INTERNATIONAL ECONOMIC LAW

I. Introduction

New Zealand continued its engagement in a full trade negotiating agenda in 2012, following exhortations from Ministers following the APEC Leaders' Meeting in Honolulu in November 2011 to conclude negotiations on the Trans-Pacific Partnership (TPP) Agreement as rapidly as possible. Negotiations also continued with India, and the customs union of Russia, Belarus and Kazakhstan. In addition, negotiations commenced on an economic cooperation agreement with the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei). As noted below, it was a quieter year on the multilateral negotiations front, although the judicial arm of the World Trade Organization (WTO) was busy, with several cases of systemic interest to New Zealand being decided.

II. Regional and Bilateral Negotiations

A. Trans-Pacific Partnership

In 2012, the nine TPP negotiating partners (New Zealand, Singapore, Brunei, Chile, Australia, Vietnam, Malaysia, Peru and the United States) held five formal rounds of negotiations as they continued to work towards an agreement creating a regional free trade area. In December, Canada and Mexico joined the negotiations, bringing the total of negotiating partners to eleven. The inclusion of these two new partners is significant for New Zealand. Canada is New Zealand's 19th largest goods trading partner, with total trade worth NZ$1.1 billion in the year ended December 2012. Mexico is New Zealand's largest goods trading partner in Latin America and our 27th largest trading partner overall. Total trade with Mexico was worth NZ$534 million in the year ended December 2012.

Leaders from the (then) nine TPP economies met in the margins of the APEC Leaders' Meeting in October 2012. They welcomed Canada and Mexico as new partners, and released a statement "reaffirming the commitments […] made in Honolulu in November 2011 to concluding a comprehensive, next-generation regional agreement that liberalizes and promotes trade and investment, and addresses new and traditional trade issues and 21st-century challenges."[1] Along with the Leaders' Statement, the Trade Ministers of the negotiating partners released a document which set out the following five features of the agreement:[2]

1 "Trans-Pacific Partnership Leaders Statement" (9 September 2012) <www.ustr.gov>.
2 "Trans-Pacific Partnership Trade Ministers' Report to Leaders" (9 September 2012) <www.ustr.gov>.

1. Provision of comprehensive market access to each other's goods markets and lift restrictions on services, investment, and government procurement;
2. Support for the development of production and supply chains among TPP members, including on such issues as rules of origin, connectivity, services, customs cooperation, and standards;
3. Addressing cross-cutting issues through commitments on regulatory and other non-tariff barriers, competitiveness and business facilitation, small- and medium-sized enterprises, capacity building and cooperation, and development;
4. Addressing new issues that have emerged in global trade, such as developments in information technology, green growth and new technologies;
5. Ensuring that the TPP is a "living agreement" that can evolve as appropriate in response to future developments in trade, technology or other emerging issues and challenges, and through other countries potentially joining in the future.

B. Bilateral and Regional Negotiations

In other negotiating activity, negotiations continued on free trade agreements with Russia, Belarus and Kazakhstan, as well as with India. In addition, two negotiations commenced – for a regional trade agreement, Pacific Agreement on Closer Economic Relations (PACER) Plus; and for an economic cooperation agreement with Chinese Taipei. The latter negotiations were between the New Zealand Commerce and Industry Office in Taipei and the Taipei Economic and Cultural Office in Wellington. PACER Plus negotiations are aimed at concluding a free trade and economic development agreement between New Zealand, Australia and Forum Island Countries and form part of the commitment in the PACER to a wider process of economic integration and trade liberalisation. A key focus of PACER Plus is ensuring that the agreement promotes sustainable economic growth in the Pacific. New Zealand's vision for the Agreement is stated as being to "equip Pacific Island countries better to withstand external shocks, to raise standards of living, to increase jobs and export capacity in the region and to address the significant goods trade imbalance that currently exists between the Pacific and New Zealand".[3]

III. World Trade Organization

A. Doha Development Agenda

Progress on the Doha Development Agenda was limited in 2012, with attention turning later in the year towards the 9th WTO Ministerial Conference scheduled to be held in Bali, Indonesia in December 2013. The importance of focusing on progress in 2013 was highlighted by Director-

3 "Key Pacific Issues – Trade" <www.mfat.govt.nz>.

General Pascal Lamy who, in a December speech, noted the continuing fallout of the economic crisis and emphasised the importance of participants in the multilateral regime remaining vigilant and redoubling "efforts to keep markets open and resist inevitable protectionism pressures".[4]

It has been suggested that a realistic outcome of the Bali Ministerial Conference in 2013 could be a small package of deliverables. Two possible areas for inclusion in any such package are trade facilitation and agriculture.[5] Trade facilitation involves the easing of customs procedures and other border restrictions. On agriculture, there was some movement in late 2012 with new proposals from the G-20 and G-33 groups of countries. The G-20 made two proposals: first, to make it easier to send goods to countries that have import quotas by setting new rules on administration of tariff rate quotas; and second, for the WTO Secretariat to update information on export subsidies, export credits, state trading enterprises, and food aid. Meanwhile, the G-33 made a proposal to address farm trade and food security trade through more flexible rules governing what kind of farm subsidies fall within the so-called "green box" (those subsidies that are exempt from any ceiling or reduction commitments on the grounds that they cause not more than minimal trade distortion). Reports indicate that the G-20 proposals may help Members craft a mini-package on agriculture for agreement at the 2013 Bali Ministerial Conference. However, concerns have been reported regarding the G-33 proposal, including that a move in the direction proposed could counter reforms aimed at moving towards less trade-distorting forms of farm support by allowing payments that distort trade.[6] Thus significant divisions remain to be worked through.

B. Dispute Settlement

The "judicial" function of the WTO continued to be very active in 2012, with a number of important disputes working their way through the system. Of particular interest to New Zealand were three Appellate Body decisions under the Technical Barriers to Trade (TBT) Agreement: *United States – Clove Cigarettes*,[7] *United States – Tuna*,[8] and *United States – Mandatory Country of Origin Labelling*.[9] New Zealand has a strong systemic interest in how the TBT Agreement is interpreted and had participated as a Third Party in two of these disputes (*Tuna* and *Mandatory Country of Origin Labelling*).

4 "Lamy says members' negotiating outlook for 2013 'encouraging'" <www.wto.org>.

5 International Centre for Trade and Sustainable Development "WTO Members Aim for Realistic Doha Deliverables for 2013" (2012) 16 (43) Bridges Weekly Trade Digest.

6 International Centre for Trade and Sustainable Development "WTO members cautiously welcome new farm proposals" (2012) 1 (6) Bridges Africa Review <www.ictsd.org>.

7 *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WTO Doc WT/DS406/AB/R, 4 April 2012.

8 *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* WTO Doc WT/DS381/AB/R, 16 May 2012.

9 *United States – Certain Country of Origin Labelling Requirements* WTO Doc WT/DS384/AB/R, 15 June 2012.

In *US – Clove Cigarettes*, Indonesia challenged a US measure prohibiting cigarettes, and component parts of cigarettes, from containing a flavour, herb or spice that gives a characterizing flavour to the product, except for menthol and tobacco. This meant that menthol and "regular" cigarettes (as manufactured in the US) were exempt from the ban, while clove cigarettes (as manufactured by Indonesia) were caught by the ban.

The *US – Tuna* dispute involved various US measures that, taken together, set out the requirements for when tuna products sold in the US may be labelled as "dolphin-safe". The measures condition eligibility for a "dolphin-safe" label upon certain documentary evidence that varies depending on the area where the tuna is harvested and the type of vessel and fishing method by which it is harvested. However, the measure does not make the use of a "dolphin-safe" label obligatory for the importation or sale of tuna products in the US. Mexico's claim alleged that the US measures had the effect of blocking its imports into the US market, and, in so doing, violated various provisions of the TBT Agreement.

In *US – COOL*, Canada and Mexico challenged US country-of-origin labelling (COOL) rules for livestock and meat exports. These rules require that muscle cut meat[10] from imported and domestic livestock (cattle and hogs) are sold at retail with one of the following labels:

- Label A: "Product of the United States" (for meat derived from animals exclusively born, raised, and slaughtered in the US).
- Label B: "Product of the United States, product of country x" (for meat derived from animals not exclusively born, raised, and slaughtered in the US).
- Label C: "Product of country x, product of the United States" (for meat derived from animals imported into the US for immediate slaughter).
- Label D: "Product of country x" (for 100% imported foreign meat).

In each of these cases, the Appellate Body found that the US had violated Article 2.1 of the TBT Agreement which requires Members to ensure that their measures were not discriminatory. The Appellate Body confirmed that, in order to show a violation of Article 2.1, a complainant must show that: (i) the measure is a technical regulation; (ii) the imported and domestic products are "like"; and (iii) treatment accorded to the like imported products has been "less favourable" than that accorded to like domestic products (or products from another country).

In *US – Tuna*, the Appellate Body affirmed earlier findings that a technical regulation is a document setting out product characteristics or their related process or production methods that are mandatory, and that this includes measures that are *de facto* mandatory. In this case, while there was no requirement to label tuna as dolphin safe, the reality in practice was that consumers were unwilling to purchase tuna without the label.

10 The term "muscle cut" is not defined in the case, but it refers to cuts of meat from muscle, such as steak, roasts, or short ribs.

The Article 2.1 claims in these cases presented the Appellate Body with its first opportunities to interpret "likeness" under the TBT Agreement. In *Clove Cigarettes*, it found that menthol and clove cigarettes were like by looking at whether the products compete in the market place, and looking at the four traditional factors used to determine likeness under the General Agreement on Tariffs and Trade (GATT). Those factors are: i) the products' properties, nature, and quality; ii) the products' end-uses in a given market; iii) consumer tastes and habits; and iv) the tariff classification of the products. In applying these factors, the Appellate Body rejected the Panel's approach to likeness which had focused on the purpose of the regulation. In *US – COOL*, the Appellate Body was comparing beef with beef and, not surprisingly, found that the products were like. In other words, where the only alleged distinction is based on the origin of the products, then those products should be considered like.

As to the "less favourable treatment" element, in each case the Appellate Body applied a two-part test to determine whether the imported products had been treated less favourably. It looked first at whether the measure modifies the competitive conditions to the detriment of one Member's products. In each case, the Appellate Body answered in the affirmative, finding that there had been *de facto* discrimination. In *US – Tuna*, the Appellate Body found that while the US measure was based on fishing methods rather than national origin (which would appear to apply to all countries equally), given that Mexico's fishing practices in the Eastern Tropical Pacific meant they could not comply with the conditions to use the "dolphin-safe" label, they were disadvantaged compared to the domestic US industry.

In *US – COOL*, the Appellate Body found that it was cheaper and easier for US meat packing plants to simply use US livestock (and use Label A) rather than having to comply with the information collecting requirements of the measure, which included segregating livestock. As a consequence, the Appellate Body found the measure modified conditions of competition in the market to the detriment of Canada and Mexico. Similarly the Appellate Body in *Clove Cigarettes* found that "the architecture, revealing structure, operation and application" of the challenged measure "strongly suggest that the detrimental impact on competitive opportunities for clove cigarettes reflects discrimination against the group of like products imported from Indonesia …".[11]

In addition to its findings of discrimination, the Appellate Body also asked whether the detrimental impact stems from a "legitimate regulatory distinction", but failed to find one in any of the three cases. In *US – Tuna*, this was because even though tuna fishing in areas other than the Eastern Tropical Pacific created similar risks for dolphins, the conditions for using the dolphin-safe label in tuna caught in those areas were not as strict. The Appellate

11 *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WTO Doc WT/DS406/AB/R, 4 April 2012, at [224].

Body said that there was no justification for having more stringent labelling conditions for tuna harvested in the Eastern Tropical Pacific. In *US – COOL*, it was because the labels failed to give consumers meaningful information. And while the US argued in *US – Clove Cigarettes* that it prohibited flavoured cigarettes because flavouring made smoking more attractive to youth, the Appellate Body found that menthol cigarettes also masked the tobacco taste, so there was no reason for the distinction in treatment of menthol and flavoured cigarettes. In addition, the Appellate Body rejected US arguments that the high number of menthol smokers in the US meant that prohibiting menthol cigarettes would have a detrimental impact on the US health care system; and the development of a black market. It found that the addictive ingredient at issue was nicotine, not peppermint, and thus there was no reason for the distinction in treatment between the two types of cigarettes.

The other key provision of the TBT Agreement at issue in these three cases was Article 2.2, which requires that measures not be more trade-restrictive than necessary to fulfil a legitimate objective. On this count, the US succeeded in defending the claims brought against it. A finding of violation of Article 2.2 requires satisfaction of three elements, namely that the measure must: i) be a "technical regulation"; ii) fulfill a "legitimate objective"; and iii) not be more trade restrictive than necessary to fulfill such objective taking account of the risks that non-fulfillment would create. Article 2.2 specifies a number of "legitimate objectives". In both the *Tuna* and *COOL* cases, the Appellate Body confirmed that the legitimate objectives set out in Article 2.2 are not exhaustive. In *US – Tuna*, one of the legitimate objectives for the measure was to provide consumer information by ensuring that consumers are "not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins". In *US – COOL*, the Appellate Body found that an objective linked to or related to a legitimate objective listed in Article 2.2 could also arguably be considered legitimate for the purposes of the Article but that it must be considered "justifiable" and supported by relevant public policies or other "social norms". It found the US objective in this case was "to provide as much clear and accurate information as possible to consumers" – this objective was found to be legitimate, even though it was not in the list.

To establish whether a measure is more trade-restrictive than necessary, the Panel must assess: i) the degree of contribution of the measure to the legitimate objective; ii) the trade restrictiveness of the measure; and iii) the nature of the risks and gravity of the consequences arising from non-fulfillment of the measure's objectives. The Appellate Body in *US – COOL* and *US – Tuna* found that the question of whether a measure fulfills the legitimate objective relates to the degree to which the measure contributes to realizing the legitimate objective. This can be discerned from the design, structure, and operation of the technical regulation. However, a measure is not required to reach any minimum threshold in order to fulfill a legitimate objective.

In *US – COOL*, the Appellate Body overturned the Panel finding of a violation, finding that there was insufficient evidence to determine whether a less trade restrictive alternative was reasonably available. The Appellate Body found that the reference in Article 2.2 to "unnecessary obstacles" implies that "some" trade-restrictiveness is allowed and, further, that what is actually prohibited are those restrictions on international trade that "exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective". In *US – Tuna*, the Appellate Body reversed the Panel's finding that the US "dolphin-safe" labelling provisions were more trade restrictive than necessary, noting that the alternative measure proposed by Mexico would not make an equivalent contribution to the legitimate objective. Rather, the alternative measure would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue, because, overall, it would allow more tuna harvested in conditions that adversely affect dolphins to be labelled "dolphin-safe". And in *US – Clove Cigarettes*, the Panel found there was extensive scientific evidence supporting the conclusion that banning clove and other flavoured cigarettes was indeed effective in reducing youth smoking.

In other key dispute settlement developments of interest to New Zealand in 2012, three countries (Ukraine, Honduras and Dominican Republic) requested consultations with Australia in regards to its measures on plain packaging of tobacco. A Panel was established in September to hear Ukraine's complaint. Ukraine has challenged Australia's Tobacco Plain Packaging Act 2011 and its Trade Marks Amendment (Tobacco Plain Packaging) Act 2011, as well as all further implementing regulations, related acts, policies and practices. Ukraine has claimed that Australia's measures are inconsistent with various provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Articles 2.1 and 2.2 of the TBT Agreement, and Article III.4 of the GATT. A large number of countries, including New Zealand, participated in the consultations as third parties, and have reserved their rights as third parties on establishment of the panel. It is likely that a panel will be established to jointly hear and determine the three complaints together.

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