Services, Anti-dumping and other "new issues" in the WTO negotiations and their relevance for the FTAA

Alejandro Jara
Ambassador of Chile to the WTO

1. In the semester following the Doha Ministerial, WTO Members were able to **set up the essential elements of the Work Program** decided by Ministers at Doha (November 2001), including the negotiations mandated in the declaration. The negotiating groups and the Trade Negotiations Committee were created and the chairpersons were elected; the negotiating plans were decided upon by each negotiating body; the venue and date for the next Ministerial Conference were decided (Cancun, Mexico 10 – 14 September 2003); the work of the WTO was rationalized in such a way that meetings of negotiating bodies are limited in order to allow for the participation of smaller delegations; a huge program of technical assistance and capacity building was established and made possible by important financial contributions from many members. Such achievements are impressive by normal WTO (and GATT) standards. This has allowed for negotiations to begin in some areas (Rules, wine and spirits geographical indications, relationship between multilateral environmental agreements and the WTO, dispute settlement). In other areas - agriculture and services- they were initiated shortly after Seattle and now continue. Agriculture, however, has a reinforced mandate.

2. At different fora Ministers and other high officials from a wide range of Members have made the point of the need to **comply with the deadlines** established in the Doha Ministerial Declaration. Since all the areas under present negotiations already have a legal framework, it would seem possible to conclude the negotiations by January 2005. However, there are two caveats to be made. First, in Cancun Ministers are going to decide whether or not to add issues to the negotiations under the "single undertaking", and some of those are "new" to the WTO, i.e., they lack an existing legal framework and thus extensive and time-consuming legal drafting would be required. Should there be additions to the menu, will there be enough time from September 2003 and January 2005? Secondly, after the experience with the Uruguay Round negotiations and the ensuing implementation problems, many members – particularly the least developed and poor developing countries- will be very reluctant to enter into new obligations they have not had the time and resources to fully understand and appreciate. More on this later.

3. Be that as it may, for the time being the Doha negotiations are on track and so far likely to meet the final deadline. This has an important **implication for the FTAA** since both processes are scheduled to finalize around the same time. First, some issues cannot but be tackled multilaterally (agriculture export subsidization, antidumping). Thus progress in WTO will be of critical importance to the FTAA negotiations. Secondly, the FTAA is a formidable agreement in terms of the size and economic importance. The rest of the world is only too aware of the need to minimize investment and trade diversion, thus generating an additional impulse to the Doha negotiations.

4. **The situation of the world economy** is another factor that obviously has an impact on the course and timing of the negotiations. The perspectives are not positive and even in the best plausible scenarios it does not look likely that recovery will fast and with high growth rates. There appears to be a sluggish but massive structural adjustment process taking place. Institutions, ranging from governments to corporations are changing rapidly. New laws and regulations are required. Protectionist pressures, trade disputes, trade remedies, NGOs blaming everything on globalization, etc. seem to be the pattern. The Doha negotiations is one of several answers: to solve some difficult trade disputes, to avoid distortions, to resist protectionism, to exert external pressure for domestic reform, to act in favor of development by liberalization of agriculture and other sectors in both goods and services with high protection everywhere, to engage all societies in the responsibility of pursuing peace, security, democracy, human rights and improved standards of living. In the face of adversity and bleak prospects, achieving meaningful results by January 2005 looks like a political imperative.

5. There are at present a number of other forces and situations that have an impact on the behavior of the main actors of the WTO, i.e., the governments. The following is not exhaustive nor does it have any implication in terms of importance or priorities.

6. For many countries, particularly developing members, a substantial **problem of compliance with the Uruguay Round** results persists. In some cases compliance means changes in laws and affecting important economic interests. It is always most difficult to withdraw "money in the pocket" from people, as is the case of eliminating certain TRIMS and export subsidies. In other instances, compliance implies major changes in the institutions and not only merely changing laws and regulations. Such is the case of implementation of intellectual property obligations.

7. For certain highly developed societies, with high density of populations and low capacity to absorb pollution the **problems concerning environment, including food safety**, have become of critical political importance. The pressure for the adoption of second-best solutions based on trade measures has increased.

8. As the economy takes a downturn in most countries, the cries for protection measures increase. More often than not such pressures are couched in careful language that depict competition as "unfair", thus adding to the moral legitimacy of the claims. Even if all agree it is an economic folly and fallacy, **"unfair trade**" has become the safeguard of choice for uncompetitive industries and a political problem for administrators and legislators. Once again, the poor pay the bill.

9. The jewel of the crown of the Doha Development Agenda is **agriculture**.[1] This is where the greatest beneficiaries and losers are to be are to be found. The reform demanded from Europe, Japan and Korea is important. But if the Doha negotiations are to realize their full potential, substantial results in agriculture are essential. Delivery on agriculture is also essential if the Doha results are to come anywhere near the development requirements. This is also essential in the context of many recent and not-so-recent free trade agreements. One of the most intractable problems countries have faced while

[1] While agriculture is the subject of a separate paper by Ambassador Carlos Pérez del Castillo (Uruguay) mention is made here only to highlight the central role of the negotiations in this sector.

reciprocally liberalizing trade, is the fact that even if both (assuming a two-country agreement) do not subsidize exports, their products will still be selling at world prices which in key sectors are depressed by excess production and stockpiles in countries that heavily subsidize production and/or exportation. Consequently, bilateral liberalization may have the effect of putting local production at an indirect competition with highly distorted production. It follows that only substantial and ambitious multilateral results, particularly on export subsidies, will allow the regional trade agreements to meet their full potential by liberalizing agriculture trade. Consequently, good results on agriculture will assist the FTAA negotiations in securing liberalization without distortions.

10. **Market access for non agriculture products** are also of great importance both as a trade-off for agriculture and because of the gains that can be expected from liberalization in sectors where resistance has been the greatest. Forestry, fish, steel, textiles, clothing are some sector where manifestations of protectionism in different forms are more rampant and the interests of countries of Latin America and the Caribbean are the greatest. Important as the reduction or elimination of tariffs may be, market access negotiations involve –not in a formal or organizational manner- disciplines on other policy instruments.

11. Advocating market opening while doing little or nothing to discipline the **investigation and application of anti-dumping measures** does not seem to be a prudent or reasonable proposition. Such measures are now applied by an increasing number of countries, very much like an arms race. Anti-dumping has become the instrument of choice of any sector wanting protection from competition but, as pointed out above, under cover of a defense of "fair trade", thus appealing to a moral value. It is all the more attractive because it discriminates among suppliers, hitting only the more efficient. Adding to its attractiveness, these measures are free (besides the administrative costs and legal fees); since the nominal intention is to eliminate injury stemming from "unfair" trade, no compensation is required to be given to the exporter. The truth is that in economies that are relatively open, "predatory" dumping cannot

take place. All trade economists agree on this. Opening markets while preserving the ability to apply anti-dumping measures under the present rules is foolish: it merely replaces one tariff by another duty that is applied discriminatorily and only when the exporter has become so efficient that he can increase his market share. With rare exceptions[2] bilateral or plurilateral free trade agreements have been unable or unwilling to improve on disciplines concerning anti-dumping measures. One of the most frequent and heavy-handed user of such measures is the U.S. Its Congress and parts of the industry (particularly steel, textiles and clothing) have been fiercely opposed to any negotiations to change U.S. laws on trade remedies. This has been reflected in the strong resistance of USTR and Commerce Department negotiators to engage in any effort to strengthen disciplines, bilaterally, plurilaterally or in the WTO.

12. **Services** negotiations were "mandated" by the Uruguay Round results. Consequently, like agriculture, they began after the Seattle fiasco. "Serious" negotiations have only begun after the Doha Ministerial Conference since everybody was waiting for a wider package of areas to be subject to the single undertaking rule. The two years between Seattle and Doha have been far from wasted as it has allowed for detailed preparations and discussions to take place. Perhaps there will be enough interest to actually achieve trade liberalization through negotiations. With the exceptions of the negotiations of countries acceding to the WTO, there is little evidence of countries actually changing their regulatory frameworks or eliminating restrictions because of trade negotiations, whether these are under the WTO or in bilateral free trade agreements.

[2] In only two cases were anti-dumping measures eliminated reciprocally: Australia – New Zealand CER Agreement; and Canada – Chile FTA. Under NAFTA, a Chapter was established providing for a binational panel review of the determinations by the investigating authorities in lieu of the domestic judicial proceedings; while this does not change the substantive disciplines nor the standard of review, it introduces an independent and authoritative review with apparently some good results.

13. "**Singapore issues**" refer to the following areas: investment, competition policy, government procurement and trade facilitation. They are grouped together because they were first included in the work program at the Singapore Ministerial Conference (1996). There is nothing of relevance common to these areas nor do they conform a political "package". The Doha mandate comes close to launching negotiations in all four areas, directing that all the steps be taken towards that goal. However, it demands an "explicit" consensus on modalities at the Cancun Ministerial for negotiations to go forward. If a consensus is achieved, on some or all areas, little over a year will be left to finalize negotiations, and some of these areas (investment) can be complex and highly sensitive. The existing Working Parties have been carrying out the Doha mandate outside the single undertaking (investment, competition policy and government procurement, while the Council for Trade in Goods has been doing Trade Facilitation?

14. Of the Singapore issues **Investment** is the most important. Under the GATS, commitments on mode three (permanent establishment) are in effect investment obligations in terms of market access. Consequently, in a way, investment on services is already dealt with in WTO. An agreement on investment could entail disciplines and commitments with a wider scope. For example, pre-establishment, performance requirements, investment protection (including procedures for disputes brought by an investor against host country). Like in services, investment may touch upon highly sensitive regulatory frameworks that many regard as part and panel of development policies. The Doha mandate refers to a "GATS-like" approach. This implies a bottoms-up approach and a modest construction of disciplines and commitments, in spite of which it is by no means granted that many developing members who until now have opposed will agree to negotiate investment. Account must also be taken of the difficulties of many to implement disciplines, commitments and ensure enforcement, particularly less developed members.

15. An additional word on investment. Of all the pending issues, this seems to be the most sensitive because of (i) the lingering memory of the negotiations

concerning failed Multilateral Agreement on Investment (MAI) conducted under the auspices of the OECD and (ii) the fear of some developing countries to assume obligations including performance requirements. The mandate on services refers to a GATS-like approach. As seen, the GATS already allows for commitments on investment in services. As a matter of fact, most of the commitments made –particularly by developing countries- involve permanent establishment which implies investment. If there is to be a new stand-alone agreement on investment it would reasonable to expect that all investment commitments under GATS be moved to the new investment arrangement. This would deprive the GATS of most of its more valuable assets and leave it limited to obligations and commitments on cross-border trade in services. For some activities this would perhaps make little sense. The GATS, at the same time, is regarded as the most developing-friendly of all WTO agreements. Consequently, the question should be posed why aim at as new agreement? From all points of view it could a greater advantage to seek for a General Agreement on Investment and Cross-Border Trade in Services. In addition, the negotiations would be greatly facilitated since it would mean adding some provisions to the present framework of GATS.

16. Much the same can be said of **Competition Policy** though here negotiations do not seem to involve an exchange of "concessions" and "benefits" measurable in terms of gains and losses. This area represents a more systemic interest of achieving improved international cooperation. Some don't see this as WTO business while others who don't have competition laws fear that one will be imposed on them. Here again the institutional deficit is a serious problem for many members.

17. With regards to **Government Procurement**, all the effort is directed at achieving transparency, which in many cases may improve access conditions, but does not eliminate discrimination in favor of domestic suppliers. Thus the negotiation has a very limited scope due to the strong resistance to provide for national treatment by the U.S. and several developing countries.

18. Ministers at Cancun will also decide negotiations on **Trade Facilitation**, the fourth Singapore issue. These involve for the main part customs procedures, while possible results are of benefit to all – thus there is no room for a mercantilist evaluation – some developing members question whether there should be mandatory rules protected by the dispute settlement procedures. Such members fear that because of the constraints of resources to implement measures on trade facilitation, they could be "taken to court" and eventually by the subject of retaliatory measures.

19. Besides their intrinsic importance and their eventual systemic impact, the **Singapore issues** appear to be key component of a package. Indeed, if those members who resist agricultural reform are to be persuaded to change, they will have to have "something to take back home" in other areas. For the most part, these members are strongly in favor of the Singapore issues.

20. Another consideration to have in mind is the fact that most free trade areas negotiated in the last years or currently under negotiations include investment (including protection and pre-establishment), some degree of national treatment for government procurement and of cooperation between competition authorities and sometimes mandatory rules to facilitate trade. Such is the case of the architecture of the FTAA, and of most FTAs negotiated among Latin American countries, or between Latin American countries and countries (or group of countries) of other regions. It must be said, however, that MERCOSUR has not negotiated these areas in agreements with other trading partners. Consequently, as a matter of fact, models of agreements are being developed internationally. Should the WTO not develop a framework, particularly on investment, the risk is that models developed by others will predominate and eventually be imposed on the rest. In this context, investment diversion may also occur. The number of FTAs being negotiated or planned speaks highly for action in the WTO as part of Doha single undertaking.

21. However, the author believes that if results in some or all Singapore issues are to be secured, a different approach will have to be used in the negotiations, introducing much **greater flexibility** to allow all to first participate in the

bargaining table and secondly, to comfortably assume and implement obligations. To simply give a period of time (i.e.5 years) to some members to fully implement will probably not do. Developing countries present very different realities. As the TRIPS agreement has demonstrated, even for medium-size and fairly sophisticated developing countries, five or six years may be quite insufficient to fully implement sophisticated and complex agreements. Even where the human and institutional resources exist, changes that require legislative action compete with political time (a scarce resource) with other and probably more pressing issues.

22. That some developing countries fully implement their obligations in very long periods of time (say fifteen years) will probably not make any difference for the world economy. Other developing countries (for example Brazil, Mexico, Chile) can make a difference and more can be demanded from them. The problem is to find the right balance, in other words to identify the "critical mass", which will probably be different in each area of the negotiations.

23. This idea of greater flexibility is underpinned by certain basic elements: (i) all members participate in the negotiations; (ii) all members will sooner or later assume the obligations; (iii) obligations will invariably be implemented on a most-favored nation basis; (iv) all members will be participants in the administration of the corresponding agreement. This is one example to illustrate a solution to a fundamental problem confronting higher levels of legally binding international cooperation. There may be other ways in which to achieve greater flexibility. The FTAA exercise will have to devise similar instruments to bring all into the fold and thus become a precedent.

24. Take two examples. First, investment. Developing countries whose take of FDI is very low should only be required to assume obligations of transparency and MFN; they could be requested to bind themselves to a deadline of their choice (within reasonable limits) when the remaining obligations – including some access commitments – become effective.

A second example is competition policy. It would seem that members who do not have comprehensive competition laws are not crucial to the world economy. Indeed there may be members (such as Hong Kong, China) that do not require or need such laws and regulations. It does not appear to be the business of the multilateral trading system to impose on countries the obligation to enact competition laws and enforce them. But it seems reasonable to expect non discrimination, transparency and cooperation from members who have availed themselves of such laws.