

STILL SETTING THE AGENDA

On the assumption that reports of its demise have not been greatly exaggerated, the apparent collapse of the World Trade Organization (WTO) Doha round of talks in Geneva in July 2008 will have immediate and far-reaching consequences for those involved in domestic and international trade. The current financial crisis has created an additional level of complication.

The purpose of this article is to consider the impact of the current environment on the international trade agenda and the consequences for Victorian legal practitioners. Those consequences will include the need for practitioners to understand the architecture of Free Trade Agreements (FTAs) and how they affect the businesses of their clients. This is discussed in more detail below.¹

Who or what killed the Doha round of the WTO?

The reasons for the collapse of the Doha round of the WTO are not simple and will be different depending on your school of geopolitics. According to a speech by WTO Director-General Pascal Lamy, the July talks associated with the Doha round "came unstuck over the precise definition of the parameters of a clause intended to protect the developing countries from import surges that could pose a threat to their agricultural production systems".²

International exporters (led by the US) expressed the view that India, on behalf of other developing nations, caused the collapse by seeking to impose an unreasonable safeguard regime in relation to imports of agricultural products from developed countries.

The alternative view put by India and many aid agencies is that it is entirely reasonable for developing countries to have the type of safeguard regime which had been proposed to protect subsistence farmers against the "dumping" of agricultural products from the developed world.

Ultimately, the disagreement on safeguards reflects the deeper division between developed and developing nations.

Signs of life for the Doha round?

Since July 2008, negotiations have continued with experts appointed by WTO trade ministers working on outstanding issues. The messages from the WTO at Geneva remain optimistic for the Doha round.

However, there are some contrary indicators. First, there is a view that China is reluctant to embrace further liberalisation on a multilateral basis beyond its WTO accession obligation. Second, the political scenario in the US with the expiry of the term of the Bush administration and the uncertainty of the position of its successor administration mitigates against the US being involved in any further negotiations. Third, as of 14 December 2008 there was still no agreement to convene a ministerial meeting before the end of 2008. All said, it seems clear that the process of multilateral global liberalisation convened by the WTO may have stalled for now.

Whither the WTO?

The demise of the WTO Doha round by no means spells the end of the relevance of the WTO. Its existing structures and operations represent an invaluable regime for regulating

international trade. Indeed, in a recent speech, Pascal Lamy was able to compare the problems of the less regulated international financial markets to the relatively sound level of regulation afforded to those trading under the auspices of the WTO.³

At present there are several international trade disputes being resolved before WTO panels. These include actions by the US in relation to the alleged failure of China to afford adequate intellectual property protection.⁴ Closer to home, New Zealand has brought action against Australia, alleging that our quarantine regulation is contrary to the provisions contained in the WTO agreements.⁵

Other aspects of international trade liberalisation

Many commentators have been dismissive of trade agreements other than the multilateral trade agreement at the WTO. They deride the "spaghetti bowl" caused by the number of these "other" agreements (although on one view a spaghetti bowl is better than no bowl at all). The collapse of the Doha round and the global financial crisis will have effects including those discussed below. However, common to all of these effects is the aim to use improvements in international trade to mitigate against the effects of the global financial crisis.

The current levels of focus on bilateral, plurilateral and regional FTAs have increased as countries endeavour to improve their trading positions and reduce barriers to trade. Australia and Chile announced an FTA on 30 July 2008 (the very day on which the Doha talks collapsed).⁶ Australia has now joined with New Zealand to

DESPITE THE COLLAPSE OF THE DOHA ROUND OF TALKS AND THE GLOBAL FINANCIAL CRISIS, COUNTRIES CONTINUE TO PUSH THE INTERNATIONAL TRADE AGENDA AND THE WTO STILL OFFERS AN INVALUABLE STRUCTURE FOR REGULATING INTERNATIONAL TRADE. BY ANDREW HUDSON



enter into an FTA with the ASEAN nations. Furthermore, the daily financial press includes regular articles exhorting the Australian FTA agenda.⁷

Several other countries have proposed FTAs under discussion and it is clear that there will be serious efforts to accelerate those discussions.⁸

History suggests that at the time of global economic downturn there is an increase in the use of trade remedies (such as anti-dumping actions) and "safeguard" measures to protect local producers.⁹ It will be interesting to see how the US responds to the expiry of its current safeguard measures on imports of Chinese textile and apparel products.¹⁰

The financial crisis is increasing the demand and cost for trade financing. The WTO called a meeting of trade financiers on 12 October 2008 and has subsequently established a taskforce to monitor the effect of the financial crisis on

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work.¹¹

The WTO is not alone in those concerns. Brazil has made a US \$20 billion commitment to support its exports and the World Bank has boosted its funding for trade finance by 50 per cent to US \$1.5 billion.¹²

It is likely that future FTAs will address environmental issues by including provisions to allow emission trading across borders. Indeed, many countries now insist that FTAs include provisions on environmental standards.¹³

While those operating in air and sea freight are trying to maximise returns, they are also under close attention from competition regulators. Action taken by the US Department of Justice against those involved in collusive air freight practices has resulted in payments of fines of over \$US 1 billion and jail for executives.¹⁴ There has been

corresponding action taken by regulators in the EU and Australia.¹⁵ Similar attention is now turning to those involved in the sea freight industry.¹⁶

Other multi-lateral organisations are working to facilitate trade. In one example, the World Customs Organisation (WCO) is working through its SAFE framework to facilitate and secure trade.

The protection of intellectual property at the border is receiving increased focus for both commercial and consumer protection reasons. This has a place both with the WTO and the WCO (the SECURE framework). Several countries (including Australia) are considering the Anti-Counterfeiting Trade Agreement to provide additional protections.

FTAs are not all about trade in goods. FTAs will also facilitate additional financial investment by removing current limits on foreign investment and regulation. Most importantly, they will improve the vital trade in services.

The services agenda

As readers may be aware, services represent a huge proportion of domestic GDP. However, they are a relatively smaller percentage of exports. There is room for improvement in trade by adopting measures to assist services exports. Clearly, improvements to the services agenda is an item close to the heart of lawyers and other professionals. Unfortunately, services seem to be the poor relation of international trade.

Services were not a focus of the July discussions associated with the Doha round of the WTO. Furthermore, even in concluded FTAs there are rarely any immediate concessions granted in relation to services. Our federal government is now more aware of the need to focus on services and has appointed a minister with responsibility for services. More recently, the Mortimer Review of Export Policies¹⁷ made very clear statements of the importance of services exports and the need for policies to support them.

The LIV, working with the Law Council of Australia (LCA), continues to press for the improvement of the market for legal services, both here and overseas.

This work has included:

- submissions to the Department of Foreign Affairs and Trade (DFAT) regarding prospective FTAs;
- work with DFAT on the implementation of FTAs to deliver benefits for those providing legal services;
- submissions to government reviews (such as the Mortimer Review);
- membership of the Services Export Advisory Committee convened by the Victorian government;
- membership of the China Working Group convened by the International Legal Services Advisory Council (ILSAC) to provide assistance to DFAT in its negotiations for the prospective China FTAs;
- seminars and publications with Austrade;
- direct negotiations with overseas law societies;
- recently becoming a member of the Australia Services Roundtable;¹⁸ and
- the LIV adopting an "International Strategy".

Conclusion

This article represents only the briefest summary of developments in relation to international trade, both generally and in

relation to legal services. However, it raises some issues for legal practitioners, such as the need:

- to be aware of developments in the FTA agenda, both here and overseas. This will have an impact on the advice provided to business clients. Practitioners can be proactive and advance the interests of their clients by making them aware of benefits which may flow from prospective FTAs and ensuring that the interests of their clients are represented to government;
- to understand the operation of an FTA. This includes an understanding of reductions in tariffs for goods and the operation of rules of origin governing which goods are entitled to preferential treatment. It also includes understanding the increase in the thresholds before approvals for foreign investment are required from the Foreign Investment Review Board (FIRB);
- to establish relationships with firms in overseas markets in which clients will operate to ensure that the clients' interests are represented in those markets. This can be achieved through membership of bodies such as the International Bar Association (IBA) or one of the many international networks of lawyers. The LIV can assist with referrals overseas.

Practitioners also need to assist clients with sourcing other professionals who can provide financial and business advice. An excellent starting point on these commercial issues is through Austrade;¹⁹ and

- to continue to support the agenda being pursued by the LIV and the LCA to improve the market for legal services, both here and overseas. ●

PRACTITIONERS CAN BE PROACTIVE AND ADVANCE THE INTERESTS OF THEIR CLIENTS BY MAKING THEM AWARE OF BENEFITS WHICH MAY FLOW FROM PROSPECTIVE FTAs.

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1. This article represents the situation as at 14 December 2008.
2. For the speech by Director-General Pascal Lamy before the Finance Commission of the French National Assembly on 1 October 2008 see www.wto.org/english/news_e/news_e.htm#news.
3. Note 2 above.
4. US action against China – "Measures Affecting the Protection of Enforcement of Intellectual Property Rights" (WTO Case DS 362). US action against China – "Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio Visual Entertainment Products" (WTO Case DS 363).
5. NZ action against Australia – "Measures Affecting the Importation of Apples from New Zealand" (WTO Case DS 367).
6. More details of Australia's FTA agenda can be found at www.dfat.gov.au/trade/ftas.html.
7. For example, "Crean to press for Malaysia FTA talks", *Australian Financial Review*, 6 October 2008, p6 and

"Australia airs its beef with South Korea", *Australian Financial Review*, 14 October 2008, p4. More details on FTAs being negotiated can be found at www.dfat.gov.au, www.dfat.gov.au/trade and www.dfat.gov.au/trade/ftas.html.

8. For example, Singapore and China have completed a bilateral FTA to go beyond the ASEAN-China FTA. ASEAN and India have completed an Agreement on Trade in Goods and Dispute Resolution. New Zealand and China have also signed a comprehensive FTA which commenced on 1 October 2008.

9. In one recent example, the Philippines sugar industry is pressing to stop a planned reduction in tariff rates. The WTO has also reported an increase in new anti-dumping investigations during the first nine months of 2008 compared to the corresponding period in 2007.

10. By way of letter of 8 October 2008, the US House Ways and Means Committee chair has asked the US International Trade Commission to monitor such imports.

11. See WTO news items of 10 October 2008 and 14 October 2008 at www.wto.org.

12. Sandler, Travis and Rosenberg, PA, "Demand for trade financing drives up price, prompting WTO review", *World Trade Interactive*, vol 15, issue 206, 14 October 2008.

13. See the binding Environment Co-operation Agreement between New Zealand and China associated with the FTA between China and New Zealand: www.chinafta.govt.nz.

14. See www.usdoj.gov.

15. On 11 December 2008 the Federal Court ordered Qantas to pay \$20 million in pecuniary penalties based on an ACCC prosecution alleging collusion in the imposition of fuel surcharges in air cargo. Qantas has already paid penalties in the US and faces similar penalties in the EU. See www.accc.gov.au.

16. The US Federal Maritime Commission has launched an investigation into vessel shipping competition in the US-Australia/NZ trade. See www.fmc.gov.

17. See www.dfat.gov.au/trade/export_review/index.html.

18. See www.servicesaustralia.org.au.

19. See www.austrade.gov.au.