

US & Multilateral Trade and Policy Developments

Japan External Trade Organization

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US General Trade Policy

GSP Reauthorization Gives Importers the Opportunity to Recover Overpaid Duties

On June 29, 2015, President Obama signed into law the *Trade Preferences Extension Act of 2015*, reauthorizing the Generalized System of Preferences (GSP) through December 31, 2017 and making its reauthorization apply retroactively to July 31, 2013. As a result, importers can now begin the process of obtaining refunds of duties overpaid during the interim period between the expiration of the GSP and its upcoming reauthorization, which will take effect on July 29, 2015.

The GSP program encourages multinational investment in specified developing countries by permitting selected goods produced there to enter the United States duty-free. The GSP program has only now been renewed after expiring on July 31, 2013. However, since 2013, importers have had the ability to flag their entries of formerly GSP-eligible imports (using an “A+,” “A” or “A*” designation on the entry) to expedite refunds in the event that Congress ever reauthorized the program retroactively.

Once the Act becomes effective on July 29 (thirty days after the President signed the bill), Section 201 will allow importers to receive a refund for duty overpayments occurring between July 31, 2013 and July 29, 2015. The Act authorizes US Customs and Border Protection (CBP) to liquidate or reliquidate (*i.e.*, to finalize CBP’s calculation of duties owed on) any eligible good that entered (*i.e.*, that had its documentation presented to CBP on arrival at the port) after the GSP expired on July 31, 2013, and to treat that good as if entered on July 29, 2015.

Submitting a Request for Repayment

To be eligible for repayment, an importer does not have to have flagged its import entry with an “A+,” “A” or “A*” indicator. However, those that have flagged interim entries may not have to file a request for repayment. CBP will reportedly, as in the past, automatically process previously filed entry forms that already contain the GSP designators “A+,” “A” or “A*.” If CBP automatically processes the entries, then importers can expect to receive their refunds 90 days after CBP concludes the liquidation or reliquidation process. It is not yet certain whether CBP will automatically process refunds because during 2014 the President removed Russia and Bangladesh from the list of GSP-eligible countries. Importers who claimed GSP benefits on their entry forms for goods from those countries will therefore not be eligible for a refund, as those items are not duty-free. CBP is currently testing to see if automatic processing is a feasible option and will issue instructions on the processing of claims most likely next week, but definitely before July 29.

Importers who did not flag their import entry with an “A+,” “A” or “A*” must submit a “sufficient” formal request to CBP within 150 days of the reauthorization’s July 29 effective date. A “sufficient” request provides enough information to allow CBP to locate or reconstruct the entry. If the good is eligible for the GSP and the importer files a sufficient request, CBP will pay the amount owed within 90 days of the completion of the liquidation or reliquidation process. The repayment does not include interest.

To be eligible for the retroactivity provision the goods must:

- Be from a country considered a “beneficiary developing country” as of July 29, 2015 (note: Russia and Bangladesh no longer qualify);
- Be designated an eligible article under the GSP in the Harmonized Tariff Schedule of the United States, as shown by the word “Free” in the “Special” duty-rate subcolumn, followed by the symbol “A+,” “A” or “A*” in parentheses;

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- Have entered the United States between July 31, 2013 and the July 29, 2015 effective date of the provision (“entered” includes the good being withdrawn from a warehouse to be used for consumption); and
 - Have been shipped directly to the United States, without further processing in a non-GSP-eligible country.

Importers must file requests with CBP by December 28, 2015, *i.e.*, 180 days after the President signed the Act.

As was the case before reauthorization, CBP may verify that the good originated from a GSP-eligible country. Besides having placed the appropriate indicator (“A+,” “A,” or “A*”) on the CBP Form 7501 Entry Summary to flag the importation for GSP benefits, importers should, as before, obtain and have available to present upon request a compliant certificate of origin. A compliant certificate of origin, meaning one that follows specific regulatory guidelines, will allow CBP to determine what portion of the product’s material inputs originated in the GSP-eligible country, what portion of the processing occurred there, and whether non-originating materials were substantially transformed. Based on this information, CBP will assess whether the item qualifies as GSP-originating (that is, as having been produced in a GSP-eligible country). The list of GSP-eligible countries and goods will not be the one used before the GSP expired but will be a new list based on 2014 data. It is expected that the only change will be that Russia and Bangladesh are no longer GSP-eligible countries.

GSP-Eligible Countries and Articles

Under the statute, 19 U.S.C. §2463, the President has the power to determine which countries and goods are GSP-eligible. The President can do so either by Executive Order or by Presidential Proclamation after receiving advice from the International Trade Commission (ITC). In the past, the list of eligible countries and goods was reviewed on an annual basis. The Office of the United States Trade Representative (USTR) would submit a list of countries and goods to the ITC for review. Interested parties could submit petitions to the USTR to have goods or countries added to the list. Once the list was submitted to the ITC, parties could comment on the list, appear at the public hearings and/or file briefs and statements before and after the public hearing. Notification of applicable deadlines was provided in the *Federal Register*. The ITC would have six months to provide its recommendations taking the hearings and filings into account. The ITC report was then filed with the USTR. There was no review conducted in 2014; however, the President removed Russia and Bangladesh from the list of eligible countries.

Competitive Need Limitation Waivers

Section 203 of the Act revises the competitive need limitation (CNL) waiver provision contained in 19 U.S.C. §2463(d). Ceilings built into the GSP program terminate benefits for products from specified countries when GSP imports of those products either account for at least half of the value of total US imports of that product or exceed a certain dollar value. In certain circumstances, however, the President — acting through the USTR after an ITC investigation — may, via a CNL “waiver,” grant continued duty-free access to products that exceed the import ceilings. To obtain a CNL waiver, the product must either not be made in the United States, be imported in only small (“de minimis”) volumes, or originate in a designated GSP least-developed country.

The USTR will be conducting a limited review of CNL product designations based on 2014 data. The USTR announced this limited review in the *Federal Register* on July 6, 2015. USTR will also be considering five cotton products from least-developed beneficiary developing countries for potential GSP eligibility. As provided for in the Act, this review is to conclude on October 1, 2015. For this review the USTR will generally not be accepting petitions to request that products be redesignated, as occurred in the past under the normal review process. USTR will accept petitions only for products newly accepted for CNL in 2014; two products from Thailand are the only newly accepted products.¹ USTR will also be accepting comments regarding (i) de minimis CNL waivers; (ii) possible redesignations of articles not currently eligible for GSP benefits; (iii) possible revocation of CNLs waivers; and (iv) the proposed designation for GSP eligibility for the five cotton products from least-developed beneficiary developing countries. The deadline for submissions will be July 31. This limited review process will occur only once.

¹ The relevant products from Thailand are (i) HTS 2008.19.15—Coconuts otherwise prepared or preserved; and (ii) HTS 7408.29.10 - Copper alloys (other than brass, cupro-nickel or nickel-silver), wire, coated or plated with metal.

After the single limited review occurs, the review process will resume its former timeline with USTR review, concluding on July 1. Once the regular review process resumes, importers will be able to submit petitions to have any product redesignated. In August, the USTR will announce, via the Federal Register, the timeline and procedures for the review of 2015 data. USTR reviews the amount and value of goods being exported to determine whether the good is eligible for CNL.

CNLs tie into the reimbursement process because an importer's ability to receive reimbursement may hinge on whether the value of the goods imported surpasses the CNL. If that is the case, then GSP benefits would not be available and so CBP would not reimburse overpaid duties. However, if there is a CNL waiver, then it is still possible to obtain reimbursement for overpaid duties because the good would still be eligible for GSP benefits. The assessment for CNL and CNL waivers is typically conducted at the same time as the assessment for GSP-eligible goods and countries. The petition process is ordinarily the same as well. The yearly assessment of CNL and CNL waivers is used as a basis to determine which countries will receive limitations or waivers in the next year. For example, the 2012 assessment would determine the CNLs and CNL waivers for 2013. There was no review of CNLs and CNL waivers conducted in 2014.

In light of the Federal Register notice, eligible importers should work closely with their customs brokers or other trade advisors to identify eligible entries and to begin the administrative process necessary to receive refunds of the overpaid duties. Failing to act within the specified time periods can result in accepting unnecessarily high import costs.

Click [here](#) for a copy of the July 6, 2015 *Federal Register* notice.

Purported Leak of Negotiating Texts Will Pose Challenges for TiSA Negotiations

On July 2, 2015, the non-profit organization Wikileaks released nine draft negotiating texts for the International Agreement on Services (TiSA), including for the first time the Core or framework text of the Agreement. The remainder are Annexes on the following specific service sectors or general disciplines: (i) Domestic Regulation; (ii) Electronic Commerce; (iii) Financial Services; (iv) Government Procurement; (v) International Maritime Transport Services; (vi) Movement of Natural Persons; (vii) Telecommunications Services; and (viii) Transparency. All of these, with the exception of the Annex on Government Procurement, are updates of previous versions that were leaked in June, showing changes that have occurred in the text or in the positions of participants. The Annexes are to be integral parts of the Agreement, with the same legal force as the core text.

The draft framework Agreement is heavily based on the GATS although there are some significant departures from the GATS template. The annexes in particular provide evidence of an ambitious substantive agenda. The release of these documents, which expose the negotiating positions of participating countries, will greatly increase the difficulty for governments to complete the TiSA and other trade agreements.

Nature of the Released Documents

As with the draft Annexes that were leaked by Wikileaks in June, the new versions are negotiating texts, recording in detail the positions of the participating countries on every contested issue of substance and drafting. They demonstrate that there is a great deal of work to be done to arrive at final texts, which the negotiators hope to do by December. It should not be assumed that all of the draft Annexes now under consideration will survive to become part of the final agreement. Some of them, including that on Government Procurement, are proposed or supported by only a minority of the participants, and could be withdrawn.

Wikileaks has also published the detailed agenda for the July Round of the TiSA negotiations, which took place in

Geneva from July 6 to 10. This document shows an impressively organized and intensive process and includes a review of what is presumably a complete list of all Annexes, including those that have not yet been leaked. These unleased Annexes deal with (i) Energy-Related Services; (ii) Direct Selling; (iii) Localisation; (iv) Patient Mobility; (v) Road Transport; and (vi) Subsidies. We presume that they too will eventually be leaked. The participating countries have not commented in any way on the leaks or the hostile analyses published with them. It seems clear, however, that the leaks will make the negotiations more difficult by providing wholly negative and often misleading ammunition to opponents. We summarize the substance of the leaked documents below.

The Framework Agreement

The draft framework Agreement is heavily based on the GATS; this was expected, given the TiSA parties' intent to "multilateralize" the agreement into the GATS. Trade in services is defined by the four modes of supply as in GATS, almost all definitions are identical and wherever possible the language of the GATS is adopted verbatim. Fifteen TiSA Articles replicate verbatim the corresponding GATS Articles and others are closely similar. The overall architecture of the Agreement, with Annexes and national Schedules forming integral parts of it, is the same as that of the GATS. This parallelism is of course designed to ensure that the eventual Agreement is capable of integration into the WTO system, and to facilitate the participation of a critical mass of WTO Members, which would permit multilateralization. This has always been a key objective of the European Union in particular.

There are some significant departures from the GATS template, however. In particular, the draft TiSA text:

- Does not contain provisions for preferential or favourable treatment of developing countries;
- Contains a new provision on the review of administrative decisions;
- In place of the GATS Article on Subsidies, which simply mandates future negotiations, contains a blank "placeholder," implying that some more substantive provision is under consideration;
- Contains a proposed new Part III, entitled New and Enhanced Disciplines, which is also currently blank; and
- Will also contain provisions, as yet undrafted, on Resolution of Disputes, Future Participation in the Agreement and Multilateralization.

The Wikileaks "analysis" of the framework agreement is nothing novel. It begins with thirteen sweeping objections to the GATS itself and goes on to denounce every addition or amendment that would flow from TISA. The standpoint of the analyses throughout is fundamentally anti-trade. The familiar attacks on the GATS as a menace to the right to regulate and to maintain public services have been falsified by twenty years of experience, but they will continue to be made.

Annexes to the Agreement

The fact that the Framework agreement closely resembles the GATS should not obscure the TiSA's far more ambitious objectives. The essence of the new and enhanced disciplines is in the Annexes, of which there are currently sixteen under consideration (Air Transport Services; Competitive Delivery Services; Electronic Commerce; International Maritime Transport Services; Movement of Natural Persons; Professional Services; Telecommunications Services; Financial Services; Energy-Related Services; Direct Selling; Localisation; Patient Mobility; Road Transport; Subsidies; Domestic Regulation; and Transparency).

In some areas (*e.g.*, government procurement) the proposed Annex is much more ambitious than the corresponding Article in the Framework Agreement, and it is not clear which of the two will prevail. The TiSA Article on Government Procurement is identical with GATS Article XIII:1, which exempted government procurement of services from the MFN, market access and national treatment obligations. Article XIII also mandated further negotiations, which have been deadlocked and wholly unproductive, and the TiSA does not repeat the call. However a TiSA Annex on Government Procurement, which has been proposed by the EU, Norway, Lichtenstein and Israel, would require that all service suppliers of another Party having a commercial presence in the market should have national treatment in

relation to all government procurements of services which are subject to prior publication of a procurement notice. This approach would go considerably further than the plurilateral WTO Agreement on Government Procurement (GPA), which applies only to designated procuring entities and to procurements above an agreed threshold value. Several of the TiSA participants are not GPA members, and it would be surprising if they were ready to accept such far-reaching obligations in TiSA. This may be an example of an Annex that will not survive.

Other annexes are similarly ambitious, but could be pared back. The Annex on Telecommunications incorporates the GATS Annex on Telecommunications, but goes considerably further, extending for example to undersea cables and landing facilities and imposing additional requirements on the competitive behavior of major suppliers. In the same way the Annex on Financial Services incorporates and extends the GATS Annex and the Understanding on Commitments in financial services. These Annexes will certainly survive, but at this stage the number and extent of differences between participants on many of the draft provisions in all Annexes makes it impossible to predict what the precise outcome will be, although the general objective, as in the case of government procurement, may be clear.

Outlook

As before, Wikileaks has published alongside each leaked text an analysis which is invariably negative and hostile. The TiSA participants have not reacted to the leakage of the documents and therefore have not sought to deny or correct the many misrepresentations in the analyses. It would indeed be a monumental and unrewarding task to do so. Nevertheless, the release of these materials, and especially the exposure of the negotiating positions of participating countries, will greatly increase the difficulty for governments to complete the TiSA and other trade agreements. First, the leaks will further inhibit governments' ability to counter the longstanding opposition of NGOs, trade unions and some politicians to trade liberalization. The TiSA in particular could encounter stronger opposition in some quarters than other major plurilateral agreements such as the Trans-Pacific Partnership (TPP). Former US Secretary of State Clinton, for example, in her Presidential campaign has expressed doubts about the TiSA even though she has refrained from attacking the Trans-Pacific Partnership (TPP), likely due to her previous support for the TPP as Secretary of State. Second, all trade negotiations are likely to be inhibited or complicated by the fear of breach of confidentiality.

Click [here](#) for the Wikileaks file containing all of the leaked documents. Please let us know if you have questions or need further information.

US General Trade Policy Highlights

Prospects Worsen for Customs Bill Following Release of New U.S. State Department Report on Alleged Human Trafficking

On July 29, 2015, House Ways and Means Committee Chairman Paul Ryan (R-WI) confirmed that the House of Representatives will depart for the month-long August recess without voting to go to conference with the Senate on the *Trade Facilitation and Trade Enforcement Act of 2015* ("Customs bill"). Efforts to pass a conference Customs bill began to lose momentum following the enactment of Trade Promotion Authority (TPA) on June 24, and have subsided further following the July 27 release of the U.S. State Department's annual Trafficking in Persons (TIP) report for 2015. The 2015 TIP report resolved concerns that the TPA law's provision on alleged human trafficking could complicate the ongoing Trans-Pacific Partnership (TPP) negotiations, and has thereby eliminated the immediate need for Congress to amend the provision through the Customs bill.

For congressional proponents of the TPP, the primary incentive to negotiate and enact the conference Customs bill was the opportunity to amend the TPA law's provision on alleged human trafficking, which states that legislation to implement US FTAs with countries in "Tier 3" of the TIP report will be ineligible for the expedited (*i.e.*, "fast-track") legislative procedures established by TPA. Malaysia, a TPP party, received the Tier 3 designation in the 2014 TIP report. Anticipating that Malaysia could receive the same designation in 2015, Congressional proponents of the TPP intended to use the Customs bill to amend the TPA trafficking provision, establishing a "waiver process" that would

allow the TPP to be considered under TPA procedures despite Malaysia's participation and Tier 3 status.

However, amending the TPA provision is no longer immediately necessary, because the State Department has upgraded Malaysia's ranking to the "Tier 2 Watch List" in the 2015 TIP report. The change in Malaysia's ranking will enable Congress to consider the potential TPP agreement under the expedited TPA legislative procedures without having to amend the TPA law. Thus, the change in Malaysia's ranking eliminated the primary incentive for Congress to invest time and political capital in conference committee negotiations on the Customs bill.

House and Senate lawmakers have also reportedly had difficulty resolving key differences between the House- and Senate-passed Customs bills during informal negotiations held throughout July. Provisions in the Senate bill that would reform the Miscellaneous Tariff Bill (MTB) process and direct the Department of Commerce to treat undervalued foreign currency as a countervailable subsidy have continued to face opposition in the House, and in particular from the House Republican leadership. Given that Congress faces a busy fall agenda, which will include debates over federal spending, a potential increase in the federal government's borrowing limit, and long-term federal funding for highway programs, it is unlikely that the Customs bill will be a high priority. Given these circumstances, congressional approval of the Customs bill in 2015 appears unlikely.

Free Trade Agreement Highlights

Update on US-China Bilateral Investment Treaty (BIT) Negotiations

From June 23 to 24, 2015, senior United States and Chinese officials met to discuss the status of negotiations toward a US-China Bilateral Investment Treaty (BIT), and in particular the proposed "negative lists" that were exchanged by the parties on June 8 at the 19th BIT negotiating round in Beijing. US Treasury Secretary Jacob Lew, US Trade Representative (USTR) Michael Froman, Chinese Vice Premier Wang Yang, and Minister of Commerce Gao Hucheng participated in the discussions, which occurred at the seventh annual US-China Strategic and Economic Dialogue (S&ED) in Washington, DC.

US BITs follow a negative list approach under which all sectors of the parties' economies will be covered by the agreement's disciplines unless specific reservations are taken. The parties must negotiate any exceptions to BIT rules and include them in the negative list of "Non-Conforming Measures." This approach has significant implications, because (i) any measures taken after the BIT enters into force are automatically covered by all BIT rules; and (ii) US BITs do not contemplate changes, so adding new exceptions would require re-opening the treaty. On April 27, USTR Froman stated that China's negative list for the BIT should contain fewer restrictions than its Negative List on Foreign Investment Access into the Shanghai Free Trade Zone (FTZ) or the most recent revision of the Chinese foreign investment catalog.

At the S&ED, USTR Froman and Minister Hucheng discussed the quality of both the US and Chinese negative list offers and how they could be improved. A Chinese Ministry of Commerce (MOFCOM) official who attended the S&ED indicated that China's negative list offer contained fewer restrictions than the Shanghai FTZ list. However, the Obama Administration's lack of an official reaction to the initial offer has caused some US observers to speculate that the offer seeks to maintain a large portion of China's national-level restrictions.

At the conclusion of the S&ED, Secretary Lew announced that the parties had committed to intensify the BIT negotiations and exchange improved negative list offers in early September 2015. The parties have agreed to hold two BIT negotiating rounds before September, which are expected to focus on improving the negative lists. However, China might delay submission of the revised negative list offer if the Trans-Pacific Partnership (TPP) has not been finalized by September, as China may wish to view the investment commitments made by TPP parties and structure its revised offer accordingly.

Officials attending the S&ED did not comment on the status of the core text of the BIT, which Minister Hucheng described in March 2015 as "basically complete". USTR confirmed on June 19 that negotiations on the core text

were ongoing as of the Beijing round in June, but did not elaborate on nature or extent of the outstanding issues. Chinese officials attending the S&ED expressed optimism that the BIT could be completed during President Obama's term, but this is unlikely given the current state and sensitivity of the negotiations.

United States and European Union Exchange Revised Services Offers at 10th TTIP Negotiating Round

From July 13-17, 2015, US and EU negotiators met in Brussels for the 10th round of negotiations on the Transatlantic Trade and Investment Partnership (TTIP). The parties exchanged revised market access offers for services during the round, in keeping with an objective set by US Trade Representative (USTR) Michael Froman and EU Trade Commissioner Cecilia Malmström in March of 2015. However, despite the parties' stated desire to accelerate the TTIP negotiations during the latter half of 2015, they made little headway during the 10th round, and did not report any progress toward resuming negotiations in the deadlocked areas of government procurement and tariffs.

In their revised market access offers for services, both parties reportedly have continued to seek reservations in sensitive sectors in which the opposite party has offensive interests. In particular, the US in its revised offer reportedly continues to seek reservations in the aviation and maritime sectors, while the EU in its revised offer continues to seek reservations in the audio-visual sector pursuant to its negotiating mandate. EU Chief Negotiator Ignacio Garcia Bercero described the exchange of the revised offers as an important milestone, but neither he nor Assistant USTR (AUSTR) Daniel Mullaney provided details on how the revised offers differ from the initial offers that were exchanged in 2014. AUSTR Mullaney did signal that the revised US offer includes some market access obligations at the sub-federal level, which were not included in the initial US offer and are a high priority for the European services industry, but he did not provide further details.

Negotiators did not discuss tariffs or market access for government procurement during the round, according to a statement issued by the European Commission (EC). On the issue of government procurement, the statement explained that the EU is seeking to establish a preliminary "framework" that would allow negotiations on market access to take place and eventually lead to an exchange of offers. Similarly, on the issue of tariffs, AUSTR Mullaney stated that the parties are working to determine "how to move forward" towards exchanging second tariff offers, but did not commit to a timeframe.

The parties devoted significant attention to regulatory issues during the round. According to the EC statement, there has been "significant convergence" among the parties around the view that TTIP should include (i) an agreement on good regulatory practices; (ii) a framework to facilitate future regulatory cooperation; and (iii) greater regulatory compatibility in certain sectors (including autos, medical devices, pharmaceuticals, and textiles). The parties also have reaffirmed their objective to finalize chapters on sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT) that will go beyond their existing WTO obligations in these areas.

Negotiators did not discuss chapters pertaining to labor and environment – termed "sustainable development" by EU negotiators – but the EC statement notes that the EU is currently finalizing an ambitious proposal in this area that will exceed the standards included in any existing EU free trade agreement. The EU aims to present this proposal to the United States in September 2015, and subsequently will make the proposal public.

The EC statement also noted that "positive discussions" took place on the issue of energy, but AUSTR Mullaney indicated that little progress was made in this area during the round. The EU is seeking a dedicated energy chapter in the TTIP that would include US commitments to lift restrictions on exports of US crude oil and natural gas to the EU. However, AUSTR Mullaney indicated after the round that the United States is still considering whether such issues "can be addressed, or should be addressed, in a trade agreement."

Both AUSTR Mullaney and Chief Negotiator Bercero expressed a desire to conclude the TTIP negotiations during President Obama's term, but such an outcome is unlikely, and AUSTR Mullaney tacitly acknowledged after the round that doing so would be challenging. The negotiators now await a political stocktaking meeting in September 2015 between USTR Froman and Commissioner Malmström, who will seek to identify potential compromises that could

advance the negotiations.

Click [here](#) for the EC's statement on the 10th round of TTIP negotiations.

Multilateral

Update on the Status of the Doha Round

WTO Director-General Roberto Azevêdo has issued his report on the consultations that have been taking place over the past few months to try to put the Doha Round back on track. The results are disappointing. As well as working intensively with WTO Ambassadors in Geneva, DG Azevêdo has appealed to Trade Ministers and directly to the G-7 Heads of State to provide the political input that is needed to strike a deal. He has now concluded, however, that WTO Members have not shown the necessary flexibility on key issues to unblock the negotiations and that it is impossible to meet the end-July deadline to produce the so-called "Bali Work Programme". "I see very little prospect of delivering a detailed and substantive work programme by the end of July," DG Azevêdo told WTO Members on July 8.

The Bali Work Programme is the blueprint that is needed to complete the Doha Round. It ties together market access with the other issues that are under negotiation. DG Azevêdo's aim had been to reach agreement on the key political decisions that need to be taken to define the scope and ambition of a final deal across the board. Once that is agreed, technical experts can take over to finalize the details of the market access schedules and the legal texts of the new agreements.

The focus of DG Azevêdo's consultations this year has been the core market access components of Agriculture and Non-Agricultural Market Access (NAMA) which hold the key to unlock the Bali Work Programme. The hope had been that he could find ways by end-July of bridging gaps that have kept WTO Members apart for so long on those issues and that this would have opened up the rest of the negotiating agenda. That hope did not materialize. DG Azevêdo has downplayed the significance of missing the July deadline and pushed back the target for the Bali Work Programme to the end of the year, when the WTO will hold its 10th Ministerial Conference in Nairobi. All now acknowledge, however, that these negotiations are in their eleventh-hour and that heroic efforts must be made over the next four months to prevent them from ending in failure in Nairobi.

Completing the Doha Round

WTO Members returned from their 9th Ministerial Conference in Bali in December 2013 hoping that the agreements they had reached there, most importantly on the Trade Facilitation Agreement (TFA), signalled newfound political determination to negotiate constructively and conclude the rest of the Doha Round. That did not turn out to be the case. Most of 2014 was spent struggling unexpectedly to finalize the TFA in the face of obstruction from India over its demands that there should be parallel progress on protecting developing countries' food security programmes from legal challenge in the WTO. Meanwhile, negotiations on the Doha Round made no headway. By the end of the year WTO Members were no closer to consensus than they had been in 2008 when their last attempt to conclude the Round failed.

Agriculture and NAMA First

Agriculture and NAMA must be settled first before other parts of the Doha Round can be tackled; without them nothing else in the negotiations can move and the Bali Work Programme cannot be completed. The details of the Agriculture and NAMA negotiations are complex but they hinge on reaching agreement on a few gateway issues, referred to as the "modalities". These are how tariffs and farm subsidies are to be cut, by how much, and with what

kind of special flexibilities for developing countries, particularly for the most advanced among them.

WTO Members came close to agreeing on these issues in 2008. Tariffs and farm subsidies were to be cut using “tiered” formulae (the “Swiss” formula in the case of NAMA). This would have produced significant reductions in the average levels at which Members have bound their tariffs and subsidies in their WTO schedules – in the case of agriculture, for example, tariff reductions of 54 percent for developed countries and 36 percent for developing countries. The formulae would have cut particularly deeply into Members’ peak tariffs, and they would have slashed the farm support programmes of the United States, the European Union (EU) and Japan. To boost the liberalisation of trade in manufactured goods, the formula cut was to be supplemented by NAMA negotiations to reduce or eliminate tariffs in individual sectors such as chemicals, electronic goods and industrial machinery. All Members were given flexibilities to soften the impact of the formula cuts in Agriculture, for example by shielding “sensitive” products from tariff reductions and applying *de minimis* exclusions to their subsidy cuts. Developing countries demanded the right to go further, by excluding from full tariff cuts their “special products” that they designated as important for their rural development and by using special agricultural safeguards and a special safeguard mechanism to allow temporary tariffs on farm imports that would override the formula cuts.

Negotiations broke down without agreement on the 2008 draft package. The proximate cause of the breakdown was disagreement between the United States and India about the special safeguard mechanism in Agriculture. Behind that, however, lay deep dissatisfaction of developed countries with the way in which the package would have limited additional access for them in the markets of the advanced developing countries, particularly China and India. Formula cuts in tariffs and farm subsidies by advanced developing countries were lower than the cuts the developed countries would have to make, and advanced developing countries made no firm commitment to sign on to the NAMA sectoral negotiations. Furthermore, development flexibilities, that were designed with low-income developing countries in mind, were available also to advanced developing countries under the WTO’s provisions on “Special and Differential Treatment” (SDT) and these would have undermined the value of their cuts in tariffs and farm subsidies.

DG Azevêdo took the 2008 draft texts on Agriculture and NAMA as a starting point this year in his consultations on the Bali Work Programme, but it became apparent quickly that the same disagreements persist; if anything, they have become even deeper since 2008. For developed countries, the 2008 draft texts are no longer an acceptable basis for trying to construct a balanced market access package, particularly in Agriculture. The United States has made it clear that it cannot accept a deal that would open its market and cut deeply into its farm subsidy programmes unless comparable efforts are made by China and India, whose own farm subsidies reportedly have grown rapidly in recent years to reach levels similar to those of the United States and the EU. For their part, China and India, as well as many other developing countries, have continued to insist on basing the negotiations on the 2008 draft texts, in particular maintaining the development flexibilities for farm subsidy programmes that they contain.

To try to overcome the deadlock, DG Azevêdo has explored the possibility of “re-calibrating” downwards the level of ambition for the market access package. The idea is that if Members are able to keep their cuts in tariffs and farm subsidies low, then less development flexibilities will be needed by advanced developing countries to protect their farmers and manufacturers from the impact of those cuts.

Reducing the level of ambition on market access has been viewed by many WTO Members as a good working hypothesis for finding a way forward on tariffs for Agriculture and NAMA. Proposals have been made to replace “tiered” formulae for cutting tariffs by simpler means such as average tariff cuts or request-offer negotiations. No alternative has attracted consensus so far, but the Chairs of the Agriculture and NAMA Negotiating Groups who are working alongside Azevêdo have reported from their own consultations that they believe there is value in pursuing this approach.

One potential bright spot for the NAMA tariff negotiations is that good progress is being made among groups of like-minded Members to negotiate an Environmental Goods Agreement (EGA) and an Information Technology Agreement (ITA) that will eliminate tariffs on the products that these agreements cover. China is participating in the ITA negotiations. These agreements will contribute to the 2008 objective of sectoral liberalisation that goes well

beyond the formula tariff cuts, and it could help build consensus for a result on NAMA.

There is no convergence yet on whether or how to lower the level of ambition for cutting farm subsidies. Many developing countries continue to demand ambitious cuts in the agricultural support programmes of the United States, the EU and Japan. China and India have resisted cutting their farm subsidy programmes which in their view serve important development objectives and have minimal trade-distorting effects since they are spread out thinly among their very many low-income farmers. Along with many other developing countries, China and India continue to insist on retaining the development flexibilities from the 2008 draft text on Agriculture, particularly the special safeguard mechanism. Developed countries seem prepared to settle for a low ambition result on farm subsidies to match the result on tariffs, but insist that this must apply equally to their own farm subsidy programmes as well and that such a result would not justify the need for development flexibilities for advanced developing countries, in particular the special safeguard mechanism.

In the report DG Azevêdo has just made on his consultations this year, he highlighted the issue of farm subsidies as being at the heart of the deadlock in the negotiations, much as it was in 2008. This is where he and key WTO Members will need to focus when negotiations start up again in September, with just three months left before the make-or-break 10th Ministerial Conference in Nairobi. One issue that might help to bridge the gap is finding a permanent solution to protect developing countries' public stockholding programmes for food security from legal challenge. This is a key objective for India and the developing countries farm coalition (the "G-33"). Developed countries have conceded already their willingness to produce a permanent solution. What is not yet agreed is how to do that, but it seems realistic to believe that it could be resolved as part of a general agreement on farm subsidies.

Other Doha Negotiations

The expectation of many WTO Members now is that if a result can be found on market access and farm subsidies, it will be at a much lower level of ambition than was envisaged when the Doha Round was launched. That will have knock-on effects on the other subjects on the Doha agenda.

One of those subjects is trade in Services, the third leg of the Doha market access package. This has received practically no attention since 2008, for two reasons. First, there has been no need in the services context to discuss "modalities" for the negotiations, since the necessary Guidelines and Procedures were agreed in 2001. Members agreed then that the request-offer approach will be used to liberalize trade in services. The next step should be for Members to begin substantive negotiations among themselves on that basis, but developing countries have insisted that this can only start when the modalities for Agriculture and NAMA have been agreed. Consequently, no serious negotiations on market access in services have taken place so far.

The second reason for the lack of attention to Services is that, in direct reaction to the impasse in the Doha Round, separate negotiations have been taking place outside the WTO on a new Trade in Services Agreement (TiSA) among like-minded WTO Members interested in liberalizing this sector. The TiSA participants, who include all of the main demanders for services liberalization, have ceased to press for movement in the Doha Round. They have indicated their readiness in principle to bring the TiSA results back under the WTO General Agreement on Services (GATS) at the appropriate time, given a critical mass of participation, but they will not risk jeopardising the TiSA, which is progressing steadily, by linking it prematurely to the rest of the Doha Round.

Other subjects on the Doha agenda are WTO Rules (covering anti-dumping measures, horizontal subsidies, fishery subsidies, and regional trade agreements), a number of issues related to the Agreement on Trade-Related Intellectual Property Rights (TRIPs), a few Trade and Environment issues (of which the most important is regarded as being the negotiations on the EGA), and several issues related to the WTO provisions on Special and Differential Treatment, particularly in favour of low-income developing countries. These were included in the mandate of the Doha Round so that those Members who were instinctively defensive about further liberalisation of access to their markets, particularly in agriculture, might find scope for trade-offs that would allow them to negotiate more flexibly.

Some Members will be reluctant to agree on a market access package without results in at least some of the other

areas, but if, as seems probable now, the level of ambition on market access is low then the need for trade-offs will diminish and the coverage of other subjects is likely to be limited. Some of them may be treated in a partial way only. Others may be dropped altogether. There is already precedent for that; negotiations on investment, competition policy and government procurement were abandoned early on in the Round. What stays in, and at what level of ambition, cannot be decided until there is clarity about the outcome on Agriculture and NAMA.

These issues have received very little attention since 2008, while Members have focused on trying to unblock the market access package. There has been some activity this year in the negotiations on WTO Rules: the “Friends of Fish” group of Members has continued trying to rally support for cutting fishery subsidies, and the “Friends of Antidumping Negotiations” (FANs) group has anticipated the probable need to lower the level of ambition by tabling new “recalibrated” proposals that reduce substantially the outcome they have been seeking on anti-dumping. For the time being, however, most Members have declined to engage in these negotiations, pending clarity on the outcome on Agriculture and NAMA.

Conclusion

Despite his bleak assessment of what can be achieved by end-July on the Bali Work Programme, DG Azevêdo struck a positive note about the prospects for success at the Ministerial Conference in December in Nairobi. “Nairobi is about showing real and definitive progress in implementing the Bali decisions, delivering for developing and least developed countries, and delivering outcomes that allow us to conclude the DDA (Doha Development Agenda)” he said. “This must be the focus of our work during the second semester.” DG Azevêdo knows better than anyone else how far away from convergence key WTO Members are on the key issue of farm subsidies. If that can be resolved quickly after the summer recess, then Agriculture and NAMA tariffs may fall into place too. This would then unblock the rest of the negotiating agenda.

There is a great deal at stake. Repeated delays and setbacks in the negotiations stretching back several years have eroded confidence in the ability of the WTO to deliver results and raised doubts about the centrality of the multilateral trading system. Several of the most influential WTO Members have made it clear that the Nairobi Ministerial represents the last chance for the WTO to prove itself capable of concluding the Doha Round. The United States has said that if a deal is not reached by then it will withdraw its support for continuing with the negotiations, and the EU and Japan have made similar statements. Without them, the Round is over. Attention will switch to completing mega-regional and WTO-plus agreements and attracting more like-minded countries to join them, such as the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the TiSA.

The WTO will not disappear; it will continue to be valued as a mechanism for multilateral consultation, surveillance and dispute settlement, but it will become the lowest common denominator for market access and trade rules. Over time, if its negotiating role cannot be revived, its profile will fade. The WTO must urgently finalize the Doha Round if it is to move on, to figure out ways of functioning more effectively with its large and complex membership structure and of putting itself back at the center of the international trading system.

The twenty-five WTO Members actively involved in negotiating an expanded Information Technology Agreement (ITA-II) have agreed informally on the final list of covered products on which tariffs will be eliminated. The final list contains 201 products, substantially less than the 350 products that were on the initial list at the time of the launch of the negotiations due mostly to China’s insistence on narrowing the list down. Nonetheless, the deal reached has been praised by the United States for its commercial value and for ushering in the first tariff-cutting agreement reached in the WTO in almost 20 years. The final list of products will be made public once it has been endorsed in country capitals.

Multilateral Highlights

ITA-II Participants Reach Informal Agreement on Final Product List

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The ITA-II negotiations had been held up since the end of last year by disagreements involving China, Korea and Taiwan over the inclusion of several sensitive products, in particular flat screen monitors, that China views as key to its efforts to expand its information technology industry. On July 18, the European Union brokered a compromise in which Korea has given up its bid to have flat screen monitors covered by the Agreement in return for having lenses used in electronic devices included and low-end medical devices, which are exported by China, excluded. China and Korea stated their satisfaction with the outcome, and although Taiwan expressed concern that its interests had not been taken fully into account in the deal that was reached, this is not regarded as likely to jeopardize the formal agreement that is expected at the end of this month once participants have had time to consult with their capitals.

The next step in the ITA-II negotiations will begin in September on "Staging" the schedules of concessions for tariff elimination by participants. "Staging" will allow participants individually to phase-in their tariff reductions for a limited number of specific products that they consider particularly sensitive, and it could result in some participants stopping short of full tariff elimination for certain products. The objective is to complete ITA-II in time for the WTO's 10th Ministerial Conference in Nairobi in December. The United States is pressing for agreement that ITA-II will enter into force by July 2016, although that timing will depend upon the speed with which participants are able to ratify the results domestically.

India has threatened recently to oppose ITA-II, but how it would do so is unclear. WTO Members can unilaterally revise their tariff schedules without needing the approval of other Members as long as the revisions involve tariff reductions and as long as they are to be applied on the Most Favored Nation (MFN) basis to all WTO Members. Only if the signatories to ITA-II decide not to apply the results on the MFN basis would questions arise about how the resulting plurilateral agreement should be treated in the WTO. At present, however, and particularly with the inclusion of China, participants seem to consider that ITA-II will cover a critical mass of world trade and they are comfortable that it therefore can be applied on the MFN basis.

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