

Identifying a trade-negotiating agenda

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The first part of this presentation will consist of a brief overview of the preparations going on for the World Trade Organization Ministerial Conference to be held in Seattle from November 30 to December 3, 1999. In the second part, I will touch on some specific agreements and look at related proposals that are relevant to health-related issues.

PREPARATIONS FOR THE SEATTLE CONFERENCE

Preparations for the Seattle Conference started in September of 1998. According to decisions reached at the Second World Trade Organization (WTO) Conference held in Geneva in 1998, the preparatory work has centered on the following areas:

- *Implementation problems.* Many countries, especially developing countries, are facing problems in implementing the Uruguay Round Agreements.
- *The built-in agenda.* At the end of the Uruguay Round, a consensus was reached to keep discussing

and to reopen negotiations on certain agreements, specifically on services and agriculture, and some specific provisions of other agreements, like the one on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

- *The follow-up to the high-level meeting on least developed countries.* There is an agreement that special measures have to be devised for the least-developed countries.
- *The new issues initiated at the Singapore Ministerial Conference.* The Singapore Ministerial Conference held in December, 1996, was the first conference of the WTO. New issues introduced at the Conference were trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation.
- *The "Deliverables".* These are issues that hopefully can be addressed and solved during the Ministerial Conference.

As of 1 November 1999, the World Trade Organization (WTO) had received

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236 proposals. These proposals refer to ideas that countries have put forward to modify, amend, or make suggestions regarding the existing WTO agreements and the new issues. Out of the 236 proposals, 51% have come from developing countries that have presented them as single countries, as groups of developing countries or, even in certain cases, as groups of developed and developing countries. Most proposals involve agriculture, services, industrial products, TRIPS, and the new issues.

COUNTRY POSITIONS ON THE CONFERENCE

As regards the countries' positions on the Seattle Ministerial Conference, in general, developed countries are in favor of a new round which would last for three years, much shorter than the Uruguay Round. The reason to have a new round is to keep a momentum on trade liberalization against the protectionism which is emerging due to the financial crisis that is affecting several regions. Also, a comprehensive round gives countries a chance to exchange concessions in different sectors.

Among the developed countries, however, the positions are quite different. For instance, the European Community is proposing a very comprehensive agenda while the United States (USA) is thinking of a limited agenda. Perhaps the main reason for the USA to think about something more limited is the lack of fast-track authority for its President.

On the other hand, some developing countries wish for a comprehensive round, mainly because of the possibility of trade-offs. Among those countries are Argentina, Chile, Costa

Rica, Korea, Mexico, Morocco, Thailand, Uruguay, and Hong Kong - China. Other developing countries feel that the problems related to the implementation of the Uruguay Round agreements and the built-in agenda do not allow starting new negotiations and adding new issues to the existing very heavy work program. They do not wish to embark on the discussion of new topics before the implementation-related problems are addressed and solved.

However, all developing countries desire effective implementation of the special and differential treatment clauses. Several agreements coming from the Uruguay Round provide for special and differential treatment for developing countries but these measures are based on the best endeavor clause and have not been implemented. Therefore, developing countries want the special and differential treatment to materialize and they also see many imbalances in several of the Uruguay Round agreements. They feel that these imbalances have implications for their developing policies and export interests, and they want them corrected.

It seems that there is growing support for what is called the "single undertaking." That is, to have negotiations that end up as a sort of package, as was the case in the Uruguay Round. But there is also some support for what is called the "early harvest." That means that some issues can be addressed and solved before others and the results implemented before the end of negotiations.

Of course, there are different interpretations of what an "early harvest" is. For some developed countries, it means to reach decisions

on the issues of interest to them. For developing countries, early harvest should mean that the problems related to implementation and the built-in agenda are discussed in first place before continuing on to other issues.

This was a short overview of what is going on for the preparations. Work is extremely hectic in Geneva, as every day brings three or four proposals from the countries. The role of the United Nations Conference on Trade and Development (UNCTAD) in this process is to support developing countries in their preparations for the Seattle Meeting. There have been a series of national and regional meetings all during 1999 to support developing countries in this task.

PROPOSALS ON SPECIFIC AGREEMENTS

It will not be necessary to go into details about the agreements themselves because they are well known. But it is worth stressing some of the proposals that have been introduced in relation to some agreements, as they can have an impact on public health.

The first agreement that comes to mind is TRIPS, the proposals for which can definitely have an impact on health. There is a proposal from a group of developing countries on the need to extend the transitional period. For developing countries the transitional period is going to expire after the end of 1999 and, according to some estimates, on 1 January 2000, around 60 developing countries will be in violation of the TRIPS agreement because they still will not have the appropriate legislation in place. This situation is very difficult to handle and may result in a series of panels brought to the attention of the WTO Dispute Settlement Body.

Another proposal introduced by Venezuela refers to the exclusion from patentability of the medications included in the WHO list of essential drugs.

There are also several proposals coming from developing countries on the issue of the transfer of technology. One of the goals of the TRIPS agreement is to have more transfer of technology to developing countries and for the research and development to take place in developing countries. This was a bit of the “carrot” for developing countries to accept all the rest, which for them is a series of very heavy and burdensome obligations. But the results are that, up to 1999, very limited transfer of technology has taken place. Research and development activities are more than ever concentrated in a small number of developed countries, especially in the pharmaceutical sector, where a few transnational companies run most of the research.

Several developing countries have proposed that a working group be created in the WTO to study the implications of existing agreements—not only the TRIPS Agreement, but also others like the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary measures (SPS)—for the transfer of technology and the ways of enhancing the transfer of technology, especially to developing countries.

As far as the Agreement on Trade in Services (GATS) is concerned, according to the built-in agenda, negotiations will start on 1 January 2000.

What developing countries are hoping to get out of the new talks on

services is, first of all, that what is called the “architecture” of the GATS be preserved. That means the structure of the positive list. Countries liberalize what they wish to liberalize and put in the so-called “positive list of commitments.”

Developing countries also wish to restore a balance between the commitments in modes 3 and 4 of supply. Mode 3 relates to foreign commercial presence and developed countries have a strong interest in it. Mode 4 relates to the movement of natural persons as services suppliers and this is a mode of supply which is of particular interest to developing countries.

Most of the commitments that exist have been scheduled with deference to mode 3, foreign commercial presence, and very few on the movement of natural persons: at the forthcoming negotiations, developing countries hope to gain more liberalization for their people to circulate.

They hope to ensure that the services of export of interest to them will be included in the liberalization process. Developing countries want to enforce the principle that they will open their own domestic markets according to their national policy priorities and development needs.

Let us now touch on two specific services sectors that are relevant to health. The first one is, obviously, the health services sector. Keeping this very brief, out of our work on international trade in health services we have reached the conclusion that developing countries have the potential to become exporters in this sector. Several developing countries are already active in this field, because they have lower production costs and can offer unique services. Examples of

this are the traditional Chinese medicine and some other very specific medicines. A link can be established between health, tourism, and natural resources. For instance some countries are attracting foreign patients because of their spas.

The questions we have to ask ourselves are: Why liberalize? Why should it be in the interest of developing countries to liberalize this sector? The answer is that further trade liberalization of the health sector can lead to improved health systems in developing countries by providing additional financial resources, exposing health professionals from developing countries to new techniques, and providing them access to higher qualifications. Also, improvements can follow from introducing innovative management systems in developing countries, upgrading the quality of the health treatments they can provide, especially in the rural areas, and strengthening foreign and domestic competition. All of these would be good reasons for liberalizing the sector.

Nevertheless, there are obstacles that need to be removed to reach those results. Some of these are restraints for the foreign ownership of health facilities and foreign equity participation. Developing country markets have to be made more attractive for foreign companies that may wish to install themselves in those markets and introduce, for instance, new hospital management or other techniques.

There are other obstacles that limit the ability of developing countries to export their health services. The most important is the nonportability of health insurance, which curtails the possibility for patients to be treated abroad.

Another problem is the temporary movement of personnel. Health services are labor-intensive and based on universal scientific knowledge. So it is, in principle, a sector where people should be allowed to move from one country to another. Still, personnel from developing countries who wish to practice their health professions abroad face several obstacles related especially to discriminatory licensing, accreditation, lack of recognition of foreign qualifications, nationality and residence requirements, and foreign exchange controls affecting their repatriation earnings. The repatriation of earnings is a very crucial point, since sending money back to their families is one of the main reasons that makes people go abroad to work.

In UNCTAD it is felt that liberalization will not of itself lead automatically to positive results for developing countries. Therefore, some conditions are necessary for developing countries to benefit from the liberalization of this sector. A legal framework is crucial to make sure that if a transnational company comes to a developing country, it will find a legal framework where it can operate. This would prevent some types of abuses.

National legislation is needed to avoid what is known as "cherry-picking practices," which refers to corporations that decide to be active in some sectors and not in others. An example would be to be active in life insurance but not in health insurance because the former is more lucrative than the latter.

One field in which the transfer of technology is obviously necessary is the development of telemedicine. However, all the legal liability problems associated with telemedicine have to be addressed and solved to make telemedicine possible.

Another obstacle faced by developing countries is the so-called economic need test. The country of destination is free to decide, according to the conditions of the local market, whether to allow foreigners to provide services. The economic need test is related to the unpredictable nature of market conditions; a country might consider that, in view of changes in the situation, it is no longer appropriate to allow foreigners to supply health-related services. Proposals have been introduced in preparation for new negotiations to make sure that the use of the economic need test is restricted and more predictable.

Another service sector worth touching on, if very briefly, is the environmental services sector. As the WHO has pointed out in various studies, the lack of sanitation and drinkable water, and the presence of pollution cause many illnesses in developing countries and hinder their development. Again, we must examine the question of liberalization. Why further liberalize the environmental services sector? Would it be in the interest of developing countries to liberalize this specific sector?

Developing countries are net importers of environmental services. Yet, we have reached the conclusion that it is in their interest to have further liberalization of this sector. We believe that if they have access to foreign environmental services, this can help them strengthen their domestic capacity in this field and that this strengthening may lead, in turn, to an increased ability to address and solve domestic environmental problems; to meet environment-related requirements in the markets of destination; to become a more appealing destination for foreign direct

investments; and to strengthen other sectors, such as tourism. In the future, of course, developing countries could become themselves exporters of environmental services, perhaps within specific geographical regions.

In this sector, as well as in the health sector, there are obstacles that need to be removed. Foreign commercial presence has to be encouraged because the environmental services are capital-intensive. A company wishing to establish itself in a foreign country, will usually want to have very flexible conditions regarding its commercial presence abroad. Therefore, if developing countries want to encourage foreign companies to come in and take care of sewage, refusal disposal, sanitation, etc., existing limitations to foreign commercial presence should be analyzed and, if possible, removed.

But in this sector, as in the health sector, we don't feel that liberalization will automatically bring positive results for developing countries unless some prerequisites are fulfilled. In this case, again, appropriate domestic legislation is necessary not only to make sure that transnational corporations and foreign and domestic companies act within a legal framework, but also because domestic legislation on environment stimulates the demand for environmental services. Besides a transfer of technology, especially of environmentally sound technology, there is a need for international cooperation and financing, since there is a big gap between what developing countries can afford and the amount of money which is required to solve the huge problems related to lack of adequate sanitation.

Thinking about the possible outcomes of the new negotiations, the USA has clearly expressed interest in

the further liberalization of trade in environmental goods and services. The USA is the most important producer and exporter of environmental goods and services. It has developed sophisticated technology and there are many companies active in this sector. But since the domestic market is saturated, companies are looking especially to developing countries for new business opportunities. The USA will surely encourage the liberalization of this sector of services.

STANDARDIZATION ISSUES

The other agreements that I will briefly touch on are the TBT and the SPS. They both deal with standardization issues. As far as the TBT Agreement is concerned, WHO has a standard-setting group which sets the standards for biological materials and components of pharmaceutical products. The standards developed by the WHO are regarded as international standards. The TBT Agreement grants a very special role to the international standards and encourages countries to develop domestic legislation on the basis of those standards. National legislation developed on the basis of international standards is considered WTO-consistent.

Now, in the framework of the preparation for negotiations, many proposals have been submitted by both developed and developing countries regarding the way in which international standards are developed. They address not only WHO's specific standards for biological materials and components of pharmaceutical products, but all kinds of international standards developed, for instance, by the *Codex Alimentarius* and by the International Organization for Standardization.

The idea is that these processes are not transparent. The number of countries that are able to participate in the international standard-setting activities is very limited. So, developing countries feel that they are excluded de facto from this process and that in the end they have to cope in the international markets with standards developed without their input, which are often very strict and very difficult for them to meet. In the case of developed countries, it seems that the USA, the European Union, and Japan are all equally unsatisfied with the way international standards are developed. In the specific case of the standards developed by the WHO, the USA has a different set of standards for the same products. These are neither stricter nor more flexible, they are just different; and this, of course, creates problems for the international markets.

Consequently, the USA and Japan made a proposal in preparation for negotiations in the General Council, but also in the TBT Committee, to make sure that the international process of developing standards becomes more transparent and more accountable to all stake holders.

In the case of the SPS Agreement, several proposals have also been submitted to the General Council in the process of preparation for new negotiations. I would like to stress a basic difference of approach on the position of the European Union and that of the USA. The European Union is seeking more flexibility in applying measures to protect human health, animal health, and the environment. The Union also wants more flexibility in applying the precautionary principle which allows countries to take restrictive trade measures when there is a risk but the scientific evidence is

insufficient. The position of the USA and of several developing countries is different. They contend that if the scientific basis to apply restrictive trade measures is not solid, it can lead to some abuses. And for those of you who have been following the hormone case, this completely different philosophy of the USA and the European Union regarding the protection of consumers and the acceptance of risks emerged very clearly. As is well known, after the Appellate Body decision, the European Community has decided not to implement the recommendation and is thus in violation of WTO rules.

Now some ideas in reference to Article XX(b) of the GATT and the equilibrium between trade interests and other legitimate policy goals, like the protection of health or the environment. It has been rightly pointed out that the interpretation of Article XX(b) has been very strict. Article XX(b) refers to measures "necessary to protect human, animal or plant life or health". Article XX(g) refers to measures "relating to the protection of exhaustible natural resources." In a case that Brazil and Venezuela brought to the WTO Dispute Settlement Body in 1995 against the USA regarding standards for reformulated and conventional gasoline, the interpretation given to the exception in Article XX(b) was that an import restriction could be justified only if there were no alternative measures less trade-restrictive that a country could employ to achieve its health policy objectives. But in the case of Article XX(g) on the protection of exhaustible natural resources, this interpretation does not apply. A country can implement a restrictive trade measure, even if other alternative measures, potentially less trade-

restrictive, are available. It seems, then, that the exception related to the protection of exhaustible natural resources embodies more flexibility than that related to the protection of human health.

One possible course of action is to suggest an amendment or a reconsideration of Article XX. However, developing countries are very concerned about modifying Article XX—the Article that includes all the possible exceptions that are allowed and authorized under GATT—because they feel that the equilibrium is very delicate. And if you touch Article XX and you give more flexibility to countries to introduce trade-restrictive measures for the protection of human health, the environment, etc., this flexibility can be abused and countries can implement trade-restrictive measures that have protective purposes but can be disguised as measures aimed at protecting the environment, or human or animal health. Consequently, discussions about modifying Article XX are very difficult and very sensitive for developing countries.

TRANSPARENCY IN PUBLIC PROCUREMENT

The last topic I want to touch on briefly is not an agreement. It is a working group established in the WTO as a result of the first ministerial meeting of the Organization, the Singapore Ministerial Meeting of December 1996.

This is a working group on transparency in public procurement, which is very relevant in the health sector because of hospitals, furniture, and the many other materials needed for the good functioning of health-related infrastructures. The mandate of the working group established after the Singapore meeting is to conduct a study on transparency in government procurement practices in order to see what pertinent practices exist in different countries. Eventually, on the basis of this analysis, the negotiation of an agreement on transparency in public procurement could be proposed. In this case, again, there are proposals related to this issue. The USA is very much in favor of an agreement on it and has included it among the “deliverables”, the issues that hopefully can be addressed and solved during the Seattle meeting.

The European Union and Venezuela feel that the work of the working group has been very thorough, and that there are already enough elements to allow moving on to the next step, that is, to start the negotiations for an agreement on transparency in public procurement. They hope that a decision about starting negotiations for such an agreement can be reached at the Seattle Meeting. The only developing country that has put forward a proposal on this subject is India, who feels that the working group has not yet gathered enough information to justify starting new negotiations in this field.
