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SPECIAL REPORT: COLLAPSE OF DOHA MINISTERIAL

Future of Doha Round Uncertain After Collapse of Talks

The collapse of the Doha Round mini-ministerial July 29, just four days after a deal seemed at hand on July 25, kills any chance for completing the talks this year. It remains to be seen whether Doha will follow the path of the Uruguay Round, which collapsed at the end of President George H.W. Bush's term in 1990 only to be revived and completed three years later in 1993 by the Clinton administration, or whether it will be permanently mothballed. There are calls already for scuttling the effort and starting a whole new approach to multilateral trade talks. For now, the round is neither cancelled nor suspended, and some negotiating groups, including the one on trade rules, are expected to continue meeting in the fall.

Ostensibly, the talks failed when the U.S. refused to bow to demands from China and India for further concessions on a special safeguard mechanism (SSM) that would allow developing countries to snapback farm tariffs to above Uruguay Round levels when food imports breach 140% of an average of recent years. Yet even if there were a deal on SSM, trade observers say the talks were likely to flounder on numerous other unresolved issues, including cotton and a demand by U.S. farm interests for a new "peace clause" to bar complaints against agriculture subsidies while any final deal was being implemented. "This wasn't going to work," National Association of Manufacturers VP Frank Vargo told WTTL.

After the breakdown, trade officials said they recognize the need to assess what happened in Geneva and consider what to do next. "I think we all now need to engage in serious reflection on the next steps in our collective endeavor," said World Trade Organization (WTO) Director General Pascal Lamy. "I am convinced that there will be a next time, which is why I said yesterday that I was not throwing in the towel," he told negotiators.

U.S. Trade Representative (USTR) Susan Schwab said the U.S. was willing to leave the offers it made at the meeting on the table for future talks, but also cited numerous issues where no agreement had been reached. "To get back on the path to success, we all will need to think hard about how we tackle these issues," she told her fellow ministers.

The compromise proposal that was presented to ministers late on July 25 was initially characterized as a G-7 proposal based on talks held by ministers from the U.S., European Union (EU), Australia, Brazil, China, India and Japan. It turned out that the paper, which later became

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known as the Lamy Text, had the agreement of only five and a half members of the group, with India not supporting it and China at first agreeing to it but then reneging (see **WTTL**, July 28, page 1). When Lamy announced the collapse of the talks on July 29, he claimed negotiators had reached agreement on 18 of 20 agenda items he had presented to them. "I had hoped to come to you today with good news," he told reporters.

"I was hoping to say that we had slashed and capped the level of trade distorting subsidies like never before. I was hoping to announce that beef, sugar, ethanol, tropical products or products suffering from tariff escalation would now see an improvement of their market access worldwide. I was hoping to tell you that tariff peaks on industrial products of interest for developing countries had been slashed, that least developed countries would consolidate duty-free and quota-free market access in the WTO, that exports support in the form of subsidies, state trading enterprises, exports credits or food aid had been removed," he said.

"All this was ready for a final package but some important pieces were missing," he conceded. Among the missing parts were agreements on SSM, cotton, geographical indications and bio-diversity. The extent to which developing countries were willing to sign up for sectoral talks, a key U.S. demand, was also uncertain at the end. Some progress was claimed for a services signaling conference on July 26 (see story page 4). Whatever progress was made during the 10 days of talks on agriculture and non-agriculture market access (NAMA) will be memorialized in reports to be filed by the chairmen of those negotiations. These texts are likely to form the starting point for any new talks, if there ever are new talks.

Doha Round Was Ill-Fated from the Beginning

If the Doha Round dies in the aftermath of the failed ministerial July 29, it won't be because of any flaws in the World Trade Organization (WTO), the global trading system or the alleged rise of protectionism around the world. It will fail because it was ill-conceived from the beginning, ill-planned and ill-managed, and it took trade ministers seven years to admit that.

Rather than the rise of protectionism, the round was hurt by the rise of trade liberalization. Countries such as India, China and other emerging markets have been lowering tariffs and trade barriers and opening to foreign investment unilaterally either out of self interest or compliance with past trade agreements. While these lower tariffs are not bound or applied to all products of interest to U.S. exporters, they have expanded trade significantly in the last decade.

Countries undertaking these measures want to be able to make these moves at their own pace and convenience in selected areas that help their development. The success of this approach has made them reluctant to tie future trade policies to a strict WTO formula and timetable.

This is particularly the case with India. Indian Commerce Minister Kamal Nath, who was widely identified as the main spoiler at the meeting, arrived at the ministerial late because his party had just survived a no-confidence vote. Nath came to Geneva needing to shore up his government's fragile coalition, and blocking a Doha deal was seen as good politics at home. There has long been speculation that Nath has ambitions to become prime minister someday, and press reports indicate that his stand in Geneva has enhanced his status in India.

Increased trade liberalization also has been spurred by the expansion of bilateral and regional free trade agreements and trade preferences for less developed countries. Three major trading bloc or axes of trade have emerged in the last fifteen years, consolidating regional trade relations. In the Western Hemisphere, NAFTA, Mercosur and numerous bilateral and regional FTAs, along with trade preference programs, have strengthened such ties. The expansion of the European Union (EU) from 12 nations at the end of the Uruguay Round to 27 today, including former communist bloc countries of Eastern Europe and Soviet republics, has kept Europe's focus inward. In Asia, China has become the center of regional trade integration.

The round was ill-conceived from the start when it was first proposed by then European Union Vice President for Trade Sir Leon Brittan. In 1997, he started calling for the launch of what he wanted to dub the Millennium Round. Although opposing the idea initially and favoring sectoral talks instead, President Clinton and then-USTR Charlene Barshefsky invited the WTO to meet in Seattle, Wash, in 1999 to launch what they hoped to call the Seattle Round.

Brittan's proposal was a clever ploy to divert the WTO from the unfinished or built-in agenda from the Uruguay Round. The main targets of the built-in agenda were EU farm supports, export subsidies and high farm tariffs. To get the bull's eye off the EU's back, Brittan needed a new round that would allow the EU to get concessions in other areas to balance what it would have to give in agriculture. In exchange for giving in agriculture, the EU wanted, among other things, to get new rules on investment, competition and geographical indications. The debacle at the Seattle Ministerial derailed both Brittan's and Barshefsky's ambitions.

When the Bush administration arrived, new USTR Robert Zoellick took on the mission of proving that he could accomplish what the Clinton administration couldn't. A key message that came out of Seattle was the anger and frustration many developing countries felt toward U.S. and EU efforts to dictate the agenda for any new round. To assuage those feelings, Zoellick undertook a global campaign to win developing country support for new talks.

The key to that effort was convincing those developing countries that any new round would be for their benefit. Zoellick's diplomacy paid off at the WTO Ministerial in Doha, Qatar, in November 2001 where the Doha Round was launched. But to get final agreement from developing countries to begin a new round, the WTO had to eschew the idea of calling it a round and instead called the new talks the Doha Development Agenda (DDA).

Although the Doha Ministerial issued a declaration stating the goals of the talks, it was never clear how the negotiations would help most of the developing countries in the WTO. That became clear at the 2003 Cancun Ministerial when developing countries walked out before the meeting was supposed to end because of their dissatisfaction with the direction of the talks. It was still a problem as recently as the spring of 2008 when developing country negotiators in Geneva protested what they considered to be the lack of deference to their concerns in draft texts on agriculture and NAMA.

Despite being called the DDA, the underlying goals of the talks were still the same aims that developed, industrialized nations and agriculture-exporting countries belonging to the Cairns Group were seeking at the end of the Uruguay Round and at the Seattle Ministerial: cuts in barriers to farm trade, lower industrial tariffs and liberalization of trade in services. "We launched the development round, but we were never bargaining about development," former Commerce Under Secretary Grant Aldonas told WTTL.

Aldonas also criticized the focus of the round on agriculture, although talks on farm trade were mandated by the unfinished agenda from the Uruguay Round. Other issues, such as trade facilitation, are more important to global trade, he said. "Politicians are 30 to 40 years behind the times," he asserted. "The rest of the world was held hostage by agriculture," he said; adding, "They were talking about the wrong things."

The Doha Round was also flawed from the beginning by its construction. By eschewing the past request-offer approach to trade talks and putting an agreement on the modalities or formulas for cutting tariffs and farm aid at the front of the agenda, the talks put governments in the difficult position of having to expose their main concessions up front without having the political cover that comes with counterbalancing benefits from other parts of the negotiating agenda. In previous rounds, agreements on final tariff cutting formulas often came at the very end – in the wee hours of the final day – when ministers had in hand as part of a single undertaking concessions in a broad array of areas. As constructed, the Doha Round forced countries, primarily emerging market nations, to build in escape clauses in their commitments on modalities. This fed the demand for flexibilities in NAMA commitments and safeguards for

agriculture. The U.S., EU, and other goods and agriculture exporting members were reluctant to accept such demands because they did not know what they would get in the end in areas of concern to them, including services, sectoral talks, intellectual property rights, rules, trade facilitation or dispute-settlement.

Before Collapse of Doha Talks, Progress Made on Services

The collapse of Doha Round negotiations July 29 leaves on the table offers that were made at a July 26 signaling conference on the services pillar of the talks. Progress made at the conference is likely to be kept for whenever Doha negotiations resume or as a benchmark for other possible uses in the future, a developing country ambassador to the WTO said. The signals of future offers that were made drew mixed reactions from service industry representatives (see **WTTL**, July 21, page 2). The conference, attended by representatives from about 30 countries plus the EU, was “a very successful meeting,” said Pascal Kerneis, managing director of the European Services Forum. “No country has backtracked,” he said.

“The signaling conference itself, in a lot of ways, was successful,” said John Goyer, VP of international trade negotiations and investment at the Coalition of Service Industries (CSI). “It was successful because it happened,” he noted; saying the tone was constructive, feedback was positive and signals promised important possible improvements. “The fact that the U.S. could indicate some flexibility on Mode 4 [the movement of natural persons] was extremely important,” Goyer said. The U.S. signal got “a reasonably warm reception from Kamal Nath,” the Indian Commerce Minister, Goyer said.

“Had everything else moved forward in agriculture and Nama ... this would be a basis to move forward,” Goyer said. A report of the July 26 meeting prepared by Pascal Lamy doesn’t identify specific market-opening offers but outlines the general areas of agreement on opening such sectors as business services and computer and related services. [**Editor’s Note:** Copy of Lamy report on services signaling conference will be sent to subscribers on request.]

At the meeting, India and China went beyond what their senior level officials had offered in preparatory talks, Kerneis reported. China proposed to move on Mode 1, which deals with cross-border supply, and Mode 3 on commercial presence in banking and asset management, he noted. India signaled improvements in distribution by single brand companies and possible moves on environmental and energy services, Kerneis said. India also indicated it might bind its current level of foreign capital ownership in the telecom sector at 74%, up from 51%, Kerneis said. He said he expected further commitments to be offered, if the round were to move ahead at some stage.

Brazil, Argentina, Philippines, Egypt, Turkey, South Africa and China made very minor signals, said CSI President Bob Vastine. He said he considered the signals from Malaysia and Indonesia to be inadequate, while another source said the Philippines indicated unexpected movement. Kerneis said the Brazilian telecom offer was not as strong as its 1997 offer.

The anticipated October 15 deadline for countries to table formally new offers is now off because of the collapse, Kerneis said. “We would like them to resume as soon as possible and conclude those modalities,” he said. “We don’t want to lose everything in the initial and revised offers,” Kerneis added.

Government Opposes Supreme Court Review of FCPA Case

The Foreign Corrupt Practices Act (FCPA) can be applied to illegal activities in foreign countries even if the crime was not related directly to acquiring or retaining business in that country because there is a “business nexus” to conduct prohibited by the statute, the U.S. Solicitor General asserted in a July 25 brief opposing a petition to the Supreme Court for a writ

of certiorari to review a circuit court ruling upholding the conviction of two men for such activities. David Kay and Douglas Murphy, two former executives of Rice Corporation of Haiti filed the petition seeking to overturn their conviction for bribing tax and customs agents in Haiti (see **WTTL**, July 7, page 2) “According to petitioners, the rule of lenity applies because the business nexus element is ambiguous,” the government’s brief argues. “Petitioners are incorrect, because the plain language of the business nexus element, when read in the context of the entire statute, is not ambiguous,” it asserts.

“The business nexus element requires that a bribe to a foreign official be made ‘in order to assist [the company] in obtaining or retaining business for or with * * * any person’,” the brief notes. It quotes the dictionary definition of business to mean a commercial or mercantile activity. “Thus, the statutory language does not restrict the FCPA’s coverage to the award or renewal of contracts, but more broadly reaches actions that assist in obtaining or retaining business,” the Solicitor General’s brief contends.

It points out that the FCPA carves out an exception from its prohibition for payments for routine governmental action. “That exception would be superfluous if the statute were limited in the manner that petitioners propose. Because the plain language of the FCPA covers petitioners’ conduct, the rule of lenity has no application here,” the brief says. “To the extent that the statutory text might be said to be ambiguous, any ambiguity can be resolved by the evolution and legislative context of the law,” it adds.

BIS Receives First VEU Applications from Indian Companies

While the Validated End User (VEU) Program for China has been dormant for several months, the Bureau of Industry and Security (BIS) has received a "handful" of VEU applications from “top quality” Indian firms that are also eligible for the program, BIS Under Secretary Mario Mancuso revealed July 30 to the Washington International Trade Association (WITA). “We are currently reviewing those companies. The review is interagency. The review is a pretty comprehensive national security screen and so, frankly, it just takes time,” he said.

Review of the applications has begun within Commerce. “We have gone back with questions to a number of the companies that have applied,” he reported. “Once that package is final we expect it will make its way to the Department of Defense and Department of State. We do a pretty thorough screen. Our screen is a national security screen, so what we send over is in pretty good shape,” he said.

Decisions on the applications are likely to be made “over the next several months,” he said. “I don’t want to put particular timetables on it because once it gets to the other agencies, we don’t control the process,” he noted. Mancuso also stressed that the U.S. has “a very important relationship with India, a strategic relationship. India will be an important foreign policy partner for the long term. So these trade issues have to be understood in the broader context of facilitating trade in the foreign policy context,” he explained.

Mancuso also reported that the first Chinese firms to receive VEU status have now begun to receive exports under the exception. “Initially, in the months following the VEUs there weren’t as many shipments as we expected in large part because it was a new program. Companies were shipping under their existing licenses. We have seen those numbers go up,” he said. Industry sources say shipments of semiconductor manufacturing equipment, which is covered by some of those VEUs, has been down this year because of a cyclical slowdown in the industry.

“In respect to when we might hear more about additional companies in China, we just want to make sure that before we scale the program, which we’re in a position to do in regard to a BIS resources perspective and the interest that exists in the program, we just want to make sure that all of the logistics issues, even the small marginal ones, are fully taken care,” he said. “There are some logistical issues that we are working on with the Chinese, but today we are able to

conduct inspections with respect to VEU companies just as we do other transactions in China,” he claimed. “I just want to underscore a very important point: we have legal authority to conduct inspections in China under the program. Not only do we have legal authority, we have a standing legal agreement with the Chinese to conduct those inspections,” he stressed.

Intra-Company Transfer Proposal Delayed Until Fall

State and Defense department objections are delaying BIS plans for the creation of a new Intra-Company Transfer (ICT) license exception. In the spring, BIS officials repeatedly said they expected to propose the new rules “in the next couple of weeks,” but the interagency review has stalled that schedule, and a proposal isn't likely to surface until the fall or later. “The state of play on the regulation is that we have submitted our draft of what that regulation would look like to our colleagues in the Department of Defense and the Department of State and other interagency partners with significant equities in this issue,” BIS Under Secretary Mario Mancuso told the Washington International Trade Association July 30.

“At least two iterations of our draft regulation have been worked through the interagency, and we are still waiting final comments from our partners in the interagency,” he reported. “We think we will make more progress in the fall. It would be inappropriate for me to comment on the twists and turns of intra-government positions but we’re making good progress,” he claimed.

Mancuso said the ICT rule would cover only the transfer of technology between U.S.-based companies and overseas affiliates and not goods or equipment. He said he doesn't know how the rule will define what will constitute an eligible company, but expects BIS “will seek to define it in a way that makes the exception meaningful.” The goal would be to make U.S. companies internationally competitive. “We don't want a category: none,” he said.

* * * Briefs * * *

CORRECTION: Brief quoting Sen. Max Baucus (D-Mont.) on status of TAA legislation failed to include his complete statement, thus reversing meaning of statement (see **WTTL**, July 28, page 6). His complete July 25 statement said: “I have worked for some time with my Finance Committee partner, Senator Chuck Grassley, and with the White House to develop a robust renewal and expansion of America's Trade Adjustment Assistance program, and today we are on the cusp of an excellent agreement. I had hoped to finalize offsets for the bill and bring it to the Finance Committee for formal consideration next week. However, the resistance of some Senators to consideration of TAA absent a guarantee of action on the Colombia Free Trade Agreement is preventing the process from moving forward.”

OFAC: Minxia Non-Ferrous Metals, Inc., of Colombia, Md., has agreed to pay civil fine of \$1,198,000 in agreement with OFAC to settle allegations that it violated Cuban Assets Control Regulations between May 2003 and October 2006. “OFAC alleged that Minxia acted without an OFAC license or outside the scope of its license by purchasing or otherwise dealing in Cuban metals. Minxia did not voluntarily disclose this matter to OFAC,” agency reported. Fine is among higher fines ever imposed for Cuba trade violations, Treasury spokesman said.

CUBA: OFAC Aug. 1 issued reminder that sale or purchase of claims against Cuba certified by the Foreign Claims Settlement Commission (FCSC) are subject to license requirement. “OFAC may consider licensing the transfer of such a claim under certain circumstances, provided that any transactions are limited to persons subject to U.S. jurisdiction,” it said.

ITAR: DDTC in July 28 Federal Register proposed new fees for export licenses (see **WTTL**, June 23, p.1).

APPLIANCE RACKS: Nashville Wire Products Inc., SSW Holding Company, Inc., United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union (USW) and the International Association of Machinists and Aerospace Workers, District Lodge 6 July 31 filed antidumping and countervailing duty petitions at ITA and ITC seeking investigation of imports of kitchen appliance shelving and racks from China.