

Breaking the Impasse: A Critical Mass Approach to Multilateral Trade Negotiations

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Introduction

The Doha Round of multilateral trade negotiations is in serious trouble. The negotiators are about five years late now in achieving the targets set out for themselves in the November 2001 Declaration. In my view, a very large part of the problem relates to the process and to the fact that a decision made in November 2001 to treat "the conduct, conclusion and entry into force of the outcome of the negotiations as parts of a single undertaking"¹ has been accepted by participants as meaning that all WTO Members must be involved in and obligated by the outcomes in all areas of the negotiations. This very unhelpful notion has its origins in a generalized belief that the Uruguay Round's "single undertaking" as it was interpreted at the conclusion of those negotiations had the same meaning as it had when GATT Contracting Parties decided in 1986 that "the launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking."²

In fact, it did not. It was never the intention at Punta del Este to craft a process that would automatically obligate all GATT CP's to be bound by all of the agreements. The language really had quite the opposite intention. However, in 1993, the Quad countries decided that they could take advantage of the creation of the Multilateral Trade Organization (later the WTO) to force other Uruguay Round participants to accept a different meaning of the single undertaking language. More on all of this in a couple of minutes.

Now, the point of this discussion is to make clear that no successful negotiation in the history of the GATT or WTO has ever been conducted on the basis of a process where all of the participants must agree to be bound by all of the outcomes *a priori*. The situation that prevailed in the final days of the Uruguay Round and which lasted only until 1999 when the principle that all Members were bound by the same basic obligations began to break down in a serious way, was made possible only by the creation of the WTO and by the fact that the Quad and their developed country allies were prepared to make good on their threat to quit the "GATT 1947" and its MFN obligations for the new "GATT 1994". This threat was powerfully persuasive, but it cannot credibly be used again in the Doha Round.

¹ Ministerial Declaration of 14 November 2001, paragraph 47.

² Ministerial Declaration on the Uruguay Round (20 September 1986), paragraph I.B.(ii)

Under the current circumstances, it makes little sense to expect the single undertaking approach to negotiations as it is currently understood to produce an agreed outcome. Even more importantly, we need to realize that we do not need to pursue such an approach in order to achieve an outcome with meaningful benefits for the global economy. In fact, insistence on the single undertaking approach will likely produce an inferior result in the Doha Round - if a result can ever be achieved on this basis.

I believe that the Warwick Commission was right to draw attention to the problem of the "single undertaking" in the Doha Round and to suggest that under the proper conditions organizing negotiations on the basis of a critical mass may be likely to produce a better outcome. In my remarks, I will elaborate on this topic after devoting the next few minutes to a brief history of negotiations under the GATT (1947-version).

A Brief History of GATT Negotiations

The fact that successful negotiating outcomes in the GATT/WTO system have been based not on a single undertaking approach but rather on what has come to be called the "critical mass" approach is borne out by the history of these negotiations. And it is important to realize that over the years the critical mass approach applied not only to the negotiation of trade liberalization but also to the negotiation of the GATT system's rules.

Fifty-three years ago, a Review Session of the GATT Contracting Parties re-examined the GATT approach to disciplining subsidies. The 1955 Review Session eventually led to the incorporation into GATT Article XVI of the rules in paragraphs 2 to 5 (or "Section B - Additional Provisions on Export Subsidies"). New paragraphs 2 and 3 dealt with export subsidies to agriculture, basing new rules on the effects of subsidies in world markets. A different approach was applied to non-primary (or industrial) product export subsidies in new Article XVI:4 which attempted to prohibit export subsidies on industrial products as from 1 January 1958. Early experience with compliance with this new rule was unsatisfactory and in 1960 a Working Party on the Provisions of Article XVI:4 produced a "Declaration Giving Effect to the Provisions of Article XVI:4" that entered into effect for its signatories in November 1962. At a time when forty-two governments were Contracting Parties to GATT, only seventeen³ signed the Declaration. The new obligations applied to the seventeen signatories but rights under Article XVI:4 accrued to all forty-two CPs. Clearly, this apparent lack of reciprocity did not stop the seventeen from signing on because they must have considered that they collectively constituted a critical mass of CP's likely to engage in meaningful export subsidies on industrial products. The fact that the agreement among these 17 Contracting Parties was a successful path to disciplining export subsidies was evidenced later -- firstly by the fact that the provisions served as the legal basis for the DISC case brought by the EEC against the U.S. and subsequently by its plurilateral extension through the Tokyo Round Subsidies Code and eventually to all WTO Members at the end of the Uruguay Round.

Another example of early critical mass in rule-making negotiations was the Kennedy Round's 1967 Agreement on Implementation of Article VI - the first Antidumping Code - which was limited in participation to those Contracting Parties and the EEC which accepted it. Nevertheless, it entered into force for those governments on 1 July 1968 and remained in force

³ Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, United States and Zimbabwe.

as supplemental obligations for these countries until it was replaced by the Tokyo Round code in 1979.

As the Warwick Commission report notes, the Tokyo Round non-tariff measures "Codes" are also good examples of how differing numbers of GATT Contracting Parties decided to join different types of "rules" agreements and where they obviously considered that enough of a critical mass of membership was achieved to make undertaking the agreements' obligations worthwhile. The Codes were an exercise in critical mass with an element of variable geometry. An aspect to the Tokyo Round Codes that distinguished certain of them from other critical mass exercises is that they were implemented on a non-MFN and/or conditional MFN basis.

As a result of GATT Article III's carve-out and the impact this has on Article I obligations, non-MFN treatment was natural for the government procurement agreement. It was trickier in the Subsidies Code where the USA argued, with some success, that the Protocol of Provisional Application allowed it to discriminate between recognized Code members and non-members. Non-MFN in the Codes operated more subtly in the case of the Standards Code where TBT notifications were exchanged only among the members of the Code.

This said, with the possible exception of government procurement, where reciprocity is obviously an issue, there is no reason to think that critical mass and non-MFN treatment are natural partners. In fact, there are many more examples from the GATT days of critical mass agreements applied on an MFN basis to others (some of which are discussed above).

So far, I've talked about the use of critical mass as a negotiating framework for "rules" negotiations because I wanted to make clear that it is not an approach that can be used effectively only in a market access framework. Of course, it is true that in effect all multilateral trade negotiations on trade liberalization / market access are largely critical mass negotiations. Some degree of the critical mass approach is lost or compromised where there is an insistence on agreed rules to guide the liberalization - such as the rules for a tariff-cutting formula or rules on how to treat exceptions to the formula.

The fact that there was no multilaterally-agreed formula for cutting tariffs on industrial products in the Uruguay Round certainly contributed to the success of that negotiation. Just look at the mess that Ambassador Stephenson is trying to unravel in the Doha Round NAMA negotiations. Critical mass has also "worked" as an approach to services negotiations and in a few more minutes I want to say something about the post-Uruguay Round telecommunications and financial services negotiations. A critically important question that needs to be seriously addressed for the future is whether a critical mass approach can be viable as the framework for multilateral agricultural negotiations in the WTO or elsewhere.

The Uruguay Round's Single Undertaking

Before I go on to a discussion of the current negotiations or speculation about the future of the multilateral trading system, I want to contribute to de-mystifying the past. What was the original context and meaning of the "single undertaking" term when it was used in Punta del Este in 1986?

The early 1980's were pretty brutal in Geneva. A certain amount of acrimony at the end of the Tokyo Round was followed by the failed attempt to launch a new round in late 1982. The 1982

GATT Work Program also entailed a lot of pushing and shoving and many of the developing countries were not interested in seeing another round launched at the end of that program - particularly as there were some ideas for negotiations in new subject areas that they did not support. Some pretty drastic tactics also came into play, including the American call for a vote in 1985 on the proposal to hold a special session of the CPs to consider the preparations for the launch of a new round. (Does anyone else remember this vote? These days, Americans are loath to recall that aspect of GATT history). In the Senior Officials Group meetings that followed the Special Session, India and Brazil insisted on verbatim records of all meetings and their translation into all official languages.

At the Punta del Este meeting, the key developing countries - led by Brazil and India - continued to insist that negotiations on trade in services were inappropriate as a topic to be dealt with in the GATT. This position led to a division of the Ministerial Declaration into Part I "Negotiations on Trade in Goods" and Part II "Negotiations on Trade in Services". In Part I it was explicitly stated that the goods negotiations were to be "within the framework and under the aegis of the General Agreement on Tariffs and Trade". Technically, the services negotiations were to be conducted outside the GATT framework - albeit with the support of the GATT secretariat and with the application of GATT procedures and practices. How the "respective results" (a term clearly indicating a degree of separateness) would be internationally implemented was to be decided after the Round at a Special Session of the CPs.

The "single undertaking" grouped the parts of the negotiation for procedural purposes (including timing) since an eventual decision on international implementation would be taken at a single Special Session. But the single undertaking as it was expressed in 1986 in no way was interpreted as implying that all participants in the negotiations would need to take on all of the resulting obligations - especially those resulting from the services negotiations. Clearly, this was also true for the negotiations foreseen on the Tokyo Round codes (which most Uruguay Round participants were not party to in 1986).

The agreement to create a new Multilateral Trade Organization was seen by the Quad countries as offering an opportunity not to be missed to rid the new system once and for all of free riders. In their decision to leave the old GATT and its MFN obligations behind, the Quad countries were able to force Uruguay Round participants into accepting obligations under all of the new system's agreements with the exception of the Government Procurement and Civil Aircraft Codes. The Quad changed the meaning of the Uruguay Round's single undertaking at the end of the game and they could get away with it only because of the creation of the new Organization. I can assure you that few countries would have accepted this interpretation of the single undertaking in 1986.

Breaking the Impasse - Moving Back to Critical Mass

Using the single undertaking and the creation of the WTO to force developing countries to accept all of the WTO's new obligations was our single biggest mistake. We never should have done it. The problem of "free ridership" we thought we were curing is nothing compared to the problems we have created by forcing a large number of our fellow WTO Members to join the Organization and theoretically accept obligations they could not implement. All of this has meant that neither the developed nor developing countries are comfortable with the situation in the WTO. For the developed countries, the inability of developing countries to keep pace has frustrated their ambitions in the round. For the developing countries, the inability to effectively

participate in rulemaking or to implement their existing obligations has made them reluctant to add new agreements and new obligations to the work of the system. The inapplicability of the one-size-fits-all model has created problems for negotiations, for implementation and for decision-making.

The single undertaking as it is now interpreted for Doha Round purposes is a disaster for those interested in progress in the multilateral trading system. It has become more than anything else a way of preventing things from happening and has fostered the birth of new blocking concepts like the "explicit consensus" that was applied to the mooted launch of negotiations on the "Singapore issues".

The idea of conducting negotiations on the basis of a critical mass approach is not new. It is a tried and tested approach that we need to move back to in the WTO.

Earlier I discussed some examples - both in rules and market access - where critical mass negotiations had achieved good results in the days of the GATT. The Warwick Commission report cites the Information Technology Agreement and results of the 1997 financial services and basic telecoms negotiations as WTO-era agreements reached through a critical mass approach. In the case of the ITA, critical mass was set at a level of 90 percent of world trade in the covered products, and this level of participation was reached in April 1997 with just 40 WTO Members. Fifty-six offers, representing 70 countries, were submitted by the deadline of 12 December 1997 in the financial services negotiations. A similar threshold for critical mass is evident in the basic telecommunications services negotiations, where sixty-nine governments made commitments covering markets that accounted for more than 91 percent of global telecommunications revenues. Does anyone believe that it would have been necessary or that it would have contributed to the successful outcome of these negotiations to have insisted on participation by 100 percent of WTO Members at the time?

History has shown that critical mass rulemaking and/or market access is often simple the first step to universal acceptance amongst the membership, so abandoning the single undertaking does not necessarily mean the end of a single set of obligations - if that is your long-term goal - although it may mean a delay in getting there. This process is helped by the phenomenon we saw in the ITA where the risk of sending the wrong signal to the market and foreign investors by not adhering to the critical mass tends to inflate the number of adherents once the deal is done.

The Doha Round is deadlocked for a number of reasons - most of which can be traced back to the single undertaking approach. The single undertaking begat complex formulae like those of the July 2004 Framework package and the similarly convoluted provisions for exceptions to the application of the formulae. The single undertaking has led to mismanagement of the dynamics of the negotiation where the Director-General of WTO and other key players are so fearful of a lack of "explicit consensus" in Ministerial meetings that they fail to use the opportunities they have to put the participants in the negotiations against any hard deadlines. And, as I said at the beginning, continued insistence on the application of the single undertaking will likely produce an inferior result in the Doha Round - if a result can ever be achieved on that basis.

On August 16, 2006, I wrote an opinion piece that was published in the Australian Financial Review in which I suggested the following way forward for WTO negotiators:

First, go back to basics and devise a simple and clearly focused political formula that, when agreed by essential participating countries, will permit a defensible and commercially interesting outcome to this round. This requires some decisions on what major players really need in a result as well as from whom. It also calls for a calculation as to which countries are essential to a negotiated outcome. In what has become a negotiation about certain major countries' subsidies and market access for key commodities, there's no need to get a consensus of all WTO Members to end the Round.

Second, if the point of success is in part the preservation of the WTO over the longer term -- and I think it must be -- then we need to avoid an agreement on results that would institutionalise new loopholes and/or categories of membership that might cause irreparable damage to the Organization. Some of the more egregious proposals on the table would gut the WTO's rules and further undercut what little potential this negotiation still has to contribute to global development. It would be a major step backward to allow some countries to carve out a large percentage of agricultural tariff lines for protection in perpetuity. If the proponents of such ideas cannot be convinced that they are wrong, then it would be better to leave current levels of tariff protection in place as the unilateral decision of those countries than to have such an outcome condoned by other WTO Members as the price for agreement in the Doha Round.

I had a number of other suggestions in that piece, including getting China to start pulling its weight in the Doha Round - which I see Sue Schwab is now working on. Nothing in the negotiations that has transpired (or not transpired) since I wrote the article has convinced me to change my views on how to break the impasse.

How could we sell the idea of going back to the critical mass approach either as a way of saving the WTO from the Doha Round or in some negotiation subsequent to the Doha Round era? Who would take the lead? The Members? The Director-General? Would the critical mass approach work for agriculture as it has in other situations?

I do not have the answers to these questions now, but they are all questions we should start to think about. I hope that my remarks today will be useful in stimulating further thought on the subject.

Thank you very much for your attention.