

Update on the Hong Kong Ministerial Conference and Next Steps in the Doha Round

To The U.S.-China Economic And Security Review Commission
By The Trade Lawyers Advisory Group
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I. Introduction

Trade ministers met in Hong Kong from December 13 to 18, 2005 at the 6th Ministerial Conference of the World Trade Organization (WTO) in an effort to push forward negotiations in the Doha Development Agenda (Doha Round) launched in 2001. For much of 2005, ministers had hoped the Ministerial would provide an opportunity to reach consensus on modalities for negotiations in areas such as agriculture and non-agriculture market access and to advance liberalization in services and achieving comparable progress in other areas such as development and rules. By late summer it was clear that major breakthroughs were not likely in Hong Kong and by Fall WTO members agreed to reduce expectations for Hong Kong without necessarily reducing ambitions for the Doha Round overall. Thus, going into Hong Kong, there was no expectation that core issues would be resolved although some hoped that some elements of the key market access negotiations could be addressed (e.g., number of bands for duty reductions) while certain members or groups of members attempted to get certain development issues pushed to the fore for resolution. As reviewed below, the “development” dimension of the negotiations occupied most of the energy of the Ministers in Hong Kong with a variety of commitments in this area undertaken.

Not surprisingly, then, the Ministerial Declaration agreed to in Hong Kong made little progress in moving towards resolution of the most controversial issues of interest to the U.S. and many other nations, though ministers affirmed their intention to conclude the Doha Round negotiations by the end of 2006. A new target date for agreeing on modalities was set, along with targets for the submission of draft schedules of concessions. A mini-Ministerial to help ministers reach these targets is expected before the end of April 2006.

Target	Date
Submit plurilateral requests in services negotiations	February 28, 2006*
Agree to negotiating modalities in agriculture and non-agriculture market access	April 30, 2006
Submit comprehensive draft schedules of concessions in agriculture and non-agriculture market access and submit a second round of revised offers in services	July 31, 2006
Submit final draft schedules of	October 31, 2006

* Or as soon as possible thereafter.

commitments in services	
Conclude Doha Round negotiations	End of 2006

But much work lies ahead if negotiators are going to be able to meet their target dates, and wide divergences among members remain on a number of key issues. Unless the impasse on agriculture witnessed in Hong Kong can be overcome quickly, it may be very difficult to reach agreement on modalities before the April 30th deadline and conclude the round by the end of the year. In Hong Kong, the U.S. emphasized the necessity to conclude by the end of 2006 so that the resulting agreement could be submitted to the U.S. Congress for approval before Trade Promotion Authority expires on July 1, 2007. Many Members of Congress expressed disappointment at the outcome of the Hong Kong ministerial, and the extent to which negotiations in the Doha Round have so far met negotiating objectives set out by the U.S. Congress in the Trade Act of 2002 were reviewed in the scorecard presented to the U.S.-China Commission in testimony ahead of the Hong Kong Ministerial. With trade promotion authority expiring in mid-2007, a successful outcome in the next year will either require a significant change in positions by a number of the important members towards greater liberalization commitments or a reduction in level of ambition by the US and other countries seeking significant market liberalization. Because of the basic structure of the Doha Round, as reflected in the Doha Declaration, does not provide obvious balance for all of the major participants, it is assumed that at some point members will reduce their expectations to capture improved market access that is available.

A summary of steps taken in Hong Kong on these major issues, and prospects for further progress in the coming year, is provided below.

II. Steps Taken in Hong Kong

A. Agriculture

Little progress was made in Hong Kong to resolve the wide differences among members on the appropriate level of ambition of the Doha Round agriculture negotiations. The most concrete progress occurred on the issue of export subsidies, while discussions on market access and domestic support continue to encounter obstacles. The Declaration sets a new target date for agreement on modalities of April 30, 2006, with comprehensive draft schedules due July 31, 2006.

- **Market Access:** The Ministerial Declaration does little beyond summarize the disagreement that exists among parties regarding formulas for tariff reductions. Ministers did agree to establish four bands for tariff reductions, but have no agreement on the thresholds for each band, the cuts each band will be subject to, or the extent to which sensitive products may be excluded from cuts or other flexibilities in the level of cuts that will be available. How to implement special and differential treatment in market access for developing countries is still under discussion as well. In addition, the Declaration makes clear that some form of Special Safeguard

Mechanism for agriculture will continue to be available, but to developing countries only.

- ***Domestic Support:*** Ministers agreed to create three bands for the reduction of domestic support levels, with steeper reductions in the higher bands. Ministers also agreed that the EU would fall in the top band, the U.S. and Japan in the second band for overall cuts (whether Japan will fall within this band for cuts to the aggregate measure of support is not agreed), and all other countries in the third (with a possible additional band with no overall cuts for some developing countries). But agreement is lacking on the depth of cuts in each band, *de minimis* limits, flexibilities for developing countries, criteria governing the so-called “blue box” of minimally trade distorting subsidies, and whether and how to review subsidies countries have classified as “green box,” or non-trade distorting.
- ***Export Subsidies:*** Ministers in Hong Kong agreed to a target date of 2013 for the elimination of export subsidies, though differences remain on related disciplines on export credits, state trading enterprises (STEs), and food aid. Parties remain far apart on these issues, with countries with major STEs such as Australia and Canada resisting new STE disciplines and the European Union insisting that most U.S. food aid must be converted to cash assistance with the elimination of export subsidies. The ministerial declaration makes clear that the 2013 elimination date for export subsidies “will be confirmed only upon completion of the modalities” in these controversial three areas.

The ability of countries to agree to negotiating modalities in agriculture by April 30, 2006 will largely depend on whether an agreement regarding the level of ambition in market access discussions is possible and what that agreement does to suggested levels of ambition in export and domestic support reductions. If Europe, the G-10 and others are not willing to meet high ambitions on market access, it will likely be difficult for the U.S. to follow through on conditional offers of cuts in domestic support. In addition, the U.S. and Europe will need to narrow their differences regarding food aid in order to ensure the target date for the elimination of export subsidies remains firm. Finally, remaining developed and developing countries will need to decide what degree of market access in NAMA and Services they are willing to provide in return for commitments made by the U.S., Europe and G-10.

B. Non-Agriculture Market Access

Like other market access issues, little progress was made on NAMA in Hong Kong, and thus there was only minimal progress towards agreement on negotiating modalities. The Ministerial Declaration formalized emerging consensus among members to use a Swiss Formula to cut tariffs, though disagreement remains on the specifics of the formula. Developed country members generally support applying a formula based on a limited number of negotiated coefficients, with the U.S. proposing the most ambitious

cuts. Some developing countries have proposed that the formula be based on each country's bound tariff rates (the EU and US have sought applied rates which for a number of advanced developing countries are much lower than bound rates). The EU and US are insisting that whatever approach is taken result in actual market liberalization and that any formula that would result in no increased liberalization in fact would not be acceptable. Other outstanding NAMA issues that members were unable to resolve in Hong Kong include how to treat unbound tariffs and provide flexibilities under the tariff-cutting formula, the extent of product coverage, and how to implement special and differential treatment for developing countries. As in agriculture, negotiators are instructed to finalize negotiating modalities by April 30, 2006 and submit comprehensive draft schedules by July 31, 2006.

One development in the NAMA area in Hong Kong was recognition of the need for comparably high ambition in market access in the agriculture and NAMA negotiations. This statement emerged principally in response to a request from the E.U., which, under pressure to concede more in agricultural market access, argued that equivalent ambition in market access was not being demanded of members in other areas of the Doha Round such as NAMA and services, from which Europe believes it has more to gain. The E.U.'s concerns on this issue reflect the reality that any real progress in the NAMA negotiations is likely to continue to hinge on whether or not members can achieve a satisfactory level of ambition in the agriculture negotiations, particularly on the issue of market access, in the next few months. G-20 countries, including Brazil and India, have argued that the high levels of ambition commitment do not undermine the right of developing countries to lower levels of reductions than developed country members.

C. Services

Even though services has been of increasing importance to developing as well as developed members, the negotiations have been bogged down in part because most developing countries wish to see the level of ambition in agriculture before committing in services. The slow pace in services has also been affected by the structure of negotiations which are based on a request/offer mode vs. a formula as is being pursued in both agriculture and NAMA. Developing countries strongly resisted attempts to agree to new, more specific goals for the Services negotiations in Hong Kong, consistent with the overall recognition that modalities would not be agreed at Hong Kong. Developing country members were particularly resistant to objectives for market access for foreign direct investment and guidelines for plurilateral negotiations included in the draft services annex issued by the Chairman of the Services Negotiating Group prior to Hong Kong, which served as the basis for Annex C to the Ministerial Declaration. Consequently, language in the draft annex stating that members "should strive to ensure" that their services commitments adhere to specific objectives in each mode of supply was changed in the final annex to state that members "should be guided, to the maximum extent possible" by the objectives. In addition, on plurilateral negotiations, language in the draft annex stating that members receiving plurilateral requests "shall enter into negotiations" to consider the requests was changed to eliminate the mandate to enter into negotiations,

stating only that members receiving such requests “shall consider” them. Developing countries appeared to be concerned that they could be pressured into accepting new obligations in services through the plurilateral request approach and wanted to maintain their flexibility.

In addition, little progress was made on the negotiations on rule-making in services, under which members are discussing whether and how to establish rules on emergency safeguard measures, government procurement, and subsidies, and whether and how to elaborate disciplines on domestic regulations. On the first three issues the annex merely urges members to intensify and focus their discussions, but more ambition is evident in the text regarding domestic regulations. Here, the annex does not just urge members to agree whether or not to establish new rules, but states that members “shall” develop new disciplines on domestic regulation before the end of the current round. The annex calls on members to develop a text for adoption based on an illustrative list of possible elements contained in a non-public JOB document.

Timelines for the services negotiations agreed to in Hong Kong differ slightly from timelines in other areas. The annex calls for members who have still not submitted initial offers to do so as soon as possible. Plurilateral requests are due February 28, 2006 or “as soon as possible thereafter.” A second round of revised offers is due on July 31, 2006, with final draft schedules due by October 31, 2006. As with NAMA, significant progress in the services negotiations appears unlikely unless developing countries are satisfied with the progress in the agriculture negotiations and thus willing to engage more actively in the request-offer process. In addition, further progress in services may be hampered if developing countries continue to make their own offers contingent on developed country concessions on temporary entry of persons, an area of considerable political difficulty for the U.S.

D. Rules

In the area of rules, there was little activity in Hong Kong as energies were focused on market access and on the development issues discussed *infra*. Nonetheless, the Hong Kong Ministerial Declaration annex on rules (Annex D), which remains unchanged from the draft forwarded to Hong Kong, appears to go beyond the original negotiating mandate in several areas. Specifically, the annex to the Declaration exceeds the original negotiating mandate by calling on members to take into account the “need to avoid the unwarranted use of anti-dumping measures” when considering possible improvements and clarifications, a direction that lacks basis either in the original negotiating mandate or in the structure of Article VI of GATT 1994 or the Antidumping Agreement. In addition, the annex appears to contemplate negotiations with respect to virtually every substantive area of the Antidumping and Subsidies agreements – going well beyond the “limited” negotiation referenced by the Administration and indicated in the Doha mandate, a negotiation principally focused on transparency and clarifications to improve administerability of existing disciplines, as opposed to a wholesale rewrite of the agreements. Moreover, the substantive proposals referenced in the annex reflect the fundamental imbalance in the talks, whereby there are dozens of proposals to eviscerate fair trade disciplines, and very little to counterbalance these weakening provisions.

The annex directs members to accelerate the negotiating process and complete their analysis of proposals as soon as possible. In addition, the annex directs the Chairman of the Rules Negotiating Group to prepare consolidated texts to serve as the basis for the final stage of negotiations. The annex sets out no specific date for preparation of this consolidated text, but provides a general instruction to ensure it is done early enough to assure a timely outcome in the overall round. Finally, in several places the annex explicitly acknowledges that additional proposals to improve and clarify the rules on antidumping and countervailing measures may still be submitted after Hong Kong.

Congress mandated in the Trade Act of 2002 that US trade remedy laws be maintained. As TLAG has reviewed elsewhere, the U.S. must use 2006 to become much more aggressive in what it seeks in the Rules negotiations if U.S. trade remedy laws are to remain strong. As noted by some concerned members of Congress before Hong Kong, the Declaration appears to pave the way for opening the Antidumping Agreement up to broad new negotiations which would weaken US rights to address unfair trade practices. It will take a much more proactive strategy in the next months for U.S. negotiators to avoid this outcome and ensure that Congressional negotiating objectives to preserve the effectiveness of U.S. trade remedy laws are met.

E. Market Access for Least Developed Countries

While Hong Kong evidenced little significant progress on negotiations in key areas such as agriculture, NAMA, and services, members did come to a new agreement in Hong Kong on market access for least developed countries (LDCs). The E.U. pressed for a commitment to provide duty-free, quota-free access for all goods from LDCs – an issue identified in the Doha Declaration but for which the EU sought an early harvest in Hong Kong, in part to shift attention away from its stance on agriculture and towards the United States and others where certain sensitive products are not presently part of duty-free programs for LDCs. With a few modifications from the U.S., the initiative was agreed to in Hong Kong. The U.S., like the E.U., already provides duty-free, quota-free access to many LDC products under preferential trade programs. In Hong Kong, the U.S. worked to preserve some of the most politically sensitive aspects of these programs, by capping the new market access commitment at 97 percent of LDC products to protect sensitive products such as sugar, and by negotiating some flexibility on rules of origin in an effort to preserve rules in current programs that prohibit the use of third-country fabric in apparel products qualifying for preferential access. In addition, the U.S. worked to ensure the new initiative was not a binding WTO obligation but rather a commitment undertaken by developed country members (and willing developing country members) and recognized in the Ministerial Declaration.

F. Other Development issues

Similarly, trade disputes involving cotton (where the U.S. has been the focus of attention) and bananas (where the EU has been the defendant) occupied significant time and energy during the Ministerial. On cotton, the following obligations were undertaken:

-- "All forms of export subsidies for cotton will be eliminated by developed countries in 2006.

-- "On market access, developed countries will give duty and quota free access for cotton exports from least-developed countries (LDCs) from the commencement of the implementation period.

-- "Members agree that the objective is that, as an outcome for the negotiations, trade distorting domestic subsidies for cotton production be reduced more ambitiously than under whatever general formula is agreed and that it should be implemented over a shorter period of time than generally applicable. We commit ourselves to give priority in the negotiations to reach such an outcome."

WT/MIN(05)/DEC at 3, para. 11. A variety of other assistance to cotton producers in developing countries was also included to help improve their competitiveness.

Many other development issues, including special and differential treatment for developing countries, resolving outstanding "implementation" issues, the amendment to the TRIPS Agreement to incorporate the agreed changes to address the public health needs of developing and least developed countries (provision technically applies to all members) are reflected in the Hong Kong Declaration.

III. Conclusion

The Hong Kong Ministerial was expected to be a low expectation event, hopefully making progress at the margin and mapping out a timeframe for forward movement in 2006. The Ministerial met those expectations and provided some successes for developing and least developed countries as well.

Lack of consensus on the appropriate level of ambition in agriculture, NAMA and Services continues to be central to the negotiations. For nearly three years, those seeking a high level of ambition in agriculture have been pursuing an approach that can permit a high level to be achieved. The EU, G10 and many other countries have serious problems with ambitious market liberalization in agriculture. While at least some of the major developed countries could accept a fairly significant liberalization in agriculture, balance for these countries would require significant ambition in NAMA and Services by many major developing countries, an ambition unlikely to be realized based on the structure of the Doha Declaration and agreement on lesser commitments by developing countries. If a consensus can't be reached at a high level, a smaller package would presumably be achievable. With expiration of trade promotion authority likely, the next six months will be critical to determine if members will agree on a level of ambition – high, medium or low. If the answer is yes, a package will likely be concluded by early 2007 and considered under fast track procedures next year.

Finally, and of most fundamental concern to many U.S. industries concerned with unfair trade from China, Japan, the EU and other major trading partners, the state of play in the Rules negotiations continues to present the likelihood of an extremely unfavorable outcome. With negotiations moving forward on dozens and dozens of highly damaging proposals to weaken core disciplines against dumping and subsidies – and with virtually nothing put forward by the United States or other delegations to counterbalance such proposals – it is difficult to see how any “compromise” on a final agreement could produce a result that would not fundamentally weaken U.S. law. Moreover, there is widespread concern that the “end game” negotiations on an overall Doha package will create pressure for major U.S. concessions in the Rules area, as a means to achieve a final deal and “pay for” agreement in other areas of the talks. Determining if, and if so how, this dynamic can be prevented will be a basic challenge in 2006.