

INTERNATIONAL ECONOMIC LAW

I. INTRODUCTION

The frustratingly slow progress that has dogged efforts to complete the Doha Development Round continued into 2009. However, lack of progress in achieving a final outcome should not be equated with lack of work on the part of many World Trade Organisation (WTO) member countries and their officials. New Zealand remained a key player in the Doha agenda throughout 2009 through its involvement in a number of working groups including agriculture, non-agricultural market access, rules, and the review of the dispute settlement system. New Zealand was also active on the bilateral and regional fronts, with a full negotiating agenda in 2009. This review details multilateral, regional, and bilateral developments in 2009 and New Zealand's participation therein. It also reviews New Zealand's involvement in WTO dispute settlement matters.

II. THE TONE FOR 2009 AS SET BY WORLD LEADERS

A key feature of the international trading environment in 2009 was the fallout from the economic crisis that had erupted in 2008. The ongoing dismal economic situation, and fears of protectionism, led world leaders to emphasise the importance of international trade in 2009. At the London Group of Twenty (G-20) Summit in April, the leaders of the world's major twenty economic powers emphasised the importance of reinvigorating international trade and investment in order to restore global growth. Leaders *reaffirmed* prior commitments to refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing WTO inconsistent measures to stimulate exports, and *pledged* to minimise any negative impact on trade and investment of domestic policy actions including fiscal policy and action in support of the financial sector. The leaders noted their continuing commitment to "reaching an ambitious and balanced conclusion to the Doha Development Round".¹ They stated their intention to give renewed focus and political attention to this critical issue, but did not suggest a goal date for completion.

However, at the July Group of Eight (G-8) Summit in L'Aquila, Italy, leaders of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States of America – together with the leaders of Brazil, China, India, Mexico, and South Africa – pledged to "seek an ambitious and balanced conclusion to the Doha Development Round in 2010."² This

1 Leaders of the Group of Twenty "Global plan for recovery and reform: The Communiqué from the London Summit" (2009) at [23]. Available at <<http://www.londonsummit.gov.uk/en/summit-aims/summit-communicue/>>.

2 "G-8 Endorses Doha Deadline, More Support for Agriculture" (2009) 13(3) Bridges Rev 3.

date was subsequently reaffirmed by G-20 leaders at a further summit in Pittsburgh in September 2009. The leaders' statement issued at the conclusion of the Summit stated, *inter alia*, that: "We will fight protectionism. We are committed to bringing the Doha Round to a successful conclusion in 2010."³

III. MULTILATERAL DEVELOPMENTS IN THE DOHA ROUND

Despite these hortatory statements made by the G-8 and G-20 leaders, progress continued to be frustratingly slow in the Doha negotiations in 2009. Notable areas where New Zealand has been involved in the negotiations are discussed briefly below.

A. Agriculture

In April, Ambassador David Walker of New Zealand was appointed as the new Chairperson of the WTO agriculture negotiations. Ambassador Walker is the third New Zealand ambassador to chair the agriculture negotiations, following Tim Groser (2003-2005, now Minister of Trade) and Crawford Falconer (2005-2009). The agriculture negotiations were relatively quiet in the early part of 2009 while Ambassador Falconer undertook consultations with interested stakeholders to follow up on the release of the latest (fourth) iteration of the draft agriculture modalities text in December 2008. In June 2009, Ambassador Walker announced that the negotiations would return to a multilateral process.⁴ This process commenced in July and continued throughout the rest of the year. It focused on technical work regarding the data that is required for Members to schedule their commitments on agricultural trade once modalities have been agreed, and the templates required for recording these.⁵ In parallel with this technical process, Ambassador Walker continued to conduct the meetings with groups of delegates that had been nicknamed "walks in the woods" by Ambassador Falconer in 2008. These meetings sought to address issues that were unresolved in the December 2008 agriculture modalities texts, including the special safeguard mechanism (SSM). This mechanism (which would allow developing countries to raise tariffs temporarily in order to deal with import surges and falling prices) has been particularly controversial and was cited as one of the primary causes of the breakdown in the Doha negotiations in 2008.

B. Non-Agricultural Market Access

Another area of the Doha agenda in which New Zealand continued its involvement in 2009 was the negotiating group that is working on further liberalisation of non-agricultural market access (NAMA). In December

3 "Leaders' Statement: The Pittsburgh Summit" (press release, 25 September 2009).

4 "Chair outlines schedule as farm talks gear up" *WTO News* (International, 18 June 2009).

5 "Farm talks head for autumn of forms and content" *WTO News* (International, 20 and 23 July 2009).

2008, the Chair of the negotiating group released a draft modalities text for tariff liberalisation.⁶ Division remained, however, with the United States seeking increased ambition, and engaging bilaterally with China, Brazil, and India. There is division in the negotiations as to whether large developing countries such as these three will participate in voluntary initiatives to cut or eliminate tariffs. These countries argue that their participation in initiatives to cut tariffs on entire industrial sectors is voluntary. However, developed country members such as the United States, Canada and Japan, want to be sure that such countries participate in some sectorals.⁷ Given this division, work in 2009 largely focused on negotiating proposals aimed at eliminating measures that create non-tariff barriers with respect to non-agricultural goods. These are measures other than tariffs that protect domestic industry, such as technical standards that have the effect of keeping imports out. The negotiations in this area focused on a number of sectors, including electronics, autos, textiles, horizontal mechanisms, chemicals, and remanufactured goods. A number of Member countries submitted proposals that consider what rules might be adopted to ensure that standards, technical regulations, and conformity assessment procedures do not restrict trade more than necessary. Issues raised in the proposals and debated in the negotiating group included: the question of whether sector-specific rules are necessary, or whether a common set of principles (with sector-specific comments) would be sufficient; the merits of a “horizontal mechanism” for bypassing the WTO’s Dispute Settlement Mechanism through swift mediation of trade-related concerns; and whether domestic regulations ought to be harmonised with international standards.⁸

C. Rules

In 2009 the WTO Negotiating Group on Rules undertook a detailed review of draft texts of the Agreement on Anti-Dumping and the Agreement on Subsidies and Countervailing Measures. It also continued to address the issue of fisheries subsidies that encourage overcapacity and overfishing. This issue was put on the Doha agenda in 2001 when WTO ministers called on member states to “clarify and improve” WTO rules on fishery subsidies. New Zealand has played an important role in these negotiations through its membership of the “Friends of Fish”, a group of countries that supports promoting sustainable fishing practices and eliminating harmful subsidies, and providing effective and appropriate special and differential treatment for developing countries.⁹

6 See *Fourth Revision of Draft Modalities for Non-Agricultural Market Access* WTO DOC TN/MA/W/103/Rev3 (2008) (Negotiating Group on Market Access).

7 “Chair calls for Focus on Technical Aspects of NAMA Talks” (2009) 13(4) *Bridges Weekly Trade Digest* 9.

8 “NAMA Talks Makes Progress on NTBs” (2009) 13(43) *Bridges Weekly Trade Digest* 4.

9 The ‘Friends of Fish’ comprise Argentina, Australia, Chile, Colombia, United States, New Zealand, Norway, Iceland, Peru, and Pakistan.

A first draft text for fishery subsidies disciplines was issued by the chairman of the Negotiating Group on Rules in November 2007.¹⁰ The text included a new annex to the Subsidies and Countervailing Measures Agreement that proposed additional disciplines on fisheries subsidies. This text contained many elements that raised controversy and uncertainty. In December 2008, the Chair recognised the need for continuing discussion of the issues raised by his draft text, and issued a new document containing a 'roadmap' to guide further talks.¹¹ The "roadmap" identified questions arising out of the text that remained to be addressed. The questions were wide-ranging and comprehensive, relating to, inter alia, the prohibition on subsidies, the general exceptions, special and differential treatment, fisheries management, transparency, and dispute settlement. The Negotiating Group's task for 2009 was to work through all the questions, and it completed this by the end of December. The Group also considered proposals to review the special and differential treatment provisions in the draft text. On this topic, the Friends group circulated a communication in October 2009 suggesting factors that it believes must be weighed to achieve an outcome on special and differential treatment that ensures it is effective, responsible, realistic, and appropriate.¹²

D. Dispute Settlement Review

New Zealand continued to play an active role in 2009 in the review of the WTO's dispute settlement system. This review was originally initiated in 1997, and aims to update and improve the rules and procedures governing dispute settlement. Work in 2009 was based on a draft text issued by the Chair of the Dispute Settlement Body in July 2008.¹³ The review provides an opportunity for Members to clarify areas in the existing text where dispute settlement cases have highlighted gaps or ambiguity. Also on the agenda is the question of how to improve the ability of developing countries to take advantage of the WTO's dispute settlement mechanism. Specific issues discussed by Members in 2009 included: expanding the participation and rights of third parties; improved transparency measures to increase public and third party access to dispute settlement proceedings and materials; whether panels should be able to accept and rely on unsolicited amicus curiae briefs; sequencing of the application of arts 21.5 and 22 of the Disputes Settlement Understanding DSU (concerning the right of a complaining party to impose retaliatory

10 *Rules Negotiations: Draft Consolidated Texts of the AD and SCM Agreements* WTO DOC TN/RL/W/213 (2007) (Chairperson's Texts).

11 See *Negotiating Group on Rules – Report to the Trade Negotiations Committee for the Purpose of the TNC's Stocktaking Exercise* WTO DOC TN/RL/24 (2010) (Chairman's Report).

12 *Fisheries Subsidies – Communication from Argentina, Australia, Chile, Colombia, the United States, New Zealand, Norway, Iceland, Peru and Pakistan* WTO DOC TN/RL/W/243 (2009) (Communication to the Negotiating Group on Rules).

13 *Special Session of the Dispute Settlement Body – Report to the Trade Negotiations Committee for the Purpose of the TNC Stocktaking Exercise* WTO DOC TN/DS/24 (2010) (Chairman's Report).

measures and the requirement to request an art 21.5 panel when there is disagreement on the existence or consistency of compliance measures); and special and differential treatment for developing country Members.

E. Other WTO Developments: Climate Change and Trade

The WTO has increasingly been taking note of the challenges raised by the interactions between international trade rules and the evolving international climate change regime. In June 2009, the WTO and the United Nations Environment Programme (UNEP) released a report on the connections between these two regimes.¹⁴ Among other things, the report examined the relationship between international trade obligations and the various domestic measures that countries are adopting in order to reduce greenhouse gas emissions. The report emphasised the scope that exists under WTO rules for addressing climate change at the national level. One of the more controversial issues to be canvassed in the report was the question of whether it is WTO-consistent for countries to impose border tax adjustments (either by taxing imports or by exempting or remitting taxes on exports) in order to counteract competitiveness losses suffered by their industries as a result of climate change measures taken domestically (such as carbon taxes or an emissions trading system). The report highlighted the legal uncertainties inherent in this question, including with respect to whether border tax adjustments (BTAs) on either imports or exports ought to be permitted in the case of production inputs and/or emissions. The UNEP Report was of significant interest to New Zealand as it, and its trading partners, take steps to implement their Kyoto Protocol commitments.

III. SIGNATURE OF REGIONAL AND FREE TRADE AGREEMENTS

A. Malaysia – New Zealand Free Trade Agreement

The Malaysia – New Zealand Free Trade Agreement was signed in Kuala Lumpur on 26 October 2009. The Agreement provides for liberalisation of trade in goods and services, as well as investment flows between the two countries. Malaysia is New Zealand's eighth largest export destination and exports include dairy and other agricultural products, minerals and fuels, and manufactured products including electronics and electrical goods.

B. New Zealand – Hong Kong, China Closer Economic Partnership Agreement (CEP)

Negotiations for the New Zealand – Hong Kong, China CEP concluded in 2009. Hong Kong is New Zealand's ninth largest export market and eighth largest source of foreign direct investment. The CEP complements New

14 The World Trade Organisation and the United Nations Environment Programme *Trade and Climate Change: WTO-UNEP Report* (World Trade Organisation Secretariat, Geneva, 2009).

Zealand's Free Trade Agreement with China and increases opportunities for Hong Kong to be used as a platform for trade into mainland China. It provides for liberalisation of trade in goods and services, while a legally binding side agreement requires the parties to negotiate an Investment Protocol within two years of entry into force.

C. Other Bilateral and Regional Negotiations

Negotiations for free trade agreements also concluded with the Gulf Cooperation Council in 2009, while those for a free trade agreement with Korea got underway. A Joint Study for a free trade agreement with India was completed and approved by the New Zealand and Indian governments. On the investment side, negotiations neared completion in 2009 for a Closer Economic Relations Trade Agreement (CER) Investment Protocol with Australia.

The year 2009 also saw New Zealand continue its active participation in negotiations for an Anti-Counterfeiting Trade Agreement (ACTA). The ACTA negotiations began in June 2008 with the aim of concluding by the end of 2010. Other participants are Australia, Canada, the European Union, Japan, Korea, Mexico, Morocco, Singapore, Switzerland, and the United States, together representing over half of global trade. Two negotiating rounds were held in 2009, in Rabat and Seoul. The ACTA seeks to establish better mechanisms, in terms of international cooperation, enforcement practices and a legal framework, to enforce rules against commercially-oriented counterfeiting and piracy. Items commonly targeted by counterfeiters have traditionally been luxury goods and compact discs, but today's operations are targeting all manner of goods. New technologies have facilitated the copying, distribution and sale of pirated movies, music, and software. More recently, many other types of goods are being counterfeited, including medicines, and spare parts for cars, buses, and aircraft. As such, they are increasingly posing a threat to public and consumer health and safety.¹⁵

IV. PARTICIPATION IN WTO DISPUTE SETTLEMENT

In November 2009, a milestone was reached in the WTO with the 400th dispute being brought to the Dispute Settlement Body. This represents an average of 27 disputes per year since establishment of the WTO. Of these disputes approximately half have been settled between the parties without going to litigation. New Zealand has been a complainant in seven cases and involved as a third party in over 20. It has not been a respondent thus far. Currently, New Zealand is the complainant in one dispute involving Australian measures affecting the importation of apples. New Zealand

15 Anti-Counterfeiting Trade Agreement, Fact Sheet <<http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Relationships-and-Agreements/Anti-Counterfeiting/Fact-sheet.php>>.

requested consultations in this case in 2007 and the proceedings continued into 2009, with the second panel hearing being held in Geneva in July. New Zealand's key complaint in the case is that Australia's measures for importation of New Zealand apples are inconsistent with the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), because Australia has failed to ensure that its measures are based on a risk assessment as required by arts 5.1 and 5.2 of the SPS Agreement.

In 2009, New Zealand registered its interest as a third party in three disputes: United States – Tuna;¹⁶ United States – Mandatory Country of Origin Labelling;¹⁷ and European Communities – Poultry.¹⁸ In United States – Tuna, Mexico has complained about United States measures that prevent Mexican tuna from being marketed in the United States using that country's domestic "dolphin-safe" labelling scheme. New Zealand has both a systemic and commercial interest in the case: environmental labelling is a growing phenomenon in international trade and New Zealand expects that this case will therefore be an important one for the WTO system. In United States – Mandatory Country of Origin Labelling, Canada and Mexico requested the establishment of a WTO panel to settle a dispute over United States measures requiring country of origin labelling in respect of certain products, including meat, for sale in America. Canada and Mexico argue that the measures at issue are inconsistent with United States obligations under the General Agreement on Tariffs and Trade, the Technical Barriers to Trade Agreement, and the Agreement on Rules of Origin. Again, New Zealand has a systemic interest in the development of WTO jurisprudence around these kinds of measures that may affect its export markets. Finally, in European Communities – Poultry, the United States requested establishment of a panel to hear its complaint regarding European Community measures requiring pathogen-reduction treatment for imported poultry. New Zealand's involvement in this dispute again reflects its systemic interests, particularly with respect to application of the requirements that food safety measures be supported by sufficient scientific evidence and based on a risk assessment under the SPS Agreement.

V. OTHER WTO DISPUTE SETTLEMENT DECISIONS OF RELEVANCE TO NEW ZEALAND

A milestone was reached in 2009 when it was announced that the United States and European Union had signed a Memorandum of Understanding that will pave the way for settlement of the long-running dispute over the

16 *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* UN DOC WT/DS381 (2010) (Third Party Submission of New Zealand).

17 *United States – Certain Country of Origin Labelling Requirements* UN DOC WT/DS384; WT/DS386 (2010) (Third Party Submission of New Zealand).

18 *European Communities – Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States* WT/DS389/4 (2009) (Communication to the Chairman of the Dispute Settlement Body).

European Union's import ban on beef produced with the aid of growth-promoting hormones. New Zealand has been involved as a third party to this dispute, including both the original complaint by the United States (and Canada) in the late 1990s regarding the European Union import ban, and that by the European Community in 2008 concerning the continued imposition of retaliatory sanctions by the United States. The Memorandum of Understanding does not require the European Union to revoke its import ban, but instead takes the approach of providing for improved market access for high quality United States beef (that is, that raised without the use of growth hormones).¹⁹

Tracey Epps
Ministry of Foreign Affairs and Trade, Wellington

19 "Truce Declared in Beef Hormones Dispute" (2009) 13(2) *Bridges* Rev 9.