

Can the United States and France Veto a Doha Deal: The Legal Dimension

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Background

The Sixth Ministerial Conference of the World Trade Organization (WTO) is being held in Hong Kong from December 13th to 18th, 2005. Ministerial conferences are the WTO's highest decision-making body, and this conference will be vital for enabling the Doha Development Agenda negotiations to move forward sufficiently to conclude the round in 2006.¹ The most contentious issue is agricultural trade, but it is critical: the World Bank has calculated that a successful Doha round could lift 140m people out of poverty.² This paper briefly explores two of the key legal issues surrounding agricultural trade negotiations leading up to the Hong Kong Ministerial: French influence on EU negotiation powers and US Trade Promotion Authority.

European Union

EU Proposal³

The European Union has offered to negotiate on substantial reductions on trade distorting domestic supports, to eliminate all export subsidies as scheduled and to offer substantial improvements in market access. As of October 28, 2005, conditional on satisfactory movement in other areas, the EU proposal includes:

- A 60% reduction in the EU's highest tariffs. A range of tariff cuts between 35% and 60% for lower tariffs. A cut in our average agriculture tariff of 46% - from 22.8% to 12.2%.
- A maximum agricultural tariff of 100% - as demanded by developing countries;
- A reduction in the number of sensitive products designated by the EU;
- Reductions in tariffs even for sensitive products - and wider Tariff Rate Quotas (TRQs) for all sensitive products - meaning more market access;
- A 70% reduction in trade distorting agricultural subsidies - as agreed in the EU's 2003 CAP reform, and tighter disciplines on Blue Box spending;
- The total elimination of all agricultural export support by an agreed date, if others discipline their export support;
- Differential treatment for developing countries: higher tariff bands, lower tariff cuts and a maximum tariff of 150%. No tariff cuts for the 50 Least Developed Countries (LDCs)

France's Veto Power?

At the same time, divisions in agricultural trade stances within the EU are sharpening between northern countries that have smaller farm sectors and are eager to gain fresh markets for manufactured goods, and their southern neighbours, who are more dependent on industries that are less competitive globally. These two camps are led by Britain and France

¹ World Trade Organization, Available at http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e.htm

² The Economist, "World Economy: High noon in Hong Kong" 30 November 2005

³ Europa, "The Doha Development Agenda: EU tables new offer in Doha World Trade talks; calls for immediate movement on services and industrial goods", 28 October 2005, http://europa.eu.int/comm/trade/issues/newround/doha_da/pr281005_en.htm

respectively.⁴ At the beginning of November, President Jacques Chirac of France accused EU trade commissioner, Peter Mandelson, of exceeding his mandate, saying he may veto the Doha trade round rather than accept more changes to the common agricultural policy (CAP).⁵ Does France have the right to do this, under EU law?

Negotiation Procedure

The European Union negotiates at the WTO on matters that concern the common trade. On behalf of EU member states, the European Commission works in consultation with the so-called "Article 133 Committee" composed of representatives from all the member states and the Commission.

Qualified Majority Voting

The European Union can negotiate at the WTO negotiations by *qualified majority voting* (QMV) on the basis of Article 133 of the Treaty establishing the European Community (see Appendix A). Moreover, a change in the Common Agricultural Policy again requires a decision of the qualified majority according to Article 37 of the EC Treaty (see Appendix B). QMV is meant to ensure that at least half the population of the EU and half the member states are in favour of a motion for it to pass.⁶ Issues which are voted on by QMV are also voted on by the European Parliament, which together with the Council form the legislative arm of the European Union.

To reach a qualified majority a minimum of 232 votes upon a total of 321 (72.3%) will be required, and any member state can require that the votes represent at least 62% of the EU's total population. Each country is attributed a number of votes according to the size of its population as follows:

- Germany, France, Italy and the United Kingdom : 29
- Spain and Poland : 27
- Netherlands : 13
- Belgium, Czech Republic, Greece, Hungary and Portugal : 12
- Austria and Sweden : 10
- Denmark, Ireland, Lithuania, Slovakia and Finland : 7
- Cyprus, Estonia, Latvia, Luxembourg and Slovenia : 4
- Malta : 3

The Council of the European Union makes the formal decisions relative to the trade negotiation and also provides negotiation guidelines to the Commission. The European Parliament is consulted and informed throughout the process, and its assent is required for major treaty ratification.

⁴ The Wall Street Journal, "Europe's Rift Threatens Trade – Fate of Global Talks May Rest on Britain-France Dispute" 27 October 2005

⁵ The Economist, "The Farmers' Friend – Charlemagne" 5 November 2005

⁶ BBC "Qualified Majority Voting", 30 April 2001, http://news.bbc.co.uk/1/hi/in_depth/europe/euro-glossary/1054052.stm

Unanimity

However, Qualified Majority Voting is not the end of the story. If negotiations relate to the *internal* rules of the European Union, a unanimous decision is required, even in WTO negotiations. In such a circumstance, the European Parliament has no deciding power and can only offer its opinion to the Council.⁷

Because the Hong Kong Ministerial is only a step in the Doha Development Agenda, the European Commission expects that no vote will be required by the European Council, and hence no opportunity should arise for France to exercise veto power.⁸

Conclusion

Thus, the legal grounds for France's veto authority seem weak. But while it does not possess a legal veto *per se* to *negotiations* at the Hong Kong Ministerial Conference itself, it is a major player in the EU whose support must eventually be won. One alternative strategy it could potentially employ to reject negotiations is bringing together a blocking minority of like-minded EU countries.

⁷ BBC "Unanimity" 30 April 2001, http://news.bbc.co.uk/1/hi/in_depth/europe/2000/nice_summit/nice_summit_glossary/1054635.stm

⁸ Inside U.S. Trade "France Wants Focus on Development, Defends EU Farm Policy" 11 November 2005

United States

*US Proposal*⁹

In contrast to the EU's proposal, the US put forward its own proposal in October 2005. Although intended to break the deadlock on farm trade, as of November 30th, there has been little convergence on the issue.¹⁰ Highlights of the American proposal are as follows:

Market Access

the U.S. calls for the following to be phased-in over five years requiring all countries, developed and developing, to provide substantial improvement in market access by making steep tariff cuts:

- **Progressive tariff reduction**: Developed countries cut their tariffs by 55-90%. Lowest tariffs are cut by 55%, with cuts ranging to 90% for highest tariffs.
- **Tariff rate caps**: Establish a "tariff cap" ensuring no tariff is higher than 75%.
- **Sensitive products**: Limit tariff lines subject to "sensitive product" treatment to 1% of total dutiable tariff lines. For these lines, ensure full compensation by expanding TRQs where they exist.
- **Special and differential treatment**: Slightly lesser cuts and longer phase-in periods will be established for developing countries, to deliver real improvements in access while ensuring import-sensitive sectors in those countries are afforded appropriate protection.

Export Competition

The United States calls for rapid elimination of export subsidies. The following rules would be phased-in by the year 2010:

- **Export subsidies**: Eliminate all agriculture export subsidies.
- **Export credit programs**: Establish specific disciplines on export credit programs to bring them in line with commercial practice, including a maximum repayment period of 180 days.
- **STEs**: Install new disciplines on export State Trading Enterprises that end monopoly export privileges, prohibit export subsidies, and expand transparency obligations.
- **Export taxes**: End discriminatory tax provisions that encourage export of processed products
- **Food aid**: Establish disciplines on food aid shipments that guard against commercial displacement, while removing obstacles to emergency shipments and deliveries to countries with chronic food aid needs. Establish an objective test to identify commercial displacement in other circumstances.

Domestic Support

The United States calls for substantial reductions in trade-distorting domestic support, with deeper cuts by countries with larger subsidies. The United States proposes the following specific elements to be enacted within five years, conditioned on other countries meeting U.S. interests in the agriculture negotiations:

⁹ Office of the United States Trade Representative "Doha Development Agenda Policy Brief", October 2005, http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file919_8128.pdf

¹⁰ The Economist, "World Economy: High noon in Hong Kong" 30 November 2005

- Amber box: Cut Aggregate Measurement of Support (AMS) by 60% for the United States, with product-specific AMS caps based on 1999 – 2001 period.
- Blue box: Cap at 2.5% of the value of agricultural production from the 5% level agreed to in the framework.
- De minimis: Cut “*de minimis*” allowances for trade-distorting domestic support by 50% (from 5% of the value of production to 2.5% in developed countries).
- Overall Cut: Reduce overall levels of trade-distorting support by 53% for the United States.
- Harmonization: Reduce the EU and Japan allowed AMS by 83% and overall level of trade distorting support by 75% (53% for Japan). Proposed cuts will reduce the disparity between the EU and the United States in allowed AMS from the current 4:1 to 2:1 of current exchange rates.
- Green Box: No substantial changes in criteria, and no cap on “green box” support levels.
- Litigation protection: Establish a “peace clause” to protect farm programs if a country keeps trade-distorting support below agreed levels.

US Trade Promotion Authority

One critical reason why it is so important to make progress at the meeting in Hong Kong has to do with US presidential Trade Promotion Authority (TPA), a part of the Trade Act of 2002. Trade Promotion Authority is best known for its procedure on how to “fast-track” international trade deals through Congress. However, it also outlines how Congress gives input into and receives feedback from trade negotiations and how it could even revoke TPA.

The American constitution grants power “to regulate commerce over foreign nations.”¹¹ However, TPA transfers this authority to the president. It enables the White House to authorize trade deals with the knowledge that they will not be subject to amendment by Congress. In effect, this gives the US much greater ability to negotiate multilateral trade deals, which would otherwise be subjected to amendments by the 535 members of Congress, essentially a “death by a thousand cuts.” This authority, however, expires in July 2007, and “with mid-term elections in November 2006 likely to weaken the US president's influence in Congress, it is unlikely this authority will be renewed.”¹² This is especially true given that TPA’s breadth and power have always made legislating it a very contentious issue. In 2002, it passed in the House of Commons by a bare 215-212, after a highly “divisive and partisan legislative battle.”¹³

“...With a presidential election due in November 2008 it is also unlikely a WTO free-trade bill would get any attention until the following year. So if nothing happens in Hong Kong, the **Doha** development agenda might be delayed by four years.”¹⁴

TPA, however, also has an influence on current negotiations; it gives provisions for Congress to learn about and give input into negotiations. Trade objectives, as broadly stipulated by Congress, must promote, above all “the principal negotiating objective of the

¹¹ U.S. Constitution Art. I, s. 8.

¹² The Economist, “World Economy: High noon in Hong Kong” 30 November 2005

¹³ Johnson, Clete D. Note. A barren harvest for the developing world? Presidential “Trade Promotion Authority” and the unfulfilled promise of agriculture negotiations in the Doha Round. 32 Ga. J. Int'l & Comp. L. 437-472 (2004).

¹⁴ The Economist, “World Economy: High noon in Hong Kong” 30 November 2005

United States with respect to agricultural commodities is to obtain competitive opportunities for United States exports of agricultural commodities in foreign markets”¹⁵ (See Appendix C for more objectives). Before entering trade agreements, TPA specifies that the president must also consult five advisors from both Houses, a specially created Congressional Oversight Group, the House Ways and Means Committee, the Senate Finance Committee, and any other congressional committees having jurisdiction over the subject matter of the agreement.¹⁶

A last group of provisions enable Congress to withdraw application of fast track from certain agreements or even in its entirety. Before June 2005, a disapproval resolution passed in both Houses could have cut short the term of TPA, if it was deemed Congress had not been consulted sufficiently in negotiations. Even today, TPA is considered part of the rules of each House individually, which implies that either House is free to repeal TPA at any time. However, the legislature has seldom used these withdrawal provisions.¹⁷

Conclusion

Thus, TPA’s sunset clause is evidently one of the most pressing impetuses to concluding agricultural trade negotiations in the Doha Development Agenda in a timely manner. Once it expires, passing such a trade deal in the US will likely be problematic for years to come. The other important but often overlooked effect of TPA, however, is that it also details broad trade objectives and Congress’s influence on trade negotiations.

¹⁵ Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933.

¹⁶ Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change*, 35 GEO. WASH. INT’L L. REV. 1 (2003).

¹⁷ Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change*, 35 GEO. WASH. INT’L L. REV. 1 (2003).

Appendix A: Article 133 of the Treaty establishing the European Community¹⁸

Article 133

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.

3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations.

The relevant provisions of Article 300 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, in so far as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph

This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.

6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.

7. Without prejudice to the first subparagraph of paragraph 6, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property in so far as they are not covered by paragraph 5.

¹⁸ Europa, "Consolidated Version of the Treaty Establishing the European Community", 24 December 2002, <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/12002E.html>

Appendix B: Article 37 of the Treaty establishing the European Community¹⁹

Article 37 EC

2. ...

The Council shall, on a proposal from the Commission and after consulting the European Parliament, acting by a qualified majority, make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make.

3. The Council may, acting by a qualified majority and in accordance with paragraph 2, replace the national market organisations by the common organisation provided for in Article 34(1).

¹⁹ Europa, “Consolidated Version of the Treaty Establishing the European Community”, 24 December 2002, <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/12002E.html>

Appendix C: Trade Promotion Authority Negotiating Objectives²⁰

(a) OVERALL TRADE NEGOTIATING OBJECTIVES- The overall trade negotiating objectives of the United States for agreements subject to the provisions of section 2103 are--

- 1) to obtain more open, equitable, and reciprocal market access;
- 2) to obtain the reduction or elimination of barriers and distortions that are directly related to trade and that decrease market opportunities for United States exports or otherwise distort United States trade;
- 3) to further strengthen the system of international trading disciplines and procedures, including dispute settlement;
- 4) to foster economic growth, raise living standards, and promote full employment in the United States and to enhance the global economy;
- 5) to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources;
- 6) to promote respect for worker rights and the rights of children consistent with core labor standards of the International Labor Organization (as defined in section 2111(2)) and an understanding of the relationship between trade and worker rights; and
- 7) to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade.

(b) PRINCIPAL TRADE NEGOTIATING OBJECTIVES-

(1) TRADE BARRIERS AND DISTORTIONS- The principal negotiating objectives of the United States regarding trade barriers and other trade distortions are--

- A. to expand competitive market opportunities for United States exports and to obtain fairer and more open conditions of trade by reducing or eliminating tariff and nontariff barriers and policies and practices of foreign governments directly related to trade that decrease market opportunities for United States exports or otherwise distort United States trade; and
- B. to obtain reciprocal tariff and nontariff barrier elimination agreements, with particular attention to those tariff categories covered in section 111(b) of the Uruguay Round Agreements Act (19 U.S.C. 3521(b)).

...

(10) RECIPROCAL TRADE IN AGRICULTURE-

- A. The principal negotiating objective of the United States with respect to agriculture is to obtain competitive opportunities for United States exports of agricultural commodities in foreign markets substantially equivalent to the competitive opportunities afforded foreign exports in United States markets and to achieve fairer and more open conditions of trade in bulk, specialty crop, and value-added commodities by—
 - (i) reducing or eliminating, by a date certain, tariffs or other charges that decrease market opportunities for United States exports—
 - (I) giving priority to those products that are subject to significantly higher tariffs or subsidy regimes of major producing countries; and
 - (II) providing reasonable adjustment periods for United States import-sensitive products, in close consultation with the Congress on such products before initiating tariff reduction negotiations;
 - (ii) reducing tariffs to levels that are the same as or lower than those in the United States;
 - (iii) reducing or eliminating subsidies that decrease market opportunities for United States exports or unfairly distort agriculture markets to the detriment of the United States;
 - (iv) allowing the preservation of programs that support family farms and rural communities but do not distort trade;
 - (v) developing disciplines for domestic support programs, so that production that is in excess of domestic food security needs is sold at world prices;
 - (vi) eliminating Government policies that create price-depressing surpluses;
 - (vii) eliminating state trading enterprises whenever possible;

²⁰ Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933, Available at http://chrome.law.cornell.edu/uscode/html/uscode19/usc_sec_19_00003802----000-.html

(viii) developing, strengthening, and clarifying rules and effective dispute settlement mechanisms to eliminate practices that unfairly decrease United States market access opportunities or distort agricultural markets to the detriment of the United States, particularly with respect to import-sensitive products, including--

(I) unfair or trade-distorting activities of state trading enterprises and other administrative mechanisms, with emphasis on requiring price transparency in the operation of state trading enterprises and such other mechanisms in order to end cross subsidization, price discrimination, and price undercutting;

(II) unjustified trade restrictions or commercial requirements, such as labeling, that affect new technologies, including biotechnology;

(III) unjustified sanitary or phytosanitary restrictions, including those not based on scientific principles in contravention of the Uruguay Round Agreements;

(IV) other unjustified technical barriers to trade; and

(V) restrictive rules in the administration of tariff rate quotas;

(ix) eliminating practices that adversely affect trade in perishable or cyclical products, while improving import relief mechanisms to recognize the unique characteristics of perishable and cyclical agriculture;

(x) ensuring that the use of import relief mechanisms for perishable and cyclical agriculture are as accessible and timely to growers in the United States as those mechanisms that are used by other countries;

(xi) taking into account whether a party to the negotiations has failed to adhere to the provisions of already existing trade agreements with the United States or has circumvented obligations under those agreements;

(xii) taking into account whether a product is subject to market distortions by reason of a failure of a major producing country to adhere to the provisions of already existing trade agreements with the United States or by the circumvention by that country of its obligations under those agreements;

(xiii) otherwise ensuring that countries that accede to the World Trade Organization have made meaningful market liberalization commitments in agriculture;

(xiv) taking into account the impact that agreements covering agriculture to which the United States is a party, including the North American Free Trade Agreement, have on the United States agricultural industry; and

(xv) maintaining bona fide food assistance programs and preserving United States market development and export credit programs.

B.

(i) Before commencing negotiations with respect to agriculture, the United States Trade Representative, in consultation with the Congress, shall seek to develop a position on the treatment of seasonal and perishable agricultural products to be employed in the negotiations in order to develop an international consensus on the treatment of seasonal or perishable agricultural products in investigations relating to dumping and safeguards and in any other relevant area.

(ii) During any negotiations on agricultural subsidies, the United States Trade Representative shall seek to establish the common base year for calculating the Aggregated Measurement of Support (as defined in the Agreement on Agriculture) as the end of each country's Uruguay Round implementation period, as reported in each country's Uruguay Round market access schedule.

(iii) The negotiating objective provided in subparagraph (A) applies with respect to agricultural matters to be addressed in any trade agreement entered into under section 2103(a) or (b), including any trade agreement entered into under section 2103(a) or (b) that provides for accession to a trade agreement to which the United States is already a party, such as the North American Free Trade Agreement and the United States-Canada Free Trade Agreement.