

## India at the WTO: From Scepticism to Activism

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### Introduction

While India was a founder Member of the General Agreement on Tariffs and Trade (GATT) 1947, she was not a very active participant in the early ‘Rounds’ of trade negotiations. This changed in 1986 when the Uruguay Round of multilateral trade negotiations was launched with much fanfare in the capital city of Uruguay, Punta del Este. India at that Ministerial meeting strongly opposed the inclusion of new subjects such as services, investment and intellectual property rights (IPRs) within the mandate of trade negotiations. It is, however, fair to stay that in the end it was basically Brazil and India which opposed the inclusion of the new ‘subjects’. When Brazil was persuaded to drop its opposition to the new subjects, it was just India, which briefly stood in the way of the launch of a new ‘Round’. Finally, India relented and thus paved the way for the launch of the Uruguay Round.

## **Mother of all Rounds**

The Uruguay Round of trade negotiations, rightly called the 'mother' of all Rounds, sought to expand the scope of GATT in an exponential fashion. While GATT just dealt with tariffs on goods, the Uruguay Round launched negotiations in areas as diverse as services, IPRs, trade-related investment measures (TRIMs) etc. As if this were not enough, the dispute settlement machinery that was hitherto based on consensus and persuasion was sought to be made mandatory and fully enforceable. The fact that big American corporate interest were behind all this made India highly sceptic about the motives of the 'QUAD' (the quadrilateral GATT members comprising US, EU, Japan and Canada) which drove the Uruguay Round. It is worth bearing in mind that India for the larger part of the Uruguay Round was a relatively closed economy with high tariff levels. After all, economic reforms in India began in right earnest only in the early 1990s.

The Uruguay Round of trade negotiations lasted eight long years from 1986 up until 1994. However, this period can be divided, for the sake of convenience, into two parts. The first period was from 1986-1991 and the second period from 1991-1994. The year 1991 has been picked essentially because towards the end of 1991, the Director General of GATT Arthur Dunkel put forward the Draft Final Act on his own responsibility.

During the period 1986-1991, negotiations in the GATT took place in various negotiating groups. For instance, for IPRs, there was a negotiating group which would be chaired by either the Ambassador of a country or by a high trade official based in the capital. The negotiating dynamics in the GATT (and later on in the WTO) go something like this. A country, say the US, puts forward a proposal usually after consulting other countries which are like minded. Thus, the US would first float the proposal in the QUAD forum. Then, it would try

and seek more support from other developed countries. By the time the proposal finds its way to the negotiating group, it would ideally have the support of a reasonable number of countries. If for instance, India, then finds the proposal prejudicial to its interest then she has three options before her:

- Accept it with or without modifications;
- Reject it; and
- Put forward a proposal of her own.

In the Uruguay Round, India often found herself in an unenviable situation. If she rejected the proposal, she often found herself in a small minority and was labelled 'obstructionist'. If she agreed to discuss it, then, it was often interpreted as weakness and a departure from the traditional position of saying 'no' to inclusion of subjects such as IPRs. It is to the credit of Indian trade diplomats that they often provided sound intellectual justification and detailed economic rationale for the positions they took. Thus, India's reasoning for opposing IPRs in the GATT was actually very sound: there was already a forum, i.e. the World Intellectual Property Organisation (WIPO) for dealing with it; and furthermore, IPRs in the strict sense of the term were not even a 'trade' issue. The fundamental basis for India's stance was also the conviction that the Government of India needed to retain in substantial measure the sovereign economic space that is necessary to meet the immense developmental challenges she faced. Besides, India was the only GATT Member (China became a WTO member only in 2001) which was '*sui generis*' – one of a kind, given the population, levels of poverty, inequality etc. All this was justification enough for the positions taken by India earlier on in the GATT.

A word on the decision-making procedure in the GATT (and later on in the WTO): GATT and WTO decisions are based on consensus – consensus being defined as those present

in the room not objecting to a decision. There has never been any vote in the GATT/WTO – although there is provision for voting in the rules of WTO. This means that at least from a theoretical point of view, it is possible for a country as small as St. Lucia to block a decision based on consensus. In practice, it is powers such as the US and the EU (and India at times) which prevent a consensus from emerging. Of course, it is impossible for any one WTO Member to block a decision indefinitely which commands an overwhelming majority. Sooner or later, the will of the majority prevails.

The Uruguay Round of multilateral trade negotiations underwent a defining moment in December 1991. At this time, the Director General of GATT Arthur Dunkel, with no explicit mandate or authority, put forward what was called the Draft Final Act (DFA) on his own responsibility. This was essentially a compilation of almost all the negotiations in different groups and termed it a comprehensive representation of the final global package. But more than anything else, it was Dunkel's prescription for amendment of the DFA that was unfair and arbitrary. He stated that if a country wished to see changes in the DFA, it was incumbent on that country to secure a consensus in favour of that change, i.e. convince every WTO Member of the need for amendment. Anyone who is familiar with the WTO negotiating dynamics knows that this is well-nigh impossible.

For instance in late 1992, the author was instructed to float a proposal to seek an amendment of the DFA relating to patentable subject matter. Thus, when we sought to exclude importation as a means of working the patented invention, US immediately opposed it and cast a veto, so that there was not even a discussion on the Indian proposal. Similarly, India sought changes to the Agreement on Textiles & Clothing (ATC) which would have led to faster front-loaded liberalisation than

that provided in the DFA, it was opposed by developed GATT members such as the US and the EU.

While it was impossible therefore for India to bring about modifications to the DFA, it was perfectly possible for US and EU to bring about changes to the Agreement on Agriculture (AoA) in November 1992 (also known as the Blair House Accord) which eventually paved the way for the conclusion of the Uruguay Round.

A few remarks on the Uruguay Round that led to the establishment of the WTO:

- The US, at times single-handedly drove the Uruguay Round based on its rational interests;
- The EU was defensive but succeeded in protecting its vital interests in agriculture;
- It is true that India did not achieve all of its original negotiating objectives. But, it managed to limit the 'damage', contribute significantly to the strengthening of rules-based international trade and almost single-handedly achieved concrete results in the area of textiles signalling an end to the pernicious quota regime in ten years; and
- Fundamentally, the Uruguay Round outcome was both unfair and unbalanced. It was a 'bum deal' and this led to a 'trust deficit' between developed countries and developing countries such as India. This was to have an enormous implication for the future of trade negotiations in the WTO.

### **Failure at Seattle**

One might imagine that the success of developed countries in the Uruguay Round will have left them satisfied and the developing countries might have got a breather. Alas, no! As early as the very first Ministerial Conference of the WTO in Singapore in 1996, the developed countries sought a vastly-

expanded agenda for the WTO with new subjects such as Investment, Competition Policy, Trade Facilitation and Transparency in Government Procurement. This was, in retrospect, a negotiating blunder by the developed countries led by the EU. The developing countries had barely stomached the unfair outcome of the Uruguay Round before they were confronted with new subjects proposed for negotiations. This may be attributed either to profound insensitivity to the concerns of some developing countries (such as India) or due to overconfidence that if they (developed countries) could get away with it in the Uruguay Round, they could get away with it again.

The above move by QUAD (led by the EU) led to two developments which were to have profound consequences for the multilateral trading system. One, it aggravated the 'trust deficit' that emanated from the conclusion of the Uruguay Round. The result was scepticism on the part of countries such as India with regard to negotiations in the WTO. Somehow, the impression was gained that the newly established WTO was not designed to take into account the legitimate concerns of developing countries. The second development was that countries such as India decided that rather than saying 'no' to proposals made relentlessly by the QUAD, they would try to be proactive and make proposals of their own.

This led to a series of proposals by India and other developing countries under the rubric of 'Implementation'. The idea was to highlight a whole range of issues that arose when developing countries started implementing the results of the Uruguay Round. 'Implementation' thus had to do with: unanticipated problems and unrealised benefits from some of the agreements; fundamental imbalances and asymmetries in some of the agreements and non-binding nature of the provisions on special and differential treatment. This proactive

setting of the negotiating agenda was important because India moved away from merely saying 'no' to 'activism' in setting the negotiating agenda.

When this author began his second stint in Geneva in 1998, the stage was set for preparations for Seattle Ministerial Conference. In the negotiations leading up to Seattle, there was a basic divergence between the negotiating objectives of the QUAD and their developed country allies and a group of developing countries led by India. The former group considered the Uruguay Round agreements as a 'settled' matter and basically rejected the 'Implementation' agenda by chairing it was an attempt to 're-open' issues already decided upon. Instead, they argued that the WTO must move on and tackle new issues such as Investment, Competition Policy and according to some countries, even Labour Standards. The group of developing countries, on the other hand, stubbornly insisted on resolution of 'Implementation' problems and strongly opposed the inclusion of new subjects in the negotiating agenda. The stage was therefore set for a negotiating impasse.

The irony was that neither the QUAD and their allies nor the WTO Secretariat really gave up their attempts to launch a new Round at Seattle. The US, the host country, did not help matters by their inability to make thorough preparations for the Conference.

Yet another extraordinary thing that happened around 1998 was the coalition of non-governmental organisations (NGOs) that came together with the sole objective of opposing the WTO's way of working. These NGOs were to play an important role in disrupting the WTO Ministerial Conference at Seattle.

In the run-up to Seattle, the author was closely involved in pursuit of 'Implementation' issues for India. The biggest challenge was to muster support from other developing

countries and use the 'negotiating space' available in the WTO. We received considerable help from inter-governmental and Third World organisations such as UNCTAD, South Centre and also from NGOs such as OXFAM, Quakers Group and Doctors without Borders. Maintaining close contact and liaising with these organisations was both invigorating and challenging. Invigorating, because they gave enormously important inputs to our negotiating strategies! Challenges, because it posed constraints on time and place! So much so that some of us would meet with them over after-dinner, coffee at 11:00 p.m.

With serious divergence on negotiating positions, the Chairman of the WTO General Council produced a document for Ministers which was 35 pages long with scores of square brackets (signifying lack of agreement). The signs were thus ominous.

To add to the confusion, when we arrived in Seattle, we did not even know the hotel which we were allotted. Meanwhile, the NGOs had gathered on the streets of Seattle to render any meeting virtually impossible. Valuable time was thus lost.

Just when we thought things could not get worse, the US delegation proposed a negotiating group on Labour Standards. If there was one issue which unified all the developing countries, it was Labour Standards. They held the near unanimous view that WTO was not the forum to negotiate Labour Standards and that the proposal was merely ill-disguised protectionism on the part of developed countries.

Meanwhile, the NGO activists resorted to blockade and the police had to resort to teargas. In fact, as an Indian I had never experienced teargas in India and had to experience it first hand in Seattle! When the meetings finally began, they began in small groups. In the GATT and then the WTO, actual negotiations have always taken place among a handful of

countries (25 to 35 at most), thus attracting criticism of lack of democracy. Negotiations also happen behind closed doors leading to criticism among the NGOs that decisions were taken in secret.

The fact, however, is that there is no way negotiations can happen among 150 odd WTO members all at once. In Seattle, however, there was complete lack of information with the result that ministers of small African-Caribbean countries did not even know that small group meetings were going on. This led to anger on their part and they staged a 'walk out' on the penultimate day.

In the end, the Conference ended in chaos and there was not even a Ministerial declaration that was agreed upon. Clearly, Seattle was WTO's darkest hour.

### **Pyrrhic Victory at Doha**

The WTO was too important an organisation for the developed countries to be allowed to atrophy and fall into disuse. So, soon after the debacle at Seattle, there was a lot of hand-wringing and soul-searching in the WTO. There were endless discussions on internal/external transparency as well as ways to enhance the participation of least developed countries (LDCs) in the multilateral trading system. Some improvements were indeed agreed upon; but, nothing radical was agreed upon. But, there was a sincere attempt to assist LDCs even though proposals to grant them unconditional market access were not agreed upon either by the US or EU. But the QUAD and their allies made a strategic, if cosmetic, decision – that the new Round would try and incorporate the development concerns of developing and LDCs, hence the name 'Development Round'.

From the point of view of negotiating procedure and organisation of Ministerial conferences, the WTO learnt from the debacle in Seattle. The choice of Doha itself was a source

of controversy but the US finally decided in its favour. Doha, ironically enough, would have the advantage that there wouldn't be thousands of NGO activists to disrupt the Ministerial Conference.

But, from a substantive point of view, the QUAD and their allies were not giving up on their expanded negotiating agenda. They still sought inclusion of Investment, Competition Policy, Trade Facilitation etc. in the WTO. The 'Implementation' issues meanwhile languished for want of political will. How then did Doha succeed, where Seattle had failed?

Two possible explanations came to mind. One was the declaration on Trade Related Aspects of Intellectual Property Rights (TRIPs) and Public Health which was agreed upon in Doha, in which the author was closely involved. The other was the events surrounding 9/11 in the World Trade Centre in New York. It is worth considering them one by one.

The TRIPs Agreement of the WTO was one of the most controversial to be concluded as part of the Uruguay Round. Objectively speaking, the Agreement in its original form simply favoured the patent rights holders and merely paid lip service to public health concerns. Also, bear in mind that the US over the years had used its dreaded Special 301 legislation to browbeat several of its trading partners into agreeing to stringent IPR legislation. It was against this background that the AIDS pandemic came into focus in Africa where AIDS patients were literally dying because they could not afford patented AIDS drugs. It was, as one NGO put in brilliantly, patents vs. patients!

The author, who was India's lead TRIPs negotiator at Doha, was involved in one of the most exciting and difficult negotiations of his life. The first step was building core support. Brazil immediately saw the merit of India's proposal that nothing in the TRIPs Agreement shall prevent governments from taking measures to protect public health. It was thus left

for me and my Brazilian colleague to chart out a negotiating strategy. We went and addressed the African Group in the WTO and sought their support, which we received. From there, to coordinate closely with them in order to accomplish what we did in Doha was a stupendous achievement for developing countries. Indeed, the negotiations on this issue went down to the wire and tough discussions took place in Doha on November 12, 2001. In that meeting, the US was represented by Robert Zoellick, the EU by Pascal Lamy, Brazil by Celso Amorim and India by the Author. Sitting and negotiating with such senior ministers was an experience of a lifetime. The main lesson that I learnt was that timing of the compromise is critical and also that the best can sometimes be the enemy of the good. Given all of the others were plenipotentiaries they had full powers to negotiate. When the negotiations concluded, I was the only negotiator who had to agree '*ad referendum*'. In the end, I heaved a sigh of relief when the Indian Commerce Minister and senior officials congratulated me on a job well done!

The '*force majeure*' event that enabled the launch of a Round at Doha, however, was the 9/11 events in New York. Following those events, it was important for everyone to send a signal that the global economy was alive and kicking. At the end of the day, this even created so much pressure especially on smaller countries that many of them could not have opposed the launch of a Round.

India, as in her wont, stood alone till the end. The reasons were not far to seek. Notwithstanding the lack of consensus, the Chairman of the Conference said that negotiations would be launched in the areas of Investment and Competition Policy at the next Ministerial Conference. This was plainly unacceptable to India. India then single-handedly blocked consensus on November 13, 2001 amidst stunned silence. It was then that discussions on compromise led to change in the

language of the Ministerial Declaration with the use of the term 'explicit consensus', which is different from consensus in the sense that the latter merely signifies in the WTO someone present and not objecting to a decision being taken.

In the final analysis, the Doha Round was launched because everyone got the promise of something from it.

### **Postscript**

If the Doha Round of multilateral trade negotiations has not been successfully concluded even after nine long years, it essentially means that the political will is simply not there. The situation is complicated by the fact that countries like India took on onerous obligations in the Uruguay Round and if they do not get substantial benefits from the Doha Round, then, it would be difficult for them to accept. The global power structure has also undergone a shift and power has shifted to the East from the West. Furthermore, China is now a full-fledged WTO member and will no doubt pursue her own interests. The WTO, meanwhile, has grown to 153 member countries. All this makes multilateral trade negotiations in the WTO more complex than ever before.