

INTERNATIONAL ECONOMIC LAW

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1 Introduction

In 2017, the 2016 election of President Trump in the United States continued to reverberate in the international trade law arena. The challenges posed to the rules-based multilateral trading system by his ‘America First’ policy and his preference for a power-based system were met by a renewed energy to negotiate new rules to strengthen the trading law system.¹ However, these efforts – particularly at the global level – have not always been successful. This review gives an overview of New Zealand’s participation in negotiations for new preferential and multilateral agreements as well as in World Trade Organisation (‘WTO’) trade disputes to enforce existing trade agreements in the course of 2017.

2 Preferential Trade Negotiations

The saga of the *Trans-Pacific Partnership Agreement* (‘TPP’)² bookended the year in trade. On 30 January 2017, merely days into the Trump administration, the United States notified New Zealand, as TPP depository, of its intention not to become a party. To the surprise of many, the remaining 11 parties³ renegotiated the agreement, and, on 11 November 2017, reached an agreement on the core elements of a *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (‘CPTPP’).⁴ At the same time, the parties also released an outline of the CPTPP,⁵ including a list of suspended provisions and of four issues that required further negotiations.⁶ The most important of the suspended provisions relate to investor-state dispute settlement (‘ISDS’), which is now significantly curtailed compared to the TPP, as well as to intellectual property standards. The negotiations on the remaining issues concluded on 23 January 2018, and the CPTPP was signed in Santiago, Chile, on 8

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¹ See, for example, the affirmation of support for the multilateral trading system, delivered at the 11th Session of the Ministerial Conference of the WTO, *Joint Ministerial Declaration by Albania; Argentina; Australia; Benin; Canada; Chile; Colombia; Costa Rica; Côte d'Ivoire; Dominican Republic; El Salvador; Guatemala; Hong Kong, China; Iceland; Israel; Kazakhstan; The State of Kuwait; Republic Of Korea; Kyrgyz Republic; Lao People's Democratic Republic; Liberia; Liechtenstein; Mauritania; Mexico; Montenegro; Myanmar; Republic of Moldova; New Zealand; Nigeria; Norway; Pakistan; Panama; Paraguay; Peru; Qatar; Russian Federation; Senegal; Singapore; Switzerland; Chinese Taipei; Thailand; The Former Yugoslav Republic of Macedonia; Turkey; Ukraine; Uruguay and Viet Nam*, WTO Doc WT/MIN(17)/55/Rev.1 (19 December 2017) (Declaration of 11 December 2017).

² Ministry of Foreign Affairs and Trade, *Trans-Pacific Partnership* <<http://www.tpp.mfat.govt.nz/>>.

³ Australia, Brunei-Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, Viet Nam, and New Zealand.

⁴ Ministry of Foreign Affairs and Trade, *Trans-Pacific Partnership Ministerial Statement* (11 November 2017) <<https://www.mfat.govt.nz/assets/FTAs-in-negotiations/TPP/2017.11.10-Ministerial-Statement-FINAL.pdf>>.

⁵ Ministry of Foreign Affairs and Trade, *Annex I – Outline of the TPP 11 Agreement* (11 November 2017) <https://www.mfat.govt.nz/assets/FTAs-in-negotiations/TPP/Annex-I_Outline-of-Agreement.pdf>.

⁶ Ministry of Foreign Affairs and Trade, *Annex II – List of Suspended Provisions* (11 November 2017) <https://www.mfat.govt.nz/assets/FTAs-in-negotiations/TPP/ANNEX-II_List-of-suspended-Provisions.pdf>.

March 2018.⁷ Although New Zealand completed the steps for entry into force of the *TPP* on 11 May 2017,⁸ it has as of the time of writing, not yet ratified the *CPTPP*.

New Zealand's 2017 activities in terms of negotiating preferential trade agreements were however not limited to the *TPP* and its *CPTPP* successor. It also concluded negotiations on the *Pacific Agreement on Closer Economic Relations Plus* ('*PACER-Plus*'),⁹ continued negotiating the *Regional Comprehensive Economic Partnership* ('*RCEP*') as well as the update to its free trade agreement ('*FTA*') with China, and started talks for a trade deal with the Pacific Alliance and with the European Union ('*EU*'). In contrast, nothing happened in the *FTA* negotiations with India,¹⁰ and the negotiations for a *FTA* with the Russia-Belarus-Kazakhstan Customs Union remain suspended following the 2014 Crimea crisis.

PACER-Plus was signed in Nuku'alofa on 14 June 2017, between Australia, New Zealand and eight Pacific Island Forum members.¹¹ The agreement is intended to be more than just a trade agreement, but also includes a development package. However, the two largest Pacific economies, Fiji and Papua New Guinea, are notably absent. The agreement has been criticized for favouring Australia and New Zealand, who are the main beneficiaries of the tariff reductions that will lower revenues for Pacific Island governments. Moreover, there are the traditional concerns about regulatory autonomy and the power of private investors to challenge domestic regulation. At the time of writing, *PACER Plus* has not yet entered into force. When it enters into force, side letters between Australia and New Zealand¹² will govern potential conflicts between *PACER Plus* and the mutual rights and obligations of these parties under the *Australia–New Zealand Closer Economic Relations Trade Agreement* ('*NZCERTA*'),¹³ the *ASEAN–Australia–New Zealand Free Trade Area* ('*AANZFTA*')¹⁴ or the *TPP*.¹⁵

⁷ The text of the *CPTPP* can be found at Ministry of Foreign Affairs and Trade <<https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/cptpp>>. As the agreement was concluded after the cut-off date for the current review, a more detailed analysis of the provisions has not been included.

⁸ Ministry of Foreign Affairs and Trade, *Text of the Trans-Pacific Partnership* (2016) <<https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership/>>.

⁹ *Pacific Agreement on Closer Economic Relations Plus*, signed 14 June 2017 (not yet in force) <<https://www.mfat.govt.nz/assets/Uploads/PACER-Plus-consolidated-legal-text.pdf>>.

¹⁰ Ministry of Foreign Affairs and Trade, *New Zealand – India FTA* <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/india/>>.

¹¹ The eight members are the Cook Islands, Kiribati, Nauru, Niue, Samoa, the Solomon Islands, Tonga and Tuvalu. Vanuatu signed up in September 2017. The Federated States of Micronesia, Palau and the Republic of Marshall Islands have concluded the negotiations, but have not yet signed the agreement, see Ministry of Foreign Affairs and Trade, *Briefing to Foreign Affairs, Defence and Trade Committee* (February 2018) New Zealand Parliament <https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/52SCFD_EVI_75555_299/ministry-of-foreign-affairs-briefing-on-pacer-plus>.

¹² Letter from the Hon Todd McClay to the Hon Keith Pitt MP, 14 June 2017 <<https://www.mfat.govt.nz/assets/FTA-Publications/PACER-Plus/New-Zealand-Australia-Side-Letter-PACER-Plus.pdf>>; Letter from the Hon Keith Pitt MP to the Hon Todd McClay, 14 June 2017 <<https://www.mfat.govt.nz/assets/FTA-Publications/PACER-Plus/Australia-New-Zealand-Side-Letter-PACER-Plus.pdf>>.

¹³ *Australia–New Zealand Closer Economic Relations Trade Agreement*, signed 28 March 1983, [1983] ATS 2 (entered into force 1 January 1983).

¹⁴ *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010).

¹⁵ As the side letters predate the conclusion of the *CPTPP*, there is no reference to the *CPTPP*.

Australia and New Zealand, alongside a few of the other *CPTPP* members, continue to negotiate the *RCEP*. This partnership, between the Association of Southeast Asian Nations ('ASEAN')¹⁶ and the six states that have FTAs with ASEAN,¹⁷ intends to consolidate these FTAs with the goal of establishing a comprehensive free trade area. In 2017, four more negotiation rounds took place, bringing the total to 20.¹⁸ No new chapters were concluded in 2017, but a working group on government procurement and a sub-working group on trade remedies were agreed to in round 18 and met for the first time in round 19. For the first time since 2012, a Leaders' Summit took place in 2017, after which an outline of the *RCEP* was released.¹⁹ The negotiations on the chapters however remain shrouded in mystery, although 2016 draft texts were leaked.²⁰

In addition to *RCEP*, New Zealand and China are also negotiating bilaterally on an upgrade to their existing FTA that entered into force in 2008. Three negotiation rounds took place in 2017, with progress being reported on trade facilitation, technical barriers to trade, and competition policy.²¹ No specific timeframe is set for the conclusion of these upgrade negotiations, although the goal is to achieve \$30 billion of bilateral trade by 2020.²²

Continuing the focus on the Pacific, but venturing outside of the Asia-Pacific region, was a call for public submissions and a first round of negotiations for an FTA with the Pacific Alliance, which comprises Columbia, Mexico, Chile and Peru.²³ The goal is to conclude an agreement in 2018.²⁴ While this is an ambitious timeframe, the negotiations aim to reduce tariffs on imports which is much more contained than other modern trade agreements.

In 2017, New Zealand also ventured outside of the Pacific in its trade negotiations when early forays were made for an FTA between the EU and New Zealand. New Zealand is one of only six WTO Members who do not have preferential access to European markets,²⁵ despite the EU being one of New Zealand's largest trading partners. Scoping discussions for this FTA were completed in March 2017²⁶ with discussions dealing with issues such as animal

¹⁶ The ASEAN members are Brunei-Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

¹⁷ These FTA parties are Australia, China, India, Japan, Korea and New Zealand.

¹⁸ Ministry of Foreign Affairs and Trade, *Regional Comprehensive Economic Partnership negotiating rounds* <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/rcep/regional-comprehensive-economic-partnership-negotiating-rounds/>>.

¹⁹ Association of Southeast Asian Nations, *Joint Leaders' Statement on the Negotiations for the Regional Comprehensive Economic Partnership (RCEP)* (November 2017) <http://asean.org/storage/2017/11/RCEP-Summit_Leaders-Joint-Statement-FINAL1.pdf>.

²⁰ Bilaterals.org, *RCEP Leaks* <<https://www.bilaterals.org/rcep-leaks>>.

²¹ For mention of the first rounds in April and July 2017, see Ministry of Foreign Affairs and Trade, *NZ-China FTA Upgrade* <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-china-free-trade-agreement/>>. A third 2017 round is reported in Chinese press, see Zhang Hongpei, 'China, New Zealand set to upgrade FTA', *Global Times* (online), 4 December 2017 <<http://www.globaltimes.cn/content/1078666.shtml>>.

²² Bill English, 'China FTA upgrade talks to begin next month' (Press Release, 28 March 2017) <<https://www.beehive.govt.nz/release/china-fta-upgrade-talks-begin-next-month>>.

²³ The latter three are also part of CPTPP.

²⁴ Ministry of Foreign Affairs and Trade, *Pacific Alliance FTA* <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/pacific-alliance-fta/>>.

²⁵ European Commission, *Countries and Regions – New Zealand* (16 April 2018) <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/new-zealand/>>.

²⁶ Ministry of Foreign Affairs and Trade, *Outline of ambition and scope of future negotiations* (May 2017) <<https://www.mfat.govt.nz/assets/FTA-Publications/EU-FTA/EU-NZ-FTA-Scoping-Summary-and-Q-A-May-2017.pdf>>.

welfare, consumer protection, and energy policy. Agriculture and geographical indications are expected to be the most sensitive issues for the EU in these negotiations.

At the time of writing, formal negotiations have not yet started, but are awaiting the European Council's approval of the European Commission's proposal of September 2017,²⁷ which the European Parliament approved in October 2017.²⁸ The Council's approval is expected for the first half of 2018.²⁹ The Ministry of Foreign Affairs and Trade sets out a timeframe of two to three years for these negotiations,³⁰ although the European Commission has a more ambitious target of the end of 2019.³¹

Any agreement reached is said to only cover matters within the EU's exclusive competences. However, this is incompatible with statements that the FTA will include an ISDS mechanism, which was found not to be an area of exclusive competence in Opinion 2/15 of the European Court of Justice.³² Restricting the agreement to the EU's exclusive competences means that the domestic legislatures of the EU member states, and relevant regional parliaments where competences have been devolved, will not need to ratify any FTA that results from these negotiations. This avoids issues such as when the Parliament of Belgium's Walloon Region refused to ratify the *Comprehensive Economic and Trade Agreement* ('CETA') between the EU and Canada.³³

3 World Trade

The WTO is undeniably the most important international organisation when it comes to the negotiation and enforcement of the rules-based international trading system. In 2017, New Zealand was involved in both aspects of the WTO's work.

²⁷ European Commission, *Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with New Zealand*, COM(2017) 469 final (13 September 2017) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A469%3AFIN>>.

²⁸ European Parliament, *Resolution of 26 October 2017 containing Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with New Zealand*, 2017/2193(INI) (26 October 2017) <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0420>>.

²⁹ Ministry of Foreign Affairs and Trade, *Europe and UK Trade Issues – Update for NZ exporters* (January 2018) <<https://www.mfat.govt.nz/assets/Uploads/Message-for-exporters.pdf>>.

³⁰ Ministry of Foreign Affairs and Trade, *New Zealand-European Union free trade agreement* <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/eu-fta/>>.

³¹ European Parliament, *International Agreements in Progress: EU-New Zealand free trade agreement - All set for the launch of negotiations*, European Parliament Think Thank (11 October 2017) <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2017\)608755](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)608755)>.

³² *Opinion 2/15 of the Court* (Court of Justice of the European Union, 16 May 2017).

³³ *Comprehensive and Economic Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part*, signed 30 October 2016 (partially and provisionally entered into force 21 September 2017) [2017] OJ L 11/23. Belgium has requested the Court of Justice of the European Union for an Opinion on the compatibility of CETA with the European Treaties, in particular in relation to the creation of an Investment Court System, see Government of Belgium, *CETA Belgian Request for an Opinion from the European Court of Justice* (9 September 2017) <https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf>. For background on Wallonia's refusal, Jennifer Rankin 'Belgian politicians drop opposition to EU-Canada trade deal', *The Guardian* (online), 27 October 2016 <<https://www.theguardian.com/world/2016/oct/27/belgium-reaches-deal-with-wallonia-over-eu-canada-trade-agreement>>.

3.1 *New Zealand and the WTO negotiations*

The main 2017 event in the World Trade Organization was the 11th Ministerial Conference, which took place in Buenos Aires in December. The Ministerial Conference is the highest official body of the WTO that brings together ministerial representatives from all members.³⁴ Although no new substantive agreements were concluded, the Conference resulted in four formal decisions, two of which dealt with issues described by the Hon David Parker in his opening speech as important to New Zealand.³⁵

A first decision relates to fisheries subsidies;³⁶ WTO Members decided on a work programme towards reaching an agreement by the next Ministerial Conference in 2019. This agreement would remove fisheries subsidies that lead to overfishing as well as subsidies that contribute to illegal, unreported and unregulated fishing. In addition, the Members agreed to improve transparency on fisheries subsidies by re-committing to the implementation of notification obligations under the *Subsidies and Countervailing Measures Agreement*.³⁷ Basing itself on the precedent of fisheries subsidies, New Zealand also launched an initiative to outlaw fossil fuel subsidies, which in 2015 amounted to USD245 billion globally.³⁸ This initiative resulted in a Ministerial Statement, supported by 11 other WTO Members, to start discussions on the reform of fossil fuel subsidies.³⁹

A second Ministerial Decision of interest to New Zealand relates to e-commerce. Again, the parties did not reach a substantive agreement but agreed not to impose duties on electronic transmissions until the next Ministerial Conference.⁴⁰ New Zealand also signed up to a statement proposing exploratory work for a WTO agreement on trade related aspects of electronic commerce.⁴¹

No progress was made in negotiations on disciplines on domestic services regulation, although New Zealand reaffirmed its commitment to such negotiations under Article VI:4 of the *General Agreement on Trade in Services* ('GATS').⁴² New Zealand also joined a statement calling for 'structured discussions with the aim of developing a multilateral framework on investment facilitation', which would aim to reduce administrative barriers to investment, but would exclude issues such as market access, investment protection, and

³⁴ *Marrakech Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) art IV:1.

³⁵ *Statement by Hon David Parker, Minister for Trade and Export Growth* (11 December 2017) World Trade Organization <https://www.wto.org/english/thewto_e/minist_e/mc11_e/webcasting_plenary_e.htm#nzl>.

³⁶ *Fisheries Subsidies*, WTO Doc WT/MIN(17)/64 WT/L/1031 (18 December 2017) (Ministerial Decision of 13 December 2017) [1].

³⁷ *Ibid* [2].

³⁸ Ministry of Foreign Affairs and Trade, *Fossil Fuel Subsidies Reform* <<https://www.mfat.govt.nz/en/environment/clean-energy-and-fossil-fuels/>>

³⁹ *Fossil Fuel Subsidies Reform*, WTO Doc WT/MIN(17)/54, (12 December 2017) (Ministerial Statement of 11 December 2017).

⁴⁰ *Work Programme on Electronic Commerce*, WTO Doc WT/MIN(17)/65 WT/L/1032 (18 December 2017) (Ministerial Decision of 13 December 2017).

⁴¹ *Joint Statement on Electronic Commerce*, WTO Doc WT/MIN(17)/60 (13 December 2017).

⁴² *General Agreement on Trade in Services*, adopted 15 April 1994, 1869 UNTS 183 (entered into force 1 January 1995) ('GATS'); *Joint Ministerial Statement on Services Domestic Regulation*, WTO Doc WT/MIN(17)/61 (13 December 2017).

ISDS.⁴³ As part of its efforts to gain public support for trade agreements,⁴⁴ New Zealand also supported the *Buenos Aires Declaration on Women and Trade*⁴⁵ which endorses initiatives to increase women's participation in trade.

Importantly, and of particular interest to New Zealand, no agreement was reached on agriculture, for which New Zealand and other members of the Cairns Group had called prior to the conference.⁴⁶

2017 also marked the entry into force of the *Agreement on Trade Facilitation*,⁴⁷ a new multilateral trade agreement under the WTO umbrella, after it met the ratification threshold of two-thirds of WTO members. The Agreement had been agreed to at the 2013 Bali Ministerial Conference, and New Zealand had ratified in 2015. With the entry into force on 22 February 2017, New Zealand exporters can now reap the benefits of the agreement's standardized and simplified customs procedures that aim to reduce the costs of importing and exporting, and to speed up the process.

In addition to the negotiations for multilateral agreements, a few negotiations at the WTO are for plurilateral agreements. The latter agreements do not involve all WTO members, although can become multilateralised when more members sign up. However, in 2017, both negotiations for plurilateral agreements that New Zealand is involved in reached a standstill.

A first proposed plurilateral agreement is for an *Environmental Goods Agreement*, which would reduce barriers to trade, such as tariffs and local content requirements, in 'environmental goods', ie goods that contribute to environmental protection, such as solar panels and recycling machinery. However, negotiations came to a halt in 2016 when parties could not agree on a list of products that would benefit from the elimination of tariffs because of their environmental nature. No new initiatives were taken in 2017 to revive the negotiations.

A second plurilateral agreement under negotiation is the *Trade in Services Agreement* ('TiSA'). This agreement is intended to further liberalize trade in services between the 23 participating WTO members, by expanding on the *GATS*. Between 2013 and 2016, 21 negotiating rounds took place, but these have come to a halt with the incoming Trump administration. It is unclear whether the United States will continue with these negotiations or whether the other states will continue if the United States drops out.⁴⁸

⁴³ *Joint Ministerial Statement on Investment Facilitation For Development*, WTO Doc WT/MIN(17)/59 (13 December 2017).

⁴⁴ As mentioned by the Hon David Parker in his speech, above n 35.

⁴⁵ *Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017* World Trade Organisation <https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf>

⁴⁶ *The Cairns Group's Objectives for MC11 and Beyond*, WTO Doc JOB/AG/91 (19 May 2017) (Communication by the Cairns Group).

⁴⁷ *Protocol Amending The Marrakesh Agreement Establishing the World Trade Organization*, WTO Doc WT/L/940 (28 November 2014) (Decision of 27 November 2014) Annex.

⁴⁸ *Answer given by Ms Malmström on behalf of the Commission* (10 November 2017) European Parliament <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-006013&language=EN>>.

3.2 *New Zealand and WTO disputes*

In 2017, New Zealand requested to join as a third-party in the United States' request for consultations with Canada about measures governing the sale of wine in grocery stores in British Columbia which are alleged to breach Article III:4 of the *General Agreement on Tariffs and Trade* ('GATT').⁴⁹

New Zealand was also still involved in a number of ongoing cases, including one as the complainant. As discussed in last year's review, in late 2016 New Zealand was successful at the Panel level in its claims that Indonesian import restrictions on beef were inconsistent with WTO law. This was however not the end of this dispute. On 17 February 2017, Indonesia notified the WTO's Dispute Settlement Body ('DSB') of its decision to appeal. Workload issues⁵⁰ meant that the Appellate Body only released its report on 9 November 2017,⁵¹ but it ultimately upheld the Panel's findings that Indonesia's measures were inconsistent with its WTO obligations.⁵² On 22 November 2017, the DSB adopted the report, together with the Panel Report.⁵³ The report in another case involving Indonesia, and New Zealand as a third party, *Indonesia — Chicken Meat and Products*, was on the agenda for the same DSB meeting. In this case, the Panel found that Indonesia's import regime, which excluded certain chicken products, amounted to a legal ban of these products and was therefore inconsistent with Indonesia's obligations under Article XI *GATT*.⁵⁴ Other measures were found to be inconsistent with the national treatment obligation of Article III:4 *GATT*. None of the inconsistent measures were found to be justified under Article XX *GATT*. In both cases, Indonesia signalled its intention to comply with the recommendations, but requested a reasonable period of time to do so. It then cited the WTO's Ministerial Conference and the WTO's year-end closure as reasons why the parties may need more than the prescribed 45

⁴⁹ *General Agreement on Tariffs and Trade 1994*, adopted 15 April 1994, 1867 UNTS 187 (entered into force 1 January 1995); *Canada — Measures Governing the Sale of Wine in Grocery Stores — Request to Join Consultations*, WTO Doc WT/DS520/2 (30 January 2017) (Communication from New Zealand). This request was accepted by Canada, *Canada — Measures Governing the Sale of Wine in Grocery Stores — Acceptance by Canada of the Requests to Join Consultations*, WTO Doc WT/DS520/6 (14 February 2017).

⁵⁰ One reason for the workload issues at the Appellate Body level is the ongoing impasse caused by the United States' refusal to support new appointments to the Appellate Body, which has increased the vacancies on the Appellate Body and concomitantly increased the workload for the remaining members. See Rosalind Mathieson, 'U.S. Block of WTO Appeals Body Compromises System, Director Says', *Bloomberg* (online), 9 November 2017 <<https://www.bloomberg.com/news/articles/2017-11-08/u-s-block-of-wto-appeals-body-compromises-system-azevedo-says>>. Within the Dispute Settlement Body, New Zealand's has expressed its 'grave concern' at the impasse, *Minutes of the Meeting Held in the Centre William Rappard on 31 August 2017*, WTO Doc WT/DSB/M/400 (31 October 2017) [5.16].

⁵¹ Rather than within the 90 days prescribed by Article 17:5 of the Dispute Settlement Understanding, *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, WTO Doc WT/DS477/12; WT/DS478/12 (13 April 2017) (Communication from the Appellate Body).

⁵² Appellate Body Report, *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, WTO Doc WT/DS477/AB/R; WT/DS478/AB/R, AB-2017-2 (9 November 2017).

⁵³ *Indonesia — Importation of Horticultural Products, Animals and Animal Products — Appellate Body Reports and Panel Reports*, WTO Doc WT/DS477/15; WT/DS478/15 (22 November 2017) (Action by the Dispute Settlement Body).

⁵⁴ Panel Report, *Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products*, WTO Doc WT/DS484/R (17 October 2017).

days from the date of adoption of the report to mutually agree this reasonable period of time.⁵⁵ As a result, neither of the cases were concluded by the end of 2017.

Delays at the Panel and the Appellate Body affected other cases in which New Zealand was involved as a third-party. A first was *Korea — Radionuclides*. The case involved a challenge by Japan against Korea's import ban and additional testing and certification requirements for certain Japanese food products, following the Fukushima nuclear accident. During the 2016 third party hearings in this case, New Zealand had made oral statements as to whether the non-discrimination analysis should be less demanding for provisional measures under Article 5.7 *SPS Agreement* and as to the transparency issues raised by this case. After multiple delays in 2017,⁵⁶ a panel report was finally circulated in early 2018⁵⁷ and subsequently appealed by Korea.⁵⁸

A second case with significant delays is *Australia — Plain Packaging*. Although the Panel promised its report in the third quarter of 2017,⁵⁹ no report has yet been released as of the time of writing of this review. Nevertheless, in May 2017, Bloomberg reported, based on anonymous sources, that the Panel had decided in favour of Australia.⁶⁰ At the same time, the New Zealand government publicly stated its confidence in an Australian win⁶¹ and introduced its own plain packaging regime that has since entered into force on 14 March 2018.⁶²

Also still on-going is *US — Tuna II*, in which Mexico has challenged certain measures regarding eco-labelling of dolphin-safe tuna products. New Zealand made its first

⁵⁵ *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, WTO Doc WT/DS477/16; WT/DS478/16 (15 December 2017) (Communication from Indonesia concerning Article 21.3(B) of the DSU); *Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products*, WTO Doc WT/DS484/13 (15 December 2017) (Communication from Indonesia concerning Article 21.3(B) of the DSU). At the time of writing of this review, Indonesia and Brazil have set an expiration date for the reasonable period of time in their dispute, see *Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products — Agreement under article 21.3(b) of the DSU*, WTO Doc WT/DS484/16 (15 March 2018) (Communication from Brazil and Indonesia). No such agreement has yet been reached between Indonesia, New Zealand and its co-complainant the United States.

⁵⁶ *Korea — Import Bans, and Testing and Certification Requirements For Radionuclides*, WTO Doc WT/DS495/6 (29 May 2017) (Communication from the Panel); *Korea — Import Bans, and Testing and Certification Requirements For Radionuclides*, WTO Doc WT/DS495/7 (28 September 2017) (Communication from the Panel).

⁵⁷ Panel Report, *Korea — Import Bans, and Testing and Certification Requirements For Radionuclides*, WTO Doc WT/DS495/R (22 February 2018, unadopted).

⁵⁸ *Korea — Import Bans, and Testing and Certification Requirements For Radionuclides*, WTO Doc WT/DS495/8 (9 April 2018) (Notification of Appeal by Korea). As this is a 2018 case, its discussion will be left to next year's review.

⁵⁹ *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS458/21, WT/DS467/22 (21 September 2017) (Communication from the Chairperson of the Panel).

⁶⁰ Bryce Baschuk, 'Tobacco Logo Ban Said to Get WTO Backing in Landmark Case', *Bloomberg* (online), 4 May 2017 <<https://www.bloomberg.com/news/articles/2017-05-04/wto-said-to-uphold-australia-s-ban-on-cigarette-logos>>.

⁶¹ New Zealand Government, 'NZ confident of plain packaging WTO case' (Release, 7 May 2017) <<https://www.beehive.govt.nz/release/nz-confident-plain-packaging-wto-case>>.

⁶² Smoke-free Environments Act 1990 s 31A, as introduced by the Smoke-free Environments (Tobacco Standardised Packaging) Amendment Act 2016 and further elaborated by the Smoke-free Environments Regulations 2017. These regulations entered into force on 14 March 2018, subject to transition provisions that will expire on 6 June 2018.

submissions in this case before the panel in 2010,⁶³ and had reserved its third-party rights in the second round of compliance proceedings, lodged by the United States and Mexico to consider whether the United States' 2016 measures complied with the *TBT Agreement* and the *GATT 1994*.⁶⁴ A compliance panel report, affirming compliance, was circulated on 26 October 2017.⁶⁵ It has since been appealed by Mexico.⁶⁶

4 Conclusion

In 2017, New Zealand continued to work on the elaboration of the rules-based trading system as well as to avail itself of the mechanisms in place to ensure compliance. Both aspects of the rules-based system – the rules and the compliance mechanisms – are considered important for export-oriented, but small, economies such as New Zealand.

The ongoing negotiations can be seen as a reaction to the pressures that the rules-based system is under, particularly those coming from the Trump administration in the United States. However, we also see an awareness of the issues that have most raised populist ire, such as regulatory autonomy issues and – related to this – the powers of private investors to challenge public measures under ISDS mechanisms.

There is a significant overlap between the parties involved in the different negotiations, and these overlaps may need to be handled carefully and undoubtedly will increase the complexity of international trade law, as traders and states will have to assess carefully the scope of their rights and obligations under the different treaties.

⁶³ Ministry of Foreign Affairs and Trade, *Current WTO Disputes* <<https://www.mfat.govt.nz/en/trade/trade-law-and-dispute-settlement/current-disputes/>>.

⁶⁴ New Zealand had not reserved its rights in relation to arbitration proceedings under Article 22:6 DSU to determine the appropriate level of remedies Mexico was entitled to. Therefore, this has not been included in this overview.

⁶⁵ Panel Reports, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to Article 21.5 of the DSU by the United States — Second Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/RW/USA, WT/DS381/RW2 (26 October 2017, unadopted).

⁶⁶ *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to Article 21.5 of the DSU by the United States — Second Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/45 (1 December 2017) (Notification of Appeal by Mexico).