

Trade Facilitation Flop May Spell Doom For Loftier WTO Talks

By Alex Lawson

Law360, New York (August 01, 2014, 7:54 PM ET) -- Failure of World Trade Organization partners to implement a relatively simple pact on trade facilitation amid a fight over agricultural subsidies deals a near-fatal blow to the organization's already floundering effort to craft comprehensive new global rules to govern international commerce.

Facing a Thursday deadline to kick off implementation, WTO members were unable to convince a group of developing countries led by India to budge from their demands that enactment of the trade facilitation agreement run in parallel with efforts to shield their domestic food security programs from legal challenges.

While the trade facilitation deal, aimed at streamlining customs and other border measures, was not believed to be an economic windfall by any stretch, WTO Director-General Roberto Azevedo made clear that the members' inaction would have far-reaching implications for the multilateral negotiating system.

"My sense, in the light of the things I hear from you, is that this is not just another delay which can simply be ignored or accommodated into a new timetable — this will have consequences," Azevedo told members Thursday. "And it seems to me, from what I hear in my conversations with you, that the consequences are likely to be significant."

From the moment the trade facilitation deal and other agreements were struck at the WTO's December ministerial summit in Bali, Indonesia, members viewed them as a shot in the arm for the WTO's negotiating functions, which have been largely dormant since the collapse of the Doha round of trade talks.

Indeed, with nearly every speech Azevedo made over the past seven months, there were statements of hope for reviving Doha, and the Bali package of deals was repeatedly pegged as a source of newfound momentum. But with the first of those agreements now facing an uncertain future after this week's missed deadline, observers are pessimistic that the multilateral system can ever be workable again.

"The fact that such Herculean efforts are required after more than a decade to yield low-hanging fruit ... does not bode well for the value that WTO members as a whole put into multilateral trade-liberalizing efforts right now," Covington & Burling LLP partner and former deputy U.S. trade representative John Veroneau told Law360. "It's certainly not a good day for the WTO."

After more than a decade yielded no progress on Doha as a complete negotiating package, the WTO

members set aside what were thought to be controversial provisions at Bali to produce a relatively modest set of trade measures, making the recent failure all the more humbling, according to Veroneau.

“It's like clowns not being able to agree that red noses are funny,” he said.

Doubts about the effectiveness have steadily increased as the membership of the WTO has become larger and more diversified, ratcheting up the difficulty of balancing the economic interests of traditional economic powers like the U.S. and Europe with large emerging economies like Brazil, India and China, according to Terence Stewart of the Law Offices of Stewart and Stewart.

The Bali package was the first unanimous trade agreement since the WTO's inception and included a so-called cease-fire on challenges to India's food subsidy programs while the countries worked to find a permanent solution by 2017. But India appeared to go back on the deal by insisting food security move to the fore. Such shifts in policy are likely to make members question whether or not the effort to reach agreements are well-spent, according to Stewart.

“It's a significant problem for the WTO in terms of maintaining its relevance as a negotiating forum,” Stewart said. “If agreements agreed to by all governments of the world become subject to hostage-taking by a country who desires a change in the package, then you have no sense in negotiating because it's not going to be worth anything.”

But many experts also said that the shrinking of the WTO as a negotiating platform might not be a completely unwelcome development and would likely lead to a shift toward smaller, plurilateral talks among willing members and regional free trade agreements.

In some ways, this is already occurring in Geneva, where small pockets of the WTO membership are engaged in talks aimed at facilitating trade in services and reducing tariffs on environmental goods.

Timothy Keeler, a Mayer Brown LLP partner and former chief of staff at the Office of the U.S. Trade Representative, said those smaller pacts would be a quicker way for members to make economic headway without being bogged down by the need for consensus. He even held out hope that the overlapping agreements could one day be pulled together, as was the case in the Uruguay Round of talks that established the WTO in the first place.

“As a practical matter, that's a way you can advance some policies that make sense without having this common denominator problem of the entire membership,” Keeler told Law360. “There is also precedent for some of these plurilaterals being multilateralized.”

Veroneau said that if enough disparate sectoral and regional plurilateral arrangements with incongruent rules began to take root, it could even reignite efforts to craft a singular global regime of trade rules, though he acknowledged that such a scenario was far from imminent.

In the near term, experts generally agree that WTO members will face an uncertain future when they return from summer break in September. Azevedo had asked countries to come forward with substantive proposals to restart the Doha talks by the end of the year, but the specter of continued efforts to implement the trade facilitation deal have clouded that effort.

Weil Gotshal & Manges LLP partner Ted Posner was optimistic about a potential embrace of plurilateral initiatives, and even raised the possibility that members excluded from those efforts might one day see

the light.

“If the goal is to develop a more sophisticated and modern set of rules and the trade-off for that is that you can't do it by consensus, I still think in most cases it will be worthwhile to try to achieve that goal,” Posner said. “And for parties that decide to opt out and not pursue that goal, maybe when they see it in action, they'll understand the benefits of it and eventually subscribe to it.”

--Editing by Kat Laskowski and Philip Shea.

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