

# The WTO negotiations: In crisis? Or the usual brinkmanship?

The current round of global trade negotiations under the auspices of the World Trade Organisation (WTO) – known as the Doha Development Agenda – are continuing to experience difficulties. Deadlines are still being missed and the atmospherics are not great.

The upcoming gathering of around 25 trade ministers from around the world (including New Zealand's and Australia's) in Montréal, Canada - in late July - will provide an indication as to whether or not the WTO's Fifth Ministerial Conference in Cancún, Mexico in September will be a success.

## Background

The Doha Development Agenda was launched at the WTO's Fourth Ministerial Conference in Doha, Qatar in late 2001. A broad negotiating agenda was approved,

including:

- further liberalisation of goods and services trade
- significant agricultural reform
- clearer rules on anti-dumping, subsidies and countervailing measures
- reform of the dispute settlement system
- some intellectual property, as well as trade and environment issues

Possible future negotiations on rules for such areas as investment and competition policy have also been foreshadowed, with the decision on whether or not such rules will be negotiated to be taken at the Cancún meeting.

The deadline for the negotiations has been set at 1 January 2005. It is, however, increasingly clear that this is exceedingly ambitious, particularly since the last round of global trade negotiations – the Uruguay Round – took almost 8 years to complete.

## Where are we at?

Progress so far has been disappointing in a number of areas. Key interim deadlines have been missed in the negotiations on agriculture and industrial products, as well as a range of issues of importance to developing countries, including:

- improving access to medicines by finding a solution to the problems faced by some developing countries regarding compulsory licensing
- improving the terms and conditions of special and differential treatment for developing countries
- addressing the full range of implementation issues that

developing countries have put on the negotiating table

These missed deadlines are a concern and highlight:

- the lack of consensus that currently exists in the global trading system
- the need for all countries to move away from well-known (and entrenched) positions and engage far more constructively in the negotiations

The Doha mandate is very broad and far more complex than the Uruguay Round. Participants this time round do not generally share a vision of what any new rules should encapsulate, let alone say.

Traditional trade issues, such as high tariffs and subsidies, are increasingly being side-lined by other issues, such as:

- geographical indications
- relationship between existing WTO rules and specific trade obligations in multilateral environmental agreements
- trade and investment
- trade and competition policy
- trade facilitation
- transparency in government procurement

## The road to Cancún

The Cancún meeting allows WTO Members to take stock of two years of negotiations under the Doha Development Agenda and set a road-map for the next phase of the negotiations.

The prospects for the meeting are not looking that good at the moment because of all of the missed deadlines. The recently released draft Ministerial Text highlights the gulf that still exists

## What's inside

**US wins WTO case against Japan over apple exports and fire blight. Will Australia be next in the gun?**

**EU CAP reform - "a step in the right direction"**

**WTO dispute settlement - recent developments**

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The Doha negotiations offer an historic opportunity to improve the economic prospects of developing countries. Here's hoping the opportunity is not lost.

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between countries in a range of areas. There has, however, been some positive moves such as the European Union's recent announcement of its long-awaited reform of the Common Agricultural Policy (CAP) which may help to unblock the agricultural negotiations and consequently improve the general atmospherics.

Unfortunately, the EU's recent announcement did not touch upon two areas of the agricultural negotiations that Australia, New Zealand and developing countries perceive as being vital to their success, namely market access and export subsidies.

Some commentators believe that the negotiations are not in crisis, but simply performing according to the traditional practice of brinkmanship and that a suitable compromise will be worked through at Cancún. If this was to happen, that would be great, but this type of scenario tends to ignore the fact that the WTO is a markedly different beast to that of its predecessor, the GATT. There are now over 145 Members and most of them are either developing or least developed countries. In addition, the traditional power-brokers of the global trading system – the EU and the US – do not appear to be able to find too many areas of agreement. And finally, agriculture is not the most difficult issue confronting Members as it was in the Uruguay Round.

All in all, the next few months will provide everyone involved in the negotiations with some great challenges. Solutions can be found to the gulfs that currently exist between those involved in the negotiations, but it will require strong political leadership from the key players, particularly the EU and the US. The Doha negotiations offer an historic opportunity to improve the economic prospects of developing countries. Here's hoping that this opportunity is not lost.

## US wins WTO case against Japan over apple exports and fire blight. Will Australia be next in the gun?

The WTO adjudicative panel, requested by the US to consider the legality of Japan's fire blight-related restrictions on the importation of US apples, recently issued its report. The panel has ruled that Japan is in breach of a number of its obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the **SPS Agreement**). The result should eventually see the lifting of current restrictions faced by all apple exporters to Japan, including New Zealand. Also, given the very similar circumstances, this decision directly calls into question Australia's proposed measures for New Zealand apple exports.

### Background

Since 1997, Japan has maintained a range of restrictive measures on the importation of apples from the US and most other countries, including New Zealand. These measures include:

- apples must only come from orchards that are, and are registered as being, free of fire blight
- such orchards must also be surrounded by a 500 metre buffer zone which is free of fire blight
- each orchard and its buffer zone must be inspected at least 3 times per year
- apples must be surface treated with chlorine or sodium hypochlorite

solution

- harvesting containers and packing facilities must be chlorine treated

The US challenged the legality of these measures, in particular under the SPS Agreement, and a WTO panel was established to hear the dispute. Because of the similarities of the case to the trans-Tasman situation (more on this below), New Zealand and Australia joined the dispute as third parties.

Given the technical and scientific issues that the panel was required to consider in this case, the panel consulted with a number of scientific and technical experts on fire blight, including New Zealander Dr Chris Hale from HortResearch, and Australian scientist Dr Chris Hayward. A number of the panel's findings draw from the information and commentary obtained from these experts.

### **The panel's findings**

The panel's report focuses on three key issues under the SPS Agreement:

- whether Japan's measures were maintained without sufficient scientific evidence, contrary to Article 2.2 of the SPS Agreement
- whether the measures could be maintained on a provisional basis under Article 5.7 of the SPS Agreement
- whether the measures were based on a risk assessment as required by Article 5.1 of the SPS Agreement.

On the first issue, the panel reviewed the very substantial body of scientifically produced, non-circumstantial evidence that was made available to it, and found that:

- there is not sufficient scientific evidence to conclude that mature, symptomless apples would harbour populations of the fire blight bacteria capable of transmitting the disease
- mature apples are unlikely to be infected with fire blight if they do not show any symptoms
- the risk of mature, symptomless apple fruit transmitting fire blight to host plants in Japan was "negligible"
- even for infected and/or immature apples, there was not sufficient scientific evidence to show that fire blight could be transmitted from the apples to host plants in Japan.

Accordingly, the panel concluded that there was not sufficient scientific evidence that apple fruit are likely to serve as a pathway for the entry, establishment, or spread of fire blight within Japan. As a result, the panel found that Japan's measures (in particular the requirement for 500 metre buffer zones and tri-annual orchard inspections) were maintained "without sufficient scientific evidence", and were therefore in breach of Article 2.2.

The panel then turned to the second issue of whether Japan's fall-back argument that its measures could be defended as provisional under Article 5.7 of the SPS Agreement. That article allows countries to provisionally adopt SPS measures, on the basis of available pertinent information, in situations where "relevant scientific evidence is insufficient". Rejecting Japan's arguments, the panel noted that there was a great deal of "relevant" scientific evidence about the disease fire blight:

*"The current "situation", where scientific studies as well as practical experience have accumulated for the past 200 years, is clearly not the type of situation Article 5.7 was intended to address. Article 5.7 was obviously designed to be invoked in situations where little, or no, reliable evidence was available on the subject matter at issue. With regard to fire blight, not only a large quantity but a high quality of*

One of the panel's conclusions was that there was not sufficient scientific evidence that apple fruit are likely to serve as a pathway for the entry, establishment, or spread of fire blight in Japan.

*scientific evidence has been produced over the years that describes the risk of transmission of fire blight through apple fruit as negligible.”*

Accordingly, the panel found that Japan had failed to show that its measures were justifiable as provisional measures under Article 5.7.

Turning to the third issue – whether Japan’s measures were based on a risk assessment – the panel examined Japan’s pest risk analysis (**PRA**) on fire blight to see whether it met the requirements for a proper risk assessment under the SPS Agreement. The panel found that:

- Japan’s PRA was not sufficiently specific with regard to the risks at issue (being the risk that apple fruit could transmit fire blight into Japan)
- several key steps along the “pathway” had not been properly assessed, and accordingly, the PRA did not properly assess the probability or likelihood of entry, establishment or spread of fire blight through the importation of apple fruit
- the PRA did not properly evaluate the relative effectiveness of the measures in place, nor did it evaluate potential alternative measures

The panel therefore ruled that Japan was in breach of Article 5.1 of the SPS Agreement, since its measures were not based on a proper risk assessment.

### **Implications for Australia**

The panel’s report has serious implications for Australia’s proposed restrictions on apple imports from New Zealand, which are contained in the Australian Department of Agriculture, Fisheries and Forestry’s draft import risk analysis (**IRA**) for apple imports from New Zealand. In its IRA, Australia proposes eleven measures, including requirements that:

- apples must only come from orchards that are, and are registered as being, free of fire blight
- such orchards must also be surrounded by a 50 meter “detection zone” which is free of fire blight
- each registered orchard and detection zone must be inspected at least 3 times per year
- apples must be surface treated with chlorine solution
- harvesting containers and sanitation of packing facilities must be chlorine treated

Sound familiar? The panel’s finding that almost identical measures put in place by Japan were maintained “without sufficient scientific evidence”, and were therefore in breach of Article 2.2, should be of grave concern to Australia, and should be the source of satisfaction to New Zealand apple growers and the Government.

Given that Australia’s IRA relies on the same body of scientific evidence as that referred to in this case, the panel’s conclusion that there was not sufficient scientific evidence that apple fruit are likely to serve as a pathway for the entry, establishment, or spread of fire blight is likely to apply equally to Australia. In particular, Australia’s IRA gives considerable weight to one 1990 study showing presence of fire blight on mature apple fruit. This study was considered by the panel to be one single study whose findings were “not clear and are disputed” and, as the panel’s scientific experts had suggested, were “relatively confused, difficult to interpret, or even unconvincing”.

The panel held quite comprehensive discussions with the scientific experts, and in its report, the panel gives careful consideration to the scientific evidence available. The panel’s firm view is that over 200 years

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of experience and a very great deal of scientific research does not support there being any significant risk that fire blight can be transmitted on apple fruit – this is something that New Zealand officials and scientists have been trying to tell Australia for many years.

It will be very interesting to watch the Australian Government's reaction to the panel report. No doubt Japan will appeal the report – meaning that the WTO Appellate Body will have to consider the case, buying Australia a few more months. In our view, the Appellate Body would be unlikely to overturn the panel's findings in any substantive way – we think the report is quite robust.

If, as we would expect, the Appellate Body upholds the panel's findings, then Australia will need to revisit its apples IRA urgently. If it does not, then New Zealand obviously has a very strong WTO case against it. Watch this space...

## EU CAP reform – “a step in the right direction”

In late June, the European Union announced the details of its long-awaited reform package for its Common Agricultural Policy (CAP). The package is described by WTO General Council Chair, Carlos Perez del Castillo, as “a step in the right direction”. It will go some way towards “de-coupling” subsidies paid to European farmers from levels of production, and will move instead towards being based on land area. Instead of the current range of production-based subsidies, there will be one “single farm payment”. There will also be reforms in the dairy sector, with reductions in intervention prices for milk powder and butter being accelerated (intervention prices are the guaranteed minimum prices that EU farmers get for their products). Payments to the largest farmers, previously the recipients of the lion's share of EU subsidies, will also be capped.

The package proposed by the European Commission was considerably watered down over the final days of negotiations by southern European states – France in particular, won concessions to continue paying some production-gear subsidies to grain and beef farmers. The reforms are set to commence from 2005, though all EU countries may apply to defer implementing the reforms until 2007.

Under the reforms, the new single farm payments will be linked to compliance with tougher environmental, animal welfare, plant and animal life and health, and food safety rules. Undoubtedly the EU will seek to impose similar compliance requirements on exporters to its market, including New Zealand and Australia – this is something that will have to be watched carefully.

While the EU wrangled over the CAP reform package, the agriculture negotiations under the Doha Development Agenda (see the related article in this newsletter) have been stalled. It will now be a question of whether the EU's progress on CAP reform will be enough to re-invigorate the agriculture negotiations under Doha. As well as bringing elements of the CAP reform to the Doha negotiating table, New Zealand and other agricultural exporters will be expecting further concessions from the EU on market access and export subsidies – two issues that were not included in the CAP reform package.

### DID YOU KNOW?

The US has removed New Zealand from its annual “Special 301” Watch List. New Zealand was originally placed on the list in 2002 on the grounds that it had not introduced legislation to ban parallel importing of copyright products – the principal concern being film products including video tapes, DVDs, and video discs. New Zealand's removal from the list is most likely as a result of the introduction of the Copyright (Parallel Importation of Film and Onus of Proof) Amendment Bill into Parliament early this year.

### DID YOU KNOW?

1 July 2003 saw the official launch of New Zealand Trade and Enterprise (NZTE), the New Zealand Government's new entity formed by the merger of the former Trade New Zealand and Industry New Zealand entities. Newly appointed CEO Tim Gibson says the new organisation will act as a catalyst to assist businesses to reach their growth potential.

### US – Safeguard measures on steel products: Panel finds US in breach.

The WTO, on 11 July 2003, issued the Panel's report, which concluded that the safeguard measures imposed by the United States on the imports of certain steel products are inconsistent with the Safeguards Agreement and GATT 1994. The complainants were the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand and Brazil.

In its report, the Panel found that the safeguard measures (higher tariffs) imposed on a range of steel products were inconsistent with the applicable rules because the US could not demonstrate that :

- there had actually been an increase in imports of steel products
- any such increases were “unforeseen”
- there was any causal link between any increase in imports and any serious injury suffered by its domestic industry.

The Panel also found that there was a mismatch between the products for which the US sought to establish the need for safeguard measures, and the products to which those measures were actually applied.

The US has until 9 September to appeal the Panel's findings (something that it will most likely do).

### Canada – Dairy: Canada renounces its dairy export scheme.

On 20 December 2002, the Appellate Body dismissed Canada's appeal and once again upheld New Zealand and the United States' arguments that Canada continued to provide export subsidies on dairy products in excess of its WTO commitment levels. On 9 May 2003, Canada, New Zealand and the

US announced that a mutually agreed solution to the dispute had been reached, as a result of Canada's provinces amending their respective regulations and thereby eliminating the commercial export milk program, which was the source of Canada's illegally subsidised dairy exports.

Canada has also confirmed that all consequential federal level regulatory amendments will be in place by 1 August 2003, and that for the marketing year beginning on that date, and thereafter, Canada's exports of subsidised dairy products will not exceed its WTO commitment levels.

### EC – Sugar: Australia and Brazil request panels.

In November 2002, Australia and Brazil held consultations with the EC under the Dispute Settlement Understanding (DSU) over the EC's sugar regime. Australia and Brazil allege that the EC is providing export subsidies on sugar in excess of its WTO commitment limits, in breach of both the Agriculture Agreement and the Agreement on Subsidies and Countervailing Measures (the **SCM Agreement**).

The consultations did not resolve the dispute, and recently Australia, Brazil and Thailand have each requested the establishment of a panel to adjudicate the dispute.

The EC's sugar pricing system has a number of similarities to Canada's dairy regime which was successfully challenged by New Zealand and the US in the *Canada – Dairy* case. The jurisprudence from the *Canada – Dairy* case will therefore be highly relevant to the sugar case. While no decision has been made at this stage, given the systemic issues that are common to both cases, New Zealand may well join Australia and Thailand as a third party in this dispute.

### Australia – Fresh fruit and vegetables: Philippines requests a panel.

In October 2002, the Philippines requested consultations under the DSU regarding Australia's quarantine measures for fresh fruit and vegetables. Consultations were held in Geneva in November 2002, but failed to resolve the dispute.

Accordingly, on 7 July 2003, the Philippines formally lodged a request for a panel to be established.

In a related dispute, in April 2003 the EU requested consultations on Australia's quarantine regime as such, and in relation to certain specific cases (pig meat and poultry meat).

The Philippines and the EU claim that Australia's quarantine regime is inconsistent with the WTO Agreement on Sanitary and Phytosanitary Measures (the **SPS Agreement**), GATT 1994 and the WTO Licensing Agreement. In particular, both disputes focus on Australia's permit system for imports, under which all imports are prohibited unless imports are specifically requested, and an import permit is subsequently issued after a risk assessment is performed.

This case has been brought as a result of the increasing level of frustration that the Philippines, the EU and other countries have experienced over the years as a result of the very slow rate at which Australia processes import requests – some requests by the Philippines are over 8 years old.

### EC – biotech products/GMOs: New Zealand and Australia join the US-led challenge.

In May 2003, the US, Canada and Argentina requested consultations under the DSU with the EC concerning the EC's 1998 moratorium on the approval of imports of biotech products (including genetically modified organisms (GMOs)). The

moratorium effectively restricts imports of certain of the complainants' agricultural and food products. The US has also challenged a number of EU member State bans on imports and marketing of biotech products. The US claims that the EC's measures lack any scientific basis and are in breach of the WTO SPS Agreement, the Agreement on Technical Barriers to Trade (**TBT Agreement**), the GATT 1994, and the Agriculture Agreement.

The EU has accepted requests from ten other WTO members, including Australia and New Zealand, to join the consultations. While not directly affected by the moratorium, New Zealand and Australia have joined in consultations for systemic reasons – namely (in the words of Australia's Trade Minister Mark Vaile) the importance of fair trading rules underpinned by science-based decision making.

### **EC – geographical indications: New Zealand joins US and Australian complaint.**

In April 2003, the US and Australia requested consultations under the DSU with the EC on the EC's regime for the registration and protection of geographical indications (**GIs**) on products such as cheese, beer, processed meat and fruit. GIs identify a product as originating from a specific geographical area. The EC has attempted to restrict the use in its market of GIs such as "Feta cheese" and "Parma ham" to producers from the relevant region inside the EC.

The US and Australia claim that the EC's measures are in breach of the WTO TRIPS Agreement, GATT 1994 and the TBT Agreement. The EU has accepted requests from 15 other WTO members, including New Zealand, to join the consultations. The consultations were held in May.

### **US – cotton subsidies: panel process under way.**

In September 2002, Brazil requested consultations with the US regarding US subsidies and related measures for its producers, users and/or exporters of upland cotton. Brazil contends that these measures are in breach of the WTO SCM Agreement, the Agriculture Agreement, and the GATT 1994. Consultations did not resolve the dispute, and a panel was established in March 2003. New Zealand, together with 12 other WTO members, have joined as third parties in the dispute. New Zealand's written submission to the Panel was lodged in mid July.

### **US – "Foreign Sales Corporations": DSB authorises US\$4 billion retaliation by the EU.**

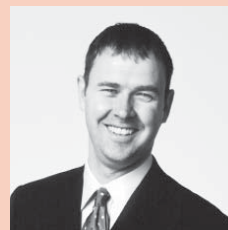
On 7 May, the WTO Dispute Settlement Body (**DSB**) authorised the EU to increase customs duties on US imports by a record US\$4 billion per annum. The decision is in response to the US' failure to remove the tax benefits it provides under its "Foreign Sales Corporations" scheme, which the WTO Appellate Body confirmed were in breach of WTO rules back in 2001. The scheme provides substantial benefits to major US exporters like Boeing and Microsoft. For the moment, the EU is holding off actually implementing any retaliatory measures, pending action the US claims it is taking to amend the regime.

## Further information

If you think our International Trade Law Group can assist you / answer your trade law or policy questions, please contact:



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Murray Denyer and Scott Gallacher together have over 17 years of experience advising the New Zealand Government on international trade law and policy, and representing New Zealand in international dispute settlement at the WTO in Geneva (including the spreadable butter, US lamb safeguards, and Canada dairy cases).

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