the Punta mandate. Simply translated, this meant that "nothing is agreed until everything is agreed". Given the tendency in the GATT for countries (and later the WTO) to never agree to anything until they get something in return, the situation was often characterized by impasse.

In the summer of 1991, the negotiating stalemate in the Uruguay Round was characterized by the following unrelated developments:

- Agriculture continued to be a major problem with the EU sticking to its guns;
- Presidential Elections were due in the US in 1992 and everyone knew that when a new administration took over in Washington, it could be weeks (if not months) before the USTR got its act together;
- In March 1993, the Fast Track Authority for the USTR was expiring, thus providing another deadline; and
- As if the above were not enough, the EU Commission finished its term in the end of 1992 and a new Commission was to be elected into office.

[113] Ibid.

So, for the proponents of the Round, time was running out. It is against this backdrop, that the Director General of GATT Arthur Dunkel took the boldest gamble of his life. An indication of what he had in mind came in September 1991 when he let it be known that he would put forward a complete package "on a take-it-or-leave-it" basis. Two factors may have contributed to Dunkel's decision. One, he was getting on in years and wanted to be remembered as the man who concluded the Round. (Since then, every WTO Director General has wanted to either launch or conclude a Round—a case of "negotiating enthusiasm" rather than "negotiating fatigue".) Two, he also had nothing to lose since he was not going to stand for re-election and did not need to go back to the GATT Members for support.

Whatever the real reasons, Dunkel kept his word and came up with the Draft Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations (DFA).[114] The timing was crucial. Members were certainly suffering from negotiating fatigue. Also, Dunkel, cleverly released the DFA before the Christmas break and told Governments to digest the 436-page document and come back with reactions in the new year. In putting forward the DFA, Dunkel as the Chairman of the Trade Negotiations Committee said that it offered a comprehensive representation of the final global package and reiterated the golden rule that "nothing is agreed until everything is agreed". He also stated the obvious: that the DFA did not include the results of the ongoing market access negotiations and the initial commitments in the Services negotiations. Dunkel then concluded by saying that all Negotiating Groups (except for Goods and Services) were dissolved forthwith.

The putting forward of the DFA in December 1991 was certainly a defining moment in the Uruguay Round negotiations. First, Dunkel pretty much arrogated to himself the right to compile, amend or arbitrate the results of five years of the most far-reaching trade negotiations ever conducted. No one explicitly gave him that right. He simply went ahead and did what he thought was his duty. Two, he went one step further and prescribed a four-track negotiating process to take things

[114] GATT document, MTN.TNC/FA, December 20, 1991 also known as the Draft Final Act.

forward.[115] While the first three tracks were straightforward (dealing with market access, services and legal drafting) the last track IV was controversial—this track was to examine whether and if it is possible to adjust the package (read modify) in certain places. But very shrewdly, Dunkel hastened to add that the track IV exercise "must be very precise and concentrated entirely on what we all can collectively agree to without unravelling the package".[116] Simply put, this meant that if a country "X" wanted a change in the DFA, then it was incumbent on that country to secure a consensus in the entire membership in favour of the change it was seeking—no mean task. It was obvious that Dunkel was trying to prevent an unravelling of the DFA by too many countries seeking too many changes. But this put countries such as India in an impossible position. If India wanted a change in the TRIPs Agreement, it would have to convince everyone else in the GATT membership to agree to it—well-nigh impossible given the positions of players such as the US, the EU. On the other hand, US–EU Blair House Accord did result in changes to the Agriculture section of the DFA and the rest of the membership either could not or would not protest. This was the most negative aspect of the negotiation dynamics of the Uruguay Round. It is conventional wisdom that a lot of countries participated in the Uruguay Round. The fact of the matter was that no more than 20–25 countries (sometimes even less) were actively involved in all aspects of the Uruguay Round.

Be that as it may, Dunkel's gambit worked. The meeting of the Trade Negotiations Committee was held on 13 January 1992 to seek the reaction of the GATT membership to the DFA.[117] Countries that clearly stated that the DFA was an acceptable basis for concluding the negotiations were: Australia, Argentina, US, Finland, New Zealand, Chile, Peru, El Salvador, Guatemala, Honduras, Nicaragua, Brazil, Hungary, ASEAN, Hong Kong, African Group, Canada, Uruguay, Austria, Venezuela, Costa Rica, Czech and Slovak Republic, Bolivia, Jamaica, Israel and Sri Lanka.

The position of EC, Japan, Switzerland and Korea was qualified support for the DFA with the exception of Agriculture. EC made it clear that "very serious difficulties arose in the area of Agriculture" where the text had to be "seriously improved upon". EC's allies listed above said more or less the same.

[115] GATT document, MTN/TNC/W/99, January 15, 1992.

[116] Ibid.

[117] GATT document, MTN.TNC/25, February 5, 1992.

The fact that developing countries were not united as a bloc was obvious during the Uruguay Round. Thus, Morocco on behalf of the Group of Developing Countries stated clearly that on the basis of a preliminary and partial evaluation of the DFA, the developing countries considered that the various texts did not take their concerns on specific subjects sufficiently into account. Morocco added that while the developing countries were being asked to undertake heavy obligations in such areas as TRIPs, TRIMs and Services, their needs and interests had been covered only in a partial, imbalanced and unsatisfactory way.[118] Yet when the developing countries (who had subscribed to the statement by Morocco) spoke in their individual capacity, a vast majority of them, as we saw earlier, stated that DFA was a reasonable basis to proceed further.

How to explain this apparent contradiction? The fact is that the individual trade interests of the various developing countries are so different from one another and their ability to withstand pressure either in Geneva or in capitals is so uneven, that it is unrealistic to expect all developing countries to subscribe to one single position. Jamaica perhaps had the most sardonic comment on the Draft Final Act:

> A preliminary review of this document indicated that the package reflected the distribution of negotiating power over the period and whether or not one was prepared to accept it as a reasonable basis on which to resume the final negotiating phase, as proposed, was academic. For the record, Jamaica agreed.[119]

That brings us to the position of India, as usual a case apart. India stated in all honesty that it had not yet completed its scrutiny of the long and complex DFA document. It was currently involved in consideration with members of Parliament, representatives of industry, etc., and, therefore, was not in a position to evaluate the package as a whole just yet. India nevertheless pronounced itself in favour of a strengthening of the multilateral trading system which could come about only if the Rounds' results were fair and balanced and perceived as such. India, based on a preliminary assessment, also expressed disappointment with those aspects of the package which had a bearing on developmental issues and public policy concerns in a developing country context and on the other,

[118] Ibid.

[119] Ibid.

with those which had to do with market opening and trade liberalization in areas of interest to developing countries, such as the agreements on TRIPs and Textiles. In a beautifully nuanced statement that only Indian diplomats are capable of drafting, India stopped short of saying that the DFA in its current form was unacceptable as a basis to proceed further. Egypt frontally attacked the track IV procedure and said that there was no consensus on the DFA and hence Egypt retained the sovereign right to put forward proposals to amend the DFA.

Many countries were being just plain honest when they said that a document that was 436-pages long could not be examined in three weeks. Indeed, the Trade Policy departments of most developing countries (including India) had just a handful of experts who had to work day and night to meet deadlines. Compare this with the US or the EU which had tens of hundreds of people involved in the Uruguay Round negotiations.

In the end, Arthur Dunkel won the day. No one explicitly objected to the DFA being the basis (reasonable or otherwise) for proceeding further in the negotiations. And no one vetoed the four-track procedure that he set out to conclude the Uruguay Round. It was one of those life's ironies that Dunkel would not continue long enough as GATT Director General to see the conclusion of the Uruguay Round, something for which he worked so tirelessly.

1.11 Creating the WTO

It would be wrong to think that the Uruguay Round negotiations among countries was confined to thorny subjects such as Agriculture, TRIPs, Textiles or Services. Just as interesting (and just as contentious at times) was the negotiations in the Legal Drafting Group or the track III with regard to the setting up of the WTO itself.

It is worth noting that the Punta del Este mandate for the Uruguay Round of trade negotiations makes no mention of a World Trade Organization or any Organization for that matter. The reason was that at the time no one really contemplated an overarching Organization that would facilitate world trade. Any mention of an Organization would have raised the hackles of US Congress (based on the track record of its opposition to ITO) and also of countries such as India which were arguing for a separate track (preferably outside the GATT) for subjects like Services.

The first hint of a proposal was made by the then Canadian Trade Minister John Gosbie in April 1990 in Geneva. Later that month in Mexico, details of the proposal were released and given below:

> Developments in the substantive negotiations are now demonstrating that the Uruguay Round results cannot be effectively housed in a provisional shelter. It is also becoming clear that the post-Uruguay Round trade policy agenda will be complex and may not be adequately managed within the confines of the GATT system as it now exists….
>
> The substantive obligations of the GATT, other existing agreements and the Uruguay Round would not be changed (by the creation of the World Trade Organization). The WTO would provide an institutional framework and formal legal status for the overall, multilateral trading system. It should be approved by the national legislative authorities as part of the approvals necessary to implement the overall, MTN trade agreements.[120] (Minister for International Trade, News Release no. 082, 19 April 1990.)

In the same proposal, Canada suggested strengthening the GATT dispute settlement mechanism in three important ways. First, a review stage should be added to the existing dispute settlement process, which would mean the panel had all relevant information before making a determination. Second, an Appellate Body should be added so that states receiving an unfavourable decision could appeal and the decision of the Appellate Body would be final. Third, Canada proposed strengthening enforcement by establishing clear procedures for redress by the injured party if a panel's decision is not implemented.[121]

What is noteworthy in the above proposal is that the proposal for an Organization was accompanied by a strengthening of the dispute settlement mechanism. As pointed out by Sylvia Ostry[122] this idea was soon supported by the EU as well because of growing concern about US unilateralism. Sylvia Ostry's views are important because there are some who feel that the Canadian government's proposal for the establishment of a WTO was itself influenced by Sylvia Ostry at the University of

[120] Leyton-Brown, David. 1990. *Canadian Annual Review of Politics and Public Affairs*, University of Toronto Press.

[121] Ibid.

[122] Ostry, Sylvia. 2006. *The WTO: NGOs, New Bargaining Coalitions and a System Under Stress*, Munk Centre for International Studies, University of Toronto.

Toronto.[123] And primarily because of the anathema for unilateralism, the EU put forward a proposal in July 1990[124] calling for the establishment of a Multilateral Trade Organization (MTO). The EU in effect asked for a political decision for the establishment of a MTO at the Brussels Ministerial Meeting. The EU left no one in doubt about one of the main objectives of the MTO, i.e. to establish a legal basis for actions that ensure the effective implementation of the results of the Uruguay Round Negotiations and, in particular, to adopt dispute settlement procedures in principle applicable to all separate Multilateral Trade Agreements.[125] It was no coincidence that this was also the period during which the EU banned the import of US beef produced with growth-promoting hormones (1 January 1989). The US then retaliated by imposing 100% duty on $100 million worth of EU products ($100 million being the lost value in exports for the US) exported to the US—this retaliation with some adjustments lasted from 1989 till 1996. It was, therefore, clear that even the EU, mighty as it was, had to face US unilateralism well before the entry into force of the WTO dispute settlement procedures.

EU proposal[126] made it clear that one element guiding its reflection was that difficulties had arisen in the context of trade disputes inasmuch as there was no competent body in the GATT to examine a matter in the light of all applicable multilateral agreements. The EU made it clear that a common dispute settlement procedure does not prejudge the issue of whether retaliation across different sectors would be authorized, which was a question of substance that could be discussed in the appropriate Negotiating Group. The EU, therefore, asked that the proposal for a MTO be examined on its own merits.

This idea of a "Multilateral" Trade Organization was not without allure for developing countries such as Brazil and India, which were often the target of Special 301 actions under Section 301 of the US Omnibus Trade Act. Indeed, one of the ways in which the EU tried to sell this idea to Brazil and India was to argue that the MTO would to

[123] Rugman, Alan M. and Verbeke, Alain. 2002. *The World Trade Organization, Multilateral Enterprises and the Civil Society*, www.g7.utoronto.ca.

[124] GATT document, MTN.GNG/NG14/2/42, July 9, 1990.

[125] Ibid.

[126] Ibid.

a large extent "defang" Section 301 of the US Omnibus Trade Act.[127] This was to be the precursor for close and often fruitful cooperation between the EU on the one hand and Brazil and India on the other. In fact, the three countries could be said to have played a crucial role in drafting of both the Dispute Settlement Understanding and the Agreement Establishing the WTO.

Since there was such large agreement on the name "Multilateral Trade Organization", it is curious how it changed to the WTO at the very last minute in 1993. When the Dunkel Draft appeared in the end of 1991, it was still the MTO. Even in the negotiations in 1993 (the endgame as it were) the name was MTO. As the account below will show, the name was changed from MTO to WTO only because of US objections to MTO.

To be fair, the US always had reservations about the creation of an "Organization" for international trade. The botched creation of the ITO (International Trade Organization) is too well-documented to bear any repetition here. American reservations over a trade organization were:

- Concern that the organization will develop into a huge UN-style bureaucracy and become politicized to such an extent that the US will cease to matter or at any rate, matter less;
- The GATT Secretariat remained lean and professional. Besides, GATT was "member-driven". The fear was that an unwieldy organization may over time arrogate to itself the power that belongs to sovereign countries;
- There was always the fear that the US Congress which rejected the ITO may do the same with a MTO or a WTO.

Indeed, when the track III negotiations finished in the autumn of 1993 (the first negotiation to finish was track III under the able chairmanship of Julio Lacarte Muro and in which this author represented India) the final text was still the MTO—as can be seen from the photo on the third floor of the WTO Headquarters in which Julio Lacarte is seen holding the text of the MTO Agreement. As late as December 15, 1993 when

[127] Schott, Jeffrey J. 1994. *The Uruguay Round: An Assessment*, Institute for International Economics.

the Final Act was circulated to all countries it was still the MTO.[128] At the Heads of Delegation meeting, however, the United States proposed that the "clumsy" and "bureaucratic" title of MTO which had been adopted by everyone else, be changed to WTO.[129] John Croome is wrong in calling the MTO "clumsy" and "bureaucratic". In fact, it was neither.

The crux of the matter has now been revealed by Andrew L. Stoler who was at the USTR Mission in Geneva at the time and later became DDG of WTO under Mike Moore.[130] Apparently, US Senator Patrick Moynihan made a last minute demand that MTO be changed to WTO. Since no one wanted to give any pretext to the US Congress for rejecting the new organization (à la ITO), the name change was agreed to. Andrew L. Stoler argues that Moynihan believed nobody would know what a "multilateral" trade organization was all about. This is a disingenuous explanation. This author believes that the problem was solely with the word "multilateral" and the US Congress wanted to preserve the possibility of taking "unilateral" trade measures at least in exceptional cases. This is amply borne out by the report to the US Congress by the US General Accounting Office in July 1994 on the Uruguay Round Final Act. It very clearly expresses some concerns and fears regarding the creation of the WTO such as the US being "outvoted on important issues" and more importantly, other countries employing "the stronger dispute settlement procedures to curtail the US' unilateral use of its trade laws".[131]

One important aspect of the Uruguay Round and the way in which it was concluded was that no substantive negotiations were left for the Ministerial Conference at Marrakesh. This was sensible. It is a pity that this lesson was not learnt well and in future Ministerial Conferences such as the one in Seattle, in particular, too much was left for the Ministers to decide at the last minute, with disastrous consequences.

[128] Croome, John. 1999. *Reshaping the World Trading System*, Kluwer Law International.

[129] See "Ibid."

[130] Stoler, Andrew L. 2003. *The Current State of the WTO*, Stanford University Workshop.

[131] Report of the US General Accounting Office to the Congress, July 1994, "Uruguay Round Final Act Should Produce Overall US Economic Gains", www.usgao/GGD-94-83.

1.12 Negotiating Implications of the Uruguay Round

1. It was clear from the beginning that the US, at times single-handedly, drove the Uruguay Round. It would, therefore, be a good starting point to ask how much the US achieved its original negotiating objectives and what the economic gains were likely to be. The most authentic account in this respect can be found in the US General Accounting Office and its report to the US Congress in July 1994 after the Ministerial meeting in Marrakesh.[132] The report makes it clear that the Final Act generally achieved the negotiating objectives established by the US Congress in the Omnibus Trade and Competitiveness Act of 1988 to benefit US trading interests. This Act granted to the US President authority to continue negotiations under the Uruguay Round. It outlined the intent of the United States to open foreign markets for agriculture and services; to gain protection for patents, trademarks, copyrights and other Intellectual Property Rights; to liberalize rules pertaining to foreign direct investment; and to cut tariffs by up to 50%. It is, therefore, clear that the Final Act, partially in some cases and substantially in others, fulfilled US negotiating objectives.
2. As for the other giant player, the EU did remarkably well in not allowing the US to secure its initial negotiating objective in Agriculture: i.e. elimination of export subsidies. In the event, the EU was able to contain the damage in this vital area while at the same time making significant gains in other areas, i.e. TRIPs, Dispute Settlement, Tariffs on manufactured Goods and Services.
3. For countries such as India, the original negotiating objective to oppose new issues such as Services and Intellectual Property Rights obviously did not succeed. This opposition may be seen in the light of the fact that for the larger part of the Uruguay Round negotiations, India had practiced a policy of import substitution and economic autarchy. In the area of Textiles, the original expectations were not met, but the goal of full integration of this sector into GATT was ensured through the Agreement on Textiles and Clothing. By making sure that the Agreement of Textiles and Clothing expired on 1 January 2005, the day on which the full

[132] Ibid.

obligations of the TRIPs Agreement kicked in, India was attempting to make a not-so subtle linkage. In Agriculture, India's defensive interests were largely protected. The problem, however, was in areas such as TRIPs where the original negotiating objective of trade in counterfeit goods was vastly exceeded and a full-fledged Intellectual Property Rights Agreement with enormous implementation and social costs came into being. This, combined with meagre results (at least upfront) in Textiles tilted the balance as far as developing countries such as India were concerned. The truth of this was borne out when in April 2009 the then Indian Prime Minister Dr. Manmohan Singh said: "India took onerous obligations in the 1990s to bring the WTO into existence".

4. For the Cairns Group of countries, the negotiating outcome in agriculture would have come as a disappointment but they will no doubt live and fight another day.
5. How fair and balanced was the outcome of the Uruguay Round? One of the best answers to this question can be found in Sylvia Ostry's article in September 2000 entitled: "The Uruguay Round North-South Grand Bargain: Implications for future negotiations".[133] The answer is quite clear: it was not balanced and ergo, not fair. Also bear in mind that the Uruguay Round was fundamentally different from the previous GATT Rounds inasmuch as it involved the domestic regulatory and legal systems of the countries involved. This meant, for example in India's case, a wholesale revision of the patent law which was previously based on process patents to a new paradigm based on product patents. In Agriculture, India which had non-tariff barriers for things like rice and milk powder had to undertake to completely switch to tariffs. In manufactures, India which had bound tariffs which were almost always three digits (100% ad valorem and above) had to reduce them to something in the range of 30%. And in Services, India had to take binding commitments even if they were not substantial. In return, it would be useful to ask what the developed countries (the US and EU, in particular) gave up. In textiles, where the US and EU enjoyed a derogation from

[133] Ostry, Sylvia. 2000. *The Uruguay Round North–South Grand Bargain: Implications for Future Negotiations*, University of Minnesota.

GATT rules for over 30 years, they made sure they needed another ten-year transition period to phase out the quotas. In Services, where India's only interest perhaps was Mode 4, i.e. Movement of Natural Persons, the US and EU made sure they made meagre commitments and where they made it, ensured that it was contingent on the Economic Needs Test.

6. Sylvia Ostry, quoted before, calls this the Grand Bargain or more appropriately, the "Bum Deal". The reasons for this unbalanced outcome in the Uruguay Round is also the subject of literature available in plenty.[134] On the other hand, there were also some limited gains for developing countries from the Uruguay Round.[135]
7. The close and active involvement of Multinational Corporations (MNCs) from the US, in particular for areas such as TRIPs and Services was a new feature of these trade negotiations. Their role has also been well-documented. In the author's view, however, that this may have led to backlash later on in the WTO when NGOs such as OXFAM came up with the briefing paper in May 2007 "Eight Broken Promises" dwelling at length on why the WTO is not working for the world's poor.
8. The backlash was also felt in the stance of developing countries opposing issues such as Investment and Competition in the WTO. Their experience with TRIPs was so bad that they simply did not wish to take a chance on "new" issues unless old issues (such as Agriculture) were fully resolved.
9. One important gain was the strengthened dispute settlement system. At the time, it was not clear how this would work in practice. It can now be said with conviction that if there is a jewel in the crown of the WTO, it is undoubtedly the dispute settlement mechanism. The author has participated in over a dozen WTO panels[136]

[134] Finger, J. Michael and Nogues, Julio J. 2001. *The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations*, Policy Research Working Paper Series, World Bank.

[135] Martin, Will and Winters, L. Alan. 1996. *The Uruguay Round and the Developing Countries*, World Bank.

[136] Horn, Hernik and Mavroidis, Petros. 2006. *The WTO Dispute Settlement System 1995–2004: Some Descriptive Statistics*, World Bank.

and has also written about it.[137] The track record, while not perfect, is very good. The proof is that many countries including developing countries now take recourse to the WTO dispute settlement mechanism.

10. A final word on participation of developing countries in the full gamut of Uruguay Round negotiations. It is true that compared to the previous Rounds such as Dillon or Kennedy or even the Tokyo Round, the number of developing countries present at Marrakesh in April 1994 and who later acceded to the WTO is very impressive. But this comparison must not be overstated. If one takes the intensive sectoral negotiations into account such as Textiles, TRIPs or Dispute Settlement,[138] then, the number of developing countries actively following the dossier never exceeded a dozen at any given point in time. This may be understood in light of what is said below:

- Developing Country delegations in Geneva did not have too many diplomats to do the job. Even a country like India had only three diplomats in Geneva—woefully inadequate to follow everything in the negotiations.
- Then, there was the issue of skills and ability to follow the negotiations. These skills are not acquired overnight and issues take a long time to understand and master.
- Many developing countries may have come to the conclusion that if India and Brazil can follow the meeting then, their concerns will be eventually taken care of. Some countries in ASEAN for instance felt sympathy for the Indian position on TRIPs but privately confided that what was acceptable to India was acceptable to them as well.
- As a result of the above, many countries would have core areas where they would negotiate and leave the rest to others. The US and EU would constantly fly in scores of negotiators from their capitals. This too was not an option for countries like India since the Trade Policy Division in the Ministry of Commerce in New Delhi was manned only by a handful of persons.

[137] Kumar, Mohan, 2006, "Dispute Settlement in the WTO: Developing Country Participation and Possible Reform", Article in the Book entitled "Reform and Development of the WTO Dispute Settlement System" published by Cameron May.

[138] The author was India's lead negotiator in these areas in the final stages of the Uruguay Round and is, therefore, in a position to testify.

- For developing countries, Brazil was an exception to the rule. They had a reasonable number of people to take care of parallel, multiple negotiations in the Uruguay Round.

1.13 Negotiation Resentment

As the foregoing account demonstrates, there is no doubt that the negotiating outcome in the Uruguay Round, taken as a whole, was both unfair and unbalanced. In countries such as India, there were serious agitations by civil society against the country accepting the results of the Uruguay Round. Being a democracy, the government had to bring the results to the Indian parliament where the opposition parties united in castigating the government of the day accusing it of a "sell out". Indeed, it was with the greatest of political difficulty that India accepted the Uruguay Round outcome. Even so, when domestic legislation was proposed to bring India into conformity with its obligations with WTO law, there would be furore in the parliament, as happened in the case of TRIPs.

Over time, this led to what the author describes as "negotiation resentment" among certain developing countries. "Negotiation Resentment" is the result of:

- negotiating outcomes being unfair and unbalanced;
- use of brute force by powerful nations to achieve their negotiating goals at the expense of others;
- lack of accommodation or sensitivity to others' national interest or negotiating concerns;
- use of disproportionate negotiating effort by developing countries with no corresponding results to show for in negotiations; and
- there being a skewed outcome for some in terms of benefits and obligations in the negotiations.

All of the above applied to a group of developing countries, particularly, India. This "negotiation resentment" was too obvious to ignore. It was for the developed countries and the WTO to take measures to alleviate this. Alas, what happened was almost the opposite!

CHAPTER 2

The Millennium Round That Failed

2.1 Background

We saw in the last chapter how and why the Uruguay Round Negotiations took eight years to conclude. It is interesting how differing interpretations were put on this eight-year period. For the QUAD, i.e. the US, the EU, Japan and Canada, eight years was simply too long. They felt that WTO Members must respond promptly to the marketplace or else they saw the risk of WTO becoming redundant and irrelevant. Of course, behind this defensible philosophy lay the clear objective of these and other developed countries to prise open the markets of developing countries (such as India, ASEAN, Latin America) in addition to seeking expanded market access among themselves. On the other hand, the developing countries (including the least developed countries) felt exhausted and resentful that despite their fierce opposition, vocal or otherwise, to the inclusion of "new" issues such as Intellectual Property Rights, they had failed in their attempts to convince their developed country partners.

There was thus a huge mismatch between these two groups of countries in their "outlook" at the conclusion of the Uruguay Round. Despite the entry into force of the WTO on 1 January 1995, there was a strong undercurrent of uncertainty in the organization. This was felt

© The Author(s) 2018

M. Kumar, *Negotiation Dynamics of the WTO*,
https://doi.org/10.1007/978-981-10-8842-1_2

in the very first WTO Ministerial Conference in Singapore in the end of 1996. As the Summary Report of the ICTSD[1] puts it, the WTO was "a body still struggling to define itself as a political entity". In fact, many WTO Members had argued prior to the Singapore Ministerial Conference that there was really no need for a meeting at all. Indeed, there was a view shared in private by the US and India that Ministerial Conferences could be held in Geneva and not in far-off places leading to avoidable expenditure for the WTO Secretariat and Governments. There were, however, two reasons why the first Conference was held in Singapore. One was a systemic reason propounded by some that under WTO, trade issues should get the attention at the level of Ministers every now and then. The WTO had become too important to be left to the Ambassadors stationed in Geneva. The second was Singapore's eagerness to showcase itself since it was a predominantly trading country and was generally considered a "good WTO pupil" worthy of reward. But as the preparations went on, expectations rose and even the host country Singapore felt that if there was no proper outcome then the Conference might be construed as a failure. However, this did not change the fundamental divergence in the negotiating approach of the two groups of countries: one group which was still smarting from "negotiation resentment" and coming to terms with digesting the far-reaching results of the Uruguay Round and thus asking for a review of the implementation of the Uruguay Round Agreements; and the other group, wanting to focus on the future of the WTO by pressing for the inclusion of new issues in order to extend the scope of WTO's competence even further.

In retrospect, it is surprising that the QUAD and other developed country members of the WTO either completely failed to detect this "divergence" or chose to ignore the tremendous sense of "negotiation resentment" felt by certain developing countries at the manner in which the Uruguay Round outcome was arrived at. It is worth remembering that at the Singapore Ministerial Conference in 1996 (less than two years after the entry into force of the WTO), all that a vast majority of developing countries (including the least developed countries) were saying was that the primary goal of the WTO should be the full and faithful

[1] International Centre for Trade and Sustainable Development, *Singapore WTO Ministerial Conference-Summary Report*, December 16, 1996, http://ictsd.net/i.wto/4477.

implementation of the Uruguay Round Agreements,[2] arguing with justification that the introduction of new negotiating issues is premature when implementation of existing Agreements was incomplete.[3]

It is useful to recall that the commitments undertaken by various countries extended well into a 10-year period at the time of the conclusion of the Uruguay Round and the entry into force of the WTO. Thus, if you take India as an example, the following Uruguay Round commitments were undertaken by it:

- *TRIPs*: By 1 January 2005, a WTO-compliant domestic regime had to be put in place. This involved, in India's case, wholesale amendment of domestic law and new institutional arrangements for enforcement of that law.
- *Agriculture*: A broad exemption from the requirement to convert all non-tariff measures to ordinary customs duties was to last for 10 years, i.e. till 2005, when the issue was up for renegotiation.
- *Textiles and Clothing*: In this case, of course, the full benefits for India would kick in after the completion of the transition period, i.e. 1 January 2005. However, India itself undertook, as a quid pro quo for market access, to remove Quantitative Restrictions on textiles imports over a period from 1995 to 2001.
- *Tariffs*: India bound 67% of its tariff lines compared to a mere 6% of its lines before the Uruguay Round. The phased reduction to the bound levels was to be achieved during a 10-year period beginning 1995.

Apart from the above, India was required to either put in place new laws or update existing laws and/or regulations to bring itself into compliance with its WTO obligations in diverse areas such as: Anti-dumping, Technical Barriers to Trade, Sanitary and Phytosanitary Standards, Customs Valuation just to name a few. It will thus be seen that even for a large developing country like India, there was tremendous work related to implementation of Uruguay Round Agreements ahead in 1995 when its WTO obligations kicked in.

[2] Ibid.

[3] Ibid.

Indeed, even though the outcome of the Uruguay Round may not have been to their liking, the developing countries were far from disowning it. Instead, they asked for "full and faithful" implementation of agreements[4] in some cases and in others sought technical assistance to meet their WTO commitments.[5] Please note that at this stage, no developing country was asking for an amendment or review of any Uruguay Round Agreement. Here then was a golden opportunity for developed country WTO Members to be magnanimous and offer some comfort to developing and least developed countries by trying to allay their fears and to provide technical assistance for implementation of the Uruguay Round Agreements.

2.2 Singapore Issues

Instead of doing the above, the developed countries led by QUAD used the first Ministerial Conference at Singapore to talk of a vastly expanded agenda for the WTO which included Investment, Competition Policy, Transparency in Government Procurement, Trade Facilitation and last, but not the least, Core Labour Standards. This move by the developed countries was not only bad negotiating tactic because it was wholly premature and the WTO Membership was totally unprepared for it. More importantly, it was deeply insensitive to the profound concerns of the developing and the least developed countries, who by now constituted the majority membership of the WTO. There is only one plausible explanation for this astonishing negotiating gambit by the developed countries: they felt that since it was possible to dictate the agenda of the Uruguay Round and secure an outcome favourable to themselves in the erstwhile GATT, there was no reason why this could not be repeated once again in the newly established WTO.

Assuming this was the explanation, it was a clear lack of judgement on the part of the powerful WTO Members. More crucially, it was to have serious long-term consequences for WTO's negotiation dynamics—the exacerbation of "trust deficit" between developed countries on the one hand and developing countries and least-developed countries on the other.

[4] India, at Singapore called for "full and faithful" implementation of the Textiles Agreement even though it had found it less than satisfactory at Marrakesh.

[5] Trinidad and Tobago, at Singapore.

For the exacerbation of the "trust deficit", the two big players must take a major share of the blame. The EU without any regard to the fact that a number of developing and least developed countries had just undertaken onerous commitments as part of the Uruguay Round, put forward its proposal for creation of Working Groups for dealing with issues such as Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation. This was subsequently agreed to. In a further attempt to overload the agenda, the subject of Information Technology Agreement was raised in which 14 odd countries got together (constituting 80% of world trade in information technology products) and undertook to bind and eliminate customs duties and other duties and charges of any kind.[6] As if this were not enough, both the US and the EU also demanded a Working Group to be set up to examine the controversial issue of Labour Standards. Indeed, there were reports that the US could simply not sign on to the Ministerial Declaration in Singapore without "something" on Labour Standards. That "something" was ultimately language in the Singapore Ministerial Declaration stating the obvious, i.e. that it was the International Labour Organization (ILO) that was the competent body to set and deal with Core Labour Standards. No matter, the USTR after the conclusion of the Conference in Singapore told the press that nothing prevented the WTO from taking up Core Labour Standards in the future.

It is hard to understand the expansive intent of the US and EU, except that they had decided in the light of the Uruguay Round experience that they will use the newly established WTO unabashedly and aggressively to achieve their goals, with little regard to the concerns of developing and least developed countries. What it did though was contribute to lack of trust between countries that is so essential in all trade negotiations.

The second WTO Ministerial Conference in Geneva took place in May 1998 against the backdrop of the commemoration of the Fiftieth anniversary of the establishment of the multilateral trading system. The Conference itself came out with a declaration[7] which was long on rhetoric (benefits of the multilateral trading system, concern at the marginalization of least developed countries, keeping all markets open etc.)

[6]WTO document, WT/MIN(96)/16, December 13, 1986, www.wto.org.

[7]Ministerial Declaration adopted 1998 in Geneva, www.wto.org.

but short on substance (we shall further pursue our evaluation of the implementation of individual agreements and the realization of their objectives). Be that as it may, the Geneva Conference was marred by anti-globalization protests by NGOs and others,[8] which was to prove a pre-cursor to the much more violent and much bigger protests that actually happened at the WTO Ministerial Conference at Seattle in 1999.

From a purely WTO negotiation dynamics point of view, the statement by President Bill Clinton[9] at the Geneva Ministerial Conference in 1998 merits close scrutiny. First off, he invited the Trade Ministers to hold the next WTO Ministerial Conference in the US in 1999. In so doing, he was taking a big risk. As we noted, the Geneva Conference attracted a lot of protesters. The US, being an open society, it was more than likely that there would be protests. Furthermore, being the host country actually limits negotiating options, as the US later found to its disadvantage. Second, Clinton called for a "new approach" in the WTO. The hitherto cardinal rule of negotiations in the WTO was based on "single undertaking", otherwise expressed as "nothing is settled until everything is settled". Clinton in his speech rejected this WTO mantra by calling for an open global trading system that moves as fast as the marketplace. Implicitly blaming the "single undertaking" rule, Clinton said we can no longer afford to take seven years to finish a trade round, as happened with the Uruguay Round. Clinton explained his "new approach to trade talks" by asking the WTO to 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. Clinton then took the example of Agriculture and argued that we should aggressively begin negotiations to reduce tariffs, subsidies and other distortions in Agriculture. And Clinton proposed that even before negotiations near conclusion, WTO Members, he argued, should pledge to continue making annual tariff and subsidy reductions. The statement of Bill Clinton was surprising for more than one reason. Firstly, Agriculture is probably the toughest nut to crack in the WTO. To suggest, therefore, that this negotiating issue could be "resolved" and "implemented" before other issues (thereby preventing any possibility of trade-off) was completely

[8] Khor, Martin. Fall 1998. *WTO Party Marred by Anti-globalization Protests*, www.greens.org.

[9] Bill Clinton's statement at the Geneva Ministerial Conference in May 1998, www.wto.org.

unrealistic. Secondly, one does not have to be a rocket scientist to know that the Clinton proposal would have never met the approval of the EU. Not only is the EU the "villain" when it comes to Agriculture, but its agenda of a "comprehensive round" including issues such as Investment, Competition Policy has no chance of any success until and unless a Round is based on the principle of "single undertaking" and "nothing is settled until everything is settled". Indeed, in the statement by the President of the European Commission at the same conference, the EU stated categorically that the best way of advancing multilateral liberalization is to start a "Millennium Round".[10] The EU also implicitly rejected the Clinton proposal by saying that experience had shown that a "global approach" offers more promising prospects than a "regional or sectoral approach". It was therefore obvious that the EU was sticking by the principle of the "single undertaking".

The Geneva Ministerial Conference of 1998 thus stood out for two reasons: one, for the ugly protests that marred what should have been a joyous celebration of 50 years of GATT's existence; and two, for the EU's call for a "Millennium Round" of new multilateral trade negotiations. It was already clear that the next Ministerial Conference would be held in the US. But it was still too early to discern a presentiment of an impending calamity!

2.3 Preparations for Seattle

As preparations started in the end of 1998 for the Seattle Ministerial Conference to be held by the end of 1999, the signs were ominous. There was no meeting of minds between the US and EU on what should constitute a Round. As we saw earlier in the statement of Bill Clinton, the US wanted "early harvest" in areas as negotiations proceeded. The US was also not too keen on a "comprehensive round" that the EU was insisting upon. For the EU, it was critical to have as large and expanded a Round as possible so that what it was potentially going to "lose" in Agriculture can be "gained" in areas such as Investment, Competition Policy and Environment. The developing countries (including the least developed countries) were in a sullen mood and were harping on "Implementation" of the Uruguay Round Agreements. And rubbing salt

[10] Jacques Santor's statement at the Geneva Ministerial Conference in May 1998, www.wto.org.

into their wounds were the developed countries led by the EU which stubbornly insisted that Core Labour Standards and Environment must somehow be part of the negotiations, in addition to the "Singapore Issues" such as Investment and Competition. To a large number of observers, it was clear as early as January/February 1999[11] that a consensus agenda for the Seattle Ministerial was a big ask. The reason for this was the fundamental and substantive difference in approach of the major players of the WTO. For the purposes of this book, the position of the US, the EU and the developing countries (not all but some important ones) vis-à-vis the Seattle Conference is considered below in some detail.

First, the EU. Notwithstanding the basic opposition of some developing countries led by India to any "Round" being launched at Seattle, the EU made it abundantly clear as early as July 1999 that "the overriding objective for Seattle should be the successful launch of the Millennium Round".[12] In fact, the EU adopted a belligerent tone by stating unambiguously[13]: "The EU will not support any proposal at Seattle meant to benefit solely any one country or group of countries (the least-developed countries excepted) or which fails to reflect the balanced interests of all WTO Members". This approach of the EU was quite extraordinary since it was either "all or nothing". In one swift stroke, the EU not only dismissed the US approach built around market access particularly in Agriculture but also those developing countries which wanted Seattle to deal with the "built-in agenda" (mandated negotiations on agriculture and services) and "Implementation". Indeed, the EU clearly threw the gauntlet at the WTO Membership and served notice that either it was going to be a "Comprehensive Millennium Round" or nothing at all.

The EU case for a Comprehensive Trade Round may be found in the communication from the European Commission to the Council and the European Parliament.[14] A careful reading of the document makes

[11] International Centre for Trade and Sustainable Development, BRIDGES Publication, January–February 1999, Year 3, No. 1, www.ictsd.org.

[12] WTO document, WTO/GC/W/232, July 6, 1999, "EC Approach to Possible Decisions at Seattle", www.wto.org.

[13] Ibid.

[14] Commission of the European Communities, communication from the Commission to the Council and the European Parliament, "The EU Approach to the WTO Millennium Round", document COM (1999) 331 final, Brussels, July 8, 1999.

it abundantly clear that the main reason why the EU was proposing a Comprehensive Trade Round was to try and secure concessions from its trading partners so as to offset the concessions that it would have to make in agriculture. Directly rejecting those who advocated a "limited round", the EU paper says[15]:

> A comprehensive round is also needed to ensure balance. The WTO's built-in agenda foresees negotiations to further liberalize agriculture and services starting at the end of 1999, but with no end-date foreseen. Those negotiations are only going to lead to substantive results if placed within a broader, time-bound negotiating framework… The Uruguay Round has shown that this is best achieved through a comprehensive approach, involving a broad range of issues, in which all participants can identify gains. A narrow sectoral approach cannot do this.

By calling for a Comprehensive Round, the EU was putting itself in a win-win situation. If the Comprehensive Round was indeed agreed to, then, they could declare victory and look for negotiating gains in areas other than Agriculture. If not, the delay in launch of negotiations also suited them because that would delay the actual commencement of negotiations in Agriculture, where they were expected to make "painful" concessions.

We had noted earlier that US President Bill Clinton in May 1998 in his speech to the WTO had advocated a new approach to trade negotiations which would not be based on the "single undertaking". Predictably, the EC approach to the WTO Millennium Round trashed this and upheld the validity of the "single undertaking":

> The results of a Round should be adopted in their entirety and apply to all WTO Members. This principle of a single undertaking constitutes the only guarantee of benefits of a Round to all members, and the best means to ensure an end result acceptable to all. Without it, it is indeed virtually impossible to strike a generally advantageous balance of rights and obligations. The European Community should therefore continue to argue in favour of launching and concluding the negotiations as a single understanding.

[15] Ibid.

The EU thus took no notice of the negotiating position of its key partners. For instance, the US clearly felt at this stage (first half of 1999) that it was too early to decide on the need to negotiate new disciplines on Investment and Competition Policy.[16] Countries such as Egypt, India, Pakistan and even ASEAN argued forcefully against the inclusion of Investment and Competition Policy in the WTO negotiations.[17] Thus, it is fair to say that the vast majority of the WTO Membership were either opposed to or unenthusiastic about commencing negotiations in new areas such as Investment and Competition Policy. In fact, the only allies that the EU had for a "Comprehensive Round" were Canada, Japan, South Korea, Switzerland and some East European countries (no doubt under pressure from the EU).[18]

The US position prior to the Seattle Ministerial Conference merits detailed examination. We have already seen that Bill Clinton while announcing in May 1998 the WTO Ministerial Conference at Seattle tried to depart from "single undertaking" even though it had no chance of any support from the EU. In retrospect, the developing countries may have missed a negotiating opportunity by not encouraging the approach hinted at by Bill Clinton. It may have suited the developing countries to say that negotiations need not be broad-based and that if it was possible to settle some issues (such as Agriculture or Implementation) before settling others, then, so be it. It would have also put pressure on the EU and the handful of its allies to give up their insistence on a Comprehensive Round. The reason the developing countries did not align with the US may have to do with the "negotiation resentment" and lack of trust resulting from the Uruguay Round.

The US approach to the Seattle Ministerial was that while they agreed to a new Trade Round (conceding by September/October 1999 that "single undertaking" was the only way forward), the priorities were quite different from that of the EU. As late as the end of October 1999, the US stated clearly that they wanted the new Round to be about "market access".[19] It went on to explain that this was to "promote the sale

[16] ICTSD, BRIDGES Publication, January–February 1999, Year 3, No. 1, www.ictsd.org.

[17] Ibid.

[18] Ibid.

[19] Statement by US Under Secretary of State Alan Larson at Washington State Department, October 21, 1999, "US Goals for the WTO Ministerial and a New Round".

of American agricultural and manufactured goods and services abroad". It is obvious that while the EU's main negotiating objective was utterly defensive—how to contain the damage in terms of avoiding or at least postponing the goal of eliminating export subsidies in Agriculture, for instance—the American objective was straightforward about gaining access for its goods and services in markets abroad. Indeed, while presenting the US goals for the Seattle Ministerial Conference,[20] Alan Larson said: "Aggressive reform of agricultural trade is at the heart of the US Government's goals. Agricultural export subsidies must be eliminated. All nations in the Western Hemisphere, all APEC members and the Cains Group share this view. The European Union spends 50% of its overall budget on agriculture support that distorts trade. This includes $7 Billion in export subsidies to support 2% of its population. This $7 Billion accounts for 85% of all agricultural export subsidies in the world".

It was also significant that in Alan Larson's remarks,[21] there was absolutely no mention of the "Singapore Issues" such as Investment and Competition Policy. In other words, the US not only made it abundantly clear before the Seattle Ministerial that Investment and Competition Policy were not negotiating objectives for the US, but it did not even show minimum courtesy to its most important trading partner, i.e. the EU, that it was willing to go along should it attract consensus in the WTO. The signs, even just two months ahead of the Seattle Ministerial, were thus ominous. While US–EU Agreement is by no means a sufficient condition for a proposal to succeed in the WTO, it is often a necessary one. However, there was fundamental disagreement about the scope and nature of the Round: the US could have lived with a limited Round; the EU on the other hand sought a Comprehensive Round; the US sought a market access Round; the EU wanted the Round to go beyond it to include environment, consumer health and transparency. Add to the US/EU divergence, the developing and least developed countries who felt they were not being heard at the WTO, the scenario was a recipe for a disaster.

In retrospect, the basic flaw in the WTO negotiation dynamics is that if proposals are made by powerful WTO Members whether the EU or the US, they tend to persist and have a life of their own, even if it is clear

[20] Ibid.

[21] Ibid.

that they do not enjoy a modicum of support in the wider membership. Thus, by any objective standards, Investment and Competition Policy should have been shelved well before the Seattle Ministerial Conference for sheer lack of quorum. Instead, it was allowed to proceed for consideration by the Ministers at Seattle, taking up valuable negotiating space and resources. As we will see later, the EU was not the only guilty party in this respect, although it should take responsibility for committing the original sin.

Even by late 1999, there was thus absolutely no agreement in sight on even the broad contours of a possible Ministerial Declaration in Seattle.[22] In matters of international negotiations, there is always a factor referred to as the "host syndrome". Put simply, it means that if a country volunteers to host a negotiating conference, it puts itself in a situation where it is wedded to the success of the Conference, sometimes even having to compromise on its own negotiating positions. When the US offered to host the WTO Ministerial in Seattle, it was thought by some that they would go along with the EU on some issues even if they were not important to the US. We saw already that this was not the case and serious and substantive differences remained between the US and EU on Agriculture and on Singapore Issues.

There was another complicating factor in the WTO which came to the fore in the beginning of 1999. This was the time when the WTO Membership had to decide on who would succeed Renato Ruggiero as Director General of WTO; his term was expiring in the spring of 1999. What followed brought out the worst in the WTO Membership by way of decision-making. Even though the WTO prides itself on being a member-driven organization, it was nevertheless true that the Director General over time had come to play a crucial role. It may be recalled that Arthur Dunkel certainly played a key role during the final stages of the Uruguay Round when he put forward, on his own responsibility, the Draft Final Act which then became the basis for the final Uruguay Round Agreements. Similarly, Peter Sutherland played a crucial role in the end-game negotiations in Geneva in December 1993 so that the Uruguay Round could be concluded in Marrakesh in April 1994.

It was true that there had never been a Director General in the WTO from a developing country. So, when Thailand put forward a candidate

[22] ICTSD, BRIDGES Publication, Year 3, No. 7, September 7, 1999, www.ictsd.org.

in the form of Dr. Supachai Panitchpakdi, it attracted a lot of support from developing countries. Two other candidates, one from Morocco and one from Canada, were very competent but lacked political support. That left the pugnacious politician from New Zealand, Mike Moore, who to begin with did not enjoy broad-based support but nevertheless had the backing of the US and a handful of countries.

What followed was a regrettable phase in WTO's functioning. In normal circumstances, based totally on broad-based support from the WTO Membership, Dr. Supachai Panitchpadki would have won hands down. Instead, the US continued to back Mike Moore knowing full well this would aggravate even further the distrust between developed and developing countries. WTO suffered paralysis and put up with intrigue for almost five or six months (till mid-June 1999), when a compromise between the then US Secretary of State Madeline Albright and her Thai counterpart put an end to the impasse with the crudest of solutions: Mike Moore would don the mantle of Director General first for three years and Dr. Supachai Panitchpakdi would get three years subsequently.

The above episode showed everyone concerned in bad light. The US would have to assume the lion's share of the blame. But it was not alone. The WTO Secretariat, manned by competent professionals, for once did not maintain strict neutrality and some key senior officials backed Mike Moore over others. More than anything else, the WTO Membership wasted valuable time squabbling over this issue when it should have been preparing for the Seattle Ministerial Conference.

2.4 Labour Standards

What was even more surprising was the move by the US barely two months before the Seattle Ministerial Conference to formally propose to the WTO General Council the establishment of a Working Group on Trade and Labour.[23] This was such an ill-timed move by the US that far from efforts by the host country to build a negotiating consensus, here was the US doing its best to wreck any chances of the Seattle Ministerial Conference succeeding.

This was all the more surprising because Core Labour Standards has arguably been the most contentious issue ever to be discussed in

[23]WTO document, WT/GC/W/382, November 1, 1999, www.wto.org.

the WTO. In fact, the EU had supported at the Singapore Ministerial Conference in 1996 the creation of a Working Group in the WTO to consider the issue of Core Labour Standards and International Trade.[24] This generated such a furore in Singapore that finally the Singapore Ministerial Declaration stated clearly that this is a subject that needs to be dealt with by the ILO which is the forum for the purpose. If there is one issue that unites the developing countries and the least developed countries together it is their implacable opposition to the inclusion of Core Labour Standards as a negotiating subject in the WTO. In spite of the EU clearly recognizing in July 1999 that there was no realistic prospect of consensus for the establishment of a Working Group within the WTO on the issue of Core Labour Standards, why did the US go ahead and make a formal proposal in November 1999?

There is only one plausible explanation as to why the US felt the need to move a formal proposal on Core Labour Standards, knowing full well it would be rejected by the WTO Membership. The explanation lies in the fact that the US Government came under tremendous pressure from the NGOs, in general, and its labour unions, in particular, to take up this matter in the WTO. In an article written in November 1999, Brandon J. Kriner[25] argues that the American proposal received much support from unions and other labour rights groups, who have been calling for such action in the past. He specifically mentions the powerful AFL–CIO[26] which submitted a petition[27] that recommended several courses of action for the proposed Working Group with regard to the establishment of international labour standards in the WTO framework, including specific mechanisms of enforcement, regular review of compliance with standards by WTO Member States, collaboration of the ILO and the incorporation of labour standards in the accession criteria for new WTO Members. Clearly, there was a vast agenda behind the Working Group proposal which the US negotiators made it sound like a mere study group aimed at examination of various issues relating to Core Labour Standards and

[24] Commission of the European Communities, Communication from the Commission to the Council, “The Trading System and Internationally Recognized Labour Standards”, document COM (96) 402 final, Brussels, July 24, 1996.

[25] Kriner, Brandon J. 1999. “The Fruits of Labour: The Need for International Labour Standards”, www.american.edu.

[26] www.aflcio.org.

[27] www.aflcio.org/wto/petition.htm.

International Trade. Also, there was already a precedent in the WTO of Working Groups being formed for Investment, Competition etc. and the EU was now calling for negotiations in those areas. So, there was the legitimate expectation that every issue in the WTO ultimately ended up in the negotiating basket sooner or later as part of the famous single undertaking.

2.5 Like-Minded Group (LMG)

The Like-Minded Group (LMG) was a grouping of countries led by India which included Cuba, Dominican Republic, Egypt, El Salvador, Honduras, Indonesia, Malaysia, Pakistan, Nigeria, Sri Lanka and Uganda. It was a loose grouping in the sense that countries were free not to join in on an issue and could pick and choose the issues to support. If there was one overarching conviction among the members of this group, it was that the Uruguay Round Agreements were fundamentally unbalanced and that there were serious problems that arose when these countries "implemented" them; hence, the title of issues called "Implementation", admittedly a bit of a misnomer. Subsequently, the LMG also cooperated on other issues such as the decision to oppose negotiations on the so-called Singapore Issues.

It was during the preparatory process for the Geneva Ministerial Conference in May 1998 that developing countries repeatedly highlighted their implementation-related concerns.[28] However, up until the first half of 1999, there simply was no attempt by the developed countries to even concede that "Implementation" Issues existed. Indeed, in the EU's approach to the Millennium Round, there is no mention of "Implementation"; similarly, the US even as late as October 1999 did not consider this as an issue that deserved attention.

The LMG thus worked against great odds. When it started meeting late 1998 and even till the beginning of 1999, it sometimes evoked derision among other WTO Members. There is little doubt that the glue that held the LMG was India, led ably by its then Ambassador S. Narayanan to the WTO. In early meetings, the LMG decided that rather than keep saying "no" to proposals being made by the EU and the US, it would

[28] For an excellent monograph on the subject, see *Implementation-Related Issues in the WTO: A Possible Way Forward*, 2009, Third World Network Publication.

take a proactive approach and table negotiating proposals. The next task was to define “Implementation” Issues. This was done as given below:

1. Non-realization of anticipated benefits from some of the Uruguay Round Agreements;
2. Obvious imbalances and asymmetries in some of the Uruguay Round Agreements; and
3. Non-operational and non-binding nature of the provisions on special and differential (S&D) treatment contained in various Uruguay Round Agreements.

Brief examples of the above three types of Implementation Issues are in order. The best example of (1) is the Textiles Agreement where the major import markets, i.e. the US and EU, simply did not abide by the spirit and at times, even the letter of the Agreement thereby depriving the exporting countries of anticipated benefits. This is why the exporting countries often talked of “meaningful integration” of products by the EU & US.[29]

As far as (2) is concerned, the best example is the TRIPs Agreement where there has been a long-standing demand that additional protection of geographical indications (GIs) should be extended to products other than wines and spirits.[30] There is no logical reasoning as to why additional protection of GIs should be extended only to wines and spirits and not to other products of interest to developing and other countries. So, countries simply wanted to correct this imbalance in the TRIPs Agreement by demanding that Article 23 be made applicable to GIs for all products, rather than just to wines and spirits as at present.

Lastly, as far as (3) is concerned the S&D provisions in various Agreements, the countries argued, have remained a dead letter and not been operationalized. So, the LMG Members[31] stated that S&D provisions in various Agreements were phrased as best-endeavour clauses. The LMG countries clearly demanded that all S&D provisions be converted into concrete commitments, specially to address the constraints on the supply side of developing countries.

[29]WTO document, WT/GC/2/283, October 1999.

[30]For a treatise on the subject, see: Kumar, Mohan. 2003. TRIPS: Geographical Indications, paper submitted to the UNDP Asia Trade Initiative.

[31]WTO document, WT/GC/W/354, October 1999.

It is important to understand the logic behind the "Implementation" demands of the LMG countries. If you take an agreement like Agriculture, very few of the LMG Members (leave aside India and Egypt) were actively involved in the Uruguay Round negotiations on the subject. The reasons had to do with lack of resources and sometimes even lack of opportunity (could any LMG member have conceivably been present when the Blair House Accord on Agriculture was concluded between the US and EU). Second, on Agreements such as Textiles, countries like India accepted the TRIPs Agreement eventually only on the assumption inter alia that there would be substantial gains from the Textiles Agreement and other areas. This was not to be. Lastly, on the issue of S&D, it is a fact that the vast majority of S&D provisions in the entire gamut of Uruguay Round Agreements are "best-endeavour" clauses which don't mean much and remain a dead letter more often than not. The only S&D that developing countries get is technical assistance and transition periods to implement the Uruguay Round Agreements.

It is also noteworthy that the 12 or so LMG Members had to work day and night (literally) and over weekends to come up with concrete negotiating proposals. This was not easy. The organizations that played a key role were the South Centre, Third-World Network, UNCTAD and some NGOs such as OXFAM, Medecins Sans Frontieres. There were also individuals and resource persons who are too many to recount here. Suffice it to say that these countries had to really stretch their resources and their ability to come up with negotiating proposals spanning the entire gamut of Uruguay Round Agreements.[32]

What was the negotiating basis/strategy of the LMG when it came to "Implementation" Issues? The following were the underlying assumptions:

1. The "Implementation" Issues arose out of the Uruguay Round Agreements. So, there was no question of paying a price for acceptance of the "Implementation" Issues by the US/EU, since these countries felt they had already granted concessions during the course of the Uruguay Round Negotiations.

[32] WTO document, JOB(99)/4797/Rev.3, November 18, 1999.

2. The LMG Members made it clear that they could not contemplate further negotiations in the WTO unless their "Implementation" demands were met.
3. The LMG Members were not naïve. They knew they lacked trade clout. Their chief weapons were "moral suasion", "cogent reasoning" and "stubborn persistence" to make their voices heard.

2.6 Negotiating Logic Behind "Implementation Issues"

Even at the time, there was criticism of the LMG by other WTO Members and by people outside the WTO. India, in particular, was told by its major trading partners that we should be more positive and should not be seen in the company of small and insignificant countries.

India was not unaware of this. But after weighing all the pros and cons, India took a strategic decision to strongly pursue the "Implementation" agenda in the WTO with other LMG countries. This has come in for some criticism among academics and policymakers. One is Arvind Panagariya who in the *Economic and Political Weekly* of 26 January 2002[33] after making an excellent analysis of India's negotiating stance at Doha, argues that Indian spent an "unduly large dispensation of the negotiating capital on the virtually empty box of Implementation Issues". The other is Amrita Narlikar,[34] who along with John S. Odell looked at some detail at the LMG in the WTO. They come to the conclusion that the "strict distributive strategy for a bargaining coalition" followed by the LMG resulted in the group sustaining "a major loss" and collected "relatively small gains". These are very enlightened critics and they are certainly entitled to their views. But as a person who was actively part of the negotiating team in Geneva, I would like to submit the following counterpoints for consideration:

1. The overriding objective of the LMG was to get some redressal for the Implementation Issues raised by them. It is true that the results have not been commensurate with the efforts made. But some indirect benefits have accrued. It was the first rallying point

[33] Paragariya, Arvind. 2002. "India at Doha: Retrospect and Prospect", *Economic and Political Weekly*, January 26.

[34] Narlikar, Amrita and Odell, John. 2006. "The Strict Distributive Strategy for a Bargaining Coalition: The Like-Minded Group in the WTO".

for developing countries in the WTO and they succeeded in forcing the WTO Secretariat and the powerful developed countries to sit up and take notice. Some WTO observers are of the view that developing countries have also become more wary of accepting commitments in the WTO now. Indeed, their opposition to the Singapore Issues can be traced to the frustration they experienced in finding meaningful solutions to their Implementation-related concerns.

2. A new Round at Seattle without "Implementation" Issues being redressed in some way would have been difficult to accept for the LMG. In the event, no Round was launched at Seattle, albeit for plenty of other reasons as well.
3. The Implementation Issues used up a lot of "negotiating space" in the WTO. The developed countries were hard put to reject some of the proposals put forward by LMG and many people inside and outside the WTO were convinced by the justification provided by LMG, even though they stated formally that the UR Agreements could not be reopened. This created negotiating pressure on the developed countries and this too was a tactical (if not strategic) advantage for LMG.
4. For too long, countries such as India were criticized in the WTO for saying "no", "no" and "no" to proposals submitted by others. Here was a case of a positive negotiating agenda, being pursued by India and some others.
5. WTO is a negotiating forum. It should be possible to raise any issue on any Agreement at any time. More importantly, no Agreement is cast in stone. For example, the TRIPs Agreement provided additional protection of Geographical Indications for Wines and Spirits alone and not to any other product. This was a legacy of the Uruguay Round where the EU had to be compensated for some concessions they made in agriculture. But there is no reason why this additional protection should not be made available to products of interest to developing countries such as Darjeeling Tea, Basmati Rice or Feta Cheese for that matter. The WTO will lose all relevance if Agreements are cast in stone and do not evolve. If some "Implementation" proposals call for a review of some Agreements, in the name of restoring some balance, then that is no reason to reject them.

6. Last, but not the least, the "Implementation proposals" were tabled only in 1999. Let us not forget that the EU first made proposals on Investment and Competition Policy at Singapore in 1996. Similarly, Core Labour Standards were first raised by the US as far back as Punta del Este in 1986. Till date, negotiations on Singapore Issues have not even begun in earnest and in the case of Core Labour Standards, it may not begin at all. But this does not prevent the US or the EU from pursuing their negotiating objectives relentlessly at every opportunity. So, I would not agree with the claims of the critics referred to earlier that LMG had very little to show for its efforts. I think important negotiating objectives were achieved. More important, the "Implementation" agenda is very much there and it can be revived (either in full or in part) by either LMG or any other alignment of countries in future negotiations at the WTO.

By September/October 1999, it was clear that there was no meeting ground between the major players of the WTO on what should constitute a Round to be launched at Seattle. Even things such as "single undertaking" were far from eliciting a consensus among WTO Members. It was in these trying circumstances that the unenviable task of submitting a draft Ministerial declaration fell on the shoulders of the Chairman of the General Council, the Tanzanian Ambassador to the WTO.

The Chairman of the General Council did come out with a draft Ministerial Declaration.[35] As far as the WTO work programme was concerned there were two headings: "implementation" and "new negotiating round". But, in the latter, the Chairman included only Agriculture and Services with other issues such as Investment. appearing in brackets. The use of brackets in WTO drafts is a negotiating technique that merits some explanation. If there is negotiating language that every WTO Member agrees to (or no one objects to) then it appears as clean or un-bracketed text. The problem, of course, is when the proposal is such that there is a division in the WTO in terms of support. If there is a proposal for which there is no consensus in the WTO, then, the Chairman has two options: either he puts it in brackets so as to indicate that there

[35] ICTSD, Bridges Publication, Year 3, No. 7, September 1999, www.ictsd.org.

is no consensus yet, but he hopes there will be one eventually; or he could leave it out altogether on the grounds that the proposal has no chance of success. Either way, the Chairman does have some discretion in this regard that can have crucial implications for negotiations.

LMG, not to be left behind, contested the chair's draft and put forward a draft of their own.[36] This draft basically focused, predictably, on "Implementation" Issues and advocated the continuation of examination of issues such as Investment, Competition Policy. in the respective Working Groups. Somewhat ambitiously, the LMG also suggested the creation of three additional negotiations aimed at making the trading system more supportive of the development process; access to technology, trade and finance; and the relationship between trade, debt and commodity prices. This move by LMG may be considered tactical since it wanted to prevent the Chairman's draft from constituting the "floor" in future negotiations on the draft ministerial declaration.

2.7 Negotiating Impasse

Separately, a shot in the arm was received by the LMG when the G-77 group of developing countries[37] met in Morocco in September 1999 and called for a Seattle Round that integrates the development dimension. They openly called for correcting the imbalance of the multilateral trading system through redressal of the Implementation Issues. In fact, the support of G-77 (comprising some 133 developing countries in the UN) to Implementation Issues gave the lie to those who felt the LMG simply did not have the political clout to push its agenda. Indeed, despite differences between its members, the G-77 declaration did not call for negotiations in Investment, Competition Policy, etc. Furthermore, the G-77 declaration made it clear that neither Labour nor Environment should be addressed as part of the Seattle Round.

Both the US and the EU took a belligerent position on Implementation Issues. The US spelt out in a communication[38] what its view on Implementation was. Basically, it argued that all issues should be

[36] Ibid.

[37] Ibid.

[38] WTO document: WT/GC/W/323, September 17, 2009, www.wto.org.

inventoried by the subsidiary body for respective decisions or agreements no later than 31 July 2000. This, if agreed to, would have removed the Implementation Issues out of the Seattle Round and made it essentially a technical exercise overseen by the WTO Committees responsible for the different Agreements. The EU, for its part, felt that Implementation Issues should be dealt with after Seattle, since their approach paper of July 1999 does not even make a reference to it.

LMG knew by now that there was absolutely no chance of any of the Implementation Issues being resolved at the subsidiary level, i.e. in the respective WTO Committees. These were often manned by people for the US and the EU who had spent a lifetime doing say, anti-dumping or subsidies. These were technical experts in every sense of the term who simply did not have the political vision or the necessary authority to make a compromise. They would merely read out their instructions from Washington or Brussels. Hence, the insistence of LMG that Implementation Issues must be dealt with by Ambassadors (at a minimum) in Geneva and by Ministers at Seattle.

The net result of the above was that there was a plethora of proposals on the table and scores of brackets in the draft Ministerial text.[39] With the Conference in Seattle less than a month away, failure was staring WTO Members in the face. The most logical step at this stage (mid-November) in hindsight would have been for the General Council Chairman and the DG, WTO to suspend all attempts to launch a Millennium Round and settle for a Ministerial Declaration which merely said that discussions are still continuing on the WTO built-in agenda (Agriculture and Services), on "Implementation" Issues and on other "new" issues and that the Seattle Ministerial Conference will take stock of these discussions. After all, there would have been nothing wrong in a WTO Ministerial Conference which took stock of the situation. Every WTO Ministerial Conference held once in two years cannot possibly be either launching a Round or concluding one!

The reason why the above did not happen has to do with the following three "actors" as it were:

[39]WTO document JOB(99)/4797/Rev.3 (6986), November 18, 1999 contains all proposals and runs into 207 pages. WTO document JOB(99)/5868/Rev.1 (6223), October 19, 1999 runs into 35 pages—draft Ministerial text.

1. The Chairman of the General Council who is supported by the WTO Secretariat (a division known as the "Council and Trade Negotiations Committee Division") often finds himself under pressure to reconcile diametrically opposing points of view. He could have decided that there is a demonstrable lack of consensus to launch a Round. But then, he would have been criticized for throwing in the towel too early. So, he decided to faithfully reflect all points of view which obviously led to a very unwieldy "draft declaration" which Ministers were forced to grapple with. In retrospect, the Chairman of the General Council should have simply submitted a one-page statement to Ministers saying there was a lack of consensus on almost all issues and hence there was no realistic prospect of launching a Round.
2. The major WTO players, the US and EU in particular, were used to a situation of "no consensus" in Geneva and a "consensus" suddenly emerging at the last minute at the level of Ministers. There are reasons for this: one is obviously political pressure brought to bear on developing country Ministers and the other is the phenomenon of developing country (and least developed countries in particular) Ambassadors taking a strong negotiating position in Geneva only to find their Ministers succumbing to pressure in the end at Ministerial Conferences. So, the major WTO players always believe in keeping up the pressure till the very end.
3. The Director General, WTO and the Secretariat have understandable reasons for wanting the scope of WTO to keep "expanding" and at a minimum, to prevent the WTO from "atrophying". This inclination, which is strong in Directors General who want to make a name for themselves in the annals of trade history, sometimes runs counter to the will of the larger WTO Membership and inevitably puts the "member-driven" character of the WTO under strain.

For all of the above reasons, WTO Members arrived in Seattle end-November 1999 with virtually no agreement on any of the substantive issues. Ideally, if there was any chance of success, the Conference should have been held in a peaceful city far away from public gaze. Indeed, when the US first decided to offer itself as a host, there was some frivolous talk in Geneva that the WTO Conference should be held in Hawaii. But, it was felt that WTO is too serious a subject and that Hawaii would have been an inappropriate venue. In retrospect, as events were to prove, Hawaii may have been infinitely better as a venue than Seattle.

With so many substantive issues unresolved, the last thing the WTO Ministerial Conference needed was issues of logistics and massive NGO protests. Yet, this is precisely what happened at Seattle. I have no doubt that the US and Seattle authorities did their best but many WTO delegates till the last minute did not know which hotel they were going to stay in. As if this was not enough, even on 27 November 1999 (three days before the WTO Conference began on November 30) thousands of NGO protesters began converging on Seattle.[40] The International Forum on Globalization,[41] in fact, sponsored a "Teach-In" on the evening of November 26 at a Symphony Hall which apparently had a sell-out crowd of 2500 persons and no standing space. A number of articles have been written about the NGO protests at Seattle and it is not the purpose of this book to go into the nitty-gritty of who did what there. But, the NGO protests brought in an external environment which had a profound impact on WTO negotiation dynamics. And this needs to be examined in some detail.

The NGOs who descended on Seattle well before the WTO Ministerial Conference began on 30 November 1999 were of all hues and colours, sizes and shapes. There were, of course, the labour and environmental NGOs. There were Third-World NGOs. There were development NGOs. The interesting thing was that there was hardly anything in common between the scores of NGOs: in fact, they even disagreed violently among themselves about whether Labour or Environment should be included in the WTO's negotiating agenda. Thomas Friedman[42] famously described the protesters at Seattle as "A Noah's Ark of flat-earth advocates, protectionist trade unions and yuppies looking for their 1960s fix".

The truth was much more complex than that. There was one thing on which all the protesters in Seattle seemed to agree: Trade and the freedom of multinational corporations to invest and move capital, resources and products around the world is not the most important value.[43] What is most important is the enhancement of life—the life of the natural

[40] Ruth van Gelder, Sarah. 1999. "WTO in Seattle: The Millennium Round or Turnaround", *YES! Magazine*.

[41] www.ifg.org.

[42] *New York Times* columnist.

[43] Ruth van Gelder, Sarah. 1999. "WTO in Seattle: The Millennium Round or Turnaround", *YES! Magazine*.

environment and the people of the Earth. Martin Khor, the soft-spoken but leading activist who was also the Director of Third-World Network, expressed it more directly[44] when he argued that the main message of the protesters at Seattle was that the WTO had gone much too far in setting global rules that "lock in" the interests of big corporations at the expense of developing countries, the poor, the environment, workers and consumers. Thus, all the NGOs who represented (either fully or in part) developing countries, the poor, the environment, the workers and the consumers ganged up against the one thing that they hate: the transnational, big corporate interests which according to them were embodied by the WTO. In a detailed, if slightly one-sided, account of "the social meaning of the anti-WTO protests in Seattle",[45] it was said that the protests were also a result of socio-economic polarization in the US and the increasing distance between the representatives of big business and ordinary people. Whatever the reasons, it was clear that the massive NGO protests and the ensuing police action (including tear gas) enormously complicated the already difficult task of the WTO negotiators gathered in Seattle.

Rather than providing a conducive environment where unresolved issues can be debated upon, Seattle was not even able to provide for a smooth commencement of the opening ceremony. In fact, some 50,000 activists lay down in the streets in an enormous act of civil disobedience. The scene was both immensely moving and intensely chaotic. The very evening of 30 November 1998 the International Forum on Globalization had excellent, intellectual debates lined up. There were people like Ralph Nader who, predictably, spoke against the WTO. But, the best debate was probably the one between renowned Prof. Jagdish Bhagwati and the Indian activist Vandana Shiva.[46] It was thus ironic that the first day of the WTO Ministerial did not fully get off the ground. But, there were actually excellent debates going on in the NGO community. Anyway, Day 1 was effectively lost to negotiators.

[44] Khor, Martin. 2000. "The Story Behind Seattle", *The Guardian*, September 6.

[45] World Socialist Web site. 1999. "The Social Meaning of the Anti-WTO Protests in Seattle", www.wsws.org.

[46] Jagdish Bhagwati is a renowned Professor of International Trade. Vandana Shiva, a fiery activist, known for her radical views. See her article: "The Historic Significance of Seattle", December 1999, www.ratical.org.

We have already noted earlier how raising of Core Labour Standards by the US in Geneva was like waving a red flag to a bull, as far as developing countries are concerned. If there was one "deal-breaker" as far as the overwhelming majority of developing and least developed countries were concerned, it was Core Labour Standards. Bear in mind that a Working Group was proposed by the US late in the Geneva process and US negotiators had, in response to queries by developing countries, stated that it was a mere "study group" and that developing countries were unduly worried about it. Developing countries were, of course, convinced that the ultimate objective of the US (and the EU) was either protectionist or sanctions-oriented in the sense of targeting the products and services of those countries which, in their view, did not meet internationally recognized core labour standards. The EU, in fact, had made clear in internal Commission discussions that export processing zones of developing countries that do not meet core labour standards must be considered a trade-distorting subsidy and hence prohibited. Against this background, the interview by US President Bill Clinton on 30 November 1999 to Seattle Post-Intelligencer newspaper probably delivered a death-blow to any hope that the Seattle Ministerial Conference might succeed.[47] Because the comments by Bill Clinton created a ripple at the Seattle Conference among delegates, the question and part of the answer is reproduced below:

Question: Let me ask you about labour, which, you know, is a big issue here. What is your position on allowing trade sanctions against countries that violate core labour standards?

Answer: (President Bill Clinton): I think what we ought to do, first of all, is to adopt the United States' position on having a working group on labour within the WTO. And then that working group should develop these core labour standards and then they ought to be part of every trade agreement. And, ultimately, I would favour a system in which sanctions would come for violating any provision of a trade agreement. But we have got to do this in steps.

The above interview enraged the developing and least developed country Ministers who were aghast that the ultimate objective of the US proposal was basically to impose trade sanctions against developing

[47] Press Release of the White House, Office of the Press Secretary, December 1, 1999, "Remarks by the President in Telephone Interview with Seattle Post-intelligencer Newspaper".

countries which were seen as violating core labour standards. For President Bill Clinton to do this on the eve of a Conference already bedevilled by street protests, it could only mean one thing. President Clinton had already made up his mind that his domestic constituency and the protesters were far more important for his strategic political objectives than a merely successful WTO Conference. This interview completely overshadowed the luncheon meeting that he had with Trade Ministers attending the Conference. Suffice it to say, that the damage was well and truly done.

Notwithstanding the above, the US Trade Representative who was Chairperson of the Conference and Director General, WTO did not give up and continued to schedule meetings on 1 and 2 December 1999. The meetings happened in three different formats. One was what was known as the "Committee of the Whole" which included and was open to all Trade Ministers.[48] The problem, however, was that this Committee, on the whole, met for barely half-an-hour or so every day and adjourned because the Chairperson did not have anything to say except that negotiations are continuing and that no consensus has been achieved. The second format was the various Working Groups dealing with subjects such as Agriculture, Investment. Discussions in these Working Groups were more or less a replay of the discussions that transpired in Geneva. In other words, no delegation believed that the time had come to reveal its bottom line negotiating position. So, discussions bordered on the bizarre at times. Thus, two days before the Conference ended in failure, the Agriculture Working Group was debating the fundamental objectives of the agriculture negotiation whether agricultural products should ultimately be treated the same as industrial products.[49]

To make matters worse, the US insisted that as late as 2 December 1999 (one day before the Conference was scheduled to end) a Working Group be set up in Seattle under the Chairmanship of the Vice-Minister from Costa Rica to deal with Trade and Labour Standards. As one developing country negotiator put it, it just kept getting worse and worse.

The third format of the meetings was, of course, the most important. It comprised the QUAD (the US, the EU, Canada and Japan), India, Brazil, ASEAN South Africa (and a couple of other African

[48] WTO Briefing Note—"Ministers Start Negotiating Seattle Declaration", www.wto.org.
[49] Ibid.

countries), Argentina, Chile, Australia, Mexico and New Zealand. (The list is not exhaustive but indicative.) This was the so-called green room which nevertheless caused outrage to the vast majority of countries that were not part of this small group. This group must have met at least half a dozen times over the two or three days in Seattle that the Conference really lasted. But, on almost every issue there was a deadlock. The problem was that the major WTO players did not budge from their respective positions. The EU did not budge on Agriculture or on issues such as Investment and Competition. The US did not budge on Labour Standards. Developing countries such as India dwelt on "Implementation". Least Developed Countries felt marginalized and vented their spleen on the "green room" procedure and "lack of transparency" in the WTO.

The irony was that even the "green room" meetings were in a sense a replay of the Geneva process. But, behind the "green room" process, there were US/EU consultations to reach a broad consensus on the new round. If this had happened, then the "green room" meetings may have come alive, with pressure being applied on other countries to agree to a Round.

In the event, even a US/EU Agreement on something as fundamental as Agriculture eluded the WTO on the third day, i.e. 2 December 2009. Agriculture is always a bellwether issue in most WTO Ministerial Conferences. It is a necessary condition, though not a sufficient condition, for a successful WTO meeting. An added complication was the US proposal for a Working Group on Biotechnology. There were credible reports[50] that the European Commission did a tentative deal with the US that it would support the Biotechnology proposal provided the US lent support to the EU for inclusion of issues such as Investment in the new Round. The Commission had no mandate from the Member States for this; this was obvious when five European Ministers for environment and several other trade Ministers from Europe expressed total opposition to the inclusion of Biotechnology in the WTO. They would rather have this issue decided in the negotiations on Biosafety Protocol under the UN Convention on Biodiversity. This spat between the European Commission and some Member States muddied the water even further. A round on the afternoon of 2 December looked an impossible proposition.

All this while the green room meetings continued relentlessly. Yet, no one, either from the host country or the WTO Secretariat made a sincere

[50] "Seattle and the WTO: A Briefing", December 13, 1999, www.foei.org.

attempt to tell the vast majority of the WTO Membership about the state of play, as it were. This left the Ministers from a number of countries seething with rage, since they were just left to hang around and sip endless cups of coffee.

By the afternoon of 3 December, it became abundantly clear that there was absolutely no chance of bridging the differences and that the conference had simply run out of time.[51] Then, two extraordinary things happened which were without precedent in the annals of the GATT/WTO:

1. Angry and hurt at being excluded from the negotiations at Seattle, a group of African Caribbean Ministers (which also included a few Latin American Ministers) issued a strong statement that there was "no transparency" in the meetings which had excluded them from negotiations. They declared unambiguously that: "Under the present circumstances, we will not be able to join the consensus required to meet the objectives of this Ministerial Conference".[52] This kind of thing had never happened before and the above represented a massive indictment of the rules-based, multilateral trading system embodied by the WTO.
2. The WTO Ministerial Conference in Seattle concluded in ignominious failure without any agreed text—declaration, agreement, even a mere communication from the Chairman, DG, WTO or the organizers—which was unprecedented. The Chairperson of the Conference, the USTR, merely told the concluding plenary session that it would be best if the WTO took some "time out". Recognizing that the process leading up to Seattle was flawed, the Chairperson added: "During this time, the Director General of the WTO can consult with delegations and discuss creative ways in which we might bridge the remaining areas in which consensus does not yet exist, develop an improved process which is both efficient and fully inclusive and prepare the way for successful conclusion".

[51] See WTO Briefing Note—"Ministers Start Negotiating Seattle Declaration", www.wto.org.

[52] Khor, Martin. 2000. "The Story Behind Seattle", *The Guardian*, September 6, 2000. Also see: Bello, Wabden. 1999. *Debacle in Seattle: A Blow-by-Blow Account*, Transnational Institute, 6 December 1999, www.tni.org.

2.8 Why Seattle Failed?

If Marrakesh in 1994 saw WTO's zenith, then Seattle in 1999 certainly saw its nadir. The reputation of WTO took a sharp dive and questions began to be raised about its functioning, its legitimacy and even its relevance. There was a lot of soul-searching among the WTO Membership and the Secretariat. The NGOs and other activists, who were delighted at first, soon began to realize that WTO could not be wished away. Their main slogan in the aftermath of the debacle in Seattle was to insist on the need for transparency, democracy and equity in the functioning of the WTO.

There is now a plethora of literature on how and why the Seattle Ministerial Conference failed. Obviously, there was no one reason why it failed. There was a combination of circumstances which led to it. These are listed below:

1. The most fundamental reason was that there was no overwhelming desire on the part of the WTO Membership to launch a new Round. There were some exceptions to this: the EU was certainly a proponent of a Millennium Round but it failed to gather wide support. The US had domestic political concerns which trumped the launch of a Round. It was clear in retrospect that the US was simply not committed enough to succeed at Seattle. Even the most basic condition, i.e. convergence between the US and EU on the broad contours of a Round, was not met.[53]
2. Developing and Least Developed Countries had plenty of reasons not to subscribe to the idea of the launching of a Millennium Round.[54]
3. As we saw, the WTO itself was paralyzed for the better part of the year struggling to elect a new Director General. The process, when it was over, left the vast majority of the members dissatisfied and frustrated.
4. While the Chairman of the General Council and the Membership were to blame for sending an unwieldy text full of brackets to Ministers, the Director General and the Secretariat should have

[53] US General Accounting Office, Testimony Committee on Finance, US Senate, "Seattle Ministerial: Outcomes and Lessons Learned", February 10, 2000, Statement of Susan S. Westin, Associate Director, National Security and International Affairs' Division.

[54] Khor, Martin. 1999. *The Revolt of Developing Nations*, Third-World Network.

also had a plan "B". The fact that the Director General was recently elected and the fact that the Deputy Directors General were barely weeks at the WTO after joining also made a difference.

5. The ability of US officials to take care of logistics in Seattle left a lot to be desired. Not only was the organization of the Conference chaotic, when the WTO wanted the conference to go on for another day, the Mayor of the City reportedly said "No" to the premises!
6. It is customary to give "credit" to the multifarious activists and NGOs for wrecking the Seattle Ministerial. While there is no doubt that they did their bit to sink the Conference, it would be wrong to characterize this as the chief reason. The activists and NGOs merely picked the right moment from their point of view. The conference was doomed from the start anyway. The violent protests merely expedited the demise of the WTO Ministerial Conference.
7. Inept moves such as the US demanding the establishment of a Working Group for Core Labour Standards showed utter lack of regard for the sensitivities of developing and least developed countries. It made it easy for the latter group to say "no" to a Round.
8. There were genuine concerns on the part of small country delegations who were not being briefed by either the Chairman of the various Working Groups or indeed the WTO Secretariat as to what was going on. Even trade Ministers of these small countries were in the dark. Small wonder that the Least Developed Countries said they would not join the consensus since they were not even consulted on the draft.
9. It was unforgivable that the team of WTO Secretariat officials advising the Director General could not keep a one-page statement ready for the Ministers, if the Conference were to fail. This statement could have just recapitulated the meetings and said that Members took stock and will pursue negotiations in Geneva. In the event, Seattle will go down in history as the Conference that ended without even so much as a concluding statement.

2.9 Conclusion

At the conclusion of the Uruguay Round of multilateral trade negotiations, the general euphoria of setting up a brand new organization, viz. WTO was tinged with "negotiation resentment" on the part of certain

developing countries. This created a strong undercurrent which should have been addressed by the more powerful players either by showing sensitivity to the concerns of less powerful WTO Members or at the very least, refrain from doing anything that would add to more resentment. Yet, consider what the major trading entities did soon after WTO was established:

1. Marrakesh Ministerial Conference took place in April 1994. By the end of 1996 when the first WTO Conference took place in Singapore, the EU was pushing for a vast expansion of the negotiating agenda with subjects that later on were dubbed as the "Singapore Issues".
2. Both the major players, i.e. the US and the EU, pushed for inclusion of "Core Labour Standards", one way or the other, in WTO's negotiating agenda.
3. The call by developing countries for focus on implementation of the Uruguay Round Agreements fell on deaf ears. Indeed, "Implementation" Issues received no traction at all from the US and the EU.
4. The atmosphere in the WTO was also vitiated by the process of decision-making through which a new Director General was chosen. It was complicated by the fact that GATT/WTO had never had a Director General from a developing country and in the present instance there was a candidate from Thailand, which the US did not back and the EU, as always, was divided.
5. Internal transparency and inclusiveness became an issue in negotiations. Many developing countries and Least Developed Countries, in particular, were never invited to the "Green Room" process and felt totally excluded from the negotiating process. Things came to a head in Seattle, where a few trade Ministers belonging to African/Caribbean grouping simply walked out even before the negotiations collapsed.

The upshot of all this was that the "negotiation resentment" which was experienced by some developing countries at the conclusion of the Uruguay Round grew into something far bigger in Seattle and involved many more developing countries and almost all of the Least Developed Countries. For these countries, their trust in the multilateral trading system embodied by the WTO was broken. And thus emerged a "trust

deficit" between the most powerful WTO Members on the one hand and a large number of developing countries along with almost all the Least developed Countries, on the other. After the spectacular failure at Seattle, the WTO, therefore, faced twin challenges: one, a huge "trust deficit" among its Members; and two, loss of credibility and reputation vis-à-vis the outside world and civil society. It was, without doubt, WTO's hour of crisis.

CHAPTER 3

The Development Round

3.1 Background

We saw in the two previous Chapters how the negotiating environment in the World Trade Organization (WTO) was characterized by "resentment" among certain key developing countries at the conclusion of the Uruguay Round. We also saw that this was aggravated, partly through errors of omission and commission by the more powerful WTO Members, resulting in significant "trust deficit" by the time the Seattle Ministerial Conference ended in failure. It was not merely a lack of trust between the more powerful WTO Members and others, including the least developed countries; it was also that the latter group began to lose faith in the WTO as an institution that could understand their aspirations and allay their concerns.

The above, combined with the dismal failure of the WTO Ministerial Conference at Seattle led to a lot of hand-wringing and soul-searching both within and outside the WTO. It was not that WTO Ministerial Conferences had not failed before. But the dramatic manner in which the failure occurred in Seattle was unprecedented. No trade conference had ever witnessed violence and police teargas action as it did in Seattle. In fact, the Non-Governmental Organizations (NGOs) that descended in Seattle, though hugely different from one another, had only one aim: to ensure that the WTO did not succeed in launching a new Round. The organization and logistics of the Conference left a lot to be desired, especially when compared to other Conferences. Last, but not

© The Author(s) 2018

M. Kumar, *Negotiation Dynamics of the WTO*,
https://doi.org/10.1007/978-981-10-8842-1_3

least, the Seattle Ministerial Conference not only failed but also ended without anything being agreed to by Ministers. Indeed, even before the Conference was addressed for the last time by the USTR and the Director General, Ministers from some African and Caribbean countries were seen leaving the Conference premises in protest.

It was, therefore, natural that the WTO began a period of introspection and soul-searching characterized by serious discussion on the following issues:

1. *Transparency and Effective Participation*—The most important issue that came to the fore following the debacle at Seattle was the practice of decision-making in the WTO dubbed as the "Green Room" process. It refers to a fairly drab room (obviously Green in colour) next to the Director General's office at the WTO Headquarters, Centre William Rappard in Geneva. The room can hold no more than 35–40 persons at a time. The room was ideal in the pre-Uruguay Round days (before the WTO came into being) of General Agreement on Tariffs and Trade (GATT) when the so-called QUAD (the US, the EU, Japan and Canada) used to meet with the Director General, WTO and a couple of other interested delegations to set and where possible, conclude the agenda of the multilateral trading system. It was a perfectly logical way to conduct business when the total membership of the GATT was around 50 and the real shakers and movers were no more than a dozen to fifteen countries. With the advent of the WTO, however, there were at least one hundred different member countries. It would have been totally unrealistic to expect a majority of these countries to be outside the Green Room twiddling their thumbs when the subject matter being discussed could lead to binding obligations for all concerned.

   Indeed, in the first substantive meeting of the General Council held on 7/8 February 2000 after the Seattle debacle, the Director General sought to address the issue of "internal transparency" and "effective participation" of all its WTO Members.[1] The Director General promised that consultations would be held with Heads of Delegation to discuss these and other issues. While recognizing that the Seattle Conference failed more because of substantive

[1] WTO document, WT/GC/M/53, March 15, 2000, www.wto.org.

issues rather than procedural ones, the issues of "transparency" and "effective participation" dominated meetings in the WTO for quite some time following the Seattle Conference. The majority view that emerged was that while Green Room meetings may be unavoidable, the existence of those meetings must be known beforehand to all delegations. Also, it was felt that the Green Room meeting must be invariably followed by a meeting of the full Membership of the WTO. Some other demands made by several small-sized delegations were that there should not be more than two or three meetings at the same time (Pakistan called this the rationalization of the pace and rhythm of meetings) as well as calls for balanced representation in the Secretariat (also Pakistan). Politics aside, the size of several developing country delegations and most least developed country delegations was a serious problem since they had no more than a handful. Add to it the fact that a negotiator from the US or EU has probably spent half his lifetime doing WTO, then one began to see a real "negotiating mismatch".[2] Both the number and skills of trade diplomats put developing countries, especially least developed countries (LDCs) at a serious disadvantage vis-à-vis their developed trading partners.

2. *Least Developed Countries (LDCs)*—One of the surprising aspects of the Seattle Ministerial Conference was the "walk-out" referred to earlier of Ministers belonging to LDCs, in sheer anger because they either did not know what was happening in closed-door negotiating sessions or they were strongly opposed to issues such as Core Labour Standards. It was, therefore, not surprising that LDCs, who had hitherto been given mere lip-service by WTO, began to be taken seriously. Thus, the Director General in his intervention to the General Council in February 2000 stressed that measures in favour of LDCs encompassing both market access and capacity-building (which were under discussion prior to Seattle) would be taken up as a matter of priority. This was clearly intended to mollify the LDCs who had walked out of the Seattle Ministerial Conference.

[2] In 1995, the Indian Mission to the WTO had only 3 diplomats including the Ambassador himself. At present there are 9 diplomats. But countries like India and Brazil are the exception rather than the rule.

3. *Decline of QUAD*—One thing that the Seattle Ministerial Conference illustrated beyond a shadow of doubt was the decline of the so-called QUAD, i.e. the US, the EU, Japan and Canada. It became clear after Seattle that agreement among QUAD countries may be a necessary condition but certainly not a sufficient condition for launching a Round. The rise of developing countries such as Brazil and India as also entities such as ASEAN ensured that a grouping such as QUAD could not entirely dominate the agenda and the decision-making process in the WTO.

   The reasons for this shift are not far to seek. For one thing, sheer economic power was shifting already to the BRIC countries. Although the term BRIC (Brazil, Russia, India and China) was coined by Goldman Sachs only in 2003, the writing was on the wall even in 1999/2000 when the top ten GDP countries included both Brazil and India (China became a member of WTO at Doha in 2001).[3] Furthermore, it was the potential for market access in countries such as India that gave it enormous negotiating leverage. Indeed, in India's case, it is quite striking that its share of global trade in 1999/2000 was no more than 1%—quite unimpressive for a country the size of India. However, the fact that India had a large middle class (300 million persons by some accounts) made it an attractive market for its trading partners, thus giving it valuable negotiating leverage.

   In the Uruguay Round, it was the QUAD which first settled things among themselves and then gradually extended it through "concentric circles". After Seattle, it became clear that countries such as India, Brazil and ASEAN had to be co-opted right from the beginning in agenda setting and decision-making. This is one of the main reasons why negotiation dynamics and decision-making has become incredibly complicated and time- consuming in the WTO. One consequence of this is that Rounds take long to launch and even longer to conclude.
4. *The rise of NGOs*—As we saw in the last Chapter, the Seattle Ministerial Conference saw the largest number of NGOs) in the history of WTO as compared to the earlier Ministerial Conferences held in Singapore and Geneva.[4]

[3] "Top 10 GDP countries 2000–2050", 2005. *Source* Goldman Sachs, www.geographic.org.

[4] "NGO participation in Ministerial Conferences", www.wto.org.

We have seen the reasons for the rise of NGOs in the last Chapter. What is interesting is that developing country negotiators who initially distrusted NGOs and thought they had a "Western agenda" later on came to realize that these NGOs were allies of the developing countries when it came to issues such as the TRIPs and Public Health. This was a novel feature in WTO negotiations.

5. *Negotiating Skills*—As we noted previously, developing country negotiators were at a serious disadvantage in the Uruguay Round. It is fair to say that the negotiating skills of their trade diplomats were not sufficiently honed, not to mention the fact that in terms of numbers they were severely outweighed by their developed country trading partners. Once WTO came into being, a number of developing countries led by India and Brazil started developing a small core of WTO negotiators who could then handle the negotiations effectively.

This then was the broad background against which the WTO started finding its feet again after the dismal failure at Seattle. The most influential countries of the world had invested heavily in the WTO and hence could not afford to see it "fail" again. More importantly, however, WTO's public image had taken a severe beating and amends had to be made.

The WTO discussions immediately following the debacle in Seattle focused understandably on three issues: transparency (both internal and external) of the functioning of the WTO; concerns of LDCs; and the issue of "Implementation" of interest to developing countries. It will immediately be observed that the WTO was desperately trying to accommodate the constituencies that were seen as responsible for the Seattle outcome. Thus, the NGOs wanted a bigger say in WTO—hence focus on transparency. The Least Developed Countries were angry at being excluded in Seattle—hence emphasis on their effective participation. And some developing countries were resolutely opposing a new Round—hence emphasis on "Implementation".

The WTO reacted in the manner it knows best: meetings of the General Council or Heads of Delegations chaired either by the Chairman of the General Council (usually an Ambassador of a country who is elected by the Membership) or the Director General of the WTO.

3.2 Internal Transparency

In the aftermath of the failure at Seattle, it was the issue of internal transparency that got a lot of attention. After all, many developing and almost all LDCs had expressed dissatisfaction at being completely left out of informal/Green Room consultations prior to and at Seattle. From February to July 2000, the Chairman of the General Council held numerous consultations/discussions with the WTO Membership on the issue of internal transparency. These meetings had one great value: allowing some developing countries and a lot of LDCs to "let off steam" and "get it off their chest". Their arguments were essentially that they were kept in the dark about informal negotiations. There were so many meetings at times that they found it impossible to attend all of them. It was, therefore, proposed by them that all negotiations henceforth take place in "open-ended plenary" sessions. With the WTO Membership well over 100 at the time, this proposal was clearly untenable. After much discussion and debate, the broad conclusion reached by July 2000 on the issue of "internal transparency" was the following[5]:

- No need for any major institutional reform which could alter the basic character of the WTO as a member-driven organization;
- Decision-making in the WTO to continue on the basis of consensus;
- Recognition that interactive open-ended informal consultations play an important role in facilitating consensus in negotiations;
- But as a complement (and not as a replacement) to the above, consultations to also take place with individual or small groups of WTO Members subject to: the Membership being advised of such consultations, Members with an interest in the issue to be given an opportunity to make their views known; and the outcome of such consultations are reported back to the full membership.

The above conclusions were anything but dramatic. However, they served to underline the broad parameters within which the negotiation dynamics occurred in the WTO. Any dream of radical overhaul in the wake of Seattle was highly misplaced. The fundamental character of the WTO is that it is member-driven, code for an intergovernmental

[5] WTO document, WT/GC/M/57, September 14, 2000, www.wto.org.

organization. This essentially means that it is the governments of countries that are entitled to negotiate in the WTO and set rules, since it is they who have to fulfil their obligations under WTO law. So, demands that NGOs be allowed to observe or participate in negotiations were set aside. WTO is intergovernmental in nature and it was going to remain that way.

The idea of decision-making by consensus deserves some explanation. WTO decisions, by and large, are taken on the basis of consensus. Indeed, Article IX entitled "Decision-Making" of the WTO Marrakesh Agreement establishing the WTO is clear on the subject: "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. A footnote makes it clear that the WTO shall be deemed to have decided by consensus on a matter submitted for its consideration, if no WTO Member, present at the meeting when the decision is taken, formally objects to the proposed decision. It is important to understand the logic behind this. It is not as if voting is not provided under WTO rules. Indeed, the same Article IX provides that any decision to adopt an interpretation (of any WTO Agreement) shall be taken by a three-fourth majority of the Members. Yet, the WTO never resorts to voting and has continued the practice of decision-making by consensus. This is because powerful countries like the US cannot easily agree to voting in an organization such as WTO that is now dominated by developing and least developed countries in terms of numbers. The alternative is, trade-weighted voting, which a number of developing and least developed countries will not accept. Given this, the WTO has continued the sensible practice of decision-making by consensus which all Members are comfortable with.

Another important aspect of the negotiation dynamics of the WTO is the prevalence of consultations among small groups of Members (such as the Green Room process). This procedure had come in for bitter criticism after Seattle. But after detailed discussion, the conclusion reached was that there was simply no alternative to this procedure for building consensus in the WTO. The stipulation, however, that this must be intimated to the fuller membership both before and after it happened, is a good measure that went some way in redressing the situation in favour of developing and least developed countries. The blunt truth of the matter is that WTO decisions once taken affect all WTO Members, albeit in varying degrees. These decisions when taken result in obligations for Member states that are binding because of the rigorously enforceable

dispute settlement mechanism. As a result, no WTO member, big or small, strong or weak, would wish to have decisions for itself taken by others and would, at a minimum, wish to be consulted at some stage of the decision-making process. Any attempt to have a representative negotiating group (either geographical or otherwise) in the WTO so far has not met with much success. Thus the European Community did make the proposal[6] on the feasibility of establishing a "Consultative Group" which would be broadly representative of the WTO Membership which apart from advising the Director General would have the task of presenting recommendations to the WTO General Council. This was not an entirely original idea since there was such a body in the GATT called Consultative Group 18 (CG18) established in 1975.[7] Nevertheless, it was interesting to see that the proposal by EC did not receive much traction among the wider membership. In fact, the developing and the Least Developed Countries were cool to the idea of a "Consultative Group" in the fear that they would be left out or that the decision-making would become non-transparent. The EC proposal of a "Consultative Group", therefore, never saw the light of day.

Other proposals in the EC discussion paper,[8] however, were useful such as measures to foster the flow of information and participation to all WTO Members, especially those countries that do not have resident representatives in Geneva or those that have small diplomatic missions. The African Caribbean Pacific (ACP) countries were particularly handicapped in this regard. The establishment of an ACP/Liaison Office was suggested by EC (a proposal made good eventually when the Liaison Office was set up in 2002). The measures proposed to improve Ministerial meetings and the General Council were rather commonsensical. For instance, it was suggested that "both in the preparatory process and in the Ministerial Conference itself, there has to be a proper combination of informal processes and meetings open to all WTO members". It was pointed out that there needs to be a clear delineation between the role of the host country and that of the Director General. At the risk of stating the obvious, the EU discussion paper argued that the structure

[6] European Community. 2000. *Improving the Functioning of the WTO System*, WTO document WT/GC/W/412, October 6, 2000, www.wto.org.

[7] For a critical analysis of this body see: Ostry, Sylvia. 2004. *The World Trading System: In the Fog of Uncertainty*, Lehigh University.

[8] WTO document WT/GC/W/412, October 6, 2000, www.wto.org.

for negotiations must be set in advance of the Ministerial meeting and planning should ensure that necessary time is given to the actual negotiation of texts. The fact that all these commonsensical proposals were put in writing is a damning indictment mainly of the way in which the Seattle Ministerial Conference was conducted.[9] The WTO Membership, therefore, had no problem learning from the disastrous experience of the Ministerial Conference in Seattle.

The role of the WTO Secretariat in general and the Director General in particular needs to be underlined because they do play a key role in the WTO negotiations. It is almost a cliché to say that the "WTO is a member-driven organization". Ergo, the WTO Members and they alone determine the nature, scope and the outcome of the negotiations. This is largely true. However, the WTO Secretariat and the Director General do play a role that needs to be understood by all stakeholders.

At the outset, it bears mentioning that the WTO Secretariat has a bunch of extremely qualified and competent professionals working for it. As an international organization, the WTO has probably the leanest Secretariat anywhere in the world.[10] As someone who has closely interacted for a long time with WTO officials at all levels (both in the multilateral negotiations and in the dispute settlement panels) there is little doubt in the mind of the author that the WTO is largely manned by persons of integrity and competence. The trouble is that the Director General and his senior advisers may be inclined to identify their interests so closely with those who are proponents of a Round that the interests of the minority and the less powerful are liable to be ignored. This is almost certainly what happened at Seattle. The inclination of Directors General to go down in history as someone who either launched a Round or concluded a Round can also have an unintended pernicious effect on the negotiation dynamics.

It is important, therefore, to elaborate further on what role the Director General (and more generally, the Secretariat) plays in WTO negotiations. The fact that WTO Members zealously guard their rights to determine the nature, scope and outcome of multilateral trade negotiations could, in theory, mean that the Director General is a "supreme facilitator" and the Secretariat an "assistance giver". And indeed, both

[9] WTO document WT/GC/W/471, April 24, 2001, www.wto.org.

[10] The WTO Secretariat has, for instance, only 629 regular staff. See "Overview of WTO Secretariat", www.wto.org.

the Director General and the Secretariat are expected to do this. The trouble is when the membership is divided on very important issues and how to get out of the impasse. Of course, the WTO Secretariat (and the Director General) then organizes informal consultations to see if the impasse can be broken. If a solution is found, then the Director General has fulfilled his role as "supreme facilitator". But what if the impasse continues. That is when the role of the Director General and the Secretariat becomes critical. Either he does nothing, especially if he thinks the climate is simply not right. Or, he could come up with proposals on his own initiative aimed at bridging the divide. Or he could even contact capital-based officials (sometimes over the Heads of Ambassadors resident in Geneva) to try and convince them to change country positions. All of this is done "informally" since the Director General up until 2001 (Doha Ministerial Conference) had no formal powers in this regard. But the Doha Ministerial Declaration issued in November 2001 does establish a Trade Negotiations Committee whose Chair is the Director General of the WTO.[11] This did result in formal powers being given to the Director General of the WTO for the first time (although informally, it was Arthur Dunkel who may be said to have exercised those powers by putting out the Draft Final Act on the basis of which the Uruguay Round was eventually concluded).

Not all WTO Members were entirely comfortable with the decision taken to make the Director General of the WTO the Chairman of the Trade Negotiations Committee, the supreme negotiating body in the WTO. So, in the very first meeting of the newly established Trade Negotiations Committee on 1 February 2002, the Chairman of the General Council made a statement[12] assuaging the concerns of those WTO members who feared that the hitherto "member-driven" nature of the WTO was being watered down. In his statement, the Chairman of the General Council was at pains to point out that the Trade Negotiations Committee will work under the authority of the General Council. Furthermore, he assured WTO Members that the Trade Negotiations Committee should follow the WTO General Council's rules of procedure "mutatis mutandis i.e. with only such adjustments as may be found necessary". The statement also called on Chairpersons

[11] Doha Declaration, WTO Publication, p. 91, WTO DG to head TNC.

[12] WTO document, TN/C/1, February 4, 2002, www.wto.org.

of the Trade Negotiations Committee and its Negotiating Bodies to be impartial and objective and to ensure transparency and inclusiveness in decision-making as well as facilitating consensus among participants.

The very fact that the above points had to be made in the very first meeting of the Trade Negotiations Committee is indicative of the tension that exists sometimes between some developing/LDCs as well as the WTO Secretariat (including the Director General). This has existed from the time of the launch of the Uruguay Round. But as the WTO has grown more and more powerful, its Members have become more and more interested in its proceedings because it concerns them directly in terms of binding obligations. It is the author's view that there is nothing wrong in WTO Members guarding their rights zealously and safeguarding their country positions, since they and they alone are responsible for implementing their WTO obligations. As for the WTO Secretariat, they need not be too bothered about the prickliness of certain WTO Members. It is incumbent on the WTO Secretariat led by the Director General to win the trust of not only the most powerful WTO Members but also the least powerful. It is worth pointing out that it is these two categories, i.e. WTO Members and the WTO Secretariat and their interaction both within themselves and between themselves that constitutes a crucial part of the WTO negotiation dynamics. To be sure, the WTO Members call the shots. But the Director General and the WTO Secretariat facilitate the negotiations and are expected to provide an enabling and objective environment for the same.

3.3 External Transparency

The issue of "external transparency", as might be expected, also came into sharp focus in the aftermath of the Seattle Ministerial Conference. One criticism levelled against the WTO at Seattle and elsewhere was that the WTO functioned in a non-transparent manner and was completely closed to the outside public. For a long time, some influential NGOs have argued that they must be given a chance to observe and even participate in WTO proceedings and negotiations. The NGOs certainly made their presence felt in Seattle. It was, therefore, natural that the US bore the brunt of the NGO wrath as it were, as did the Europeans to a lesser extent.

For the vast majority of developing countries and the Least Developed Countries, the issue of external transparency was a sensitive one. As it is, they felt the negotiating framework in the WTO was tilted against

them. These countries feared that if the NGOs (the bulk of which were based in the West) were given a voice in WTO negotiations, then, it would become even more loaded against them. The other important reason that developing countries and LDCs opposed NGO participation in the WTO was that a lot of NGOs that took interest in the WTO in the eighties and the nineties were those that espoused environmental and labour standards in multilateral trade negotiations. It may be recalled that developing countries and LDCs strongly opposed the inclusion of environmental and labour standards within the ambit of WTO. They saw these, with some justification, as measures aimed at protectionism and at changing the rules of the game. As a result, developing and LDCs were determined not to allow any participation of NGOs in WTO negotiations.

The question, therefore, was how to meet the public outcry primarily in the West that the WTO was a non-transparent organization. Guidelines in the WTO relating to arrangements on relations with NGOs dated back to 1996.[13] That decision made it clear that Members underlined the special character of the WTO, which was both a legally binding, intergovernmental treaty of rights and obligations among its Members as well as a forum for negotiations. It went on to say that as a result of extensive discussions, there was currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. The 1996 decision also noted that primary responsibility for close cooperation and consultation with NGOs lay with WTO Members themselves within their national jurisdiction.

The question before the WTO after the debacle at Seattle was whether the above decision needed to be reviewed and if so, in what manner. Predictably, it was the US which proposed radical departures to the 1996 decision. In a submission to the WTO General Council on the subject,[14] the US suggested opening up the various WTO Council and Committee meetings on an experimental basis including webcasting some meetings of the WTO Trade Policy Review Body. More importantly, the US proposed that in dispute settlement proceedings (which were hitherto closed-door) a mechanism be developed to permit NGO stakeholders to present their views on disputes and also permit the public

[13] WTO document, WT/L/162, July 23, 1996, www.wto.org.

[14] WT/GC/W/413/Rev.1, October 13, 2000, www.wto.org.

to observe WTO panel and appellate body proceedings. Canada did not go as far as the US but also expressed itself in favour of webcasting a limited number of meetings such as Trade Policy Review.[15] EC in its paper[16] suggested opening up the meetings of the Trade Policy Review but on a voluntary basis. The very fact that it is the Trade Policy Review meetings that were sought to be opened up for observation by NGOs is interesting. Of all the meetings of the WTO this was probably the "softest" in the sense that these meetings make observations and recommendations which were promptly forgotten by the country whose trade policy was being reviewed. In other words, the recommendations of the Trade Policy Review Body were not legally binding. On the other hand, opening up the dispute settlement proceedings to NGOs was like waving the red flag to a bull as far as the vast majority of the WTO Membership was concerned. This proposal was, therefore, "dead on arrival".

For countries like India, the question was not whether the Trade Policy Review meeting could be webcast or not. The question was, if you agree to webcast the Trade Policy Review meeting today, it was a matter of time before dispute settlement proceedings were also thrown open. Already, the developing countries were at a disadvantage. Add to it the fact that most of the powerful NGOs were based in the West (PhRMA, OXFAM, AFL–CIO, Friends of the Earth, etc.) there was no doubt as to which way the structure would be skewed. The decision was also coloured by the issue of "amicus curiae" briefs on which the Appellate Body had already taken a view, in total disregard to the majority opinion in the WTO.[17] In one of the earliest instances of judicial activism, the Appellate Body gave a convoluted justification in the Shrimps-Turtle case as to why Panels can indeed consider "amicus curiae" briefs, even if these were thrust upon it without it being sought by the Panels. Developing countries led by India were aghast at this interpretation and bitterly contested the verdict of the Appellate Body.

After much debate and discussion, the issue of "external transparency" led to the following conclusions:

[15] WT/GC/W/415, October 17, 2000, www.wto.org.

[16] WT/GC/W/412, October 6, 2000, www.wto.org.

[17] For a good article on the subject please see: Mavoidis, Peter C. 2002. "Amicus Curiae Briefs Before the WTO: Much Ado About Nothing", Jean Monnet Working Paper 2007.

- WTO website to be developed into an important tool for provision of information about all activities in the WTO;
- A number of symposia organized by the Secretariat[18] for NGOs on specific issues of interest to them such as environment, trade and development and trade facilitation. These symposia, in which the author personally participated as a WTO negotiator, provided an opportunity for interaction between NGOs and the WTO Membership;
- The WTO Secretariat receives a large number of requests from NGOs and Secretariat officials who either send an e-mail or meet them to provide information. Indeed, the External Relations Division of the WTO has a programme of regular briefings for NGOs;
- The issue of derestriction of documents became a real saga in the WTO. The discussions and negotiations that took place under the Chairman of the General Council continued well into the middle of 2002 when a decision was adopted by the General Council.[19] The most important aspect of the decision was that all official WTO documents shall be unrestricted. The decision went on to provide that even if a WTO Member submits a document as restricted, it will be automatically derestricted after its first consideration by the relevant body or 60 days after the date of circulation, whichever is earlier. Also, minutes of meetings will be derestricted 45 days after the date of circulation. These were far-reaching decisions with regard to external transparency if you consider the background of what happened in the past in GATT and WTO. This went a long way in meeting the demand of NGOs and others who have wanted to follow closely the meetings in the WTO.

The bottom line, however, is that the vast majority of the WTO membership felt strongly that the intergovernmental nature of the WTO or the existing representation system of the WTO should not be changed. Subject to this proviso, it is true that there is now much more information about WTO available in the public domain than at any time in the past.

[18] "Relations with Non-Governmental Organizations/Civil Society", www.wto.org.

[19] WTO Document, WT/L/452, May 14, 2002, www.wto.org.

3.4 Participation of LDCs

One of the reasons for the spectacular failure at Seattle was the total disenchantment of the LDCs with the multilateral trading system embodied by the WTO. Many of these countries did not have resident representatives in Geneva to follow the WTO negotiations closely. Even if some of them did, they did not have the human resources and the necessary skills to even cover the meetings, let alone participate meaningfully in the negotiations.

In the absence of meaningful participation in negotiations in specific areas, the mantle of leadership fell on a few countries such as Bangladesh which was the spokesperson for LDCs in the WTO. A lot of assistance by way of proposals and negotiating demands were offered by United Conference on Trade and Development (UNCTAD) and UNDP, not to mention the WTO Secretariat itself from time to time. This led to proposals for a Comprehensive New Plan of Action (CNPA)[20] which spoke of the fundamental challenge of integrating LDCs into global economy. These were first addressed in the context of the Seattle Ministerial Conference.

Even though the Seattle Ministerial Conference itself ended in failure, the draft Ministerial declaration[21] (which did not see the light of day) considered in Geneva made a number of useful proposals:

- Extension of duty-free, quota-free market access for (all) products originating in least developed countries;
- Implementation of the Integrated Framework for Trade-Related Technical Assistance[22];
- Extension of Transition period for LDCs in some WTO Agreements;
- Standstill on all contingency protection measures on market access for the export products of LDCs; and
- Acceleration of the process of accession of LDCs in a manner in which acceding Members are not asked to undertake more obligations then for existing WTO LDC members.

[20] WTO document, WT/GC/W/251, July 13, 1999, www.wto.org.

[21] WTO document, JOB(99)/5868/Rev., October 19, 1999, www.wto.org.

[22] "Integrated Framework for Trade-related Technical Assistance", www.wto.org.

It will be seen that the proposals, while not earth-shaking, at least went some way in meeting the collective aspirations of the LDCs. Alas, the Seattle meeting collapsed and with that, the hopes of the LDCs. In fact, at the General Council meeting immediately following Seattle in February 2000, the representative of Bangladesh in his intervention[23] bemoaned the fact that even in the final draft in Seattle, the declaration did not include the proposal on the extension of duty-free, quota-free market access for (all) products originating in LDCs. He urged the WTO to implement all the proposals of the CNPA without delay.

Discussions in the WTO continued on and off on the issue of LDCs. But, apathy from the developed countries was now mixed with a touch of anger because the LDCs (some of them) "walking out" from Seattle was not appreciated by the powerful players in the WTO or indeed by some in the WTO Secretariat.

In May 2001, there was a high-powered UN Conference in Brussels on the LDCs which again[24] focused on the proposals relating to CNPA. Again there were no significant concessions from the developed countries in favour of LDCs, especially on the issue of market access.

A word on the LDCs in the WTO. It is the UN which decides which countries are LDCs on the basis of specific criteria such as low income, human resource weakness and economic vulnerability.[25] On this basis, there were 50 countries designated as LDCs in March 2009 (the list keeps changing since some countries are graduated from the list and some others added to it from time to time). Out of this list of 50, the WTO counted 32 as its Members.[26] Many of these countries such as Solomon Islands do not have a resident mission in Geneva. Most others who do have a Mission in Geneva do not even have one diplomat entirely devoted for WTO Issues.

It is worth noting that the merchandise export share of the LDCs in 1960 was around 2.5%. In 2006, it amounted to a mere 0.9%.[27] If you take only the 32 WTO LDCs, this share will be even lesser.

[23]WTO document, WT/GC/M/53, March 15, 2000, www.wto.org.

[24]ICTSD, BRIDGES Monthly Publication, May 2001, Year 5, No. 4, www.ictsd.org.

[25]UN Office of the High Representative for LDCs, www.unohrlls.org.

[26]List of LDCs who are WTO Members, www.wto.org.

[27]Statement made by Bangladesh on Behalf of LDCs at the UN General Assembly in May 2008 on the subject of "Monetary consensus", www.un.org.

Thus, from a trade clout point of view, these countries are not in a strong position. On top of that, these are also not huge potential markets. It would, therefore, be easy to assume that their demands for market access in the developed country markets would be granted by the latter without much difficulty. And yet the developed countries did not really grant any meaningful market access to LDCs up until 2002 when the US had American Growth Opportunity Act (2002) and the EU's famous Everything But Arms Program (2001).[28]

In the run-up to Doha, it became clear that concessions, if any, would be granted only as part of quid pro quo the launch of a new Round. Indeed, this was the fundamental problem faced by LDCs with the WTO negotiation dynamics. We have seen by now that there was no concession which can be secured by a country without paying a price. The trouble was that LDCs did not have a whole lot to "give" as it were. On the other hand, by choosing to participate in the multilateral trade negotiations, albeit in a limited manner, they lend the WTO both legitimacy and credibility. And in return for this, they are entitled to their demands being met.

The WTO's record with regard to most things ranges from spectacular to decent depending on the subject area. But if there is one area where the WTO's record is shameful, it is in acceding to the demands of market access of the LDCs. While there was progress in the WTO by way of the Integrated Framework for Technical Assistance,[29] there was no progress in the run-up to Doha in regard to other key demands relating to market access and to obligations for new acceding LDC Members of the WTO.

On the issue of market access to LDCs it is worth noting that almost 90% of tariff lines of products belonging to these countries enter duty-free into most developed countries. The problem, however, is that there are quotas and prohibitive tariffs which restricted access of their most competitive agricultural and textile products. Even the much-touted UN declaration[30] on LDCs in Brussels in May 2001 only spoke of "aiming at" improving preferential market access for LDCs by working towards the objective of duty-free and quota-free market access for all LDCs products in the markets of developed countries. It is ironical that the

[28] For a comparison on the subject please see USDA Economic Research Service, www.ers.usda.gov.

[29] www.wto.org.

[30] "Brussels Declaration", UN General Assembly document A CONF 191/12. July 2, 2001, www.un.org.

Brussels declaration recognized that the primary responsibility for development in LDCs rests with LDCs themselves.

The two paragraphs (42 and 43) of the Doha Declarations devoted to LDCs did not inspire great enthusiasm. While recognizing that the integration of the LDCs into the multilateral trading system required meaningful market access, WTO Members committed themselves to the objective of duty-free, quota-free market access for products originating from LDCs. Please note that not only have the developed countries not agreed to granting meaningful market access to LDCs, they have also cleverly managed to water down their responsibility by now saying that all WTO Members (including developing and LDCs themselves) commit to the objective of market access to LDCs. This is one area where the political will has been found to be wanting in the WTO. And yet, it was so important to have the LDCs firmly anchored in the multilateral trade negotiations since their participation lent legitimacy and credibility to the WTO.

3.5 Choice of Doha as Venue for the Ministerial Conference

The choice of Doha as venue for the fourth Ministerial Conference of the WTO has a little bit of background to it. Article IV of the WTO Agreement[31] provides that: "There shall be a Ministerial Conference composed of representatives of all Members, which shall meet at least once every two years". In the discussions leading up to the Marrakesh Ministerial Conference in 1994, there was a debate on this very issue. A view was expressed that the Ministerial Conference should meet every year. After discussions, it was felt that once every year would be too frequent and since preparations for Ministerial Conferences do take up a lot of time and resources, a Ministerial Conference every year will lead to WTO being in a state of perpetual preparations. On the other hand, once every three years was considered too long a gap for the WTO Ministers to meet. Indeed, it is worth noting that the structure of the WTO is designed in such a way that the Ministerial Conference is at the apex and is authorized "to take decisions on all matters under any of the Multilateral Trade Agreements….".[32] Having agreed that the Ministerial

[31] The Legal Texts, Marrakesh Agreement Establishing the WTO, Article IV, www.wto.org.

[32] Ibid.

Conference should meet every two years, there was a discussion about the venue. At the time, countries such as the US and India felt that it was best if the Ministerial Conferences took place in Geneva, the seat of the WTO. On the other hand, there were countries which felt that the WTO needed to be showcased outside Geneva and that different countries should get a chance to host the Ministerial Conference. After the WTO entered into force the government of Singapore displayed great enthusiasm and keenness to host the first WTO Ministerial Conference. Singapore managed to convince the US and others that the first WTO Conference must take place in Singapore, especially since Singapore had good free trade credentials in the multilateral trading system.

The Second Ministerial Conference was held in Geneva in 1998 and it was felt that from then on all Conferences would take place in Geneva. But two things happened to ensure that this would not be the case. For one thing, the 1998 WTO Ministerial Conference experienced street demonstrations which turned into rioting. The Swiss authorities let it be known that they would be reluctant to host WTO Conferences for a while. So, when the US proposed that the third Ministerial Conference could be held in Seattle, it was an offer the WTO could not refuse since it came from WTO's most powerful Member. We have seen in the last chapter how the Ministerial Conference in Seattle collapsed in dramatic fashion.

After the debacle, almost no country in the West with a strong NGO movement came forward to offer hosting a WTO Ministerial Conference. Indeed, the Swiss got extremely worried that the fourth WTO Ministerial Conference would be held in Geneva by default. Anticipating this, the Swiss authorities made it clear that they would find it difficult to host a WTO Ministerial Conference. In the absence of any country coming forward, the State of Qatar early in 2000 offered to host the fourth Ministerial Conference of the WTO. But instead of WTO Membership jumping at the offer, what followed was a lot of foot-dragging by key WTO Members; the WTO Secretariat even tried to dissuade Qatar from pursuing its offer. The first contact between the Qatari Mission in Geneva and the WTO Secretariat took place in July 2000. But in October 2000, the WTO Secretariat circulated a note[33] in which the Conference facilities in Doha were outlined following a visit

[33] WTO document, WT/GC/35, October 17, 2000, www.wto.org.

by the Secretariat to Qatar in September 2000. At the end of the above note, the WTO Secretariat's verdict was clear: it might be difficult to hold a Ministerial Conference in Doha.

In January 2001, the State of Qatar circulated a communication to the WTO General Council.[34] It reminded the General Council that the offer to host the Ministerial Conference by Qatar had not even been "duly discussed" by the WTO General Council and considering there was no other official offer by any other country, Qatar urged "a speedy decision" in the matter. Indeed, Qatar issued an ultimatum by saying that if the WTO General Council postponed a decision in this regard beyond 26 January 2001, then, the State of Qatar reserved the right to reconsider its offer.

After the above ultimatum of Qatar, the WTO General Council took a formal decision on 8 February 2001 to accept the offer of the State of Qatar to host the fourth Ministerial Conference.[35] Despite this, however, there were always some reservations held by key developed countries about the choice of Doha as venue. In private conversations, it was argued that Qatar would be a bad advertisement for WTO, given that there was neither human rights nor free trade practiced there. The plight of the Qatari authorities was rather unenviable, because despite making best efforts they were not being given either recognition or full certainty that the Conference will go ahead in Doha. And then, September 11 (9/11) terror attacks happened in the US and the issue of security also came to the fore about the Conference being hosted by Qatar, an Islamic country. Meanwhile, Qatar, which is a proud and self-respecting country, decided it will pursue its offer to host a Ministerial Conference, if necessary to the bitter end.

In October 2001, there was a mini-Ministerial Meeting of some key 22 WTO Members at Singapore. At this meeting, there were credible reports that a possible change of venue from Doha to Singapore was considered.[36] This was unfair as far as Qatar was concerned since it had already spent enormous time and resources in preparation. Not surprisingly, this hardened the stance of the Qataris who started lobbying other Islamic countries as well other developing countries. The choice of venue in the WTO was now turning out to be a classic North–South divide

[34] WTO document, WT/GC/33/Add/2, January 9, 2001, www.wto.org.

[35] WTO Newsletter "FOCUS", January–February 2001, No. 51, www.wto.org.

[36] Blustein, Paul. 2009. *Misadventures of the Most Favoured Nations*, Public Affairs, New York.

with the US and EU (to a lesser extent) on the one hand reluctant about Doha and a vast majority of WTO Members (developing and least developed countries) on the other who were supportive about Qatar hosting a Ministerial Conference.

At the end of October 2001, the issue figured in the US House of Representatives where some representatives expressed “deep reservations about the appropriateness of Doha as a venue, not to mention the obvious security concerns for our citizens”.[37] It went on to add that Qatar denied its people fundamental rights and much like the Taliban, oppressed women. Anyway, the issue became so serious as to threaten the very prospects of the fourth Ministerial Conference itself.

The most reliable story of how Qatar prevailed vis-à-vis the US is told by Paul Blustein in his fascinating book.[38] It would appear that quite a few in the WTO Secretariat and the USTR did not favour Qatar as the venue for their own personal security. Indeed, around October 20, Director General Mike Moore flew to Qatar to try and convince them to back down. But by the time he arrived in Doha, the Qataris conveyed to him with unconcealed glee that US President Bush had already stated publicly that the next WTO Ministerial Conference would be held in Doha.

Two reasons appear to have worked in favour of Qatar. One, as Paul Blustein notes in his book,[39] the Emir of Qatar phoned the then US Vice President Dick Cheney to make out a persuasive case. In particular, he seems to have won the argument by conveying to Cheney that if Qatar was safe enough to house the US Airbase then surely it was safe enough to host a WTO Ministerial Conference. More importantly, in the aftermath of 9/11 events, it would have been politically suicidal for the WTO Membership and the international community to have been seen to be snubbing a moderate Islamic nation.

3.6 The Mystery of “Development”

Before we deal with how the Doha Ministerial Conference played out, it is important to know why the outcome at Doha was called variously as the “Development Round” or the “Doha Development Agenda”.

[37] Library of Congress, *THOMAS*, 2001, http://thomas.loc.gov, p. 47564.

[38] Blustein, Paul. 2009. *Misadventures of the Most Favoured Nations*, Public Affairs, New York.

[39] Ibid.

The actual coining of the term was first done by UK Minister for International Development Clare Short who in a speech at Seattle while addressing NGOs in November 1999 called for a "Development Round" of multilateral trade negotiations.[40] As we saw in the last chapter, the Seattle Conference ended in utter failure. Nevertheless, the idea as proposed by Clare Short was that the WTO must launch a broad development round including a range of subjects, both old and new. Second, the needs of the developing countries including the LDCs would be taken seriously. Third, technical assistance to developing countries and LDCs was proposed. Lastly, as a sop to developing countries it was conceded that Labour Standards should be addressed directly through development efforts and not through trade sanctions.

In retrospect, the idea to call for a Development Round was a shrewd one. After the failure in Seattle, Director General Mike Moore immediately saw that the only way to launch a new Round was to have a development agenda which addressed developing country needs.[41] After the experience of the Uruguay Round, the developing countries and the LDCs were opposed to a new Round because they had nothing to gain from it. But by calling it a "development round", the idea was to blunt this opposition of developing and least developed countries. In particular, the idea of the developed countries and Mike Moore was to mollify the LDCs and some developing countries so that hardline opponents of the round like the Like-Minded Group (LMG) countries can be isolated. The idea of a Development Round could also be seen as a strategy by the proponents of the new Round to counter "negotiation resentment" and "trust deficit" emanating from the conclusion of the Uruguay round and the Seattle fiasco, respectively.

While attempts, albeit cosmetic and through nomenclature, were made to incorporate the development dimension into the new round, the fact of the matter was that there was really no change in substance as far as the negotiating objectives of the powerful WTO countries were concerned. The EU still sought a "comprehensive round" and the US aggressively sought market access and insisted on Core Labour Standards. Worse, both of them would not budge on Implementation-related Issues.

[40] Short, Clare. 1999. "Speech in Seattle on How to Make the Next Trade Round Work for the World's Poor", www.dfid.gov.uk.

[41] Blustein, Paul. 2009. *Misadventures of the Most Favoured Nations*, Public Affairs, New York.

Indeed, soon after Clare Short made her speech on the "development round", Yash Tandon, a noted Indian writer came out with a critique of it.[42] As Yash Tandon pointed out, the vast majority of developing countries do not want a broad/comprehensive round but wanted negotiations to be confined to Implementation, the built-in agenda and rectifying the imbalances in the Uruguay Round Agreements. On Investment, Tandon argued that there is, at best, a tenuous link between a multilateral investment agreement and actual Foreign direct investment (FDI) flows. On government procurement, the developing countries have even less reason to want it, he added.

All in all, the idea of calling the new round a Development Round had more to do with appellation than substance. Indeed, in the final Ministerial Declaration agreed upon,[43] there was no specific mention of a "development round" or even a "development agenda". The coinage "Doha Development Agenda" came about later and may be attributed to the WTO Secretariat.

3.7 Prelude to Doha

One of the defining features of WTO negotiation dynamics was that even four or five months before a Ministerial Conference is to take place, the situation in Geneva was often characterized by impasse in negotiations. There are a couple of reasons for this state of affairs. This was precisely the period during which delegations are "posturing" rather than actually "negotiating". This often involves making maximum and often unreasonable demands on each other. Second, WTO negotiators tend to wait till the very last minute to exchange concessions. If a delegation revealed its cards early on, it was not considered good negotiating tactics. Lastly, the golden rule in WTO negotiations was that never concede anything without getting something in return.

The situation prior to the Doha meeting in June 2001 was no different. If one had attended the meetings of the WTO General Council in the summer of 2001, there was not a hint that by the end of the year a round would be launched.

[42] Tandon, Yash. 1999. "What is Wrong with the "Short" Development Round", www.seatini.org.

[43] Doha Declaration, www.wto.org.

Be that as it may, there was one issue which did occupy centre stage after the summer break in 2001. That issue was one concerning life and death or as one NGO put it rather eloquently, it was the choice between patents and patients!

It will be seen immediately that the "Development Round" that Clare Short had in mind would not have met with the approval of developing countries because of the fact that the vast majority wanted a limited round rather than a broad round. Nevertheless, it made eminent political sense to call it a "Development Round" since the main criticism of developing and LDCs against past "rounds" in the WTO was precisely that the outcome had not helped in the achievement of developmental goals in their respective countries.

3.8 TRIPs and Public Health

A word about the TRIPs Agreement in the context of public health. We already saw in Chapter 1 that the TRIPs Agreement was, more or less, forced upon the developing countries. Moreover, the paradigm of the TRIPs Agreement itself was very different from the other two areas, namely, Goods and Services. In both those WTO Agreements (GATT and GATS) the overriding objective was to promote free trade by removing barriers and restrictions. In the case of TRIPs, it had more to do with restricting the free flow of trade, albeit for legitimate purposes of rewards for innovation. The second defining characteristic had to do with the subject matter of Intellectual Property Rights (IPRs) themselves. IPRs are inter alia, about a trade-off between reward for innovation (private good) and promotion of public health (public good). By definition, this creates tension. Ideally, if IPRs strike a fair balance between private and public good, then the tension becomes manageable. Unfortunately, for reasons that we looked at in Chapter 1, the TRIPs Agreement as it emerged from the Uruguay Round tilted strongly towards reward for innovation (which is legitimate) rather than towards promotion and protection of public health (an equal, if not more legitimate objective).[44] Lastly, the TRIPs Agreement, unlike the GATT and GATS does not have an Article devoted to "General Exceptions". In other words, there would

[44] Report of the Commission on Intellectual Property Rights, *Innovation and Public Health*, 2006, World Health Organization, www.who.int.

appear to be no generally exceptional circumstances in which TRIPs Agreement and its obligations can be derogated by WTO Members. What if there were to be a public health emergency? This is precisely what set off a huge debate in the WTO.

By 1999, AIDS had become the number one cause of deaths in sub-Saharan Africa. Indeed, in 2000 the UN Security Council talked about AIDS for the first time. The pharmaceutical lobby which achieved great success in the Uruguay Round through the incorporation of the TRIPs Agreement then committed, what in retrospect, can only be termed as a monumental blunder. In 1998, big pharmaceutical companies sued the South African Government for allowing the purchase of branded drugs at reduced rates. This was seen as a hostile act by not just the public but it had the effect of mobilizing a whole range of NGOs who started criticism,[45] most of it justified, against the TRIPs Agreement. Although the pharmaceutical companies dropped the suit against South Africa in 2001, the damage had already been done. In fact, public pressure was so much that US President Clinton had to give an assurance that the US will not carry out punitive trade sanctions against any sub-Saharan African country that wants to grant parallel licences or produce generic drugs, notwithstanding the provisions of the TRIPs Agreement.

It was against the above backdrop, that a group of developing countries got together to put the issue of TRIPS and Public Health squarely on the agenda of the forthcoming WTO Ministerial Conference in Doha. The saga of how this began and how it ended successfully at Doha needs to be told in some detail for the following two reasons:

1. It was one of the most remarkable success stories as far as WTO negotiations by developing and LDCs was concerned; and
2. It offers important lessons in WTO Negotiation Dynamics. It is, therefore, of obvious relevance to this book.

Since the background to this issue was based on problems faced in Africa, it was entirely logical that the African Group in the WTO[46] numbering about 40 countries took the initiative and started discussions among

[45] OXFAM Discussion Paper, 2001, "WTO Patent Rules and Access to Medicines: The Pressure Mounts", June 2001, www.oxfam.org.uk.

[46] "Groups in the WTO", www.wto.org.

themselves. It was commendable the way the African Group came forward and overcame all sorts of constraints (manpower, expertise and availability of resources) and met in informal consultations over and over again to decide on the negotiating strategy. Subsequently, the African Group (in which five countries played a key role: Egypt, South Africa, Zimbabwe, Kenya and Tanzania) was contacted by India and Brazil, two countries with enormous expertise in the TRIPs area and relative clout in the WTO. It is this "triple alliance" of the African Group, India and Brazil that conceived the negotiating strategy, planned the tactics and was primarily responsible for the negotiating outcome in this area at Doha. India and Brazil were able to count on the support of 20-odd developing countries, so the "triple alliance" actually comprised well over 50 countries in the WTO—not an insignificant number by any reckoning.

Nevertheless, it was a huge struggle to achieve a Ministerial Declaration such as the one on TRIPs and Public Health in Doha. The biggest impediment to achieving a meaningful outcome was the US—undoubtedly the most influential player in the WTO. The US, of course, had its powerful domestic pharmaceutical lobby to contend with. In addition, the overriding objective of the US was that having succeeded in getting the TRIPs Agreement in the Uruguay Round that was so favourable to it, it was worried about letting it unravel. At the same time, the US was under pressure from its own domestic NGOs and others to address the problems faced by Africa in the context of AIDS. The US formed a limited coalition of countries including Australia, Canada, Japan, Switzerland, Czech Republic and New Zealand. Simply put, these countries wanted the status quo to be maintained as far as the TRIPs Agreement was concerned.

The EU presented a negotiating case that can only be described as "sui generis". First, there was no unanimity within the EU Membership on the issue of TRIPs and Public Health.[47] Second, the EU, in essence, did not also want the unravelling of the TRIPs Agreement but stood ready to debate about interpretation of its provisions.[48] But to be fair to the EU, it displayed much greater understanding of the concerns and problems of the "triple alliance" than other major players in the WTO such as the US.

[47] It was apparent that the Commission and the Member States did not always see eye to eye. Thus, in an unprecedented move, the Commission submitted a non-paper to the TRIPs Council in September 2001 which was subsequently withdrawn. For details, see: ICTSD, BRIDGES Publication, Year 5, No. 7, September 2001, www.ictsd.org.

[48] WTO document, IP/C/W/280, June 12, 2001, www.wto.org.

A handful of developed countries took an enlightened view of TRIPs and Public Health. It was their view that TRIPs was not cast in stone and that some adjustments could be made especially with regard to its operation and interpretation. Thus, Norway in its statements to the TRIPs Council on the subject often tried to see the point of view of the developing countries and its views were often "middle of the ground" and served to cool tempers in the room.[49] The other "enlightened view" came from persons/public figures like the Dutch Minister for Development Cooperation Ms. Eveline Herfkens who in a persuasive article[50] argued in favour of a "balanced interpretation of TRIPs" which she said had "everything to do with universal human rights".

The other unique feature of the negotiation dynamics of the TRIPs and Public Health issue related to the "participation" of certain key NGOs whose role was critical for developing country negotiators. In my entire time as WTO negotiator for India for about a decade, I never had to really rely too much on NGOs (Indian or foreign) for expertise, inputs and even strategic advice. But for the first time, developing country negotiators such as me realized that the political clout and even the expertise held by these NGOs was significant. Thus, negotiators of the "triple alliance" held numerous meetings with the following NGOs/think tanks. The following list is illustrative rather than exhaustive:

- OXFAM
- Medecins Sans Frontieres
- Quaker UN Office, Geneva
- Third-World Network, Geneva
- South Centre, Geneva.

I remember numerous lunches and dinners (because those were the only times available, away from WTO negotiations) with several individuals from the above offices who played a significant role in the success achieved in Doha. Besides, the NGOs would get experts such as Carlos Correa and Frederick Abbott to address negotiators in an interactive session. As a negotiator, I gained tremendously from this interaction. This was a new dimension for developing country negotiators in the WTO.

[49] WTO document, IP/C/M/33, Paragraph 238, November 2, 2001, www.wto.org.

[50] ICTSD, BRIDGES Publication, Year 5, No. 8, October 2001, www.ictsd.org.

The specific issues which were up for negotiation are given below:

1. *Title and Scope*—The EU sought a declaration on TRIPs and Access to Affordable Medicines; the US (and its allies) wanted it confined to Access to Medicines for HIV/AIDS and other pandemics; and the Triple Alliance wanted a broad declaration on TRIPs and Public Health.

    There was considerable debate even on the title for the possible declaration at Doha dealing with TRIPs and Public Health. This was not a trifling matter. The US was clear from the beginning that the issue had arisen primarily because of HIV/AIDS and, therefore, must be confined to it. For countries such as India, this would have been too restrictive because even the current flexibility in the TRIPs Agreement provided in Articles 30 and 31 of the TRIPs Agreement did not specify diseases or specific health situations. They merely stipulated conditions under which there could be "other use without authorization" of the Rights Holder.[51] If the American proposal to confine the declaration to HIV/AIDS were to be accepted, then it would have had the perverse effect of diluting the already available flexibility in the TRIPs Agreement. Indeed, the developing countries had early on decided that instead of having a declaration along the lines suggested by the US and its allies, it would be better not to have it at all. The EU's proposal, reflecting lack of unanimity among its member states, was neither here nor there.

    Why was this declaration important for the "Triple Alliance" and others? Because it was the conviction of India, Brazil and the African Group that the TRIPs Agreement in its current form had the potential to impede rather than promote public health. Because the TRIPS Agreement (or any other WTO Agreement for that matter) was not cast in stone and will be interpreted by Panels and the Appellate Body over time. Having been a panellist many times over, I can confirm that when the texts are not clear, then the panellists look for some guidance either in the negotiating history or in Ministerial declarations and decisions. This is why the declaration on TRIPs and Public Health at Doha assumed so much importance.

[51] WTO "The Legal Texts", Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 31, www.wto.org.

2. *Status Quo vs. Change*—The members of the "Triple Alliance" led by Africa, India and Brazil were clear in their minds of one thing: should there be a conflict between their TRIPs obligations and the fundamental duty to protect public health, their governments will obviously choose the latter. Events in South Africa and elsewhere on the HIV/AIDS issue led developing countries to believe that the WTO Ministers in Doha must say this upfront without any ambiguity.

   The "Triple Alliance", therefore, proposed what was known as Option 1 which read:

   "Nothing in the TRIPs Agreement shall prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPs Agreement, we affirm that the agreement shall be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to ensure access to medicines for all."[52]

   Some explanation is necessary. The phrase "Nothing in the TRIPs Agreement…." was similar to the language found in Article XX (General Exceptions) of the General Agreement on Tariffs and Trade, 1947. This made sense since there was no provision for "General Exceptions" in the entire TRIPs Agreement. It could be nobody's case that the TRIPs Agreement shall prevail under all circumstances. The word "shall" in the above Option 1 was preferred by the "Triple Alliance". For obvious reasons, the US and others objected violently to it.

   The most critical part of Option 1 was the affirmation that the TRIPs Agreement shall be interpreted and implemented in a manner supportive of WTO Members' right to protect public health. No one, not even the US could contest a WTO Member's right to protect public health. However, the US argued, somewhat disingenuously, that the TRIPs Agreement helped the WTO Members do precisely that and that the TRIPs Agreement was part of the solution. For the "Triple Alliance", the TRIPs Agreement in its current form was part of the problem, not the solution. The main demand of the "Triple Alliance" was that absent a consensus to amend the TRIPs Agreement, at least it must be interpreted and implemented in a manner supportive of WTO Members' right to protect public health.

[52] Blustein, Pau. 2009. *Misadventures of the Most Favoured Nations*, Public Affairs, New York.

The US and its allies (including the EU albeit implicitly) came up with Option 2:

"We affirm a members' ability to use, to the full, the provisions in the TRIPs Agreement which provide flexibility to address public health crises such as HIV/AIDS and other pandemics, and to that end, that a member is able to secure affordable access to medicines. Further, we agree that this declaration does not add or diminish the rights and obligations of members provided in the TRIPs Agreement."[53]

The above option was simply unacceptable for the "Triple Alliance". For one thing, it merely catalogued the flexibility already available for WTO Members in the TRIPs Agreement and then sought to confine it to HIV/AIDS and other pandemics. What was worse, it rendered the declaration null and void by saying that it neither added nor diminished to the rights and obligations of members provided in the TRIPs Agreement. In other words, the TRIPs Agreement was inviolable and supreme and would trump public health in all circumstances. For the US and its allies to claim this after all that had happened in Africa and elsewhere, was to follow an ostrich-like policy and add insult to injury.

3. *Battle over Objectives and Principles*—There are two provisions in the TRIPs Agreement, Articles 7 and 8 that refer to objectives and principles.[54] These were dear to developing countries because Article 7 referred to transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and Article 8 referred to measures by Governments for protecting public health and for promoting the goal of socio-economic and technological development. It needs bearing in mind that developing countries were "sold" the TRIPs Agreement by persuasion that it would lead to transfer of technology and promote general socio-economic development by inter alia, attracting foreign investment. It became clear to developing countries that it was far from certain that the TRIPs Agreement and its mere implementation would achieve those objectives. On the contrary, there

[53] Ibid.

[54] WTO "The Legal Texts", Agreement on Trade-related Aspects of Intellectual Property Rights, Articles 7 and 8.

were increasing reports (in addition to the ones on HIV/AIDS) that the TRIPs Agreement could actually impede transfer of technology.[55] So, the developing countries in an attempt to make sure the TRIPs Agreement facilitated those objectives proposed that "the fundamental importance of the objectives and principles of the TRIPs Agreement" be emphasized and should guide all interpretation of the Agreement. The US (and its allies) would have nothing of it and said that the TRIPs Agreement should be read in accordance with customary rules of interpretation of public international law as reflected in the Vienna Convention on the law of treaties. The EC for its part said that Articles 7 and 8 provided "essential guidance" for interpreting all the provisions of the Agreement,[56] which was close to the developing country positions.

The debate over objectives and principles and their primordial importance in interpretation of the provisions of the TRIPs Agreement was more important than what seemed at first sight. As a WTO panellist in numerous disputes, I was acutely aware that interpretation of Agreements by panellists and the Appellate Body can be crucial in how the Agreement functions in actual practice. For instance, when any WTO Agreement is interpreted it is important to remember what the objectives and principles of that Agreement are: to promote free trade, to provide security and predictability to international trade or raising standards of living and other developmental goals. Any measure that was being judged by a panel must of course be judged on specifics and on WTO law. But, the overall objectives and principles of the multilateral trade agreement can provide the backdrop and guidance. For the developing countries, the TRIPs Agreement needed to be interpreted in accordance with the agreed Objectives and Principles in Articles 7 and 8 of the TRIPs Agreement.

4. *Technical Details of Flexibility*—It is not the purpose of this book to get into technical details such as Compulsory Licencing, the freedom to determine the grounds thereof, the issue of regime for exhaustion and the difficulties of WTO Members with insufficient

[55] For an interesting point of view: Correa, Carlos. 2001. *Review of the TRIPs Agreement: Fostering the Transfer of Technology to Developing Countries*, Third-World Network.

[56] WTO document 1P/C/M/33, 2 November 2001, www.wto.org.

or no manufacturing capacities in the pharmaceutical sector. These were debated at length and find mention in the Doha Ministerial Declaration on the TRIPs Agreement and Public Health.

The challenge for the Chairman of the General Council was how to reconcile the two vastly differing viewpoints of the "triple alliance" on the one hand and the US and its allies on the other. In the event, the Chairman's draft on the subject[57] reflected the two options when it came to the critical issues of title and scope of the declaration, operational language and other technical issues. Both the options were thus put up for the Ministers to resolve at Doha. The following observations are pertinent in this regard:

(a) The Chairman avoided the trap of falling into the Seattle Draft Declaration where there were scores of bracketed language for the Ministers to resolve. The present draft did have brackets/ options but only to the extent necessary. Clearly, the WTO had to some extent learnt its lessons from Seattle.

(b) In terms of sheer number of countries supporting the text, the Chairman could have decided that the US and its allies were only a small minority (albeit a powerful minority) and ignored their points of view. But the Chairman did not do that because of the strength of the views as well as the clout of the countries concerned, viz., the US, Japan, Switzerland. But, overall, it was a reasonable way to sum up the discussions on the subject and allow the Ministers to make a decision.

3.9 Implementation Again

The second important area where the Chairman of the General Council put up a draft to Ministers[58] was the thorny subject of Implementation. We have already seen in the last chapter the background to this issue and how it affected the outcome at Seattle. It is interesting that after the Seattle debacle, efforts were indeed made to take some confidence-building measures such as these in the areas of transparency, LDCs and even TRIPs and Public Health to some extent. But, there was absolutely

[57] WTO document, JOB(01)/155, October 27, www.wto.org and ICTSD, BRIDGES October 2001 issue, Year 5, No. 8, www.ictsd.org.

[58] WTO document JOB(01)/139/Rev.1, October 27, 2001, www.wto.org.

no sign that the major players would be willing to show flexibility in the area of Implementation. In fact, up until June 2001, there was a dialogue of the deaf as far as Implementation was concerned. The only exception was the decision taken in May 2001 by the WTO that the General Council meeting in special sessions, will address outstanding Implementation Issues and concerns, particularly those raised during the preparations for the Ministerial Conference in Seattle. The reason for the developing countries demand that the General Council (the highest body in the WTO after the Ministerial Conference) should meet in special session to consider the "Implementation" proposals was that there was first of all, a total stalemate in the WTO subsidiary bodies where the developed country representatives simply refused to even consider the "Implementation proposals". Second, given the negotiation dynamics of the WTO, these issues could be resolved only at the "political level" if at all and stood no chance of any resolution at the "technical level". In the June meeting of the General Council seven countries (Argentina, Morocco, New Zealand, Norway, Switzerland, Thailand and Uruguay) submitted an informal paper aimed at breaking the impasse surrounding the issue of "Implementation". The choice of these seven countries was interesting. These were the so-called middle ground countries which did not have the strong views associated with India, Malaysia and Pakistan on the one hand and the US/EC on the other. Uruguay played a key role in organizing the meetings and in drafting the paper. The paper, promptly dubbed the G-7 paper, divided all the proposals into four categories[59]: (a) issues on which early agreement can be reached; (b) issues that have been solved, clarified or appear relatively less urgent; (c) issues referred to subsidiary bodies; and (d) other pending issues. This G-7 paper then became the basis for discussions on the "Implementation" Issues.

We have already seen in the last chapter that "Implementation" Issues cover the whole gamut of WTO Agreements and were highly technical in nature. And yet it was not possible to resolve these issues at the technical level because of the peculiar negotiation dynamics at the WTO. The peculiarity is that once a "Round" is over and concessions are exchanged (or coaxed out of countries as it was in the Uruguay Round) then it became impossible to reopen the issues in the WTO. Any attempt then

[59] WTO document WT/GC/M/67, August 29, 2001 General Council Meeting devoted to "Special Session on Implementation held in July 2001", www.wto.org.

to change the situation had to undergo the process of give and take. So, developing countries who had tabled Implementation Issues had done so in the belief that they would get some satisfaction well before a new Round was launched at Doha in November 2001. Developed countries on the other hand argued that any resolution of "Implementation" Issues would amount to a concession by them to developing countries and thus these countries expected something in return from them say, either a comprehensive round or deeper concessions in other areas. So, the timeline for resolution of "Implementation" Issues became a big issue with no compromise in sight.

This was one of the most fundamental problems of the negotiation dynamics of the WTO. Nothing was ever done for free, even if it benefitted all countries involved. If some countries sought changes/make proposals, it was automatically assumed that these countries were willing to pay a price to the rest of the membership. Hence, the need at present for a "Round" every few years in the WTO where there was global give and take. One of the critical issues determining the future of WTO is how to get out of this "round entrapment", as I prefer to call it.

In September 2001, the Chairman of the General Council released a draft on "Implementation" Issues[60] which had the effect of leaving the key demands made by developing countries to an uncertain post-Doha agenda.[61] The only improvement was that while earlier drafts did not include Textiles and Anti-Dumping at all, the present draft[62] did include some language on these Agreements.

In any case, when the Chairman put out the last draft in October 2001 on "Implementation" Issues, it backtracked on some major developing country concerns.[63] In fact, proposals in key areas such as Safeguards, Textiles, TBT and TRIMs were sent to the WTO Subsidiary bodies for further study and analysis, thus ensuring the stalemate continued.

It was clear that the die was cast as far as "Implementation" Issues were concerned. The final language that appeared in the Doha Declaration can only be characterized as a "disappointment" as far as

[60] WTO document, JOB(01)/139, September 26, 2001, www.wto.org.

[61] For a detailed analysis see: ICTSD, BRIDGES Publication, September 2001, Year 5, No. 7, www.ictsd.org.

[62] Ibid., p. 9

[63] ICTSD, BRIDGES Publication, October 2001, Year 5, No. 8, www.ictsd.org.

protagonists of these proposals were concerned. While the Ministerial decision on Implementation-related Issues and concerns[64] covered a whole range of Agreements, the real benefit of those decisions remained to be seen. The real outcome was reflected in paragraph 12 of the Ministerial Declaration[65] which clearly stipulated that "negotiations on outstanding Implementation Issues shall be an integral part of the Work Programme….". For those issues where there was no specific mandate provided, the subsidiary bodies shall report to the Trade Negotiations Committee by the end of 2002.[66]

A few lessons from the "Implementation" saga for developing countries:

1. It is time the developing countries and the LDCs are proactive in setting the negotiating agenda, rather than merely react to the negotiating agenda set by the powerful countries; and
2. While success in negotiations is hard to come by, the above has the advantage of benefitting the developing/LDCs by (i) Occupying the WTO negotiating space available which is limited and is liable to be used for subject areas that are harmful to the interests of developing/LDCs; and (ii) conferring valuable negotiating leverage on the developing and LDCs in their face-off with their more powerful trading partners.

The real tug of war in the run-up to Doha were among those who were seeking a redressal of imbalance as they perceived it in the Uruguay Round (basically the Like-Minded Group whose origin we have seen in the last chapter) and those who were pursuing what is known as a "Comprehensive Round". It is important to understand what was meant by a "Comprehensive Round" and who the main protagonists were. There was no doubt that the chief proponent of a "Comprehensive Round" was the European Union. In a document which outlined the EU approach to the WTO Millennium Round,[67] there was detailed

[64] WTO Document, Doha Declarations, Booklet, 2001.

[65] Ibid.

[66] Ibid.

[67] "The EU Approach to the WTO Millennium Round", Commission of the European Communities, 1999, COM (1999) 331 Final.

explanation under the chapter: "The case for the Comprehensive Trade Round". It may be seen that the "Comprehensive Trade Round" included negotiations on a whole range of subjects such as the more traditional ones like agriculture, services, tariffs but also the Singapore Issues such as Investment, Competition, Trade Facilitation and Government Procurement. Even issues such as Core Labour Standards were not left out, although the EU paper recognized that there was no realistic prospect of consensus within the WTO on this subject. The primary motivation for advocating a "Comprehensive Trade Round" was that for the EU it was only such a comprehensive round that ensured "balance". Simply put, the EU knew that in the area of Agriculture it was on the defensive and will be asked to make important and probably painful concessions. The EU felt that it needed solid gains in as many other areas as possible to offset the "losses" in agriculture. This is what was meant when the above paper of the EU said: Negotiations in Agriculture and Services were only going to lead to substantive results if placed within a broader, time-bound negotiating framework. (From the EU's point of view this was a win-win scenario, as we saw earlier.) It was also this insistence on a "Comprehensive Round" that was one of the main causes of the debacle in Seattle, as we saw in the last chapter.

Yet, in July/August 2001, just a few months from Doha, the EU (along with Japan, Norway, South Korea and Switzerland) still pursued a "Comprehensive Round".[68] Indeed, all these countries including the EU had real problems in the Agriculture negotiations, hence their insistence on a "Comprehensive Round". The EU, even in September 2001, was not willing to contemplate a Round without the Singapore Issues. In contrast, the US was not too keen on a Comprehensive Round[69] and could easily have lived with what is known as the "built-in agenda", i.e. Agriculture, Tariffs and Services.

The pursuit of a "Comprehensive Round" by powerful WTO Members referred to above was an important aspect of WTO negotiation dynamics. It was clear that the idea of launching negotiations in the so-called Singapore Issues, i.e. Investment, Competition Policy, Government Procurement and Trade Facilitation did not meet the approval of the entire membership. In fact, it did not even evoke the

[68] ICSTD, BRIDGES, July–August 2001, Year 5, No. 6, www.ictsd.org.

[69] Ibid.

necessary enthusiasm in WTO Members such as the US, Canada, ASEAN so that a "negotiating quorum" can be established for this purpose.[70] Yet, the proponents of the "Comprehensive Round" never gave up on this till the very end in Doha. It is necessary to ask the question why?

The need for launching a "Comprehensive Round" for these countries would appear to be both tactical and substantive. Negotiations in the WTO were sought by member countries on two important grounds. One, to "protect" the vital trade interests of countries. These "protectionist" aims might range from wanting to shelter domestic companies from foreign competition or to prevent "free trade" from disrupting socio-economic objectives (anti-poverty programmes, etc.). The second, to "promote" a country's trade interests in foreign markets. In the case of the proponents of the "Comprehensive Round" neither of the grounds were fully justified. In fact, the business and industry groups of the EU, for instance, were not even passionate about including Investment and Competition Policy in the WTO.[71] The ferocious insistence of inclusion of Investment by the European Commission was a source of mystery. In fact, as early as beginning 2001, a group of 20 top EU companies met the then Indian Ambassador to the WTO and conveyed quite unambiguously that they were not pushing for inclusion of Investment in the new Round.

On the other hand, countries such as India, Pakistan and Malaysia (who belonged to the "Like-Minded Group", the origins of it we discussed in the last chapter) were strongly opposed to negotiations in any of the new areas. Their reasoning was very simple: Developing Countries could hardly be called upon to undertake negotiations in new areas when "imbalances" of the Uruguay Round Agreements were yet to be addressed as part of "Implementation". In the Working Group on Trade and Investment, India made a solid case[72] against the launch of

[70]The author's idea of a "negotiating quorum" is based on his own decade-long negotiating experience in the WTO. For instance, if the QUAD plus ASEAN, Australia, Brazil and India back a proposal then there probably is a "negotiating quorum" and the proposal has every chance of going through. In the post-Doha phase, to this list must be added China and South Africa.

[71]CEO Quarterly Newsletter "Corporate Europe Observer", December 10, 2001, www.corporateeurope.org.

[72]WTO document, WT/WGTI/W/86, June 22, 2000, www.wto.org.

negotiations in this area. Why then, it is pertinent to ask, was the EU hell-bent on the pursuit of a “Comprehensive Round” at Doha, knowing full well it did not work in Seattle and it had the potential to cause failure again at Doha.

The answer lay in one substantive reason (Agriculture) and one tactical reason. Negotiations in Agriculture have always been intractable in the WTO. Right from the launch of the Uruguay Round in Punta del Este in 1986 the negotiations in Agriculture have been characterized by two fundamentally different philosophies. One, the underlying philosophy of the Cairns Group—defined as agricultural exporting nations lobbying for agricultural trade liberalization—which was to eliminate all forms of export subsidies and to secure substantially improved market access in Agriculture. On the other side, the EU, Japan, Switzerland and others who heavily subsidize their agriculture sectors obviously wanted only to go thus far (well short of elimination of export subsidies for instance) and that too, in a longish kind of time frame. It was no surprise that these were precisely the countries that also wanted the launch of a Comprehensive Round. The only plausible reasons for their insistence was that the new areas can “provide trade-offs for agricultural and other concessions that they may be required to make under a new round”.[73] The tactical reason, therefore, was to put the new issues on the table so that they can be used as “negotiating leverage” when it came to other difficult areas such as agriculture. The EU by demanding a comprehensive round was in a win-win scenario. Even if it got postponed because of opposition to Singapore Issues by developing countries, the EU would be “off the hook” as far as Agriculture was concerned. In other words, the EU did not desperately seek the launch of a new Round unless it was on its own terms.

When the WTO General Council Chairman came up with the draft Ministerial Declaration on 27 October 2001[74] it was, therefore, something of a surprise that issues such as Investment and Competition Policy were up for eventual negotiation. In September 2001, when the draft Ministerial declaration was proposed by the Chairman of the General Council two options, viz, the continuation of the study process and that of launching negotiations were outlined. In October,

[73] ICTSD, BRIDGES Publication, Year 5, No. 8, October 2001, www.ictsd.org.

[74] WTO document, JOB(01)/140/Rev.1, October 27, 2001, www.wto.org.

however, the further study option was dropped. This caused a lot of "angst" to the developing countries led by India which had steadfastly opposed the launching of negotiations in these new areas. In the meeting of the WTO General Council on 31 October/1 November 2001, just eight days before the Doha Ministerial Conference, India's Commerce Secretary made a clear and unambiguous statement[75] saying that the manner in which the Singapore Issues had been dealt with in general and in particular, the language suggested for Investment and Competition Policy was "extremely disturbing". In the same statement, India also strongly questioned the negotiating process prior to the Doha Ministerial Conference and called it unfair since it prejudiced the views not just of India but of a lot of others as well. Basically, India questioned the right of the Chairman of the General Council who with the help of the WTO Secretariat had put forward a text without brackets, thereby implying consensus whereas there was, in fact, no consensus on commencing negotiations at all. The Chairman of the General Council had, of course, sought to provide a sop to the countries led by India by providing that Members could opt out of negotiations or opt into the agreements at a later time.[76] This meant little to countries such as India since they knew that once an agreement (even plurilateral) was arrived at, there would be immense pressure to join. The costs of not being part of even a plurilateral investment agreement in the WTO could be high for developing countries which would come under severe pressure later on to join it.

3.10 The End Game

When the Doha Ministerial Conference began on 9 November 2001, therefore, there was hardly any consensus on the main sticking points:

1. TRIPs and Public Health;
2. Agriculture;
3. Singapore Issues, particularly Investment and Competition; and finally
4. Environment.

[75] WTO document, NT/GC/N459, November 6, 2001, www.wto.org.

[76] ICTSD, BRIDGES Publication, Year 5, No. 8, www.ictsd.org.

But beneath the surface, the real sticking points were TRIPs, Agriculture and the Singapore Issues. The success or failure at Doha depended on how these issues would be resolved.

The first day, i.e. November 9 was mainly devoted to inaugural speeches by the Qatari Emir and by WTO Director General and the Chairman of the General Council. Different Ministers were appointed for the various subjects as "friends of the Chair". For instance, the Mexican Minister was to deal with TRIPs, the Singaporean one for Agriculture, the Canadian one for the Singapore Issues and so on.

One of the features of the WTO negotiation dynamics was that even at a Ministerial Conference, the Ministers needed to lay out their negotiating position in the first instance. This does take time and hence the need for Ministerial Conferences to be at least 3–4 days long. As we will see, the real hardball negotiations often happen in the last 24–48 hours.

Even by the evening of the November 11, there was no breakthrough in any of the difficult areas of negotiations. One element of surprise was the EU's push for core labour standards.[77] In Seattle, it was the US that raised this issue, hastening the demise of the Conference itself. In almost every document outlining the EU approach to WTO Negotiations,[78] one found mention of "trade and core labour standards". It seems clear that the EU, while conscious of the fact that there was no consensus in the WTO on the subject, nevertheless wanted to keep plugging away to make sure that WTO Members accept core labour standards in WTO Trade Policy Reviews. The eventual goal of the EU would seem to get WTO Membership to accept that weakening of internationally recognized core labour standards in order to increase exports (as in export processing zones) was a trade-distorting export incentive that was not permitted by WTO rules.[79] This was of course strongly opposed by the vast majority of developing countries.

By insisting on a "comprehensive round" and by raising "core labour standards" the EU was sending out a rather mixed signal. Take the EU position on agriculture and environment as well and you have to say that the EU was keen to launch a Round only on its own terms. Perhaps, the

[77] For a day-to-day report of what happened in Doha, Chan, WK, "New WTO Round—A Doha Daily Report", November 2001, www.hkcsi.org.hk.

[78] "The EU approach to the WTO Millennium Round", Commission of the European Communities, 1999, COM (1999) 331 Final, July 8, 1999.

[79] Ibid.

perceived losses in Agriculture were so much and the views of France so strong, that a "no Round" may have been a better outcome for the EU than a "Round" that involved a bad deal for it.

In the event, the first breakthrough came on the night of 12 November 2001 on the subject of TRIPs and Public Health. We have already covered the issues at stake. The real battle was between the US and its allies on the one hand and Brazil, India and Africa on the other. Well into the night, the Mexican Minister in charge of the subject along with the DG, WTO and the Chairman, WTO General Council convened a meeting which included the following countries: the US, the EU, Brazil, India, Malaysia and South Africa, among others. But, the real battle was between the US (Mr. Robert Zeolleck), the EU (Pascal Lamy), Brazil (Celso Amorim) and India (Mohan Kumar). After a lot of debate and discussion, it was obvious to the US Chief Negotiator that there was no way Brazil, India and Africa could compromise on the title (Public Health vs. Access to Medicines) and on the TRIPs Agreement not preventing Members from taking measures to protect public health as well as being interpreted in a manner supportive of WTO Members right to protect public health and, in particular, to promote access to medicines for all. Paul Blustein in his book gives a detailed account of how these negotiations came about.[80] He gives the impression that the negotiations were done behind the scenes by Brazil's Amorim and US's Larson. The truth is somewhat more complex. I think USTR Robert Zoelleck realized that if this issue was not resolved early on, then, it had the potential to wreck the Round. He prevented this by showing some flexibility. But this should not detract from the tough talks in the small room where India, Brazil and South Africa played a key role together.

Two observations are in order. The outcome represented a huge victory for India, Brazil and Africa that had steadfastly held to their position.[81] Second, it would not have been possible without the shrewd understanding displayed by USTR Robert Zoelleck who overruled his colleagues. It is also clear in retrospect that without this breakthrough, the developing countries would simply have stonewalled on all the other

[80] Blustein, Paul. 2009. *Misadventures of the Most Favoured Nations*, Public Affairs, New York.

[81] Correa, Carlos. 2002. *Implications of the Doha Declaration on the TRIPs Agreement and Public Health*, WHO Publication, www.gefoodalert.org.

issues, perhaps leading to a repeat of Seattle.[82] For the US, the consolation, however, was that the TRIPs would not be renegotiated and the Agreement would not unravel.

On 13 November 2001, negotiations resumed at the highest level on Agriculture, Singapore Issues and Environment. Once again, the EU played hardball. On Agriculture, the EU had serious reservations with the expression "phasing out" of export subsidies. On the Singapore Issues, the EU wanted negotiations launched immediately. And on Environment, while developing countries such as India objected to the very word "negotiations" in this area, the EU wanted strengthening of the language which said: negotiations have been agreed on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs) as well as elimination of tariff and non-tariff barriers to environmental goods and services. The EU even kept up insistence on inclusion of core labour standards in the WTO.[83]

For any WTO Ministerial Conference to be successful, Agriculture needed to be resolved. This happened in late 13th night/early 14th morning when the EU succeeding in getting the words "without prejudging the outcome of the negotiations" as a prefix to "reductions of, with a view to phasing out, all forms of export subsidies". The EU has got both belts and braces here: first, the phasing out of export subsidies was only an "aim" not an actual outcome; second, even this "aim" was without prejudging the outcome of the negotiations, a WTO term which has a loaded connotation and which implied either a positive outcome or none at all.

Developing countries led by India jumped at the expression "without prejudging the outcome of the negotiations" and insisted that this also figure in the negotiations on environment. The EU, having insisted on this expression in Agriculture, could not object to it in the area of environment.

A word on Implementation. We have covered it in great detail in the last chapter. The single most important outcome at Doha was the "mainstreaming of Implementation with the negotiating agenda of the WTO". This was no mean achievement, even if actual results so far can be said to be well below expectations.

[82] Report by Congressional Research Service to the US Congress "WTO Doha Ministerial", December 4, 2001.

[83] Chan, W.K. 2001. *New WTO Round—A Doha Daily Report*, November 2001, www.hksci.org.hk.

Given the EU's insistence on a "comprehensive round", it was always clear that the Singapore Issues would go down to the wire. Since the EU wanted negotiations to be launched immediately and India and others did not, the Chairman with no doubt the able help of the WTO Secretariat came up with a typical WTO solution. The draft that was initially considered was something like this: we agree that negotiations will take place after the fifth session of the Ministerial Conference on the basis of a decision to be taken at that Session on modalities of negotiations. For India and other Like-Minded Group Countries, this was unacceptable since it could be construed as a stipulation that negotiations will commence after the fifth Ministerial Conference. It was then that the developing countries thought of "explicit consensus" which figured first in the Singapore Ministerial Declaration, thanks to intervention at the time by India.

When late afternoon, on 13 November 2001, the Ministers gathered to meet and launch a Round on the basis of the text issued by the Chairman, India single-handedly opposed the text on the Singapore Issues. When the Indian Minister uttered the words: "India cannot join the consensus", there was stunned silence followed by scattered applause from some developing countries and LDCs. In one sense, India's position was not unexpected. India had maintained all along that it would not be in a position to join in the launch of negotiations in the new Singapore Issues. It was a position of principle. The Conference, then, had to be suspended to try and bring on board India.

I remember a US diplomat asking me whether India was really going to block a consensus to launch a Round. I replied saying that, fortunately, my seniors would have to decide that. In the EU camp, by contrast, there was no gloom but merely some stoic resignation.

After what seemed an interminable amount of time, the Chairman of the Conference the Qatari Trade Minister read out a statement which said that the formulation would give a WTO Member the right to take a position on modalities that would prevent negotiations from proceeding after the fifth session of the Ministerial Conference, until that Member is prepared to join in an explicit consensus.[84] Through this statement, India had secured some assurance that even in the future, the

[84] ICTSD, BRIDGES Publication, Weekly Digest November 15, 2001, Volume 5, No. 39, www.ictsd.org.

WTO would not launch negotiations in new areas without its explicit consensus. This and a lot of persuasion from the WTO Membership enabled India to join in the consensus. When the Indian Minister told the Conference after the break that "we would join the consensus", there was thunderous applause in the audience probably tinged with relief.

3.11 India's Position

Much has been written about India's position taken above. The leading British Newspaper "Financial Times" (15 November 2001) described India as the "worst villain" and the weekly "Economist" (17 November 2001) alleged that India "almost scuttled" the launch of the Round at Doha. Others have been less than charitable to India. The newsletter "Corporate Europe Observer" Issue 10 December 2001[85] argued that India's position was more a shrewd negotiating tactic than a serious attempt to block the launch of a new Round.

The truth was obviously more complex. India's position of opposition to the commencement of negotiations in the Singapore Issues was one of principle and had never wavered.[86] The fact of the matter was that in Implementation, the results were meagre. Given this, accepting the launch of negotiations in new areas where the gains were doubtful would have been suicidal for countries such as India. It is true that India was virtually alone at the concluding session. But this had more to do with the negotiation dynamics in the WTO than with lack of support for India. The fact is that a host of other countries (Asian, African and Latin American) had either been cajoled or had secured other bilateral concessions from major WTO players.[87] Yet others, led by the US, though not terribly enthusiastic about the Singapore Issues, could live with it.

It was traditional for the Indian Commerce Minister to come back after a WTO Conference and address the Indian Parliament. In that address, it was important and necessary for the Minister to justify his actions and explain why he agreed to the negotiations and how it would

[85] "Corporate Europe Observer", December 10, 2001, www.corporateeurope.org.

[86] Panagariya, Arvind. 2001. "The Millennium Round and Developing Countries", Discussion Paper UNCTAD, www.bsos.umd.edu.

[87] For instance, the ACP Group of Countries secured preferential market access to the EU as well as securing specific concessions in exports of Banana. ICTSD, BRIDGES Publication, Weekly November 15, 2001, Volume 5, No. 39, www.ictsd.org.

benefit India. In this sense, the Indian Parliament rivals that of the US Congress and its famous fast track authority. The Indian delegation's stance may have also stemmed from an attempt to exhaust all avenues before accepting the launch of a Doha Round to its liking. Indeed, the Indian Minister Murasoli Maran's interview with the Indian daily "The Financial Express" on 19 November 2001[88] as well as the text of the Speech he gave to the Plenary Session of the India Economic Summit 2001 in New Delhi on 4 December 2001 gave the full rationale of India's position. As in any democracy, a good part of what India did at Doha was plain and simple defence of national interest. A small part of it, justifiably, was also to convince the indefatigable opponents of WTO in India that her national interests were safe and secure and were defended with vigour. It was odd that when the US and the EU did the same thing, it was not thought of in the same manner as when countries such as India did it. In fact, a Member of the European Parliament (Greens, Sweden) Per Gabrton wrote in a letter to Financial Times (24 November 2001) that rather than India, perhaps the EU could qualify as the "villain". Obviously, who you see as the "villain", depended on your point of view.

3.12 Why Doha Succeeded

Why was a Round successfully launched at Doha? Obviously, there were a combination of factors at work. Some had to do within the WTO and its negotiating dynamics. Others had to do with reasons outside the WTO.

One of the main reasons outside the WTO that contributed significantly to the success of the Doha Ministerial Conference was the September 11 (9/11) events in the US. There is enough evidence to support this point of view.[89] It was argued that if the multilateral trading

[88] www.financialexpress.com.

[89] In the Congressional Research (CRS) Report for Congress on the Doha Development Agenda, there is explicit reference to this. The "Corporate Europe Observer", the CEO Quarterly Newsletter, Issue 10, December 2001 refers to the "September 11 effect". An article by Carlos Correa on December 5, 2001 for the Third-World Network SUNS Publication refers to the September 11 events. Arvind Panagariya in his treatise; "Developing Countries at Doha: A Political Economy Analysis" says pretty much the same thing. And finally, Paul Blustein in his interesting book "Misadventures of the Most Favoured Nations" in 2009 goes as far as to say that Osama Bin Laden may have unwittingly done WTO at Doha a favour.

system was allowed to fail in Doha, then the terrorists might construe this as "victory"!

Indeed, the September 11 events had a significant effect on the US negotiating position at Doha. It was almost as if the US wanted to on the one hand, atone for its sins at Seattle and on the other, take the lead as it had done historically in the WTO. Arvind Panagariya argued in his article in "Economic & Political Weekly" of 26 January 2002 entitled "India at Doha: Retrospect and Prospect" that it is fair to speculate that USTR Robert Zoelleck arrived in Doha with the intention not to return home empty-handed. I certainly share this "informed" speculation. In fact, the EU may have known this in advance and this may in part explain the latter's stubbornness till the very end to launch a full-fledged "Comprehensive Round" even while trying to limit the damage in Agriculture. The US, on the other hand, did make critical concessions in TRIPs and Rules, not to mention the fact that it accommodated key EU concerns in Agriculture and the Singapore Issues.

Among other external factors which affected the outcome at Doha, was the threat of global recession.[90] It is fair to say that success at WTO assumes importance in the eyes of its Members when there is a recession or global economic slow-down.[91]

In the final analysis, though the Doha Ministerial Conference succeeded because of the age-old axiom of negotiations: there was something in it for everyone. While it can be reasonably argued that in the past, successful GATT/WTO Conferences have always benefited, one way or another, the major players including the US and EU, this is probably the first time that developing countries such as India had some notable negotiating success. One, clearly, was TRIPs and Public Health. Second, was Implementation. While it is true that results were considerably less than expected, the strategic value of this issue cannot be overestimated. Third, effectively putting off negotiations on the Singapore Issues. Fourth, keeping out issues such as Labour. And last, but not the least, fully safeguarding vital interests in Agriculture, Services and

[90] Speech of Dr. Supachai Panitchpakdi at the India Economic Summit 2001 listing reasons for success at the WTO Doha Ministerial, www.weforum.org.

[91] There is some justification for this argument. IMF sees a global recession when the definitive annual world growth is below 3% threshold. Using this criterion, the years 1980–1983, 1990–1993 as well as 2001–2002 were at or below this threshold. And interestingly, Punta del Este (1986), Marrakesh (1994), and Doha (2001) were all around this period.

Industrial Tariffs. This was by no means an insignificant achievement and was a far cry from the defensive and reactive negotiating positions taken by developing countries in the Uruguay Round.

Above all, the Doha Round made a promise contained in paragraph 2 of the Ministerial declaration adopted on 14 November 2001:

> … The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration…

It was on the basis of this promise that many developing and least developed countries chose to support the launch of the Doha Round.

3.13 Doha Post Script

The question needs to be posed as to why it is proving next to impossible to conclude the multilateral round of trade negotiations launched with such fanfare at Doha in November 2001. It is now over 16 years and there is still no sign of substantial progress in the Doha talks.

The following is by way of hindsight and retrospective reasoning:

1. The Uruguay Round led to an unbalanced outcome resulting in "negotiation resentment" on the part of some developing countries.
2. Instead of addressing this "resentment", the developed countries led by the EU at the very first Ministerial Conference at Singapore in 1996 sought an expanded negotiating agenda for WTO which subsequently amounted to a demand for a "Comprehensive Round".
3. This strengthened the resolve of certain developing countries and LDCs to oppose a new Round. They sought a resolution to Implementation-related concerns and issues raised by them.
4. Things came to a head in Seattle when the Ministerial Conference collapsed under the weight of contradictions between the WTO Members. The result was "trust deficit" in the WTO between the developed countries on the one hand and the developing including least developed countries on the other.
5. Prior to and at Doha, there were some important developments both within and outside the WTO which helped in the launch of a Round. There was some movement on TRIPs and Public

Health. Thanks to stubborn resistance from India and other like-minded countries, no immediate negotiations were launched in the so-called Singapore Issues leaving this to be decided later. By calling it a "development round", the idea was to provide some comfort to developing and LDCs that their interests would be at the heart of the negotiations. Last but not least, the September 11 terror attacks of which we had spoken a lot earlier. It was considered sheer heresy in Doha to oppose the launch of a Round, lest it be interpreted as "victory" by the terrorists.

6. It is, therefore, fair to say that the Doha Round promised something new to the developing and least developed countries for the first time: that their developmental concerns and interests would be fully taken into account in negotiating modalities and outcomes. It is one thing to call a Round, a development Round. It is another to really "mainstream" development in WTO negotiations. The mercantilist negotiating approach of the developed countries prevented the above from happening.
7. What thus constituted a genuine development agenda for the Doha Round of WTO negotiations? The best answer was provided by the joint agency statement on the Doha Round signed by NGOs such as CAFOD, Save the Children, Oxfam, Action Aid, World Vision, Christian Aid, the Fairtrade Foundation, Traidcraft, ITDG and "World Development Movement".[92] Among other things, it specified:
   - Implementation Issues to be resolved as an urgent priority;
   - Phasing out of export subsidies and credits and reorientation of domestic support in Agriculture;
   - A Development Box in the Agreement on Agriculture;
   - Increased level of commitments by developed countries under Mode 4 (Movement of Natural Persons) of GATS;
   - Less than full reciprocity in commitments by developing countries in NAMA;
   - Negotiations to ensure that TRIPs was fully compatible with the International Treaty on Plant Genetic Resources for Food and Agriculture and with the provisions of the Convention on Biological Diversity;

[92] See "A Genuine Development Agenda for the Doha Round of WTO Negotiations", January 2002, Joint Agency Statement, at website: http://www.ukabc.org/doha_dev_round.htm.

- Special and Differential Treatment provisions to be made mandatory. Legally binding and enforceable; and
- All OECD countries to grant tariff-free and quota-free access for all Least Developed Country exports.

It was interesting that this group of internationally renowned NGOs had a clear idea of what constituted a development Round as far back as 2002. It was, however, clear that the political will needed to be there to achieve this. So far, this has proved elusive.

8. The most important reason why the Doha Round has not concluded so far is to be found in the "conclusion" of the Joint Agency Statement of the NGOs. This is worth repeating in full:

> "We do not accept the mercantilist paradigm which says that the world's richest countries must win further concessions from the poorest as a reward for redressing the imbalances of the world trading system. If the WTO and its member states wish to present the new round of negotiations as a Doha Development Agenda, they must enshrine the principles of special & differential treatment and non-reciprocity at the heart of the WTO. This entails both unilateral and multilateral action in advance of the conclusion of the Round as a whole—action which will bring benefits to the world's poor communities at no significant cost to the rich.
>
> The world's poor deserve a genuine development agenda. It is up to the WTO and its member states to deliver one."

It is a matter of supreme irony that though the above statement was issued as far back as January 2002, the concerns expressed therein have not been addressed by the WTO so far. This is one of the chief reasons for the Doha Round not concluding successfully so far. Simon Evenett[93] in an excellent article examined why the process of reciprocal trade negotiations has run into so much trouble in the Doha Round. Going further, Cho[94] shrewdly observed that the decade-old negotiations stalemate was symptomatic of diametrically opposed perceptions of the nature of the Round between developed and developing countries. He rightly argued

[93] Evenett, Simon. 2007. "Reciprocity and the Doha Round Impasse: Lessons for the Near Term and After", University of St. Gallen and CEPR.

[94] Cho, Sungjoon. 2010. "The Demise of Development in the Doha Round Negotiations", *Texas International Law Journal*, Vol. 31.

> that developed countries appear to be increasingly oblivious to Doha's original genesis and developing countries vehemently condemn the narrow commercial focus. This analysis is valid since the original premise of the Doha Round when it was launched in 2001 was that development would be the cornerstone of these negotiations. Instead, what we were seeing was a reversal to the classic, old style mercantilist negotiations with scant consideration for developmental priorities and concerns. This, then is the crux of the problem that faces the Doha Round today.

The situation obtaining in the WTO in 2012 put the negotiation dynamics in a "state of disequilibrium". The developed countries were looking at the Doha talks as a discrete Round where reciprocal concessions could be exchanged without regard to the mandate provided in paragraph 2 of the Ministerial Declaration and not taking into account the unfinished business from past negotiations. The developing countries, meanwhile, felt that the Doha Round was turning out to be another mercantilist Round with little of the "development agenda" that was promised. And going by the experience of the Uruguay Round, they were understandably wary. The least developed countries meanwhile are beginning to lose faith totally in the WTO. This "state of disequilibrium" implied the following:

- The WTO was experiencing negotiating instability and uncertainty.
- Thus, developed powerful WTO Members wished to see the conclusion of the Doha Round on their terms, i.e. within a mercantilist framework based on full reciprocity and addition of a few "new issues".
- Some developing countries and the least developed countries wanted the Doha Round to be fully based on the commitment to a "development agenda" promised at Doha. They also wished the negotiations to take place within a non-mercantilist, non-reciprocal and development-oriented framework.
- The above two negotiating visions, different as they were, contributed to the state of negotiating disequilibrium and total stalemate in the WTO around 2012.

CHAPTER 4

India at the WTO: Punching Above Its Weight

4.1 Domestic Decision-Making Structure

Before we look at how India has fared at the WTO, it is important to understand the domestic structure in place where policies are formulated and decisions taken. In India, the business of Government is transacted in Ministries or Departments. The business of each Ministry or Department is governed by the Allocation of Business Rules, 1961 under Article 77 of the Indian Constitution.[1] The Government of India under the leadership of the Prime Minister has the freedom to create new Ministries through recommendations to the President of India who in turn promulgates it under powers granted through the Constitution.

The Allocation of Business Rules 1961 of the Government of India[2] broadly comprises two Schedules. The First Schedule specifies the list of Ministries, Departments, Secretariats and Offices. For purposes of this book, the relevant Ministry is the Ministry of Commerce and Industry which has two Departments under it, i.e. Department of Commerce and the Department of Industrial Policy and Promotion. Of the two, it is the Department of Commerce that most directly deals with all aspects of WTO. Where the subject matter falls under the jurisdiction of other Ministries (e.g. Agriculture in the Ministry of Agriculture

[1] Constitution of India, Allocation of Business Rules. 1961. Article 77, http://india.gov.in.

[2] Allocation of Business Rules. 1961 can be downloaded at: http://cabsec.nic.in.

© The Author(s) 2018

M. Kumar, *Negotiation Dynamics of the WTO*,
https://doi.org/10.1007/978-981-10-8842-1_4

or Trade-Related Aspects of Intellectual Property Rights (TRIPs) in the Department of Industrial Policy and Promotion) it is still the Department of Commerce, as the nodal agency, that is expected to get inputs from the relevant Ministry and formulate an integrated policy for India.

A detailed list of subjects is listed under the Department of Commerce which may be found at Annex 1. As might be expected, all aspects of international trade and commercial policy are covered. The Department of Commerce is functionally organized into nine Divisions.[3] The Division that most directly deals with the issues of WTO is known as the Trade Policy Division. The Organizational chart of the Trade Policy Division can be found in Annex 2. The functioning of the Department of Commerce is, in essence, no different from the other Departments of the Government of India. The Commerce and Industry Minister is, of course, the elected politician and has overall responsibility and authority. Under him are civil servants led by the Commerce Secretary who in turn exercise responsibility and authority over the entire Department.

The actual functioning of the Trade Policy Division, on a day to day basis, is however carried out largely, though not exclusively, by Joint Secretaries. These are senior civil servants with about 25 years-experience and it can be said without fear of contradiction that policy formulation begins at this level. In a large number of mostly routine cases, policy decided at this level will go through with virtually no change. But, in other important cases, the role of the Commerce Secretary and the Commerce Minister becomes crucial and often decisive.

A notable feature of the Trade Policy Division in the Department of Commerce is the relatively small number of officers who man it. Thus, there are only a dozen or so officers at various levels who deal with allotted subjects and responsibilities. There are historical reasons for this which we shall go into a little later.

The Permanent Diplomatic Mission of India to the WTO in Geneva is an important part of the policy and the decision-making structure. Annex 3 lists the diplomats who work at the Mission in Geneva. It is not a particularly large Mission. For example, the Brazilian Mission to the WTO in Geneva is at least twice as big as the Indian Mission to WTO.

[3] Department of Commerce, Organizational set-up and functions, http://commerce.nic.in.

The reason for this small size both at headquarters and in the Mission in Geneva deserves explanation. Traditionally, the elite public service in India, whether it is the Indian Administrative Service (IAS) or the Indian Foreign Service (IFS) has relied on a handful of people recruited through a highly competitive exam. Once you enter the Service, you become the “chosen one” so to speak and are given responsibilities which are onerous. By definition, the numbers recruited every year are not too many for a country the size of India. Significantly, lateral entry is practically forbidden. So, it is only natural that at decision-making levels, the numbers remain small. There is also the “turf factor” which every department and every bureaucrat in India guards zealously. This system has both advantages and disadvantages. The obvious advantage is that the “cream” of the civil service gets to decide on issues without too much distraction. The disadvantage, on the other hand, is that too few people are involved with policymaking with all the accompanying risks. Of course, post-Uruguay Round, the situation has evolved and there are now a number of Non-Governmental Organizations (NGOs) and special interest groups which give inputs to decision-makers in the Ministry of Commerce and Industry. Also, other Ministries such as the one dealing with Agriculture and the one dealing with Environment for example, are now more inclined to push for their views to be taken into account by the Ministry of Commerce. This is again something that has happened fairly recently in India.

Indeed, the author remembers the situation during the Uruguay Round negotiations in early nineties when the Mission in Geneva had an Ambassador and just two other diplomats to assist him during the Uruguay Round. At the Trade Policy Division in Delhi, there were just 3 or 4 persons dealing with WTO. Admittedly, the situation now is better, but it still does not compare favourably with countries such as Brazil, much less with major players such as the US and EU.

Every Ministry of the Government of India has a Parliamentary Consultative Committee and the Ministry of Commerce and Industry is no exception. Annex 4 gives details of the Parliamentary Consultative Committee of the Commerce Ministry. As mentioned therein, the main objective of the Committee is to provide a forum for informal discussion between Members of Parliament, on the one hand, and the Minster and senior officers of the Ministry on the policies, principles and programmes of the Government and the manner of their implementation. It needs to be borne in mind that the Committee is meant for the Ministry

of Commerce and Industry as a whole and not just for WTO Issues. As parliamentarians, the Committee would naturally be interested in matters that have more to do with domestic politics rather than WTO. It is, therefore, reasonable to assume that the Parliamentary Consultative Committee of the Ministry of Commerce and Industry would be interested in WTO Issues only when they come into sharp focus during sensitive stages of the multilateral trade negotiations. It is fair to say that the Parliamentary Consultative Committee is used principally by the bureaucrats to inform and explain the policies pursued by the Government of India to key Parliamentarians. The internal logic is to ensure that there is parliamentary support, to the extent possible, for governmental policy.

There is little doubt that the Commerce Minister (under instructions from the Prime Minister or his office, i.e. PMO) is really the ultimate authority in terms of policy formulation and decision-making for India at the WTO. This was not always the case. There are reliable reports that during the Kennedy Round, it was the Joint Secretary in the Commerce Ministry who would decide on GATT matters and this would virtually go through unchanged. Even during the initial stages of the Uruguay Round, the Additional Secretary in charge of the Trade Policy Division would decide on India's approach which would then be approved and endorsed by the Commerce Minister. At the most, this would then go up to the Cabinet Committee on Economic Affairs (CCEA) which would invariably endorse the approach taken by the Commerce Ministry. Annex 7 outlines the main functions and the composition of the CCEA. For a detailed and an overly critical account of trade policymaking in India please see the article by Julius Sen written in 2004.[4] Although one cannot agree with all the points made by Sen, it nevertheless offers a broad glimpse of how trade policy was formulated, especially in the period up to the late eighties.

The real impetus for change in the way trade policy was perceived and subsequently formulated, was provided by the issue of Intellectual Property Rights in the context of the Uruguay Round. As we saw in the chapter on the Uruguay Round, the issue of Intellectual Property Rights evoked strong views and emotions in India. The problem became so political that perhaps for the first time since GATT came into existence, India had to undertake "political management of its trade policy".

[4] Sen, Julius. 2004. *Trade Policy Making in India: The Reality Below the Water Line*, London School of Economics, CUTS.

This is also the time when it was no longer enough for the Ministry of Commerce and Industry to formulate a policy and then justify it as being in "national interest". The political furore over Intellectual Property Rights was so huge that it needed a good part of the political leadership to get involved. It was against this background that the institution of "Group of Ministers" was born. The composition of Group of Ministers may be seen at Annex 5. But the following brief account is important in understanding the political background to trade policymaking in India.

It will be recalled that towards the end of 1991, the then Director General of GATT, Arthur Dunkel brought out the famous Draft Final Act. While India had reservations with a lot of the proposals, the Agreement on TRIPs was unacceptable to large sections of the Indian intelligentsia. What is more, there was massive mobilization by both political parties and NGOs against the TRIPs Agreement. The sentiment was so strong that the Draft Final Act put forward by Dunkel was known as the Draft Dunkel Text—but this was promptly dubbed by the opponents in India as being as toxic as DDT!

It was against this background that the then Commerce Minister early in 1992 suggested to the Prime Minister and the Cabinet that a "Group of Ministers" be set up to look at the text put out by Arthur Dunkel. The then PM reportedly agreed.[5] From the Commerce Ministry's point of view, this was politically shrewd since the opposition to the Dunkel Draft was so violent that it needed to be tackled politically. The choice of the Chairman of the Group of Ministers, Mr. Arjun Singh, an Indian Minister belonging to the ruling party, was also interesting. Although he belonged to the ruling party, Mr. Arjun Singh was a bitter critic of the TRIPs Agreement. The then Prime Minister probably found it tactically clever to request Mr. Arjun Singh to chair the Group of Ministers. This Group then went on, for a period over a year, to receive testimony and oral/written presentations from well-known Indian economists, from the pharmaceutical industry, from NGOs, from farmers and agriculturists and form political activists. No written records were kept but from the oral account of the Trade Policy Official who attended all the meetings, it appears that the predominant focus was on TRIPs and on certain aspects of Indian Agriculture. In the end, the Group of Ministers led by Mr. Arjun Singh made recommendations (again not readily available)

[5] There are no written records available. But the above account was verified by the author with the Chief Trade Policy Negotiator of India at the time.

to the Prime Minister and the Government that the Group had serious reservations on the Dunkel Draft in its present form and that the Indian Government would be well advised to be very careful in approaching these negotiations. Note two aspects of Indian trade policy which emerged. First, the Group of Ministers system, to ensure political management of trade policy. Second, petitions were sought proactively for the first time and stakeholders properly consulted.

From that time onwards, the "Group of Ministers" (the composition of which can vary from time to time) has become an instrument available to the Government of India for tackling thorny issues or issues on which there is not yet a consensus. This institutional structure also needs to be seen in the light of the "coalition era" that had dawned in Indian politics. In other words, no political party gets an absolute majority and therefore the party with the largest number of seats (in a first-past-the-post electoral system) has to depend on one or more smaller parties for political survival. In such circumstances, it becomes difficult for the Prime Minister to take risks by resorting to bold and decisive measures. This is ironic since in the Indian parliamentary form of government, the Cabinet is fully authorized to enter into international agreements and it is not necessary to seek the prior approval of Parliament for this purpose. Indeed in November 2002, the Government of India constituted a Group of Ministers on WTO[6] with the explicit objective of "finalizing the strategy to be followed during the negotiations on Agriculture". Presumably, this was different from the Group of Ministers dealing with WTO issues (Annex 5) which "is mainly responsible for finalizing strategy to be followed during the negotiations in the WTO and to take appropriate decisions from time to time".

The Group of Ministers thus had a mandate of "fine-tuning" India's negotiating strategy on issues of importance. Once the Group of Ministers does come up with a recommendation, this then is put up to the Cabinet Committee on WTO matters (see Annex 6). This apex Committee with the Prime Minister as the Chairman was constituted by the Government of India in June 2004. Again, as the WTO has become more and more political, it can be seen that decision-making and policy formulation in trade policy has tended to involve political leaders at the highest level.

There is just one other Committee which bears mentioning in the context of the institutional features of trade policy formulation. This is

[6] Press Release of Ministry of Commerce and Industry, 29 November 2002, http://commerce.nic.in.

known as the Trade and Economic Relations Committee (see Annex 8) again chaired by the Prime Minister himself. Although the primary focus of this Committee is bilateral economic relations, India's engagement in RTAs, economic relations with the US, the EU, etc., there is also the question of the Committee taking stock of the status of negotiations in the WTO. It would appear however that this Committee is only kept informed of the status of WTO negotiations and does not concern itself very much with deciding the nuts and bolts of India's negotiating strategy at the WTO.

To sum up, it can be surmised from the above that the Ministry of Commerce and Industry headed by the Commerce Minister (under the instructions of the Prime Minister and the PMO) would be primarily responsible for Trade Policy although it does receive guidance from the Group of Ministers on WTO and the Cabinet Committee on WTO matters. It must nevertheless be noted that since the present Government took office in 2014, the system of Group of Ministers has been done away with. The Prime Minister's office, it is fair to assume, now calls the shots at least where thorny issues of WTO are concerned.

A brief word on the Chambers of Commerce and the NGOs which play a role, albeit indirect, in formulating trade policy in India. Annex 9 has an illustrative list of the same. In this regard, the period prior to TRIPs and the period after TRIPs serves as a useful dividing line. Before the advent of TRIPs and the Dunkel Draft, it is safe to say that the Chambers of Commerce and the NGOs hardly figured in trade policy debates, let alone policy formulation. The reasons are not far to seek. The Indian Economy up until 1990 was a relatively closed one and the Chambers of Commerce which broadly represented the Indian Business houses had every interest to go along with government policy because it suited them. As for the NGOs, any debate was confined to what the implications will be if the Government of India were to bring down the tariffs (customs duty) from astronomically high levels. Issues such as loss of revenue for the Government and protection of domestic industry held centre stage during this period.

Two issues that figured during the Uruguay Round Negotiations changed this scenario dramatically. Both related to Section 5 of the TRIPs Agreement relating to Patents. One was, of course, the question of providing patent protection for pharmaceutical and agricultural chemical products. The second had to do with the stipulation in the TRIPs Agreement that "Members shall provide for the protection of plant

varieties either by patents or by an effective sui generis system or by any combination thereof". Gradually, a number of NGOs and social activists in India became strongly opposed to the above two WTO provisions on the legitimate grounds that one could lead to extremely high drug prices in India leading to the triumph of "patents over patients" and the other would lead to MNCs such as Monsanto (for example) taking over agriculture in India leading to the misery and even death of small farmers. In retrospect, while the concerns, on the whole, were legitimate and justified, there is no doubt that some of the predictions were apocalyptic and doomsday-like and turned out to be exaggerated.

In the circumstances, the Chambers of Commerce though critical of some governmental positions were broadly supportive of the Government's goal of signing on to the Uruguay Round package and greater integration with the global economy. The NGOs listed in Annex 9 were by and large moderate in their views. But, NGOs led by activists such as Vandana Shiva and Suman Sahai were strong opponents of the Government's decision to sign on to the TRIPs Agreement.

4.2 Sui Generis

Anyone trying to understand India's trade policy will be well advised to begin by thinking of the country as a sui generis case on the global stage. China comes close to India on some aspects, but bear in mind that China joined the WTO only after the launch of the Doha Round in end 2001. So, for the entire period of the Uruguay Round and subsequently till the launch of the Doha Round, there was simply no other country like India in the entire WTO Membership.

First, some basic facts. A huge country with a total area of 3.28 million square kms. And a population of 1.2 billion people (2009 estimate). The Gross Domestic Product was 1 Trillion Dollars in 2009. Add to this the Goldman Sachs Report which talked of "India's Rising Growth Potential"[7] and it is easy to think of India as the fourth largest economy (in purchasing power parity terms) with foreign exchange reserves of over $100 Billion Dollars. The website of the Department of Industrial Policy and Promotion (http://dipp.nic.in) gives at least ten reasons why India's economy is sizzling hot and one of the fastest growing in the world.

[7] Poddar, Tushar and Yi, Eva. "Goldman Sachs", Global Economics Paper No. 152, January 2007.

It is, however, prudent to remember that for the purposes of this book, the period under reference was 1991–2001, when the real success story of India had yet to completely emerge. Indeed, most Indians will remember 1 July 1991 as the day that India went bankrupt. On that fated day, foreign exchange reserves with India's central bank, the Reserve Bank of India, were zero and India's external debt had reached a record $69 Billion, a third of its total GDP. India was virtually blacklisted by Standard and Poor's and by Moody's and there was absolutely no credit forthcoming from anywhere. To add to it, there was looming political instability following the assassination of Prime Minister Rajiv Gandhi. It was in these circumstances that the then Finance Minister Dr. Manmohan Singh had no choice but to ship the Gold reserves of the Reserve Bank of India to England as collateral to obtain a desperate loan of $400 million dollars. (Things came full circle in 2009 when India made a huge purchase of 200 million tonnes of Gold—largest purchase ever—from IMF.)

The situation in 1991 was thus desperate and acted as a trigger for the difficult economic reforms that India launched under the stewardship of Dr. Manmohan Singh. But India is sui generis for some other reasons as well. Take the Human Development Index prepared by UNDP.[8] The very same year, i.e. 2007 in which Goldman Sachs talked of "India's Rising Growth Potential" and of a shining India, the Human Development Index for India was a miserable 0.612 and was ranked 134th out of 182 countries worldwide. If you take the Human Poverty Index prepared by the UNDP,[9] India ranked 88th, behind countries such as Djibouti (ranked 86th) and Cambodia (ranked 87th). While it is true that the Human Development Index is not perfect, it should be obvious to any observer that poverty levels in India are high and the numbers involved (because of the size of the country and her population) are significant. This has had an important bearing on India's negotiating positions with regard to trade policy in the WTO. Some of the positions taken by India on Intellectual Property Rights and in Agriculture can be legitimately defended on grounds that no trade policy which increased the vulnerability of the weakest sections of the population was politically acceptable in a democracy.

[8] Human Development Report for India. 2009. http://hdrstats.undp.org.

[9] Ibid.

While there is constant talk of how well the Indian companies, especially IT companies, are doing globally and how economic liberalization has brought undoubted benefits to large numbers of people in India, there remain big questions with regard to levels of poverty in India. It is easy to say that there is consensus on the direction of economic reforms in India and that it is irreversible. What is less sure, is the pace of economic reforms and there will always be debate in India on whether or not the reforms have the potential of destroying the lives of the most vulnerable sections of the population.

Even the most basic fact—what is the proportion of the population that is below the poverty line—is in doubt. In an interesting article "What is Poverty, Really? The case of India",[10] Carl Haub and O.P. Sharma writing for Population Reference Bureau argue that the estimates of persons living below poverty in India in 2009 vary from something like 328 million to as high as 903 million. Chances are that the truth is close to 600 million out of a total estimated population of 1.2 Billion. Indeed, the Commerce Minister said as much in his statement at the recently concluded (December 2017) WTO Ministerial in Buenos Aires. This is what makes India unique and sui generis—a large country with enormous economic potential but with serious challenges. When India opposed the draft TRIPs Agreement for the better part of the Uruguay Round, it needed to be seen in this context. It may well be that the TRIPs Agreement was capable of benefiting the lives of the upper middle class or the tech companies in India. It may also be that foreign direct investment (FDI) into India had the potential to rise, thanks possibly to TRIPs. But, if the Agreement had negative repercussions for 600 million people, then how could negotiators not oppose it. This is worth bearing in mind when examining India's negotiating positions in the WTO right up to the launch of the Doha Round in November 2001.

4.3 Going It Alone

To understand India's trade policy, it is important to look at the origins of Independent India's foreign policy. The first Prime Minister of independent India, Jawaharlal Nehru, formulated India's foreign policy doctrine widely known as "non-alignment". As early as 1947, Nehru said:

[10] Population Reference Bureau, Haub, Carl and Sharma, O.P. 2010. *What Is Poverty, Really? The Case of India*, http://www.prb.org.

> Our General Policy is to avoid entanglement in power politics and not to join any group of powers as against any other group. The two leading groups today are the Russian bloc and the Anglo-American bloc. We must be friends with both and yet not join either. Both America and Russia are extraordinarily suspicious of each other as well as of other countries. This makes our path difficult and we may well be suspected by each of leaning towards the other. This cannot be helped.

It should be obvious to anyone that in the above formulation there were two key underlying assumptions: one, freedom to take decisions with regard to international affairs on merits and two, to do so in one's "enlightened self-interest". This combination of independence and self-interest was to guide India in all of its relations with the World.

At the time of independence, India was in disastrous economic shape. Two centuries of colonialism had reduced what was once a rich and even advanced country into one of the poorest and most backward countries of the world. To cite some key statistics, life expectancy was around 30 years, literacy rate was an abysmal 14% and GDP was as low as just 93 billion Rupees (at the time a dollar was worth about five Rupees). During this period just after independence, trade and trade policy were not of primordial importance.[11] The Planning Commission of India in its first five-year plan document (1951–1956) had the following to say[12]:

> The expansion of trade has, under our conditions, to be regarded as ancillary to agriculture and industrial development rather than as an initiating impulse in itself. In fact, in view of the urgent needs for investment in basic development, diversion of investment on any large scale to trade must be viewed as a misdirection of resources.

Even though trade and trade policy was not a priority, there are sound reasons to believe that the first two decades since independence (1947–1965) was characterized by relatively liberal policies.[13] Arvind Panagariya makes the point that the import regime remained quite free and even the FDI regime remained open till 1965.[14] There is broad consensus, however, among economists that the period that followed between

[11] Narayan, S. Dr. 2005. "Trade Policy Making in India", May 2005.

[12] Ibid.

[13] Panagariya, Arvind. 2008. *India: The Emerging Giant*, Oxford University Press.

[14] Ibid.

1965 and 1981 was characterized by what is known as "licence raj" in India. The beginning of this phase usually has reference to the nationalization of banks, oil companies and mines. Tight restrictions were imposed on foreign companies and some of them were forced to leave India.

For trade policy, an interesting example is tariffs. Average tariffs in India between 1931 up till 1961 was 23.3%.[15] But by 1986, the average tariffs had risen to a whopping 127.6%.[16] An explanation given by Arvind Panagariya is that tariff rates were raised substantially in the 1980s in India to turn quota rents into tariff revenue.[17]

India thus entered the Uruguay Round at Punta del Este (1986) with high tariffs, an array of Quantitative Restrictions, a complex "licence raj" and with a share of world trade of 0.5%. When the idea was mooted to launch a new Round with issues such as Services and Intellectual Property Rights, India was obviously defensive, nay hostile. The former economic advisor to the Prime Minister of India, Dr. S. Narayan, gives three plausible reasons as to why India took this approach[18]:

> First, India was such a small player in international trade that any reciprocal tariff concessions would almost certainly have resulted in a net welfare loss. Second, import substitution had resulted in such a wide variety of industries in India, some of them inefficient, that any reciprocal concessions to economies with a small industrial base would hurt India more than it would the other economy. Thirdly, several internal policies had a distorting effect on the export sector. For example, the textile and garment sector was reserved for the small industries sector. The Indian textile industry thus was characterized by a wide array of technologies and production techniques. In short, market access negotiations in the Uruguay Round were not attractive and India's attitude to other issues was well known. This made India an unattractive bargainer, which resulted in India being left alone or ignored.

The last sentence above merits examination in some detail. India might have been an "unattractive bargainer". India might have even been left standing "alone". But as a lead negotiator who was involved with the

[15] Smith, David Clinging. 2006. *Economic Development in India, 1931–1961*, Harvard University Press.

[16] Panagariya, Arvind. 2008. *India: The Emerging Giant*, Oxford University Press.

[17] Ibid.

[18] Narayan, S. Dr. 2005, "Trade Policy Making in India", May 2005.

Uruguay Round and then the launch of the Doha Round, the author wishes to state categorically that India was "never ignored" in the WTO. This had, of course, little to do with either the ability of Indian trade diplomats or the soft power appeal of India. It had to do with one simple and brutal fact. Even in 1986, there were negotiators in the US, EU and other major players who were shrewd enough to realize that India represented enormous potential as a market for their goods and services. They also realized that this potential market was effectively closed for them at the time of the launch of the Uruguay Round at Punta del Este. One of the aims of the US and EU (as others) of the Uruguay Round was to prise open the closed markets of developing countries such as India and Brazil. Inevitably, this gave India "negotiating clout" and it is safe to say that while India might have been a nuisance, might have been intransigent and might have even stood alone, there was never any danger of India being ignored.

It is interesting that India and its trade diplomats were never unduly worried about "going it alone". Once a position of principle and/or a position based on national interest was decided upon in New Delhi, then it became for the negotiators an article of faith. On occasion, some negotiating flexibility would be available, but this would be used judiciously with a view to securing some reciprocal concessions from trading partners.

This negotiating pattern of "going it alone", should the need arise, has continued since. It began in Punta del Este where India along with Brazil stuck to the G-10 draft till the end. As Ernest H. Preeg recounts[19] so succinctly, it was basically Brazil and India which stuck to their guns. He further says that it was their assessment that "Brazil appeared inclined to be helpful while India was more and more isolated".[20] It is worth remembering that this was in 1986 at Punta del Este. Now, move forward to Doha in 2001. Once again, India was the only country (there was not even Brazil by her side) which stated it could not join the consensus and had the Conference of Ministers suspended at Doha on 13 November 2001. Eventually, on 14 November 2001 of course, India did join the consensus.[21]

[19] Preeg, Ernest H. 1995. *Traders in a Brave New World*, University of Chicago Press.

[20] Ibid., p. 7.

[21] For an interesting account see Hopewell, Kristen. March 2017. "Recalcitrant Spoiler? Contesting Dominant Accounts of India's Role in Global Trade Governance", *Third World Quarterly*.

To understand India choosing to go it alone if necessary, it is important to appreciate India's experience with trade and economic reforms. We have already seen how India is "sui generis" and any participation in international trade is seen against the background of its possible impact on the most vulnerable sections of its population. The psychology governing India's negotiating attitude has also got to do with the nature of commitments/obligations undertaken in the WTO. A common anecdote that one used to hear in India was that the IMF is far less powerful than the WTO. If you borrowed from the IMF, all you needed to do was to return the money back to the IMF. But if you undertook commitments at the WTO, then, they were forever. A further element guiding India's negotiating strategy is the "preservation of sovereign policy space" and therefore commitments at the WTO were seen as a serious intrusion into this space. This "sovereign policy space" is still considered critical for India's present development strategy. As recently as December 2017 at the WTO Ministerial Conference in Argentina, the Indian Commerce Minister opposed the inclusion of "Investment" in WTO negotiations arguing it would constrict India's policy space.

In one sense, India's opposition to the inclusion of new subjects at Punta del Este such as Services and Intellectual Property Rights was perfectly understandable. In 1986, India's economy had yet to take off and its services sector was underdeveloped, if not non-existent. On Intellectual Property Rights, the situation was even more serious. Its domestic law based on process patents had served it well from the seventies and led to a flourishing generic pharmaceutical industry. It would have been sheer folly to negotiate in this area where India had nothing to gain and everything to lose. Besides, there was already WIPO as a forum for negotiations on Intellectual Property Rights, so why bring it into WTO, unless there was an ulterior motive. Again, in the area of tariffs India had triple digit tariffs by the eighties and since the days of non-reciprocity (of the Dillon and the Kennedy Round) were effectively over, India had to necessarily view tariff negotiations in the Uruguay Round with disquiet.

Many observers understood why India was opposed to negotiations in Punta del Este. They were much less convinced why India continued to oppose new subjects (such as Investment and Competition Policy for instance) in Seattle and Doha. This merits detailed explanation. First is the manner in which the Uruguay Round was concluded by the then QUAD and by other major players. New subjects (such as Services and

Intellectual Property Rights) were included without explicit consensus. Worse, the subjects themselves underwent transformation in a way that the final TRIPs Agreement, for instance, did not bear any resemblance to the mandate decided upon in Punta del Este which was primarily for Trade in Counterfeit Goods. The result of all this was negotiation resentment followed by total trust deficit between the then QUAD and major players on the one hand and key developing countries such as India and Brazil on the other. This lack of trust has continued to this day in the WTO.

The second reason, a corollary from the above, was the "unfair" outcome of the Uruguay Round. For developing countries such as India, the obligations were onerous. In TRIPs, for example, the entire domestic legislation had to be overhauled at great cost, political and otherwise. In the area of tariffs for industrial goods, the bound tariffs had to be brought down although it needs to be said that autonomous tariff reforms undertaken from 1991 onward made this task arguably easier. India was also able to secure transition periods for fulfilling these commitments. In Agriculture, where India was used to maintaining Quantitative Restrictions, it had to undertake its elimination and replacement with high tariff bindings. Considering 70% of India's population was dependent, directly or indirectly on Agriculture, this move was fraught with uncertainty and risk. And finally, in the one area where India could have expected tangible, immediate benefits, viz. Textiles, the eventual outcome in the Uruguay Round was so back-loaded that no immediate benefits were forthcoming. Indeed, whatever gains that might have accrued to India was only conceivable when all UR commitments were fully implemented. Even then, India's welfare gain has been estimated at 0.68%.[22] And this does not take into account the costs of implementation. In this regard, it is worth looking at the Indian Parliament's examination of the implications of the Uruguay Round Agreements. A Parliamentary Standing Committee of the Commerce Ministry, headed by the well-known economist and parliamentarian Ashok Mitra, after looking at the Marrakesh WTO Agreements made the following broad observations[23]:

[22] Mattoo, Aditya and Stern, Robert. 2003. *India and the WTO*, World Bank and Oxford University Press, p. 43.

[23] Narayan, S. Dr. 2005. "Trade Policy Making in India".

1. Developing countries, in general, have failed to extract any significant leverage out of the WTO system.
2. India failed to extract concessions pertaining to its interests in the agreement on IT (Information Technology) products.
3. Global free trade over which WTO presides was quite some distance from the concept of fair and equitable international trade and that the balance was tilted in favour of the developed world.
4. India should reiterate its reservation with reference to Articles 70.9 of the TRIPs in ministerial meetings.
5. There was need to introduce transparency in government actions in respect of WTO related Issues. There is also need to improve coordination between various ministries dealing with WTO Issues.

Dr. S. Narayan goes on to say that the above unprecedented report led to the following three developments from India's perspective:

- Acceptance, howsoever reluctant, of the WTO framework and to the process of globalization of trade.
- Indian Commerce Ministers from this point on had to be careful and began reporting to Indian parliament with a blow-by-blow account of the status of WTO negotiations.
- Administrative coordination between the various Ministries of Government of India improved considerably.
  Thus, by the time Seattle happened, the Indian delegation comprised almost all stakeholders and even included opposition members of parliament.

India was also accused of saying "no" all the time and not having a "positive agenda" of its own. This may have been true of the period in the run-up to Punta and arguably till the conclusion of the Uruguay Round. Arguably, because India did make positive proposals with regard to the Agreement on Textiles and Clothing which were not only reasonable but would have brought significant gains to some developing country exporters. But, the textile lobbies of the US and EU conspired to make sure India's proposals did not see the light of the day and consequently, the Agreement on Textiles and Clothing turned out to be back-loaded.

Soon after the Singapore Conference, the EU left no one in doubt that it wanted to expand the WTO agenda further by the inclusion of the so-called Singapore Issues viz. investment, Competition Policy, Trade Facilitation and Transparency in Government Procurement. Predictably,

India and others who were barely recovering from the onerous commitments of the Uruguay Round could hardly be expected to welcome the above new subjects. It was at this time that India started looking at evolving a positive agenda of its own at the WTO.

The "Implementation" saga has been recounted in great detail in an earlier chapter, so we will not go into it again here. But, there were two other issues that India pursued relentlessly at the WTO. One was Mode-4 (Movement of Natural Persons or Professionals) of the General Agreement on Trade in Services. It was well known that Mode-4 commitments of the US and the EU (the two markets that India was most interested) in the Uruguay Round were far from meaningful. When India (backed by Philippines, Dominican Republic and some others) pushed for the establishment of a Negotiating Group on Movement of Natural Persons under the Services Council, this was indeed granted with some reluctance. But, the meetings of this Negotiating Group were an object lesson of how the major players (the US, the EU, Japan, etc.) thwart any agenda in the WTO, if it does not suit them. The author remembers how the Negotiating Group on Movement of Natural Persons used to meet and the meetings sometimes lasted only half an hour or so. India would speak, a couple of others like Philippines, Dominican Republic would follow and after a period of embarrassing silence, the meeting would be adjourned. The developed countries did not even think that they owed it to India and others to show the basic respect of responding to their proposals. India, going it practically alone, came up with a comprehensive proposal on the subject. Despite this, responses by the US, the EU and others were not encouraging.

The second example of India pursuing a positive agenda in the WTO, again without much success, is the issue of Additional Protection of Geographical Indications to products other than wines and spirits. India and others (including the EU) had real commercial interests at stake, as we saw in an earlier chapter. But, because of strong opposition from the US, Australia, New Zealand, Canada, Mexico, etc. the proposal never saw the light of the day.

The above examples need to be kept in mind when India's negotiating stance in the WTO is examined. It is the author's belief that it has been WTO's collective loss that it has not been in a position to accommodate India's requests listed above. The result has been, at least in the domestic political context in India, a further loss of confidence in the WTO as an institution that can meet the legitimate aspirations of developing countries like India.

The other criticism, albeit more recent, levelled against India was that while going it alone, she sometimes keeps the company of countries which neither share the same outlook nor have the corresponding trade clout. These critics argue that it is one thing for India to keep the company of Brazil but is it okay for it to be in the company of Dominican Republic or Cuba? This criticism is based on a misunderstanding of India's negotiation strategy and alliance-building.

Take the G-10 grouping prior to the meeting at Punta del Este in 1986. The G-10 countries then comprised: Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia. These countries basically insisted that the GATT should not concern itself with the new subjects viz. services, Intellectual Property Rights, Services and Investment Measures. The point was not about trade-weighted clout. If it was, then, the GATT could not function on the basis of consensus. Lack of consensus, hypothetically, meant that St. Lucia for instance, all by itself, could block a decision in the GATT. This did not happen for reasons of realpolitik. But for India, a position of principle was worth defending either alone or in the company of those who were willing—a coalition of the willing, if you please.

It is interesting to compare the above G-10 grouping of 1986 with the Like-Minded Group (LMG) of countries that came into being in the pre-Seattle phase of 1998. The LMG comprised, broadly, of: Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe. The changes which are striking have to do with Argentina and Brazil both of which do not figure in the LMG. Cuba, India, Egypt and Tanzania figure in both groupings. Malaysia, Indonesia and Pakistan could be considered significant additions to the Group.

The fundamental point was that for the majority of the WTO Membership, negotiations (especially the launch of a new Round) may not have posed a problem. It could either be that their share of global exports or imports was so small that it did not really matter one way or the other. Or many countries may already be entangled in a series of regional trade agreements which almost always are ahead of the multilateral trade agreements in WTO. Yet others whose economy was based on exports and whose domestic economy was not large enough, such as Singapore and New Zealand would obviously be interested in a Round that may be expected to bring down barriers in the rest of the world. It is easy to see how India is a case apart from the rest of the countries mentioned above.

It was therefore quite natural that you got only a handful of countries who could have more to lose than gain and who thus adopt a position of principle on inclusion of new issues in the WTO. For such countries including India, the fact that the WTO had a rigorous and binding dispute settlement made it even more difficult for them to willingly commit to new subjects that could lead to onerous obligations. So, for India and some others, "going it alone" was not only natural but was also in their national interest.

4.4 Punching Above Its Weight

This section focuses on the influence that India has brought to bear on the outcome in various negotiations in the GATT and then the WTO. There is a popular view that India has either not engaged fully with the GATT/WTO system and/or has not been able to influence the negotiating process very much.[24] Almost all these sources, to a greater or lesser degree, talk of India and how it negotiates in the GATT/WTO system. Almost none of them seem to suggest that India punches above its weight. This section argues, somewhat counter-intuitively, that when it comes to critical issues relating to the multilateral trading system, India often (but not necessarily always) punches above its weight.

Let us begin with the 1986 meeting at Punta del Este which launched the Uruguay Round. Gilbert R. Winham[25] and Ernest H. Preeg[26] give

[24] Following are some publications in this regard:

Sen, Julius. 2004. *Trade Policy Making in India: The Reality Below the Water Line*, London School of Economics, CUTS; Narayan, S. Dr. 2005. "Trade Policy Making in India", May 2005; Srinivasan, T.N. 2000. *Developing Countries and the Multilateral Trading System*, Westview Press; Hudec, R.E. 1987. *Developing Countries in the GATT/WTO Legal System*, Trade Policy Research Centre; Narlikar, Amrita. 2003. "Peculiar Chauvinism or Strategic Calculation? Explaining the Negotiating Strategy of a Rising India", *International Affairs, Chatam House*, Volume 82, Issue 1; Blaas, Wolfgang and Becker, Joachim. 2007. *Strategic Arena Switching in International Trade Negotiations*, Ashgate Publishing Company.

[25] Winham, G.R. 1990. "GATT and the International Trade Regime", *International Journal*.

[26] Preeg, Ernest H. 1995. *Traders in a Brave New World*, University of Chicago Press.

the clear impression that India (along with Brazil to a lesser degree) was bitterly isolated and had no choice but to accept the Punta del Este declaration which included "new" areas such as Services, Intellectual Property Rights and Investment Measures. This is certainly one way of looking at it since both India and Brazil had vehemently opposed the inclusion of the above "new" areas into GATT.

A different account of what India achieved at Punta del Este may be seen in the article written by former Indian Ambassador to GATT S.P. Shukla.[27] As he points out, on Services, India did manage to achieve a clear legal separation of the two negotiation streams, one for Goods and the other for Services and with the mandate that the national laws and regulations in the services sector should be respected. Even more significant, Trade-related Investment Measures (TRIMs) and TRIPs were anchored in the GATT framework. As he says, this did fall short of the objectives of the US which would have wanted full-fledged negotiations with an open-ended mandate. Furthermore, to get a mandate on eventual integration of the textiles sector into GATT was no mean achievement. Bear in mind that in 1986, India insofar as trade clout was concerned, could hardly be described as any power, let alone a leading power. In this sense, India did manage to punch above its weight. It is a different matter altogether that the US and its friends came up with a "single undertaking" later on in the Uruguay Round to negate the two-track approach to Services described above and the TRIPs mandate itself was expanded to go well beyond trade in counterfeit goods.

India along with Brazil also played an important role in maintaining the sanctity and integrity of the multilateral trading system when it came to three areas: Rules, Dispute Settlement and the Marrakesh Agreement Establishing the World Trade Organization. In the area of Safeguards (Rules), for instance, Brazil and India made proposals early on (before Montreal, 1988) arguing that safeguard actions must be taken on a non-discriminatory basis and must entail more favourable treatment for developing countries. But the basic philosophy was that MFN and GATT bindings must be respected except in rare circumstances. This issue of non-discrimination with regard to safeguard issues was insisted upon by

[27] Shukla, S.P. 2000. *From GATT to WTO and Beyond*, United Nations WIDER Publication.

India (along with others) till the end. Finally, this found mention in Article 22 of the Agreement on Safeguards: “Safeguard measures shall be applied to a product being imported irrespective of its source”. This is just by way of one example. Similar examples can be found in other areas of Rules.

The other crucial example of India punching above its weight is in the Legal Drafting Group (Track Three) set up in the wake of the Draft Final Act submitted by Arthur Dunkel. This Group first chaired by Madan Mathur and then by the formidable Julio Lacarte (an Uruguayan negotiator who was present in Havana in 1947 and was equally around in Marrakesh in 1994) was an important but less-known work during the Uruguay Round. It was important because the basic mandate of this Group was to ensure internal, legal consistency between the various Agreements without any substantive change. The author took active part in Track Three negotiations representing India and can testify that the bulk of the text was at least in broad terms determined by the US, the EU, India and Brazil. Once again, India along with Brazil was interested in the following objectives when it came to dispute settlement:

- to prevent unilateralism in all forms by the powerful WTO members;
- to ensure that the WTO dispute settlement system being created would not only be rigorous and enforceable (as sought by the US and EU) but also be objective and fair; and
- suspension of concessions (also known more commonly as trade retaliation) would happen only as a last resort and only when all other avenues had been exhausted. Even then, principles and procedures outlined in Article 22[28] would have to be followed scrupulously. It is fair to say that India and Brazil played a decisive role in the drafting of these texts.

Again, the above is an example of how India which in 1992 had not faced more than a handful of dispute settlement cases had the foresight and wisdom to play an important role in safeguarding the “systemic interest” of WTO. In fact, India would be one of the few countries

[28]WTO “The Legal Texts”, Understanding on Rules and Procedures governing the Settlement of Disputes, www.wto.org.

in WTO which agitated as much for its national interest (which was perfectly natural) as for the systemic interest of an open and non-discriminatory multilateral trading system.

Similarly, India played an important role (again with Brazil, the US and the EU) in the drafting of the Marrakesh Agreement establishing the WTO.[29] In particular, Article IX of the above Agreement that deals with decision-making took up lots of time. Even the basic practice of decision-making by consensus and in its absence, by voting, was discussed threadbare. This, notwithstanding the fact that voting had never really happened on any substantive issue in the GATT/WTO system. It was interesting to note that there were two players who were always attached to the practice of decision-making by consensus in the WTO. They were: the US and India. Perhaps, these two countries knew at the back of their minds that there would always be situations when they would find themselves alone.

The Agreement on Textiles and Clothing was another example of India having punched above its weight. It would be no exaggeration to say that if India had not agitated for the elimination of the quota-based Multi-fibre Arrangement, the full integration of the textiles sector into GATT may have never happened. This is particularly true because the Punta del Este mandate in this area only talked of "eventual integration" of this area into GATT rules. Also, bear in mind that despite the obvious clout of the Cairns Group, Agriculture to this day is yet to be fully subject to GATT disciplines. It is common to criticize the Uruguay Round Agreement on Textiles and Clothing as being "back-loaded", which it clearly was. But, given that the vast majority of textiles and clothing exporting countries were less attached to the goal of total elimination of the Multi-fibre Arrangement than India (and Pakistan), it was no mean achievement that Textiles and Clothing was fully integrated into the GATT/WTO system.

Two other examples of India punching above its weight relate to the Doha Round. One was the systematic opposition by India to the commencement of negotiations in the so-called Singapore Issues, namely, Investment, Competition Policy, Trade Facilitation and Transparency in Government Procurement. Especially in the areas of Investment and Competition Policy, it was often asked what India can possibly lose by

[29] Ibid.

agreeing to negotiate in these areas. Indeed, in an excellent chapter on India's Trade Policy, Aaditya Mattoo and Arvind Subramanian[30] (both of whom were young professionals working for the GATT/WTO Secretariat in the nineties) argue against what they describe as "Negotiating Pessimism" and ask India to align itself with countries that have open markets rather than those which argue for closed markets. They say, for example, that India's natural allies should be the Cairns Group in Agriculture, Japan and Hong Kong in Anti-Dumping and the European Union in Investment and Competition Issues.

The author would like to respectfully disagree with the above proposition for the following reasons:

1. Asking India to align itself with the Cairns Group on Agriculture reveals a certain lack of appreciation for India's Agriculture. It is one thing to agree in favour of a tactical alliance with the Cairns Group in order to put pressure on the EU and US to get rid of their nefarious practices in Agriculture. But which country in the Cairns Group has a situation even remotely similar to that of India where 60% of the population depended on Agriculture, where Agriculture continued to be dependent on the monsoons and where farmer suicide was a political time-bomb. Massive investment in Indian Agriculture was needed before it can even consider aligning itself with the objectives of the Cairns Group. In fact, if there was one deal-breaker for India in the Doha negotiations, it was the issue of Agriculture. Indeed, all statistics on Indian Agriculture[31] reveal that around 60% of the labour force was still employed with agriculture. A report by the European Commission clearly stated that "India was still a big unknown". Indeed, it said that India's food import bill could rise sharply because of shortfall in domestic production. The report concluded that "Questions have arisen about India's capacity to compete in global markets under the current farm structure and farm policy". Even if it is argued that Indian farm policy can be modified, it was hard to contemplate short-term changes to the Indian farm structure.

[30] Mattoo, Aditya and Stern, Robert M. 2003. *India and the WTO*, World Bank and Oxford University Press.

[31] European Commission, Monitoring Agri-Trade Policy, "India's Role in World Agriculture", December 2007, http://ec.europa.en/agriculture.

2. On Anti-dumping, India's situation had evolved. It is true that in the early nineties India was in alignment with Japan and Hong Kong asking for toughening of anti-dumping rules when it faced these actions by developed countries. The author was elected Chairman of the WTO Committee on Anti-Dumping in 1995 when India was considered a neutral and objective player in this area. The situation today is vastly different. India has emerged as one of the biggest users of the anti-dumping code of the WTO.[32] While this may be justified because of the dramatic reduction of applied tariffs that India has carried out in recent times, it would be naïve to expect Hong Kong and Japan to welcome India as an ally in this area.
3. On Investment and Competition policies, merits of the case aside, the problem for India had nothing to do with EU's motives for pursuing negotiations in these two areas. We saw in an earlier Chapter that EU's motives for launching a Comprehensive Round were mainly to compensate, as it were, for the "painful concessions" it is likely to have to make in the area of Agriculture. None of the EU businesses/lobbies were asking for negotiations to be launched in Investment, for example. Competition Policy was different because it evoked strong feelings from the US which was disinclined.

As for Investment, India's basic line was that the total FDI that India can attract, had very little or nothing to do with a multilateral agreement on Investment. And India has proved this with the FDI that it has been able to attract over the past years:

Amount of the total FDI Inflows in 2000–2001	US$4 Billion
Amount of total FDI Inflows in 2008–2009	US$35 Billion
Amount of total FDI Inflows in 2016–2017	US$60 Billion

Source Department of Industrial Policy Promotion in India: www.dipp.in

While India was not convinced that it will gain from the multilateral instrument on Investment in the WTO, there are many in India who worry that just like the TRIPs Agreement of the Uruguay Round, the proposed Agreement on Investment will turn out to be an onerous burden for India.

[32] Baruah, Nandana. June 2007. "An Analysis of Factors Influencing the Anti-dumping Behaviour in India", *The World Economy*.

It was against this background that India took the stance it did in Doha, details of which we have seen in an earlier chapter. India, as is now well known, single-handedly had the Conference of Ministers suspended and got the language relating to "explicit consensus" included in the text. It did so against all odds and it did so in order to provide some cushion for itself in the future on this important issue.

The main reasons for providing the above examples was to throw some light on India's negotiating stance on some critical issues. It was easy to label India as negative, obstructionist and defensive, as many observers have done. But as this section has shown, India's "sui generis" character, her past experience at the GATT and the WTO, her fundamental defence of the "systemic interest" of the multilateral trading system and last, but not least, her supreme national interest in the context of the vigorous parliamentary democracy at home may explain in substantial measure the positions taken by her in multilateral trade negotiations. Also, as we have seen above, there were some negotiating areas where India indeed punched above its weight during the multilateral trade negotiations at the WTO.

CHAPTER 5

Conclusion

5.1 Whither WTO?

The Doha Ministerial Conference in 2001 represented a solemn promise to developing and least developed countries. The promise was to place the needs and interests of developing countries at the heart of the negotiations as also to address the marginalization of least developed countries in international trade.[1] So when Ministers gathered in Cancun in 2003, there were huge expectations on the part of developing countries and least developed countries that their demands, especially in Agriculture, would be met substantially, if not fully. In the event, the Ministerial meeting in Cancun ended in a Seattle-like fiasco with no declaration at all.[2] The strong resistance put up by the so-called G22 coalition (comprising India, Brazil and China) on the issue of Agriculture took the US–EU alliance head on. Perhaps even more surprising, the so-called G90 coalition of developing countries simply refused to be cowed down on the question of launching negotiations in the Singapore Issues. In 2003, at Cancun, it seemed the developing and least developed countries had come of age in the WTO and refused to sign on the dotted line.

[1] The Doha Ministerial Declaration adopted on November 14, 2001.

[2] For an excellent account of the Cancun Ministerial see Narlikar, Amrita and Wilkinson, Rorden. January 2007. "Collapse at the WTO: A Cancun Post-mortem", *Third World Quarterly*.

© The Author(s) 2018

M. Kumar, *Negotiation Dynamics of the WTO*,
https://doi.org/10.1007/978-981-10-8842-1_5

If Cancun served notice of the firm resolve of developing and least developed countries to pursue their interests, this was lost on their developed country partners. The latter continued to push for greater market access and for negotiations to be launched in the Singapore Issues. The developing countries, however, stood firm especially on the issue of Agriculture. And with countries like India, China and Brazil joining hands, it was no longer possible to steamroller them. The WTO, after the failure at Cancun, thus faced an existential crisis.

A decade flew by (with no breakthrough) before yet another WTO Ministerial Conference was held in Bali in 2013. The Bali Ministerial outcome, as it turned out, prevented a possible collapse of the multilateral trading system and may have given the WTO a new lease of life. Although by no means earth-shaking, the Bali outcome represented the first-ever new multilateral agreement decided upon by WTO members since its inception in 1995. This was the Trade Facilitation Agreement, undoubtedly the most development-friendly subject of all the Singapore Issues. In yet another example of India punching above its weight, it managed to secure as quid pro quo to the Trade Facilitation Agreement a decision on "Public Stockholding for Food Security Purposes" which prescribed a peace clause (immunity for India's programmes from WTO dispute settlement) initially till 2017, when a permanent solution to the issue was to be found. But in November 2014, India managed to make the peace clause indefinite through another decision, till obviously a permanent solution is found. This was an important achievement by any reckoning. That said, in overall terms, the Bali Ministerial only represented limited progress and did not fundamentally address the iniquities of the WTO system.[3] But by making progress, albeit limited, the Bali Ministerial created the illusion that the Doha promise was still alive.

If Bali created the illusion of the Doha Development Agenda being alive, the same cannot be said of the tenth WTO Ministerial at Nairobi held in December 2015. In the Nairobi Ministerial Declaration, it was stated on record that WTO Members have "different views" on the Doha Round. This beggared belief, not least because the developing and the least developed countries had set great store by the Doha Development Agenda. The UK Daily's (FT) reading of the Nairobi

[3]Wilkinson, Rorden. September 2014. "The WTO in Bali: What MC9 Means for the Doha Development Agenda and Why It Matters", *Third World Quarterly*.

Ministerial was that the Doha Round was dead![4] Between Bali and Nairobi, the WTO wrought the following fundamental changes to the negotiating dynamics:

1. The hitherto sacrosanct rule called "single undertaking" (WTO Members to accept all results and not cherry-pick) was set aside. WTO now appeared to prefer dealing with small packages and specific issues.
2. Plurilateral agreements have become the vogue. Nairobi led to an Agreement on Information Technology II which was subscribed to by over 50 WTO Members. Negotiations would henceforth be spearheaded by a "coalition of the willing".
3. There was now a serious question mark over the future of the Doha Round in its current form. If not already dead, it is certainly in the ICU!

The latest WTO Ministerial to be held in Buenos Aires, Argentina, in December 2017 confirmed all the above trends and concluded without any positive outcome. The Director General of WTO accepted failure at Buenos Aires when he said: We cannot deliver at every Ministerial Conference! The WTO thus finds itself at a crossroads.

5.2 Some Ideas to Revive the WTO

How did it come to this? After all, the WTO not so long ago symbolized the very essence of the multilateral trading system and was the only serious forum for negotiating rules and for settling trade disputes between nations.

One possible answer lay in the hubris of the leading powers which felt that they could just keep on adding to the negotiating agenda with scant regard as to whether this was acceptable to less powerful members or not. It was possible to do this in the Uruguay Round and they almost got away with it at Doha, but now the power had shifted. This was evident from the fact that the earlier QUAD (comprising the US, the EU, Japan and Canada) has now been virtually replaced by the so-called G 5 (comprising the US, the EU, China, India and Brazil) plus ASEAN,

[4] Donnan, Shawn. December 21, 2015. "Trade Talks Lead to Death of Doha and Birth of New WTO", *Financial Times.*

Japan and Australia. In areas like Agriculture, India and China now constituted a formidable duo and cannot be rolled over. Furthermore, the African Group and the Least Developed Countries have also started pulling their political weight.

At the risk of stating the obvious, the majority of WTO Members today are developing and least developed countries. It, therefore, stands to reason that their voice be heard and they be counted in negotiations. The decision-making process has also been complicated by the fact that there are now 164 member countries zealously guarding their rights. Since WTO operates on the basis of consensus, every country has the potential right to block an agreement if it is against its national interest.

It is distinctly unfortunate that the leading powers now want to abandon the Doha Round. There is a reason why most developing and least developed countries are attached to the Doha Round. The Doha Declaration promised that development would be at the centre of all future trade negotiations. It further stipulated the following criteria[5]:

- Need for all peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates.
- Need to place the needs and interests of developing countries at the heart of the WTO.
- Efforts to ensure that developing countries and especially the least developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development.
- Efforts to help least developed countries secure beneficial and meaningful integration into the multilateral trading system and the global economy.

At the time of writing, one would have to be an inveterate optimist to give Doha Round any chance of succeeding. Yet, it would be a mistake to abandon it. Abandoning it would create a further gulf between developed and developing countries and negotiating fault-lines would deepen. Does Doha deserve one last attempt? In an interesting report six years ago by Jagdish Bhagwati and Peter Sutherland,[6] it was rightly pointed out by them that the "developed countries have to accept that

[5] Doha Ministerial Declaration, Adopted on November 14, 2001.

[6] Bhagwati, Jagdish and Sutherland, Peter. January 2011. *The Doha Round: Setting a Deadline, Defining a Final Deal*, Interim Report.

the outcome will be asymmetrical". If the leading powers can accept this (a big ask from the US and EU), then a way can still be found to break the impasse. But the odds appear slim.

Meanwhile, plurilateral agreements seem to be the preferred route for a number of countries. If so, it must then be made clear that if plurilateral agreements are negotiated in the WTO then they should adhere to the following principles:

- Full transparency during and after the negotiations;
- Open to all WTO Members at a time of their choosing;
- No punitive measures for those who choose not to join;
- Ensure the Agreement is applied on an MFN basis; and
- Must be a building block and contribute to an open, equitable and non-discriminatory multilateral trading system.

As if the serious impasse in negotiations is not bad enough, there is yet another crisis confronting the WTO. It has to do with the dispute settlement system, which is under strain primarily because of US objections. The US has stopped approving fresh appointments to the Appellate Body expressing serious misgivings about some reports issued by Panels and the Appellate Body. The US contention is that the Panels and the Appellate Body have indulged in judicial overreach and have added to the rights and obligations of WTO Members. This is a serious allegation and even though the US is alone in this matter, a solution needs to be found on an urgent basis. The dispute settlement mechanism is fundamental to the credibility of the WTO. The WTO Membership needs to drop everything else it is doing and resolve this issue as quickly as possible. It is the view of the author that the big users of the WTO dispute settlement system (other than the US) such as the EU, India and Brazil must start consulting immediately with the US to find a compromise solution. India is well placed to take the lead in this matter. One way out to assuage US concerns is for the WTO General Council (supreme body in the absence of the Ministerial Conference) to issue the following instructions (already contained in the WTO Agreement on dispute settlement) to the Panels and the Appellate Body:

1. The Panels and the Appellate Body shall ensure that the rights and obligations of all WTO Members are preserved under the covered agreements. It, therefore, follows that the recommendations and

rulings of the Dispute Settlement Body cannot add or diminish the rights and obligations provided in the covered agreements (the US has alleged that obligations have been added to it by the Panels/Appellate Body).

2. The Panels and the Appellate Body will ensure that their recommendations and rulings clarify (and not "legislate" as the US alleges) the existing provisions of covered agreements in accordance with customary rules of interpretation of public international law.
3. The Panels shall examine, in the light of the relevant provisions of the covered agreement, only the matter referred to by a WTO Member (the US alleges that the Panels go fishing for issues).
4. The Appellate Body shall ensure that the appeal will be limited to issues of law covered in the panel report and legal interpretation developed by the panel (the US has had a problem with "obiter dicta" of the Appellate Body).
5. Finally, the Appellate Body comprising three persons who are hearing a dispute shall all be serving members at the time of consideration of the dispute. (The US has had a problem with people who have just retired from the Appellate Body serving on cases initiated when they were still in service.)

The above may seem arcane points to an outsider, but these are precisely the issues raised by the US which has accused the Panels and the Appellate Body of judicial overreach. It is important for the WTO to take the US allegations seriously and find a compromise solution. This is a systemic issue and must be resolved forthwith. India has a systemic interest in finding a solution to this crisis engendered by the US position and has the necessary clout and respect to lead efforts in this regard. It must do so without further delay.

Once that is done, the WTO needs to do some soul searching as to why so many, both within and without, have lost confidence in the organization. Countries who are members of the WTO need to be convinced that its rules help them achieve developmental goals. One way of doing it would be to link WTO's rules and negotiations to the Sustainable Development Goals (SDGs) that all countries subscribe to without reservation.[7] The developed countries have, ironically, picked one SDG

[7]For the 17 SDGs agreed to by all 193 UN Members in 2015, see https://sustainabledevelopment.un.org.

(14) and justified negotiations in the area of Fisheries Subsidies. Fair enough. The question now is, are they willing to agree that the following negotiations will take place in line with the relevant SDGs:

1. Doha Development Agenda: linked to SDG 17 calling for early conclusion of Doha Round.
2. Agriculture negotiations, public stocking for food security purposes and special safeguards mechanism for developing countries: linked to SDG 2 "Zero Hunger".
3. TRIPs Non-Violation negotiations: linked to SDG 3 "Good health and well-being".
4. Services Negotiations: Obligations to be consistent with and linked to SDGs 4, 5 and 6. Education, Gender and Water.
5. Fisheries Subsidies Negotiations: linked to SDG 14 "Life below Water".
6. Actions to combat climate change to be immune from WTO dispute settlement (subsidies and local content requirements for solar cells): linked to SDGs 7 and 13 "Access to Clean Energy" and "Climate Action".
7. Electronic Commerce Negotiations: linked to SDG 17 calling for access to ICT for all.
8. Trade and Transfer of Technology negotiations: linked to SDG 17, Global Partnership.
9. Trade, Debt and Finance negotiations: linked to SDG 17, Global Partnership.

It would be hard for anyone to object that the WTO rules must, in principle and in practice, enable countries to achieve the SDGs which have been universally agreed upon. By the same token, if it can be demonstrated by a WTO Member that the provisions of any Agreement impede it from achieving the SDG goals then, there would have to be a limited exception from obligations for that country concerned. This is not just necessary for developing and least developed countries in terms of policy space, but equally for restoring the credibility of the WTO as an institution by sending a clear signal that WTO rules are made not just for the powerful members or to facilitate free trade, but also to ensure that the rules enable all WTO Members in achieving their developmental goals. There could be no better tribute to Doha Development Agenda than this.

Ministry of Commerce and Industry (Vanijya Aur Udyog Mantralaya)

Annex 1

A. Department of Commerce

I. International Trade

1. International Trade and Commercial Policy including tariff and non-tariff barriers.
2. International Agencies connected with Trade Policy (e.g. UNCTAD, ESCAP, ECA, ECLA, EEC, EFTA, GATT/WTO, ITC and CFC).
3. International Commodity Agreements other than agreements relating to wheat, sugar, jute and cotton.
4. International Customs Tariff Bureau including residuary work relating to Tariff Commission.

II. Foreign Trade (Goods & Services)

5. All matters relating to foreign trade.
6. Import and Export Trade Policy and Control excluding matters relating to-
   a. import of features films;
   b. export of Indian films—both feature length and shorts; and

© The Editor(s) (if applicable) and The Author(s) 2018

M. Kumar, *Negotiation Dynamics of the WTO*,
https://doi.org/10.1007/978-981-10-8842-1

c. import and distribution of cine-film (unexposed) and other goods required by the film industry.

III. State Trading

7. Policies of State Trading and performance of organizations established for the purpose and including-
    a. The State Trading Corporation of India Limited and its subsidiaries excluding Handicrafts and Handlooms Export Corporation and Central Cottage Industries Corporation; the Tea Trading Corporation of India Limited and the Spices Trading Corporation of India Limited;
    b. Projects & Equipment Corporation of India Limited (PEC);
    c. India Trade Promotion Organisation and its subsidiaries;
    d. Minerals and Metals Trading Corporation and its subsidiaries.
8. Production, distribution (for domestic consumption and exports) and development of plantation crops, tea, coffee, rubber, spices, tobacco and cashew.
9. Processing and distribution for domestic consumption and exports of Instant Tea and Instant Coffee.
10. a. Tea Board.
    b. Coffee Board.
    c. Rubber Board.
    d. Cardamom Board.
    e. Tobacco Board.

V. Management of the Indian Trade Services (ITS)

11. Cadre Management of the Indian Trade Service and all matter pertaining to training, career planning and manpower planning for the service.
12. Cadre Management of Indian Supply Service and all matter pertaining to training, career planning and manpower planning for the Service.
13. Cadre Management of Indian Inspection Service and all matter pertaining to training, career planning and manpower planning for the Service.

VI. Special Economic Zones

14. All matters relating to development, operation and maintenance of special economic zones and units in special economic zones, including export and import policy, fiscal regime, investment policy, other economic policy and regulatory framework.

Note: All fiscal concessions and policy issues having financial implications are decided with the concurrence of the Department of Economic Affairs (Ministry of Finance) or failing such concurrence with the approval of the Cabinet.

VII. Export Products and Industries and Trade Facilitation

15. Setting up of Export Processing Zones (EPZ)/Agricultural Export Zones (AEZ) and 100% Export Oriented Units (EOUs).
16. Gems and Jewellery.
17. Matters relating to Export Promotion Board, Board of Trade and International Trade Advisory Committee.
18. Matters relating to concerned Export Promotion Councils/ Export Promotion Organizations.
19. Indian Institute of Foreign Trade and Indian Institute of Packaging.
20. Indian Diamond Institute and Footwear Design and Development Institute.
21. Coordination for export infrastructure.
22. Development and expansion of export production in relation to all commodities, products, manufacturers and semi-manufacturers including-
    a. agricultural produce within the meaning of the Agricultural Produce (Grading and Marking) Act, 1937 (1 of 1937);
    b. marine products;
    c. industrial products (engineering goods, chemicals, plastics, leather products, etc.);
    d. fuels, minerals and mineral products;
    e. specific export-oriented products (including plantation crops, etc. but excluding jute products and handicrafts which are directly under the charge of this Department).

23. All organizations and institutions connected with the provision of services relating to the export effort including-
    a. Export Credit and Export Insurance including Export Credit and Guarantee Corporation Limited;
    b. Export Inspection Council; Standards including Quality Control;
    c. Directorate General of Commercial Intelligence and Statistics;
    d. Free Trade-Zones.
24. Projects and programmes for stimulating and assisting the export efforts.

VIII. Attached and Subordinate Offices

25. Directorate General of Foreign Trade.
26. Administration of Directorate General of Supplies and Disposals, New Delhi.
27. Directorate General of Anti-Dumping and Allied Duties and related matters.
28. Directorate General of Commercial Intelligence and Statistics.

IX. Statutory Bodies

29. Marine Products Export Development Authority.
30. Agricultural and Processed Food Products Export Development Authority.

X. Miscellaneous

31. Purchase and inspection of stores for Central Government Ministries/Departments including their attached and subordinate offices and Union Territories, other than the items of purchase and inspection of stores which are delegated to other authorities by general or special order.

B. Department of Industrial Policy and Promotion (Audyogik Niti Aur Samvardhan Vibhag)

I. Industrial Policy

1. General Industrial Policy.
2. Administration of the Industries (Development and Regulation) Act, 1951 (65 of 1951).

3. Industrial Management.
4. Productivity in industry.

II. Industries and Industrial and Technical Development

5. Planning, development and control of and assistance to, all industries other than those dealt with by any other Department.
6. Issue of licences for establishment of industries for production of civil aircraft to be made in consultation with the Ministry of Civil Aviation and Department of Defence Production.
7. Cables.
8. Light Engineering Industries (e.g. Sewing machines, typewriters, weighing machines, bicycles, etc.).
9. Light industries (e.g. Plywood, stationary, matches, cigarettes, etc.).
10. Light Electrical Engineering Industries.
11. Raw films.
12. Hard Board.
13. Paper and newsprint.
14. Tyres and Tubes.
15. Salt.
16. Cement.
17. Ceramics, Tiles and Glass.
18. Leather and Leather Goods Industry.
19. Soaps and Detergents.
20. Technical Development including Tariff Commission and United Nations Industrial Development Organization.
21. Direct foreign and non-resident investment in industrial and service projects excluding functions entrusted to the Ministry of Overseas Indian Affairs.
22. Foreign Investment Implementation Authority (FIIA).

III. Industrial Cooperation

23. Administration of the Indian Boilers Act, 1923 (5 of 1923) and the regulations made thereunder; Central Boilers Board.
24. Explosives-Administration of the Explosives Act, 1884 (4 of 1884), and the rules made thereunder, but not the Explosive Substances Act, 1908 (6 of 1908).
25. The Inflammable Substances Act, 1952 (20 of 1952).

IV. Industries and Industrial and Technical Development

26. National Council for Cement and Building Materials.
27. Indian Rubber Manufacturers' Research Association, Mumbai.

V. Protection of Intellectual Property Rights (Industrial Property)

28. Standardization of international products and raw materials.
29. The Designs Act, 2000 (16 of 2000).
30. The Trade and Merchandise Marks Act, 1958 (43 of 1958).
31. The Patents Act, 1970 (39 of 1970).

31A. Matters concerning World Intellectual Property Organization (WIPO) including coordination with other concerned Ministries or Departments.

VI. Materials Planning

32. Coordinated assessment of demands for raw materials by sectors, industries and large-units in relation to particular groups of products and to available capacities.
33. The Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999).
34. Assessment of domestic availability of raw materials with due regard to the feasibility of import substitution.
35. Assessment of requirements of imports of raw materials, with due allowance for inventories.
36. Determination of principles, priorities and procedures for allocation of raw materials.
37. All other matters connected with materials Planning.

Annex 2

Organizational Chart (Trade Policy Division)

Trade Policy Division

The Trade Policy Division (TPD) is divided into different functional areas of trade and commerce, such as Agriculture, Non-Agricultural Market Access, Disputes and Rules, SPS/TBT, TRIPS & Environment/

Labour, Services and Trade Facilitation catering the functions of World Trade Organization and other International Bodies/Groups functioning in the field of development World Trade.

The Division is headed by Additional Secretary with two Joint Secretaries and Seven Divisional level Officers, i.e. Directors/Additional Economic Adviser/Deputy Secretary and other supporting staff of the following desks:

Name and Contact Address of Division Head:
Additional Secretary Trade Policy Division Department of Commerce Government of India Udyog Bhavan, New Delhi-110011.

Joint Secretary Trade Policy Division Department of Commerce Government of India Udyog Bhavan, New Delhi-110011.

Major functions of Trade Policy Division (TPD):

TPD (Agriculture & Coordination Desk)
Major Area: Agriculture including

- Work relating to Notification requirement of WTO
- Review of compliance with relevant Agreements
- WTO Committees on relevant Agreements

Others:

- Overall coordination for WTO negotiations of Doha Round including matters to be placed before CCWTO/ Cabinet.
- Ministerial Conference of WTO.
- Talking points and briefs on WTO Issues.
- Parliamentary work including Standing Committees.
- Material for annual reports, economic survey, budget speeches, monthly cabinet reports and other VIP reports etc.
- Work of TNC and General Council.
- Matters related to India's participation in WTO Public Forum, Inter-Parliamentary Union etc.
- Matters related to G-20, OECD and World Economic Forum.

Director
TPD(Disputes & Rules)

- WTO Dispute Settlement, Interpretation of GATT provisions, Rules Negotiations including Anti-Dumping, & Agreement on Subsidy and Countervailing measures and Agreement on Safeguards, Section 9 of Customs Tariff Act, Indian Council of Arbitration and related work including:
  – Work relating to Notification requirement of WTO
  – Review of compliance with relevant Agreements
  – WTO Committees on relevant Agreements
  – Government procurement chapter in India-EU BTIA

Director
DESK.III TPD (SPS-TBT-TRIPS)
Major Area:
Trade & Environment, Trade & Labour, Agreement on TRIPS, Agreement on Sanitary and Phyto-Sanitary Measures and Agreement on Technical Barriers to Trade including:

- Work relating to Notification requirement of WTO
- Review of compliance with relevant Agreements
- WTO Committees on relevant Agreements

Other Areas

- TPD Capacity building including the Centre for WTO studies and WTO chair in National Law School, Bangalore, Study proposal for approval under MAI, etc.
- TPD Documentation Centre and Library
- Work relating to RIS
- E-Governance

Under Secretary
DESK.IV TPD (NAMA)

1. Non-Agricultural Market Accesss (NAMA): NAMA, NTMs as limited to NAMA Negotiations, Textiles and clothing issues in the WTO, Committee on Regional Trade Agreements of WTO

including CRTA negotiations, International Textile Clothing Bureau (ITCB), e-commerce, Council for trade in goods, Committee on market access, tariff negotiations, ITA, Duty Free Tariff Preferences (DFTP) for LDCs;
2. Government procurement and Global coherence; and
3. State Trading Enterprises; including

- Work relating to Notification requirement of WTO
- Review of compliance with relevant Agreements
- WTO Committees on relevant Agreements
- Committee on Balance of Payments

1. Trade Policy Reviews of all WTO members including India

Director
DESK V.A. TPD (Services-I)
WTO Related Work

- Schedule of Commitments/Offers: Market Access Discussions including new approaches to negotiations as suggested by some developed countries.
- Issues of text: Domestic Regulations, LDC Modalities, Emergency Safeguard Measures, Government procurement, Subsidies etc.
- Implementation of WTO Obligations under Article III and VII etc. of the GATS—issues of notification etc.
- Participating in the multilateral services negotiation and preparation for various meetings of various bodies at the WTO, such as the Special Session of the Council for Trade in Services (CTS SS), Regular Session of the Council for Trade in Services (CTS), Committee on Trade in Financial Services (CTFS), Working Party on Domestic Regulations (WPDR) and the Working Party on GATS Rules (WPGR) and to provide inputs to PMI Geneva. Contributing to India's submissions at the WTO.
- Other WTO related matters such as contributing towards India's trade Policy Review, the Ministerial Conference.
- TISA.
- Work related to interpretations of WTO law/GATS.
- Interpretations of WTO law/GATS.

FTAs/Bilaterals

- RCEP
- India—EU BTIA
- India EFTA

Specific Service Sectors

- Business Services
- Legal services
- Communication Services

Other Issues

- Cabinet notes, RTI, Parliament Questions, Briefs and Speeches, and Studies
- Evolution of our position on FDI in multi-brand retail
- E-Commerce
- All work related to Bilateral Investment Promotion & Protection Agreements(BIPAs)

DESK V.B.TPD (Services-II)
FTAs/Bilaterals

- India–Malaysia
- India–New Zealand FTA
- India–Australia FTA
- India–Canada FTA
- Implementation work related to India–Japan CEPA, India–Sri Lanka CFEC
- Implementation of India–Korea CECA
- India–Thailand FTA
- India–China Working Group on Services
- ASEAN-India Trade in Services Agreement
- 2nd Review of India–Singapore CECA
- BIMSTEC
- APTA
- SAARC Agreement of Trade in Services (SATIS)

Specific Service Sectors

- Construction and related engineering
- Distribution Services
- Educational Services
- Environmental Services
- Transport Services

Other Issues

- Cabinet notes, RTI, Parliament Questions, Briefs and Speeches, and Studies
- Improvement in Statistics on Trade in Services

DESK V.C.TPD (Services-III)
FTAs/Bilaterals

- India–US TPF
- India–US ICT Working Group
- India–Israel FTA
- Initiation of dialogue with Chile, Brazil and Mercosur
- Any new bilateral engagement

Services Conclave & Global Exhibition on Services
Specific Service Sectors

- Tourism and Travel related Services
- Health-related and Social Services
- Health Services
- Re-creational, Cultural and Sporting Services

Other Issues

- Cabinet notes, RTI, Parliament Questions, Briefs and Speeches, and Studies
- Contributing to the formulation of proposed internal reform agenda in key services sectors. Work related to IMG on Services.
- Improvement in Statistics on Trade in Services

Director
DESK V.D.TPD (Services-IV)
Specific Service Sectors

- Financial Services
- Other Services not included elsewhere

Other Issues

- Bank branches approval related issues
- Agreements negotiated by respective line Ministries, e.g. Shipping, Civil Aviation, Department of Industrial Policy & Promotion,
- Ministry of Overseas India Affairs, Department of Economic Affairs etc.
- Cabinet notes, RTI, Parliament Questions, Briefs and Speeches, and Studies

Desk VI TPD (TF & Admin)

- Trade Facilitation, Customs Valuation, Pre-shipment Inspection, Import Licensing Procedure, including: Work relating to Notification requirement of WTO.
- Review of compliance with relevant Agreements.
- WTO Committees on relevant Agreements.
- Committee on Trade and Development (special session), sub-committee on LDCs.
- Working group on Trade and Transfer of Technology.
- Aid for trade, Technology assistance and capacity building.
- Work relating to Investment including TRIMs, Trade, Debt & Finance and Competition Policies.
- Monitoring of NTMs of key countries.
- Accession.
- Coordination in TPD.
- Result Framework Document (RFD).
- General Administration, VIP cases in TPD, Hindi matters and matters related to PMI Geneva.
- Nominations for WTO sponsored Seminars/ Workshops and Conferences.
- Matters relating to membership Administration, Budget of WTO.

Annex 3

Permanent Mission of India to the WTO, Geneva

1. Ambassador and Permanent Representative
2. Deputy Permanent Representative
3. Counsellor (Market Access)
4. Counsellor (Agriculture)
5. Counsellor (Services)
6. First Secretary (Intellectual Property)
7. Second Secretary (Legal Affairs)
8. Attache (Parliament and Admin)

Explanatory Note:
The Ambassador is normally someone from the Indian Administrative Service and the Deputy is someone from the Indian Foreign Service. This has more to do with balance of turf factors than necessarily someone with trade expertise.

The Counsellors are normally from the Indian Trade Service or Indian Economic Service. Others are from the Ministry of Commerce or seconded from other departments of the Government of India.

Annex 4

Parliamentary Consultative Committee
The main objective of the Committee is to provide a forum for informal discussion between Members of Parliament, on the one hand, and Ministers and senior officers of the concerned Ministry, on the other hand, on the policies, principles and programmes of the Government and the manner of their implementation, Members of Parliament belonging to both Houses are nominated on these Committees by the Minister of Parliamentary Affairs. The maximum limit of membership on a Consultative Committee is 40 from both the Houses.

Each Consultative Committee is expected to hold one meeting each during the session and inter-session period, the only exception being the Consultative Committee for the Ministry of Railways which meets only during the inter-session period. The agenda for the meeting is decided by the Chairman of the Committee either on the basis of suggestions received from the Members or in consultation with Members during the preceding meeting of the Committee.

Composition of the Consultative Committee for the Ministry of Commerce & Industry:

Minister of State in the Ministry of Commerce and Industry.
Selected members of Lok Sabha and Rajya Sabha.
Minister of State in the Ministry of Parliamentary Affairs (Ex-Officio Member).

Annex 5

Group of Ministers Dealing with WTO Issues

The Government constituted a Group of Ministers (GoM) with the following composition. This GoM is mainly responsible for finalizing a strategy to be followed during the negotiations in the World Trade Organization (WTO) and to take appropriate decisions from time to time. The responsibility of servicing this GoM lies with the Department of Commerce.

1. Minister of Finance
2. Minister of Agriculture
3. Minister of Home Affairs
4. Minister of Law & Justice
5. Minister of Labour & Employment
6. Minister of Commerce & Industry
7. Deputy Chairman, Planning Commission

Note: The present Government upon assumption of office in June 2014 has done away with the Group of Ministers mechanism.

Annex 6

Cabinet Committee on WTO Matters Constituted on 9 June 2004

The Cabinet Committee on WTO Matters (CCWTO) was constituted with the Prime Minister as Chairman. The members of the Committee were:

1. Mr. Pranab Mukherjee, Minister of Defence
2. Mr. Sharad Pawar, Minister of Agriculture; Food & Civil Supplies; Consumer Affairs & Public Distribution

3. Mr. Ram Vilas Paswan, Minister of Chemicals and Fertilizers; Stee
4. Mr. P. Chidambaram, Minister of Finance
5. Mr. Shankarsinh Vaghela, Minister of Textiles
6. Mr. Kamal Nath, Minister of Commerce & Industry
7. Mr. Raghuvansh Prasad Singh, Minister of Rural Development
8. Mr. Dayanidhi Maran, Minister of Communications & IT
9. Mr. Kapil Sibal, Minister of State (Independent Charge) of the Ministry of Science & Technology; and Department of Ocean Development
10. The Deputy Chairman, Planning Commission and Mr. Prithviraj Chavan, Minister of State (PMO) will be the Special Invitees.

Note: The present Government upon assumption of office in June 2014 has done away with the practice of Cabinet Committee on WTO matters.

Annex 7

Cabinet Committee on Economic Affairs (CCEA)
The main functions of the CCEA include (i) to direct and coordinate all activities in the economic field including foreign investment, (ii) to deal with matters relating to fixation of prices, (iii) to deal with industrial licensing policies, (iv) to review the performance of PSUs, (v) to consider proposals/infrastructure projects costing more than Rs. 150 crores, (vi) to deal with price increase of essential commodities or bulk goods, (vii) to consider issues of disinvestment, (viii) to review progress of rural development activities, etc. This Committee has become powerful vis a vis WTO matters since the Group of Ministers and the Cabinet Committee has been done away with.

Composition of the CCEA

1. Prime Minister
2. Minister of Home Affairs
3. Minister of External Affairs
4. Minister of Finance
5. Minister of Railways
6. Minister of Power
7. Minister of Road Transport & Highways
8. Minister of Defence

9. Minister of Chemicals and Fertilizers
10. Minister of Law and Justice
11. Minister of Commerce & Industry
12. Minister of Agriculture
13. Minister of Civil Aviation
14. Minister of Food Processing
15. Special Invitees as appropriate

ANNEX 8

The Trade and Economic Relations Committee

Constituted on 3 May 2005, the Trade & Economic Relations Committee is an institutional mechanism for evolving the extent, scope and operational parameters of our economic relations with other countries in a coordinated and synchronized manner.

The Committee is serviced by the Prime Minister's Office, which may obtain assistance as required from any Ministry/Department/Agency of Government.

Composition

The composition of the Trade and Economic Relations Committee is as follows:

a. Prime Minister—Chairman
b. Finance Minister
c. Commerce & Industry Minister
d. External Affairs Minister
e. Deputy Chairman, Planning Commission
f. Chairman, Economic Advisory Council
g. Chairman, National Manufacturing Competitiveness Council
h. National Security Adviser
i. Principal Secretary to PM—Convener

The Secretaries of the Departments of Economic Affairs, Revenue, Commerce, Industrial Policy & Promotion as well as Secretary, Planning Commission and Foreign Secretary, are permanent invitees to the meetings of the Committee.

The Chairman may invite any other Minister/Officer to any meeting of the Committee depending upon the context.

Charter
The Committee would engage in the following tasks:

a. Suggest mechanisms for promoting economic cooperation through various arrangements, such as Joint Study Groups, Task Forces, Negotiating Teams, etc.
b. Suggest the extent and scope of economic engagement with the identified countries.
c. Commission studies which would be valuable inputs in arriving at suitable decisions.
d. Examine proposals for economic coordination between India and the identified countries.

Activities
The Committee has held thirteen meetings till date, in which the following issues have been discussed:

1. India's engagement in regional trading arrangements.
2. Investments, both into the country and by India abroad.
3. Economic relations with the US, with special emphasis on the Small and Medium Enterprises sector.
4. Economic relations with the EU.

Note: This mechanism would appear to have fallen into disuse since the assumption of office of the present Government.

Annex 9

Federation of Indian Chambers of Commerce & Industry (FICCI)
FICCI is the largest and oldest apex business organization in India. FICCI plays a leading role in policy debates that are at the forefront of social, economic and political change. FICCI's stand on policy issues is sought out by think tanks, governments and academia.

FICCI works closely with the government on policy issues, enhancing efficiency, competitiveness and expanding business opportunities for industry through a range of specialized services and global linkages. It also provides a platform for sector-specific consensus building and networking. FICCI has a President and Secretary-General.

Confederation of Indian Industry (CII)

CII is a non-government, not-for-profit, industry-led and industry managed organization. It plays a proactive role in India's development process. Founded over 114 years ago, it is India's premier business association, working closely with government on policy issues, enhancing efficiency, competitiveness and expanding business opportunities for industry through a range of specialized services and global linkages. It also provides a platform for sectoral consensus building and networking.

With around 75 offices in India and overseas, CII serves as a reference point for Indian industry and the international business community. CII has a President and Director-General.

Consumer Unity and Trust Society (CUTS)

CUTS is involved in the area of trade and sustainable development in various ways and at various levels. The activities are focused mainly on WTO and related domestic policies. At the national level, the work mainly involves regular interaction with the Ministries of Commerce, Industries, Textiles and Consumer Affairs, and networking with consumer and other NGOs. CUTS has a President and Secretary-General.

Research and Information System for Developing Countries (RIS)

RIS is an autonomous research institution established with the financial support of the Government of India. It is India's 'Think-tank' on global issues in the field of international economic relations and development cooperation.

RIS is also mandated to function as an advisory body to the Government of India on matters pertaining to multilateral economic and social issues, including regional and sub-regional cooperation arrangements. RIS has a Chairman, Vice Chairman and Director General.

Indian Institute of Foreign Trade (IIFT)

The Indian Institute of Foreign Trade was set up in 1963 by the Government of India as an autonomous organization to help professionalize the country's foreign trade management and increase exports by developing human resources; generating, analyzing and disseminating data; and conducting research. The Institute's portfolio of long-term programmes is diverse, catering to the requirements of aspiring International Business executives and mid-career professionals alike.

IIFT has, over the years, undertaken research studies with organizations like WTO, World Bank, UNCTAD and the Ministry of Commerce

and Industry, Government of India. The Institute has also trained more than 40,000 business professionals across 30 countries in various facets of international business and trade policy via its Management Development Programmes. IIFT is headed by a Director.

Centre for WTO Studies

The Centre for WTO Studies was established in the Indian Institute of Foreign Trade in November 2002.

The major objective of the Centre has been to provide research and analytical support on a continuous basis to the Department of Commerce on identified issues pertaining to the World Trade Organization. In addition, it is also tasked to carry out research activities, bring out Publications on WTO related subjects, carry out Outreach and Capacity Building programmes by organizing seminars, workshops, subject-specific meetings etc., and to be a repository of important WTO documents in its Trade Resource Centre.

Indian Council for Research on International Economic Relations (ICRIER)

ICRIER, established in August 1981, is an autonomous, non-profit, economic policy think-tank. ICRIER's main focus is to enhance the knowledge content of policymaking by undertaking analytical research that is targeted at improving India's interface with the global economy. ICRIER receives financial support from a number of sources including grants from the Government of India, multilateral institutions, bilateral agencies and the private sector.

ICRIER organizes workshops/seminars/conferences to generate a more informed understanding on issues of major policy interest. ICRIER invites distinguished scholars and policymakers from around the world to deliver public lectures on economic themes of interest to contemporary India. ICRIER has a Director.

References

AFLCIO. www.aflcio.org.

Aggarwal, Rajesh, 2005. Dynamics of Agricultural Negotiations in the WTO. *Journal of World Trade* 39 (4): 741–761.

All WTO Documents and Information. www.wto.org.

Allocation of Business Rules. 1961. Government of India. http://cabsec.nic.in.

Bagchi, Sanjoy. 2001. *International Trade Policy in Textiles—Fifty Years of Protectionism*. Geneva: An International Textiles and Clothing Bureau (ITCB) Publication.

Baruah, Nandana. 2007. An Analysis of Factors Influencing the Anti-dumping Behaviour in India. *The World Economy* 30 (7): 1170–1191.

Bello, Webden. 1991. Debacle in Seattle: A Blow-by-Blow Account. Transnational Institute. www.tni.org.

Bergsten, C. Fred. 1998. Fifty Years of the GATT/WTO. Lessons from the Past for Strategies for the Future. Peterson Institute for International Economics.

Bhagwati, Jagdish, and Sutherland, Peter. 2011. *The Doha Round: Setting a Deadline, Defining a Final Deal*. Interim Report.

Blaas, Wolfgang, and Becker, Joachim. 2007. *Strategic Arena Switching in International Trade Negotiations*. Aldershot: Ashgate.

Blustein, Paul. 2009. *Misadventures of the Most Favoured Nations*. New York: Public Affairs.

Brussels Declaration. July 2001. UN General Assembly Document A CONF 191/12. www.un.org.

Cairns Group. www.wto.org.

CEO Quarterly Newsletter. December 2001. Corporate Europe Observer. www.corporateeurope.org.

Chan, W.K. 2001. *New WTO Round—A Doha Daily Report*. www.hksci.org.

© The Editor(s) (if applicable) and The Author(s) 2018

M. Kumar, *Negotiation Dynamics of the WTO*,
https://doi.org/10.1007/978-981-10-8842-1

Cho, Sungjoon. 2010. The Demise of Development in the Doha Round Negotiations. *Texas International Law Journal* 31: 29.
Commission of the European Communities. Communication from the Commission to the Council. http://europa.eu.
Congressional Research Service Reports. http://fas.org/spg/crs/index.html.
Constitution of India, Allocation of Business Rules, 1961, Article 77. http://india.gov.in.
Correa, Carlos. 2001. *Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries.* Geneva: Third World Network.
Correa, Carlos. 2002. *Implications of the Doha Declaration on the TRIPS Agreement and Public Health.* WHO Publication. www.gefoodalert.org.
Department of Commerce, Government of India. Organizational Set-up and Functions. http://commerce.nic.in.
Doha Declaration. www.wto.org.
Drahos, Peter, and Browthwaite, John. 2002. *Information Feudalism.* London: Earthscan.
Evenett, Simon. 2007. *Reciprocity and the Doha Round Impasse: Lessons for the Near Term and After.* University of St. Gallen and CEPR.
Finger, Michael, and Nogues, Julio. 2001. *The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations.* Policy Research Working Paper Series. World Bank.
Friends of the Earth International. 1991. Seattle and the WTO: A Briefing. www.foei.org.
GATT Document. www.wto.org.
Goto, Junichi. 1989. The Multifibre Arrangement and Its Effects on Developing Countries. *The World Bank Research Observers* 4 (2): 203–227.
Hoda, Anwarul. 2002. *Tariff Negotiations and Renegotiations Under the GATT and the WTO: Procedures and Practices.* Cambridge: Cambridge University Press.
Hoekman, Bernard, et al. 2002. *Development, Trade and the WTO: A Handbook* (Chapter 7). Washington, DC: World Bank Publication.
Hoekman, Bernard, and Messerlin Patrick. 2000. Liberalizing Trade in Services: Reciprocal Negotiations and Regulatory Reform. In Pierre Sauve and Robert Stern (eds.), *Services 2000: New Directions in Services Trade Liberalization.* Washington, DC: Brookings Institution.
Horn, Hernik, and Mavroidis, Petros. 2006. *The WTO Dispute Settlement System 1995–2004: Some Descriptive Statistics.* World Bank.
Hudec, R.E. 1987. *Developing Countries in the GATT/WTO Legal System.* Aldershot: Trade Policy Research Centre.
Human Development Report for India. 2009. http://hdrstats.undp.org.
Hudgins, Edward L. 1986. A US Strategy at the GATT Trade Talks. www.policyarchive.org.

International Centre for Trade and Sustainable Development. BRIDGES Publication. www.ictsd.org.

International Forum for Globalization. www.ifg.org.

International Textiles and Clothing Bureau. www.itcb.org.

Jackson, John Howard. 1997. *The World Trading System: Law and Policy of International Economic Relations*. Cambridge: Massachusetts Institute of Technology.

Khor, Martin. 1999. *The Revolt of Developing Nations*. Penang, Malaysia: Third World Network.

Khor, Martin. 2000. The Story Behind Seattle. *The Guardian*.

Kriner, Brandon J. 1999. The Fruits of Labour: The Need for International Labour Standards. www.american.edu.

Kumar, Mohan. 2003. TRIPS: Geographical Indications. Paper Submitted to the UNDP Asia Trade Initiative.

Kumar, Mohan. 2006. *Dispute Settlement in the WTO: Developing Country Participation and Possible Reform*. Cameron May.

Leutwiler, Fritz, et al. 1985. *Trade Policies for a Better Future: Proposals for Action*. Geneva: GATT.

Leyton-Brown, David. 1990. *Canadian Annual Review of Politics and Public Affairs*. Toronto: University of Toronto Press.

Library of Congress. THOMAS. 2001. http://thomas.loc.gov.

Macroiy, Patrick F.J., Appleton, E. Arthur, and Plummer, Michael G. 2005. *The World Trade Organization: Legal, Economic and Political Analysis*. New York: Springer.

Martin, Will, and Alan, Writers, L. 1995. The Uruguay Round and the Developing Economies. World Bank Discussion Papers.

Mattoo, Aditya, and Stern, Robert. 2003. *India and the WTO*. World Bank and Oxford University Press.

Mavoidis, Peter C. 2002. Amicus Curiae Briefs Before the WTO: Much Ado About Nothing. Jean Monnet Working Paper 2007.

Messerlin, Patrick. 2001–2003. The Real Cost of European Protectionism. Agriculture in the Doha Agenda. World Bank Policy Research Paper.

Narayan, S. Dr. 2005, Trade Policy Making in India.

Narlikar, Amrita, and Odell, John. 2006. *The Strict Distributive Strategy for a Bargaining Coalition: The Like-Minded Group in the WTO*. New York: Cambridge University Press.

Narlikar, Amrita. 2003. Peculiar Chauvinism or Strategic Calculation? Explaining the Negotiating Strategy of a Rising India. *International Affairs, Chatam House* 82 (1): 77–94.

Ostry, Sylvia. 2000. *WTO: Institutional Design for Better Governance*. Harvard: Kennedy School.

Ostry, Sylvia. 2000. *The Uruguay Round North–South Bargain: Implications for Future Negotiations*. University of Minnesota. www.utoronto.ca.

Ostry, Sylvia. 2004. *The World Trading System: In the Fog of Uncertainty*. Lehigh University.

Ostry, Sylvia. 2006. *The WTO: NGOs, New Bargaining Coalitions and a System Under Stress*. Toronto: Munk Centre for International Studies, University of Toronto.

OXFAM Discussion Paper. 2001. WTO Patent Rules and Access to Medicines: The Pressure Mounts. www.oxfam.org.uk.

Panagariya, Arvind. 2002. India at Doha: Retrospect and Prospect. *Economic and Political Weekly* 37 (4): 279–284.

Panagariya, Arvind. 2001. The Millennium Round and Developing Countries. Discussion Paper UNCTAD. www.bsos.umd.edu.

Panagariya, Arvind. 2008. *India: The Emerging Giant*. Oxford: Oxford University Press.

Poddar, Tushar, and Yi, Eva. 2007. Goldman Sachs. Global Economics Paper No. 152.

Haub, Carl, and Sharma, O.P. 2010. *What Is Poverty, Really? The Case of India*. Population Reference Bureau. http://www.prb.org.

Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*. Chicago: The University of Chicago Press.

Raffaeli, Marcelo, and Jernkins, Tripti. 1995. *The Drafting History of the Agreement on Textiles & Clothing*. Geneva: ITCB Publications.

Raghavan, Chakravarthi. 1990. *Recolonization: GATT, the Uruguay Round and the Third World*. Penang, Malaysia: Third World Network.

Rugman, Alan M., and Verbeke Alain. 2002. The World Trade Organization, Multilateral Enterprises and the Civil Society. www.g7.utoronto.ca.

Ruth van Gelder, Sarah. 1999. WTO in Seattle: The Millennium Round or Turnaround. *YES Magazine*.

Sauve, Pierre. 1995. Assessing the GATS—Half-Full or Half-Empty. *Journal of World Trade* 29 (4): 125–145.

Sauvé, Pierre. 2002. Trade, Education and the GATS: What's In, What's Out, What's All the Fuss About? OECD.

Schott, Jeffrey J. 1994. *The Uruguay Round: An Assessment*. Washington, DC: Institute for International Economics.

Schwab, Susan. 2011, May/June. After Doha: Why the Negotiations Are Doomed and What We Should Do About It. *Foreign Affairs* 90 (3): 104–117.

Sen, Julius. 2004. *Trade Policy Making in India: The Reality Below the Water Line*. London School of Economics, CUTS.

Short, Clare. 1999. Speech in Seattle. www.dfid.gov.uk.

Shukla, S.P. 2000. *From GATT to WTO and Beyond*. UNU World Institute for Development Economics Research (WIDER) Publication.
Smith, David Clinging. 2006. *Economic Development in India, 1931–1961*. Harvard University Press.
Srinivasan, T.N. 2000. *Developing Countries and the Multilateral Trading System*. Boulder: Westview Press.
Stewart, Terence P. 1999. *The GATT Uruguay Round: A Negotiating History*. Boston, MA: Kluwer Law International.
Stoler, Andrew L. 2003. The Current State of the WTO. Stanford University Workshop.
Tandon, Yash. 1999. What Is Wrong with the "Short" Development Round? www.seatini.org.
Timoney, Nicola. 1986. GATT: The New Round of Trade Negotiations. TROCAIRE. www.trocaire.org.
United Nations Documents and Information. www.un.org.
US General Accounting Office Documents and Information. www.gao.gov.
Wilkinson, Rorden, and Scott, James. 2008. Developing Country Participation in the GATT: A Reassessment. *Word Trade Review, Cambridge Journals* 7 (3): 473–510.
Winham, Gilbert R. 1989. *The Pre-negotiation Phase of the Uruguay Round*. Baltimore and London: Johns Hopkins University Press.
Winham, Gilbert R. 2005. *An Interpretative History of the Uruguay Round Negotiations*. Boston, MA: Springer.
Winham, Gilbert. 1990. GATT and the International Trade Regime. *International Journal* 45 (4): 796–822.
World Health Organization. 2006. Report of the Commission in Intellectual Property Rights, Innovation and Public Health, www.who.int.
World Socialist Website. 1991. The Social Meaning of the Anti-WTO Protests in Seattle. www.wsws.org.
Zutshi, B.K., and Self, Richard. 2002. Movement of Natural Persons (Mode 4) Under GATS. Joint WTO—World Bank Symposium Held in Geneva.

Index

A

AFL-CIO, 80, 113
African Caribbean Pacific (ACP) countries, 108, 144
Agriculture, 3, 8, 10, 13, 16, 23–30, 33, 39, 40, 43, 45, 46, 52, 54, 56, 61–63, 69, 72–78, 83, 85, 86, 88, 93, 94, 136, 138–142, 146, 148, 151, 153, 155, 156, 158, 159, 161, 165, 172–174, 177, 178, 180, 183, 190, 191, 197, 198, 200
AIDS, 125, 126, 128–131
Air transport services, 33
Allocation of Business Rules 1961, 151
Anti-dumping code, 3, 174

B

Basic telecoms, 33
Blair House Accord, 29, 33, 54, 83
Bound and applied tariffs, 51, 174
Bretton Woods Conference, xi

C

Cabinet Committee on Economic Affairs (CCEA), 154, 199
Cairns Group, 16, 21, 25, 26, 28, 29, 33, 40, 45, 62, 138, 172, 173
Chambers of Commerce, 157, 158, 201
Commerce and Industries Minister (CIM), 144, 151–155, 157, 160, 164, 166, 198–200
Common Agricultural Policy (CAP), 23–25
Competition Policy, 70, 71, 73, 76–78, 86, 87, 136–139, 164, 166, 172, 174
Comprehensive New Plan of Action (CNPA), 115, 116
Comprehensive Round, 26, 73, 75–77, 122, 123, 134–138, 140, 143, 146, 147, 174
Consensus in GATT, 29
Constitution of India, 151
Consultative Group, 108

© The Editor(s) (if applicable) and The Author(s) 2018
M. Kumar, *Negotiation Dynamics of the WTO*,
https://doi.org/10.1007/978-981-10-8842-1

Consumer health, 77
Copyrights, 36, 61
Core Labour Standards, 70, 71, 74, 79, 80, 86, 92, 93, 97, 98, 103, 122, 136, 140, 142
Counterfeit goods, 12, 18, 36–38, 40, 62, 165, 170

D
Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, 4
Department of Commerce, 151, 152, 185, 191, 198, 203
Department of Industrial Policy Promotion, 174
Development Round, 101, 121–124, 148, 149
Dillon Round, 4, 44
Dispute Settlement mechanism/ system, 57, 181
Doha Development Agenda, 121, 123, 145, 149, 178, 183
Doha Round of trade negotiations, 149
Draft Final Act, 28, 41, 50, 52, 53, 55, 78, 110, 155, 171
The Dunkel Draft, 28, 29, 48, 59, 155–157

E
Eminent Persons Group, 11, 21
Environment, 73, 74, 77, 87, 90, 91, 94, 101, 111, 114, 139, 140, 142, 153, 190, 192
European Free Trade Area (EFTA), 14, 185, 194
External transparency, 111, 113, 114

F
Financial services, 32, 33, 193, 196
Foreign direct investment (FDI), 61, 123, 174, 194
Free-riders, xii
Friends of the Earth, 113
Fritz Leutwiler Group and Report, 11
The Fundamentalist School, 6

G
General Agreement on Tariffs and Trade (GATT), 2–6, 8–18, 20–22, 24–30, 34, 36–49, 51–54, 56–59, 61, 62, 70, 73, 95, 98, 102, 107, 108, 114, 124, 129, 146, 154, 155, 168–170, 172, 173, 175, 185, 192
General Council, 79, 86, 88, 89, 96, 102, 103, 105, 106, 108, 110, 112, 114, 116, 120, 123, 132–134, 138–141, 181, 191
General Exceptions to GATT, 42, 124
Generalized System of Preferences (GSP), 18
Geographical indications (GIs), 82
Great Depression, xi
Group of Ministers, 155–157, 198, 199
G-7 group of countries, 12
G-77 group of countries, 12
G22 coalition of countries, 177
G-2 Management of the multilateral trading system, 10

I
Implementation-related issues, 81, 122, 135
Import Licensing Procedures, 3, 6
Indian Administrative Service (IAS), 153, 197
Indian Foreign Service (IFS), 153, 197
Integration and growth rates, 48

Intellectual Property Committee (IPC), 36–39
Intellectual Property Rights (TRIPs), 8, 10, 13–15, 17, 19, 20, 23, 30, 36–43, 46, 47, 52, 54–56, 61–65, 67, 69, 82, 83, 85, 105, 124–132, 139–142, 146–148, 152, 154, 155, 157–160, 162, 164–166, 168, 170, 183
Internal transparency, 98, 102, 106
International Intellectual Property Alliance (IIPA), 37, 40
International Monetary Fund (IMF), 146, 159, 164
International Textiles and Clothing Bureau (ITCB), 43, 45, 47, 193
International Trade Organization (ITO), 56, 59, 60
Investment, 6, 12, 14, 17, 18, 20, 23, 30, 61, 63, 70, 71, 73, 74, 76–78, 81, 86, 87, 93, 94, 123, 130, 136–139, 160, 161, 164, 166, 168, 170, 172–174, 187, 189, 194, 196, 199

J

Joint agency statement, 148, 149

K

Kennedy Round, 3, 4, 154, 164

L

Least developed countries (LDCs), 96–98, 103, 105, 108, 111, 115–118, 122, 132, 135, 180, 193, 196
Licence raj, 162
Like-Minded Group (LMG), 81–88, 122, 135, 168

M

Maritime transport, 32, 33
Medecins Sans Frontieres (MSF), 83, 127
The Millennium Round, 67, 73–75, 81, 88, 96, 135
Mobility of labour (Mode 4), 34
Most Favoured Nation (MFN), 2, 4, 32, 33, 35, 170, 181
Mother of all Rounds, 1, 6
Multi-fiber arrangement (MFA), 9, 44–47
Multilateral Trade Organization (MTO), 58–60

N

Negotiation resentment, 43, 65, 68, 76, 97, 98, 122, 147, 165
9/11 terror attacks, 120
Non-Agricultural Market Access (NAMA), 23, 49, 148, 192
Non-Governmental Organizations (NGOs), 57, 63, 72, 80, 83, 90, 91, 96, 97, 101, 104, 105, 107, 111–114, 122, 125–127, 148, 149, 155, 157, 158, 202

O

The Official School, 8
OXFAM, 63, 83, 113, 125, 127, 148

P

Parliamentary Consultative Committee, 153, 154, 197
Part IV of GATT, 3
Patents, 7, 36, 42, 47, 61, 62, 124, 157, 158, 164, 190
Permanent Mission of India to the WTO, Geneva, 197

Plurilateral Agreements, 6, 179, 181
Prime Minister's Office (PMO), 154, 157, 199, 200
Principle of non-reciprocity, 18
Product coverage, 47, 48
Progressive liberalization, 31, 34
Public Stockholding for Food Security Purposes, 178
The Punta del Este Conference, 14

Q

QUAD, 11, 16, 50, 67, 68, 70, 93, 102, 104, 137, 164, 165, 179
Quantitative Restrictions, 69, 162, 165

R

Regional Trade Agreements (RTAs), 157, 192
Request and offer, 34, 35
Rules, 7, 8, 12, 18, 29, 30, 37, 38, 40, 43, 44, 46–48, 61, 63, 91, 95, 107, 110, 112, 125, 131, 140, 142, 146, 151, 170–172, 174, 179, 182, 183, 189, 190, 192, 193

S

Section 301, Omnibus Trade and Competitiveness Act of 1988, 39, 61
Services (GATS), 8, 14, 15, 17–21, 23, 27, 30–35, 37, 42, 46, 52, 53, 55, 56, 61–63, 86, 88, 124, 136, 146, 148, 162, 164, 167, 168, 170, 183, 191, 193–197
Short-term arrangement regarding international trade in textiles, 44
The Singapore issues, 85, 136, 139, 140, 142–144, 146, 177, 178
Single undertaking, 26, 33, 52, 72, 73, 75, 76, 81, 86, 170, 179
South centre, 83, 127
Special and Differential Treatment (S&D), 82, 83, 149
Standstill and rollback, 12
State of disequilibrium, 150
Super or special 301, 9, 39, 40, 43, 58
Sustainable Developmental Goals (SDGs), 182, 183

T

Technical Barriers to Trade (TBT), 3, 69, 134, 190, 192
Textiles, 9, 12, 13, 23, 43–49, 52, 56, 61, 62, 64, 69, 70, 82, 83, 134, 165, 166, 170, 172, 192, 199, 202
Third World Network, 6, 81, 83, 91, 96, 127, 131, 145
Tokyo Round, 3–6, 9, 49, 64
Track IV of the Final Act, 56
Trade facilitation, 70, 71, 114, 136, 166, 172, 178, 187, 191, 196
Trademarks, 36, 61
Trade Negotiations Committee, 53, 54, 89, 110, 111, 135
Trade Policy Division, 64, 152–154, 190, 191
Trade Policy Review, 112, 113, 193
Transition period, 41, 42, 46–48, 63, 69, 115
Trans-National Corporations (TNCs), 7
Transparency in Government Procurement, 70, 71, 166, 172
TRIPs and Public Health, 125
Trust deficit, 70, 71, 98, 99, 101, 122, 147, 165

U

United Conference on Trade and Development (UNCTAD), 83, 115, 144, 185, 202
Uruguay Round, 1–3, 6–8, 10, 11, 13–18, 20–36, 38, 40–43, 45, 46, 50–65, 67–73, 75, 76, 78, 81–83, 85, 97, 98, 101, 102, 104, 105, 110, 111, 122–126, 133, 135, 137, 138, 147, 150, 153, 154, 157, 158, 160, 162–167, 169–172, 174, 179

W

World Bank, 5, 18, 29, 34, 44, 47, 63, 165, 173, 202
World Trade Organization (WTO), 1–3, 6–9, 11, 13–16, 19, 22, 25, 28, 31, 34, 35, 42, 45, 48, 52, 53, 56–60, 62–65, 67–72, 74–81, 84–86, 88–99, 101–154, 156–160, 163–175, 177–183, 185, 191–193, 196–199, 202, 203

Y

The Yankee School, 9