

INTERNATIONAL ECONOMIC LAW

I. INTRODUCTION

Several new trade related agreements entered into force for New Zealand in 2013, including the Protocol on Investment to the New Zealand – Australia Closer Economic Relations Trade Agreement, and the Agreement between New Zealand and the Separate Customs Territory of Taipei, Penghu, Kinmen, and Matsu on Economic Cooperation (ANZTEC). New Zealand also continued its active engagement in Free Trade Agreement negotiations; participating in ongoing negotiations towards the Trans-Pacific Partnership (TPP), PACER Plus, and a New Zealand India Free Trade Agreement; relaunching negotiations with Korea; and starting negotiations towards a Regional Comprehensive Economic Partnership (RCEP).

New Zealand also increased its engagement with WTO dispute settlement, initiating a dispute alongside the United States that challenges Indonesian agricultural restrictions; and reserving its third party rights in a series of tobacco related plain packaging disputes and the compliance proceedings of the *US-Country of Origin Labelling* disputes.

Negotiating activity also increased in Geneva, with conclusion of the Trade Facilitation Agreement at the WTO Bali Ministerial Conference, and New Zealand's efforts to progress its accession to the WTO Plurilateral Government Procurement Agreement. New Zealand is also participating in negotiations outside the WTO towards the Trade in Services Agreement, which builds upon existing WTO rules and market access commitments and may eventually become the basis for a new multilateral agreement at the WTO.

II. REGIONAL AND BILATERAL NEGOTIATIONS

A. New Agreements

The Agreement between New Zealand and the Separate Customs Territory of Taipei, Penghu, Kinmen, and Matsu on Economic Cooperation (ANZTEC) was signed on 10 July 2013,¹ and entered into force on 1 December 2013.² ANZTEC will significantly improve New Zealand market access into Chinese Taipei, with tariffs on 80 per cent of current exports to Chinese Taipei immediately eliminated on entry into force (including almost all New Zealand dairy products, as well as apple,

1 Tim Groser "Minister welcomes NZCIO/TECO signing" (press release, 10 July 2013). The full text of ANZTEC can be found at New Zealand Commerce and Industry Office "What is ANZTEC?" <<http://nzcio.com/node/249/>>.

2 Tim Groser "Minister welcomes ANZTEC entry into force" (press release, 20 November 2013).

cherry and wine exports). Tariffs on 99 per cent of current exports will be eliminated over a further four year period and complete tariff elimination will be achieved within twelve years – delivering an expected tariff savings of at least NZD 75 million.³

The Agreement includes, for the first time in New Zealand trade agreement practice, a chapter on indigenous cooperation drawing on the “unique connections between Māori and the indigenous people of Chinese Taipei”.⁴ It is also a cutting edge agreement in terms of its commitments to liberalise environmental products deemed to support green growth and sustainable development objectives.⁵

The Protocol on Investment to the New Zealand – Australia Closer Economic Relations Trade Agreement entered into force on 1 March 2013.⁶ Considered New Zealand’s “most ambitious investment agreement” to date, the Protocol raises the screening threshold for certain Australian non-government investment in New Zealand business assets to NZD 477 million and for certain New Zealand investments in Australian business assets to AUD 1.0178 billion (both subject to certain conditions).⁷ These thresholds will be updated annually to reflect changes in gross domestic product.

B. Continuing Negotiations

1. Trans Pacific Partnership Negotiations (TPP)

Following the conclusion of consultations between Japan and the individual TPP Members, Japan was welcomed as the twelfth TPP Member in April 2013,⁸ and following a mandatory three-month notification period in the United States, officially joined the negotiations in July. The statement by New Zealand, on behalf of TPP Members, noted in particular “Japan’s commitment to achieving the shared goal of a comprehensive, high-ambition, next-generation agreement as rapidly as possible, consistent with the statements made by TPP Leaders and Trade Ministers on 12 November 2011 in Honolulu”.⁹

The inclusion of Japan is significant for New Zealand. New Zealand does not yet have a free trade agreement with its fourth largest individual trading partner, with whom two-way trade in the year to December 2012

3 Groser, above n 2.

4 Groser, above n 1.

5 Groser, above n 2.

6 New Zealand Ministry of Foreign Affairs and Trade “New Zealand-Australia Closer Economic Relations” <www.mfat.govt.nz>.

7 New Zealand Ministry of Foreign Affairs and Trade “CER Investment Protocol takes effect” (1 March 2013) <www.mfat.govt.nz>.

8 Tim Groser “TPP members welcome Japan as a new member in Trans-Pacific Partnership negotiations” (press release, 21 April 2013).

9 Groser, above n 8.

was valued at NZD 6.2 billion. It has been estimated that Japan's inclusion in TPP negotiations adds nearly USD 6 million to the combined TPP GDP.¹⁰

TPP negotiations continued throughout 2013 with formal rounds in Singapore, Peru, Malaysia and Brunei, as well as a series of discussions amongst Chief Negotiators and Ministers. The December 2013 Ministers' statement emphasised the continued importance attached to the Honolulu goal of "a comprehensive, next-generation regional agreement that liberalizes trade and investment and addresses new and traditional trade issues and 21st-century challenges"¹¹ and noted Ministers had identified potential "landing zones" for most of the remaining textual issues.¹²

2. Regional Comprehensive Economic Partnership (RCEP)

New Zealand participated in negotiations for the RCEP, which were launched in May 2013 amongst the ten members of the Association of Southeast Asian Nations ("ASEAN", made up of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam) and those countries with which ASEAN has already concluded FTAs (Australia, China, India, Japan, Korea and New Zealand).¹³ Negotiations were at the initial stages with the first two rounds held in 2013 in Brunei Darussalam from 9-13 May and Brisbane from 23-27 September. Working groups were established in Goods (with sub-groups on Customs Procedures and Rules of Origin), Services and Investment. Discussions also touched on competition policy, intellectual property, economic and technical cooperation and dispute settlement.¹⁴

Although at the early stages, Japanese Prime Minister Abe has heralded RCEP (along with TPP) as setting the stage for a free trade agreement of the Asia Pacific.¹⁵ Some commentators have remarked on the potential threat of such large regional agreements to the primacy of the WTO.¹⁶ These two agreements are also viewed by some as part of a larger battle between China and the United States for influence in the region with some commentators suggesting that in contrast to the high-ambition and expansive coverage of

10 Steven Joyce "Japan's interest in joining TPP negotiations welcomed" (press release, 16 March 2013).

11 Office of the Press Secretary, The White House "Trans-Pacific Partnership Leaders Statement" (press release, 12 November 2013).

12 Office of the United States Trade Representative "Trans-Pacific Partnership (TPP)" <www.ustr.gov/tpp>.

13 New Zealand Ministry of Foreign Affairs and Trade "Regional Comprehensive Economic Partnership (RCEP)" <www.mfat.govt.nz>.

14 New Zealand Ministry of Foreign Affairs and Trade "Regional Comprehensive Economic Partnership (RCEP)" <www.mfat.govt.nz>.

15 Inside US Trade's World Trade Online "Japanese PM Abe Says TPP, RCEP 'Setting The Stage' For Free Trade Area Of Asia-Pacific" (9 October 2013) <<http://insidetrade.com>>.

16 See Ganeshan Wignaraja, East Asia Forum "Why the RCEP matters for Asia and the world" (15 May 2013) <www.eastasiaforum.org>.

emerging issues such as labour and environment in TPP, RCEP may be more attractive to developing countries with its more flexible approach to trade negotiations.¹⁷

3. Other Negotiations

New Zealand announced resumption of negotiations for a bilateral free trade agreement with Korea¹⁸ and participated in negotiating rounds towards a New Zealand-India Free Trade Agreement (held in July 2013 in Wellington),¹⁹ a Free Trade Agreement with the Russia, Belarus, Kazakhstan Customs Union and the PACER Plus agreement with Pacific Island Forum Countries and Australia (for which the sixth round of negotiations was held in Auckland in November 2013).²⁰

Colombia has indicated its interest in an FTA with New Zealand and the two sides have agreed to conduct a strategic assessment of a comprehensive partnership between the two countries²¹ – the first step towards launching FTA negotiations.

III. WORLD TRADE ORGANIZATION

A. 9th WTO Ministerial Conference

New Zealand participated in the 9th WTO Ministerial Conference, held in Bali from 3-7 December 2013. WTO Director General Robert Azevêdo heralded the conference outcomes as reaffirming Members' commitment to the WTO and to the Doha Development agenda and labelled the decisions as "an important stepping stone" towards the completion of the Doha round.²²

Ministers took a range of decisions on general WTO work and progression of the Doha agenda.²³ Of particular note was the conclusion of negotiations towards a multilateral Agreement on Trade Facilitation (TFA), subject to review by lawyers for accuracy and consistency. The TFA aims to reduce costs and delays for traders by encouraging consistency and predictability in customs procedures and other procedures at the border and increasing cooperation amongst WTO members. The agreement is expected to "increase

17 Parameswaran Ponnudurai, Radio Free Asia "China vs. US in Proxy Trade Battle" (2 May 2013) <www.rfa.org>.

18 Tim Groser "Minister welcomes resumption of trade negotiations with Korea" (press release, 3 December 2013).

19 New Zealand Ministry of Foreign Affairs and Trade "New Zealand – India Free Trade Agreement (FTA)" <www.mfat.govt.nz>.

20 New Zealand Ministry of Foreign Affairs and Trade "Pacific" <www.mfat.govt.nz>.

21 New Zealand Ministry of Foreign Affairs and Trade "Businesslink" (April-May 2013) <www.mfat.govt.nz>.

22 World Trade Organization *Concluding remarks by Mr Roberto Azevedo Director-General*, WT/MIN(13)/47, 7 December 2013.

23 See World Trade Organization "Ninth WTO Ministerial Conference" <<https://mc9.wto.org/>>.

customs efficiency and effective collection of revenue, and help small businesses access new export opportunities through measures like transparency in customs practices, reduction of documentary requirements, and processing of documents before goods arrive.”²⁴ New Zealand actively participated in the negotiation of proposals to establish more specific disciplines on perishable (including agricultural) goods.²⁵

The TFA will be incorporated into the WTO Agreements. Ministers established a Preparatory Committee on Trade Facilitation at Bali charged with, amongst other things, drafting a Protocol of Amendment to insert the TFA into Annex 1A of the WTO Agreement. Ministers directed that the Protocol is to be adopted by the General Council no later than 31 July 2014 and is to enter into force in accordance with art X:3 of the WTO Agreement.²⁶

Ministers also agreed a number of decisions of interest to developing countries, including a decision to establish an interim mechanism to negotiate an agreement (to be adopted by the 11th Ministerial Conference) for the issue of public stockholding for food security purposes. In the meantime, Members agreed to refrain from initiating WTO disputes challenging developing country Members’ compliance with arts 6.3 and 7.2(b) of the Agreement on Agriculture in relation to support provided for traditional staple food crops through public stockholding programmes for food security purposes.²⁷

An understanding was also reached on Tariff Rate Quota (TRQ) Administration for agricultural products.²⁸ TRQs allow a certain quantity of product to enter at a lower tariff rate within the quota, and once that allocation has been filled, a higher rate is applied to any further imports. The understanding clarifies that TRQs are a form of import licensing subject to the Import Licensing Agreement, and establishes additional publication, notification (including in relation to fill rates) and administrative obligations. A mechanism is also established for dealing with TRQ under-fill.

24 “USTR Fact Sheets Lay Out Details On Bali Package Agreements” Inside US Trade World Trade (online ed, 9 December 2013).

25 New Zealand Ministry of Foreign Affairs and Trade “Businesslink” (February-March 2013) <www.mfat.govt.nz>.

26 World Trade Organization *Agreement on Trade Facilitation*, WT/MIN(13)/36, WT/L/911 (Ministerial Decision of 7 December 2013) <http://wto.org/english/thewto_e/minist_e/mc9_e/desci36_e.htm>.

27 World Trade Organization *Public stockholding for food security purposes*, WT/MIN(13)/38, WT/L/913 7 December 2013 (Ministerial Decision) <<http://wto.org>>. See also World Trade Organization *Preferential Rules of Origin for Least Developed Countries*, WT/MIN(13)/42, WT/L/917, 7 December 2013 (Ministerial Decision) <<http://wto.org>> and World Trade Organization *Monitoring Mechanism for Special and Differential Treatment*, WT/MIN(13)/45, WT/L/920, 7 December 2013 (Ministerial Decision) <<http://wto.org>>.

28 World Trade Organization *Tariff Quota Administration*, WT/MIN(13)/39, WT/L/914, 7 December 2013 (Ministerial Decision) <<http://wto.org>>.

B. WTO Negotiations

In addition to the TFA mentioned above, in 2013 New Zealand also actively pursued its bid to accede to the plurilateral WTO Government Procurement Agreement and was involved in negotiations to expand the list of products covered by the WTO Information Technology Agreement.²⁹

C. WTO Dispute Settlement

New Zealand increased its engagement with the WTO Dispute Settlement process in 2013, initiating one dispute and notifying its third party interests in several others.

1. DS 466: Indonesia – Importation of Horticultural Products, Animals and Animal Products

For only the second time in a decade, New Zealand initiated dispute settlement proceedings at the WTO when it requested dispute settlement consultations with Indonesia regarding Indonesian restrictions on a range of animals, animal products and horticultural products on 30 August 2013.³⁰ New Zealand stated that the introduction of these restrictions had “significantly affected New Zealand’s trade interests” and that since the measures’ introductions in 2010, New Zealand had lost an estimated \$145 million worth of trade per year.³¹ New Zealand claimed that the restrictions were inconsistent with Indonesia’s obligations under the GATT 1994, the Import Licensing Agreement and the Agreement on Preshipment Inspection related amongst other things to quantitative restrictions, national treatment, transparency and the administration of import licensing regimes.³² This appears to be the first dispute where claims have been made under the Preshipment Inspection Agreement.

The United States also requested consultations on the same measures,³³ having previously requested consultations and established a Panel earlier in the year in a related dispute regarding earlier versions of the Indonesian measures (to which New Zealand had reserved its third party rights).³⁴ The United States welcomed New Zealand as a co-complainant in the new dispute

29 World Trade Organization “Briefing note: the WTO’s Government Procurement Agreement” <www.wto.org>. See also International Centre for Trade and Sustainable Development “ITA, GPA Processes Aim for Bali Ministerial Outcome” (17 October 2013) <www.ictsd.org>.

30 World Trade Organization “Dispute DS466 Indonesia – Importation of Horticultural Products, Animals and Animal Products” <www.wto.org>.

31 New Zealand Ministry of Foreign Affairs and Trade “Trade law and Free Trade Agreements; New Zealand involvement in World Trade Organisation disputes” <www.mfat.govt.nz>.

32 New Zealand has made the following claims: arts III:4, X:1, X:3(a), XI:1, XIII:2(a), XIII:2(c) and XIII:2(d) of the GATT 1994; art 4.2 of the Agreement on Agriculture; arts 1.3, 3.2, 3.3, 3.5(a), 3.5(b), 3.5(c) and 3.5(k) of the Import Licensing Agreement; and arts 2.1 and 2.15 of the Agreement on Preshipment Inspection.

33 World Trade Organization “Dispute DS465 Indonesia – Importation of Horticultural Products, Animals and Animal Products” <www.wto.org>.

34 World Trade Organization “Dispute DS455 Indonesia – Importation of Horticultural Products, Animals and Animal Products” <www.wto.org>.

and noted its intention to hold joint consultations with New Zealand and Indonesia.³⁵ Canada, the European Union, Thailand and Australia requested to join the consultations as third parties.³⁶

2. Third Party Participation in Tobacco Plain Packaging Disputes

New Zealand remained engaged as a third party in a series of tobacco plain packaging disputes brought against Australia at the WTO;³⁷ requesting to join consultations between Cuba and Australia;³⁸ and reserving its third party rights in disputes brought by Honduras³⁹ and Indonesia⁴⁰ respectively. These cases challenge Australian laws and regulations requiring plain packaging for tobacco products, and are of clear interest to New Zealand given its own stated policies in this regard.⁴¹

3. Third Party Participation in US-COOL Compliance Proceedings

On 25 September 2013, New Zealand reserved its third party rights in the compliance phase of the *US-Country of Origin Labelling* dispute where Canada and Mexico are challenging the WTO consistency of the United States' implementation of the Appellate Body's decision.⁴² A panel was composed on 27 September 2013 to hear the compliance proceedings. Given its strong interest in the interpretation of the Agreement on Technical Barriers to Trade (TBT Agreement) as an export-based economy, New Zealand had also previously reserved its third party in the panel and Appellate Body stages.

The Appellate Body had held that the labelling rules were inconsistent with art 2.1 of the TBT Agreement and accorded less favourable treatment to Canadian and Mexican cattle and hogs than those from the United States.⁴³ In doing so, the Appellate Body affirmed the Panel's finding that

35 Office of the United States Trade Representative "United States Welcomes New Zealand's Decision to Join U.S. Challenge to Indonesia's Import Restrictions on Horticultural Products, Animals and Animal Products" (30 August 2013) <www.ustr.gov>.

36 World Trade Organization "Dispute DS466 Indonesia – Importation of Horticultural Products, Animals and Animal Products" <www.wto.org>.

37 See background in Tracey Epps, "International Economic Law" (2012) 10 NZYIL 220.

38 World Trade Organization "Dispute DS458 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging" <www.wto.org>.

39 World Trade Organization "Dispute DS435 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging" <www.wto.org>.

40 World Trade Organization "Dispute DS467 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging" <www.wto.org>.

41 See New Zealand Ministry of Health "Plain Packaging" <www.health.govt.nz>.

42 World Trade Organization "Dispute DS386 United States – Certain Country of Origin Labelling Requirements" <www.wto.org>; World Trade Organization "Dispute DS384 United States – Certain Country of Origin Labelling (COOL) Requirements" <www.wto.org>.

43 *US-COOL (Canada)* Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, adopted 23 July 2012 and *US-COOL (Mexico)* Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS386/AB/R, adopted 23 July 2012, ("*US-COOL*, Appellate Body Report"), at [496].

the record keeping and other verification requirements disincentivised the use of imported animals. The measure was found to lack even-handedness due to the fact that much of the information collected was not passed on to consumers and the measure contained a number of exceptions.⁴⁴

Canada and Mexico are arguing that the new labelling measure to implement the Appellate Body's ruling, which requires information on where the animals are born, raised and slaughtered, is more discriminatory than the original measure. In response, the United States has stated that its measure ensures consistency across the different labels and ensures that information collected is accurately passed on to consumers.⁴⁵ The panel report on the matter is not expected to be issued until mid-2014.

IV. OTHER SECTORAL FORUMS

Outside the WTO, New Zealand is also participating in negotiations in Geneva towards a new Trade in Services Agreement (TiSA) for which negotiations formally began in early 2013.⁴⁶ Currently negotiated amongst a subset of WTO Members, it aims to build upon existing WTO rules and market access commitments with the intent of attracting broad participation and folding the agreement back into the multilateral negotiations.⁴⁷ This negotiation is of obvious interest to New Zealand given that, as noted recently by the Productivity Commission, the services sector accounts for nearly three quarters of New Zealand's gross domestic product and over half of total exports once services inputs to merchandise exports are included.⁴⁸ Negotiations are reportedly making good progress with market access offers beginning to be exchanged.⁴⁹

New Zealand welcomed the World Wine Trade Group's conclusion of the *Protocol to the 2007 World Wine Trade Group Agreement on Requirements for Wine Labelling, Concerning Alcohol Tolerance, Vintage, Variety and Wine Regions, concluded in March 2013* (Protocol to the WWTG Treaty on Wine Labelling).⁵⁰ New Zealand signed the Protocol on 22 March 2013 and it entered into force for New Zealand on 1 November 2013. According to the

44 *US-COOL*, Appellate Body Report, at [348].

45 International Centre for Trade and Sustainable Development "Disputes Roundup: Plain Packaging Row Reignites; COOL Compliance Panel Established" (26 September 2013) <www.ictsd.org>.

46 New Zealand Ministry of Foreign Affairs and Trade "Trade In Services Agreement" <www.mfat.govt.nz>; New Zealand Ministry of Foreign Affairs and Trade "Businesslink" (February- March 2013) <www.mfat.govt.nz>.

47 New Zealand Ministry of Foreign Affairs and Trade "Businesslink" (April-May 2013) <www.mfat.govt.nz>.

48 New Zealand Productivity Commission *Boosting Productivity in the Services Sector* (May 2014) at 1 available at <www.productivity.govt.nz>.

49 International Centre for Trade and Sustainable Development "Services Talks Advance as TiSA Members Prepare to Exchange Offers" (26 September 2013) <www.ictsd.org>.

50 Tim Groser "World Wine Trade Group conclude Treaty Protocol on Wine Labelling" (press release, 22 March 2013).

Foreign Affairs, Defence and Trade Committee considering the Protocol, it provides substantial simplification of labelling standards for exporters of wine to the United States and, noting that wine is New Zealand's fastest growing primary export, is expected to save exporters millions of dollars per annum in reduced labelling costs.⁵¹

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51 Foreign Affairs, Defence and Trade Committee *International treaty examination of the Protocol to the 2007 World Wine Trade Group agreement on requirements for wine labelling: Concerning alcohol tolerance, vintage, variety and wine regions, Brussels, 22 March 2013* (13 June 2013) at [7].