

DECISION MAKING AT THE WTO: NEED FOR A CHANGE?



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DECISION MAKING AT THE WTO

○ Key Features:



**Single
Undertaking**

- One-Member-One-Vote
- Consensus Decision Making
- Member driven character of the WTO
- Informal Processes in the WTO Decision Making



SINGLE UNDERTAKING: INTRODUCTION

- Considered one of the most important and defining elements of the WTO
- No precise definition available
- Understood to generally mean a type of negotiation approach and outcome, where:

“Nothing is final till everything is agreed upon”

- *All or nothing* approach
- By virtue of the Single Undertaking, Members of the WTO undertook commitments covering a wide array of issues: ranging from trade in goods and services to IPRs and investment measures



SINGLE UNDERTAKING: INTRODUCTION

- The principle of single undertaking is captured in Article II:2 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), which states that:
 - "*The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as “**Multilateral Trade Agreements**”) are **integral parts** of this Agreement, **binding** on all Members.*" (emphasis added)
- Thus, the Multilateral Trade Agreements (MTAs) listed in the WTO Agreement are binding on all Members, unless specific derogations are permitted therein.
- Plurilateral Agreements are exceptions: Trade in Civil Aircraft and Government Procurement



SINGLE UNDERTAKING: INTRODUCTION...CONTD.

○ Pros:

- Allows for removal of fragmentation caused by a Plurilateral trading regime
- Helps in offsetting concessions in one area with gains in another
- Cross Retaliation in the dispute settlement system under the WTO possible

○ Cons:

- There exists a view that single undertaking at the *Uruguay Round* put liberalisation before the development needs of the Members



SINGLE UNDERTAKING: THE ORIGINS – TOKYO ROUND


- The origin of 'single undertaking' in its current form is usually traced back to the declaration launching the Uruguay Round.
- However, it is noteworthy that the Tokyo Round of Multilateral Trade Negotiations ('**Tokyo Round**') declaration also used a similar terminology. The declaration stated that the
 - The negotiations shall be considered **as one undertaking**, the various elements of which shall move together' (MIN (73)W/1).
- Thus, the understanding reflected there was that the **negotiations** on different issues would be **simultaneous and not sequential in nature.**



SINGLE UNDERTAKING: THE ORIGINS – TOKYO ROUND

- The outcome of the Tokyo Round, however, could not have been further from the concept of 'single undertaking' as it is understood today.

The Tokyo Round had '***GATT a la carte***': Freedom to pick and choose the trade rules Contracting Parties wished to be bound by, to accommodate the non-reciprocal nature of these negotiations.

- Thus, Tokyo Round 'codes' were of plurilateral nature and only binding on the countries that acceded to them.
 - For Eg. Anti-Dumping Code contained code-specific dispute settlement procedures as well.
 - As a result, under the *GATT a la carte* setup, not only did each agreement have a different set of signatories but also separate dispute settlement rules, which led to an extremely fragmented world trading regime
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SINGLE UNDERTAKING: THE ORIGINS: URUGUAY ROUND

- As part of preparatory process for the launch of the Uruguay Round of Multilateral Trade Negotiations ('Uruguay Round'), a secretariat note indicates that the idea of launching the new round as a **single undertaking**, where parallel progress was made in all areas of negotiations was toyed with, as early as in **April 1986** (PREP.COM(86)W/26).
- A contrary view is also recorded in the note, according to which the **progress in some areas should not have been necessarily conditioned by progress in others. It was also stated that such a mechanism could be especially useful for the developing countries.**
- However, it is clear that by September 1986, it was the first view that managed to prevail and find its way in the launch of the Uruguay Round.



SINGLE UNDERTAKING: THE ORIGINS: URUGUAY ROUND

- **August 1986:** United States took the clear position that the new round to be launched in Uruguay, would have to be a **single undertaking both politically and legally**, for the United States to participate in it and must include services as one of the subjects of negotiations (MDF/36).
- The European Community also took a similar stand but, within the context of single undertaking, was willing to explore any solution, like an *ad hoc* ministerial meeting to take account of the genuine concerns of all sides in order to reach a consensus.



SINGLE UNDERTAKING: THE ORIGINS: URUGUAY ROUND

- The **Punta del Este declaration** that launched the Uruguay Round, in its **Part I**, relating to 'Negotiations on Trade in Goods', used the phrase 'single undertaking' and stated that:
 - *'The **launching, the conduct and the implementation** of the outcome of the negotiations shall be treated as parts of a **single undertaking**. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis by agreement prior to the formal conclusion of the negotiations. Early agreements shall be taken into account in assessing the overall balance of the negotiations.'* (emphasis added)
- Thus, not just launch and conduct, but **implementation** of negotiations, made part of the single undertaking as well.



SINGLE UNDERTAKING: THE ORIGINS: URUGUAY ROUND

- Thus 'single undertaking', while clearly stated in **Part I dealing with Negotiation in Goods**, is **glaringly absent from Part II, dealing with Negotiation in Services**.
- The formal position of the '**group of ten**' led by India and Brazil, that there could be no negotiations on services in the new GATT round, despite the efforts of the United States.
- But the United States was nevertheless successful in getting the new round of multilateral trade negotiation launched with services as part of it.
- The other two new issues relating to trade –related investment measures (TRIMS) and trade-related intellectual property rights (TRIPS) were dealt with within the confines of the relevant GATT articles and did not transgress the GATT framework, and therefore were not seen to cause as much trouble as the negotiations in trade in services.



SINGLE UNDERTAKING: THE ORIGINS: URUGUAY ROUND

- Omission brought to notice by various developing countries time and again to reiterate their stand that the **negotiation on services was never really a part of the single undertaking.**
- India stated in a February 1987 meeting of the **Group on Negotiation Services**, that though the Uruguay Declaration as a whole, had been adopted as a '**single political undertaking launching the Uruguay Round**', this concept of a single political undertaking had to be distinguished from the concept of a 'single undertaking' which had been used in Part I in relation to the Negotiation on Trade in Goods (MTN.GNS/W/4).
- The singleness of the political undertaking had to be seen only in terms of the
 - unity of time and place provided by the Punta del Este meetings;
 - establishment of the TNC,
 - the same time–frame for the two processes of negotiations and finally,
 - the provision that the decisions on the implementation of the respective results of the negotiations would be taken at the Ministerial meetings on the pattern of the Punta del Este meetings.



SINGLE UNDERTAKING: THE ORIGINS: URUGUAY ROUND

- **1989:** Resistance on **TRIPS** by the developing countries had crumbled to a large extent, when in the name of compromise, and contrary to earlier resolve, the developing countries had virtually accepted the chairman's proposals which reflected the stand of the major industrial countries.
- In case of **services** negotiations, as late as in 1990, there appears to be **no clarity** as to whether trade in services was part of the single undertaking.
- India remained consistent with its stand on "single undertaking", and in a TNC meeting on November 26, 1990 reiterated that it had been previously agreed to put the negotiations on services on a separate track, outside the judicial framework of GATT (MTN.TNC/17)



SINGLE UNDERTAKING: THE ORIGINS: URUGUAY ROUND

- India's position was supported by **Egypt** which also submitted that trade in services and TRIPS were separate domains upon which governments would have to decide separately and without any bearing on decisions on trade in goods (MTN.TNC/17).
- Outside the formal trade negotiations too, developing countries and the LDCs put resistance, to the introduction of the single undertaking. The **Group of 77 (G-77)**, in a run up to UNCTAD VIII, made a public statement that introduction of single undertaking had been done a very late stage and was tantamount to 'breach of good faith'.
- It was stated that the concept had not been part of the negotiations, and had been introduced only to force the developing countries to accept all the outcomes of the Uruguay Round



SINGLE UNDERTAKING: THE ORIGINS: URUGUAY ROUND

- However, according to the secretariat history of the Uruguay Round by John Croome, the rigid separation between negotiations in trade in goods on the one hand and the issues of trade in services and TRIPS on the other hand started to fizzle out only in 1991, when with respect to the integrated dispute settlement procedure, some countries proposed that such a procedure should cover not only agreements on trade in goods, but also the 'new subjects', particularly services.
- Unofficially, several versions available to account for what really happened.




SINGLE UNDERTAKING: THE ORIGINS: URUGUAY ROUND

- However, what is apparent is that:
 - **From 1986 to 1991**, there was **no unanimity** amongst the countries as to what issues would be included within the ambit of the single undertaking;
 - **Between 1991 to 1993**, the developed countries led by the United States were successful in getting the 'new issues' relating to services, TRIPS etc. as part of the so called '**single package**' covered by the single undertaking mandate, despite this not being reflected in the Punta del Este declaration.
 - In turn, the developing countries had to settle with the textiles agreement and the increased access to the United States' markets.



SINGLE UNDERTAKING: POST URUGUAY ROUND

- Post the establishment of the WTO, developing countries have come to recognise how the principle of single undertaking was used as a coercive tactic to make them agree to newer issues.
 - Moreover, the consequences and potential pitfalls of entering into an agreement on an issue where there is lack of technical and economic capability has been greatly felt, especially in the case of TRIPS.
 - Thus, post 1995 the developing countries have evolved their negotiating strategy and adapted themselves to face the consequences of undertaking obligations as part of a single undertaking, and adopted it as a defensive strategy.
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SINGLE UNDERTAKING: POST URUGUAY ROUND: DOHA DECLARATION

- Doha Development Round launched in 2001. Para 47 of the Doha Declaration states that:
 - "With the exception of the improvements and clarifications of the Dispute Settlement Understanding, **the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking.** However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations."



SINGLE UNDERTAKING: DOHA ROUND

Post Bali: Some questions?

1. What happens to the Trade Facilitation Agreement (TFA)?
2. Will it be implemented on a provisional basis or a definitive basis?
3. What will a provisional implementation entail? All Members or Voluntary basis?
4. If implemented on a definitive basis, what happens to the Single Undertaking?

Points to note:

Ministerial Declaration on TFA does not address Para 47.

However, the Members have not nullified Para 47 at Bali either.

Thus, technically Para 47 is still available to Members, providing a legal basis to argue that TFA shall be treated as part of the single undertaking. If TFA applied on a provisional basis, DSU should not apply in the interim.

Reversal of Roles: At the Uruguay Round, the Developed countries were main proponents of Single Undertaking. In the Doha Round, they appear to be in favour of diluting the Single Undertaking principle.



SINGLE UNDERTAKING: IS IT HEADED FOR A CHANGE?

- Despite limited success at the Bali Ministerial, there is increasing frustration among the WTO Members, especially the developed countries, who have for long been used to getting their way in international trade negotiations.
- Not surprising that informal talks of moving away from the single undertaking to some form of variable geometry is catching force.
- Some argue that given the rigidity of the principle of single undertaking, it may not be completely undesirable to look for alternatives, especially as membership of the WTO is now close to 160 countries having varied trade interests and the Doha Development Round is nowhere near its conclusion even 13 years after it was launched.
- Modified Single Undertaking would allow developing country members to reap the benefits of a more flexible system while preserving the coherence of the multilateral trade system?



SINGLE UNDERTAKING: ALTERNATIVES PROPOSED

- **Opt in/ “a la carte”**
- Tokyo Round agreement followed this approach.
- Members pick and choose agreements
- Post Uruguay Round, number of plurilateral agreements/commitments have emerged
- Eg.: Commitment on the movement of natural persons, telecommunications and financial services, Information Technology Agreement



SINGLE UNDERTAKING: ALTERNATIVES PROPOSED

- **Critical Mass Approaches**
- Seeks to balance qualitative and quantitative aspects of participation in commitments.
- Rather than a simple opt-in system, a critical mass approach requires the members opting in to also account for a **particular value, volume, number, or other benchmark that is relevant to the issue being negotiated.**
- For instance, an agreement would come into force if members representing 80% of the trade in this area subscribe to it.
- This allows members with particular interest in a topic to deepen trade liberalization without the encumbrance of the whole membership, most of which might not be interested in the issue or might use it purely as strategic leverage, ultimately paralyzing the negotiations.



SINGLE UNDERTAKING: ALTERNATIVES PROPOSED

- **Selective Opt-out**
- Allow developing countries to **opt out of certain agreements that's are too onerous** for them to implement or not calibrated to their level and style of development
- Determination of the criteria of Opt-Out required
- Threshold may be set: who can opt out; by agreement or overall
- Certain sectors may be excluded
- Members opting out may benefit from MFN concessions accruing under the agreement among rest of the Members: Limited free riding



SINGLE UNDERTAKING: ALTERNATIVES PROPOSED

- **Scaled Commitments**
- In this variance, all members undertake a single package of commitments, but the commitments vary for each member.
- Thus, the coherence and uniformity of the types of disciplines that comprise the world trading system are preserved, but members are not forced to choose between all or nothing.
- In a way, the current schedules of concessions for goods and services already illustrates this approach



SINGLE UNDERTAKING: ALTERNATIVES PROPOSED

Partial Linkage

- Another approach to increase flexibility consists in modifying the “package” format for the negotiations.
- While some linkage may be productive, inasmuch as it allows for cross-sectoral bargaining, it may be suboptimal to link all topics at all times.

Variable Geometry/All Plurilaterals

- A number of experts have advocated for a shift to a variable geometry of commitments at the WTO. Former Director General Mike Moore, for instance, thought that the variable geometry model developed within the then European Community held some promise for the WTO.
- The Sutherland Report’s Chapter VII explicitly calls for variable geometry.
- The objective in this model is to maintain a **common institutional framework while allowing a diverse range of members to participate within the range of their respective capabilities**. The variable geometry model in the EU proposed that some but not all countries participate in various levels of integration (EEC, Schengen, common currency, etc).
- Proliferation of RTAs could be checked: If DSU opened to all Plurilaterals.



SINGLE UNDERTAKING: CONCLUSION

- Has Single Undertaking become part of the problem?
- DFQF for LDCs, less controversial technical matters may have been implemented if not hinged on the outcome of NAMA and Agriculture talks?
- Whatever may have been the dubious history of inclusion of 'single undertaking' in the Uruguay Round, since then, it has become an integral part of the WTO framework.
- Just as the inclusion of single undertaking at the Uruguay Round was predominantly pushed by few countries who wanted to promote their own interests, departure from single undertaking should not become a tool in the hands of few who want to serve their own interests at the cost of others.



ONE MEMBER-ONE VOTE

- One Member One Vote defining tenet of the WTO decision making process
- Differs from other international financial institutions, like the IMF and World Bank: where there is weighted voting.
- Eg. IMF: voting power of member countries determined by the size of their respective quotas, where quotas are function of their weight in international economic system
 - In Contrast, **Article IX:1** of the Agreement Establishing the WTO states that each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member states.
- Rule ensures that at least formally, developing countries share an equal voice with their developed counterparts
- Developing countries comprise of more than 100 of the 159 members: therefore building simple majority not difficult. Contrast with IMF where many decisions require 85% majority as US has 17.56% of the voting share.



ONE MEMBER-ONE VOTE

- The rule of taking most decisions by simple majority also offers a considerable potential advantage to developing countries. **But voting kicks in only when decision cannot be arrived at by consensus.**
- Exceptions i.e. Special voting procedures prescribed in three situations (Articles IX and X of Marrakesh Agreement):
 - In cases of **interpretation of the agreements**, the decision is to be taken by three-fourths majority of the members at the levels of the Ministerial Conference and General Council(Article IX:2).
 - Second, the decision to grant a **temporary waiver** to a member country from WTO obligations requires a similar three-fourths majority of the membership of the Ministerial Conference(Article IX:3).
 - Finally, **amendments**, if they cannot be reached by consensus, generally require two thirds majority. (Article X)

However, amendments to the provisions on amendments and decision-making i.e. Article IX of the Agreement establishing the WTO, Articles I and II of the General Agreement on Tariffs and Trade (GATT) 1994, Article II:1 of the General Agreement on Trade in Services (GATS) and Article IV of the Agreement of TRIPs require acceptance by all members i.e. **unanimity**



DECISION BY CONSENSUS

- While One-member-one vote suggest high level of egalitarianism that would work in interest of developing countries: Little evidence of the Developing countries utilising the power of majority votes.
- Partly because of the norm of **consensus** based decision-making rather than majority voting.
- Incorporated in **Article IX:1** of the Marrakesh Agreement:
 - *The WTO shall continue the practice of decision-making consensus followed under GATT 1947.*
- **Consensus meaning:** The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, **present** at the meeting when the decision is formally taken, formally objects to the proposed decision.
- **Criticism:** Consensus decision making means developing countries are not able to make effective use of their majority votes. Also this procedure ascribes considerable importance to having a permanent presence or active knowledgeable presence in the WTO meetings.
- Lack of capacity and resources for developing countries. Many developing countries find it difficult to attend meetings of the WTO.
- Absence of secrecy that a voting may provide also a problem for the developing countries.



OTHER FEATURES

- Member Driven Nature
 - WTO is a member-driven organisation comes with the definitive advantage that it is the members themselves who run the organisation and the secretariat. This also means that the costs of research and representation must be borne by the members themselves.
- Informal Processes in the WTO Decision Making
 - Highly informal and ad hoc Green Room of the WTO where negotiations take place
 - But these lack transparency. Earlier, informal meetings were often by invitation only or through the process of a self selection of a small group within the WTO.
 - Aftermath of the Seattle Ministerial, some attempts have been made towards addressing the problem of internal transparency. Effort made to inform all members of the informal meeting that is scheduled, along with the list of invitees. Practical impact of these changes questionable.



THANK YOU

