

INCORPORATING CLIMATE CHANGE IN FREE TRADE AGREEMENTS: PROSPECTS FOR AN EU/UK-NZ FTA

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A dissertation submitted in partial fulfilment of the requirements of the degree of
Bachelor of Laws (Honours) at the University of Otago, Dunedin, New Zealand – Te
Whare Wānanga o Ōtākou.

October 2021

ACKNOWLEDGEMENTS

I am proud of this dissertation, but I could not have completed it without a village of support.

First, I would like to thank Tracey Epps. Your supervision this year has been superb. I appreciated your endless support that kept this dissertation practical and (hopefully) free of passive sentences.

Second, to my flatmates Laura and Erin. Thank you both for putting up with me, grounding me, and keeping me sane.

Third, to my friends, thank for reminding me about what is important. In particular thank you Claire and Selena, I appreciated your kindness, humour, and willingness to read my full dissertation draft.

Fourth, thank you to Maria Hook, and to all those people who led me into the field of international law. I am excited for the adventure to come.

Finally, to Mum, Dad, and Jono. I love you and I am grateful for everything.

ABBREVIATION LIST

ACCTS: Agreement on Climate Change, Trade and Sustainability

ANZTEC: Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Cooperation

ASCM: Agreement on Subsidies and Countervailing Measures

CAFTA: Central America Free Trade Agreement

CETA: Canada European Union Trade Agreement

CFD: Climate Related Financial Disclosure

CITES: The Convention on International Trade in Endangered Species of Wild Fauna and Flora

CORSIA: Carbon Offsetting and Reduction Scheme for International Aviation

CPTPP: The Comprehensive and Progressive Agreement for Trans-Pacific Partnership

EU/UK-NZ FTA: European Union/United Kingdom-New Zealand Free Trade Agreement

EU/UK-Japan FTA: European Union-Japan FTA and United Kingdom-Japan FTA

FTA: Free Trade Agreement

GATT: General Agreement on Trade and Tariffs

GHG: Greenhouse Gas

IPCC: Intergovernmental Panel on Climate Change

MARPOL: International Convention for the Prevention of Pollution from Ships

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MEA: Multilateral Environmental Agreement

MERCOSUR: Common Market of the South

NAALC: North American Agreement on Labor Cooperation

NAFTA: North American Free Trade Agreement

OECD: Organisation for Economic Co-operation and Development

TBT: Technical Barriers to Trade

TCFD: Taskforce on Climate Related Financial Disclosures

UMSCA: United States–Mexico–Canada Agreement

UNCLOS: United Nations Convention on the Law of the Sea

UNFCCC: United Nations Framework Convention on Climate Change

VCLT: The Vienna Convention on the Law of Treaties

WTO: World Trade Organisation

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CHAPTER ONE: INTRODUCTION

New Zealand is a trading nation. From early Māori traders,¹ to a state with a 3.5-billion-dollar trade surplus,² New Zealand has relied on international trade for its economic prosperity. New Zealand was one of the 23 founding members of the General Agreement on Trade and Tariffs (GATT) in 1947,³ and has since supported the World Trade Organisation's (WTO) creation and trade rules, having a longstanding permanent mission in Geneva.⁴ But New Zealand's support of an open, liberalised trade system is not uncontentious. The protests around the Trans Pacific Partnership Agreement (TPPA) highlighted a public perception that the international trade system is too elite, too powerful and too secretive.⁵ In response, the New Zealand government launched the Trade for All consultations, whose final report envisaged an international trade policy that benefits all New Zealanders.⁶ The report recommended a new approach to trade where social, economic and environmental objectives become the triple bottom line for trade policy.⁷ The press around the European Union/United Kingdom- New Zealand Free Trade Agreement (EU/UK-NZ FTA) negotiations highlight this new approach to international trade. United Kingdom (UK) has marketed Brexit to New Zealand (NZ) as an opportunity to rekindle old ties and create a world leading, socially conscious, NZ-UK Free Trade Agreement (FTA).⁸ The European Union-New Zealand (EU-NZ) FTA negotiation objectives similarly focused on a deal that does more than just lower tariffs and improve market access for consumers.⁹

¹ Ministry for Culture and Heritage "Māori explore the world" (19 February 2019) New Zealand History www.nzhistory.govt.nz/.

² Statistics New Zealand "Goods and services trade by country: Year ended March 2020" (2 June 2020) www.stats.govt.nz/.

³ The original General Agreement of Tariffs and Trade (1947), the predecessor to the WTO.

⁴ Ministry of Foreign Affairs and Trade New Zealand "Permanent Mission to the World Trade Organisation Geneva" www.mfat.govt.nz/.

⁵ Matthew Theunissen and Teulia Fuatai "Thousands protest TPPA in downtown Auckland" www.nzherald.co.nz/ (29 March 2014); It's Our Future press release "Hamilton TPPA Rally demands referendum" (16 November 2015) www.scoop.co.nz/.

⁶ *Report of the Trade for All Advisory Board* (Trade for All Advisory Board New Zealand, 978-0-473-50649-0, November 2019), at 4.

⁷ At 10.

⁸ Yvette McCullough "NZ begins free trade talks for 'comprehensive' deal with UK" (17 June 2020) Radio New Zealand www.rnz.co.nz/.

⁹ *EU-NZ Free Trade Agreement Summary of negotiation objectives* (Ministry of Foreign Affairs and Trade); *Negotiating directives for a Free Trade Agreement with New Zealand* (Council of the European Union, 7661/18 EU Restricted, 8 May 2018).

In this new approach to trade, the EU/UK-NZ FTA Parties have drawn public attention to what trade can do for sustainable development. In particular, the Parties highlighting the inclusion of climate change in their FTA negotiation agenda.¹⁰ This attention towards trade and climate change could not come any sooner. Transport emissions from aviation and shipping are famously not included in the Paris Agreement,¹¹ and the latest Intergovernmental Panel on Climate Change (IPCC) report illustrates the need for urgency in states' actions to avoid the worst effects of climate change.¹² However, the press releases on using FTAs for climate action do not suggest what a climate conscious trade agreement would *actually* look like.¹³ This lack of detail around the EU/UK-NZ FTA Parties' climate agenda supports the view that the international trade system is inherently unsustainable. International trade creates complicated, high carbon transactional structures like those seen in the New Zealand dairy industry. The industry only exporting high-grade lactose and importing in low-grade lactose from abroad.¹⁴ But on the flip side, this international trade system is efficient¹⁵ and importantly, can give countries better access to climate-positive goods and services. An Organisation for Economic Co-operation and Development (OECD) report that shows no clear positive relationship around free trade and improved environmental quality¹⁶ adds to the uncertainty around international trade's climate scorecard.¹⁷ Therefore, there are questions about whether the promise of a climate-concerned EU/UK-NZ FTA will be simply rhetoric or reality.

¹⁰ Yvette McCullough, above n 8; Ministry of Foreign Affairs and Trade "EU-NZ Free Trade Agreement" www.mfat.govt.nz/.

¹¹ Although they are contained in the International Convention for the Prevention of Pollution from Ships (MARPOL) and in the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA).

¹² United Nations "Secretary-General Calls Latest IPCC Climate Report 'Code Red for Humanity', Stressing 'Irrefutable' Evidence of Human Influence" (press release, 9 August 2021)

¹³ Yvette McCullough, above n 8 <https://www.rnz.co.nz/news/political/419218/nz-begins-free-trade-talks-for-comprehensive-deal-with-uk>; David Parker "New Zealand and UK launch free trade talks" (press release, 17 June 2020); Jakob Hanke Vela "EU-New Zealand chart course toward green trade deals" (1 November 2020) www.politico.eu/.

¹⁴ Baz Macdonald "NZ has so many cows. Why do we import millions of tonnes of dairy?" www.renews.co.nz/.

¹⁵ New Zealand able to specialise in one product or service and trade it for a product or service that they are not specialised in.

¹⁶ Looking specifically Sulphur Dioxide, PM 2.5 and Nitrogen Oxide emissions from trade in Inmaculada Martinez-Zarzoso *Assessing the Effectiveness of Environmental Provisions in Regional Trade Agreements* (OECD Publishing, OECD Trade and Environment Working Papers 2018/02, 2018).

¹⁷ At 7.

This dissertation argues that a climate conscious EU/UK-NZ FTA is possible. International trade can incorporate climate change concerns, and states should use FTAs as a tool to act on climate change. Therefore, an EU/UK-NZ FTA that incorporates climate-related concerns could be a model agreement for other states to replicate.

This dissertation proves this argument through five chapters. Chapter Two shows that trade law is not only concerned with trade liberalisation. States can use trade law's plurality of goals to make FTAs climate conscience and increase their legitimacy. Next, Chapters Three and Four prove that states underutilise this opportunity to create climate conscious FTAs. Chapter Three will create a methodology to show how states can incorporate climate-related FTA provisions, and Chapter Four will analyse current FTA practices against the methodology's criteria. Chapter Four will conclude that EU/UK-NZ FTA Parties can and should improve on current FTA practices. Finally, Chapter Five addresses some gaps in current FTA practices and offers two new areas where the EU/UK-NZ Parties can integrate climate-related FTA provisions. Chapter Six concludes that FTA Parties must take initiative and take advantage of trade law's ability to incorporate climate-related concerns.

CHAPTER TWO: THE WTO SYSTEM AND CLIMATE PROTECTION

I. The WTO System and “Free Trade”

On the outside, the WTO system seems to only be concerned with trade liberalisation, and opening up markets through the lowering of tariffs, subsidies, and trade inhibiting regulations. Indeed, many WTO principles reflect the view that trade liberalisation accelerates economic growth and improves market competition.¹⁸ WTO principles such as non-discrimination,¹⁹ national treatment,²⁰ and predictability²¹ are proven to have facilitated exponential growth in global trade volumes.²² Moreover, since WTO agreement negotiations focus on barriers to trade in a state’s domestic regulations,²³ negotiations are popularly perceived as pursuing trade liberalisation regardless of the costs. The 2015-2016 TPPA protesters argued that the economic benefits of trade liberalisation do not outweigh the negative impacts on states’ decision-making sovereignty.²⁴ However, this story pushed by the protestors is incomplete, and a closer examination of the WTO system shows that liberalised trade is not its only concern. The WTO’s negotiation focus on barriers to trade in states’ domestic regulations²⁵ has not led to a giving up of sovereignty but instead has made trade law more receptive to individual state concerns. States negotiating changes to their regulations disagree on what are acceptable regulatory standards. Exporting states may complain that strict regulations create barriers to trade and place a disproportionate burden on them, whereas importing states want strict standards to avoid unfair competition between domestic firms and firms in exporting states.²⁶ Moreover, due to public pressure, states increasingly weigh and balance the WTO principles of trade liberalisation

¹⁸ World Trade Organisation “Understanding the WTO: Basics: The case for open trade” www.wto.org/.

¹⁹ If you grant a state a lower customs duty rate, you must grant it to all states, GATT (signed 1948, last updated by the Marrakesh Agreement 15 April 1994), Art I.

²⁰ Imported and locally produced goods should be treated equally after the foreign goods enter the domestic market, Art III.

²¹ States are bound to their tariff rates and their trade rules must be as clear and public as possible, World Trade Organisation “Principles of the trading system” www.wto.org/.

²² World Trade Organisation “Statistics: Evolution of trade under the WTO: handy statistics” www.wto.org/.

²³ Michael Trebilcock and Joel Trachtman *Advanced Introduction to International Trade Law* (Edward Elgar, Northampton Massachusetts, 2020); Manfred Elsig, Michael Hahn, and Gabriele Spilker “Current Challenges and Future Scenarios” in Manfred Elsig, Michael Hahn, and Gabriele Spilker (eds) *The Shifting Landscape of Global Trade Governance* (Cambridge University Press, Cambridge, 2019).

²⁴ Chris Bramwell “Will TPP undermine NZ’s sovereignty?” (3 February 2016) Radio New Zealand www.rnz.co.nz/; Jane Kelsey *Analysis of the Trans-Pacific Partnership Agreement from a NZ Perspective Expert paper 1 - Treaty Making, Parliamentary Democracy, Regulatory Sovereignty and The Rule of Law* (New Zealand Law Foundation, December 2015).

²⁵ Michael J Trebilcock and Joel Trachtman, above n 23; Manfred Elsig, Michael Hahn, and Gabriele Spilker, above n 23.

²⁶ Michael J Trebilcock and Joel Trachtman, above n 23, at 194.

against their non-trade concerns. The WTO's judicial arm's approach to disputes around Articles XX and XIV (which provide exceptions to WTO obligation) illustrate this trend.²⁷ Increasingly, jurisprudence around these exceptions gives states more regulatory space to legislate in the public interest. Moreover, as Chapter One noted, FTA Parties have started to include more non-trade issues in their agreements. Research suggests that as public interest in FTAs grow, so too does the inclusion of non-trade issues in its text.²⁸

But for those who push for trade liberalisation, the WTO system's competing goals do not call for alarm. On the contrary, the WTO system's multifaceted agenda can make FTAs more legitimate and responsive to societal concerns. Importantly, states can use the WTO's FTA system to work together and collaborate on measures that enhance climate action through trade. This analysis is contentious and commentators question FTA Parties' ability to do this job fairly and effectively whilst not undermining their focus on trade liberalisation. Nevertheless, this Chapter will respond to those criticisms. It will show that Parties should use FTAs to enhance climate action through trade.

II. Trade Liberalisation's Multiple Concerns

The WTO's rules include exemptions that balance their goal of trade liberalisation with other concerns. Articles XX and XIV of the GATT allow WTO Members to legislate in the public interest if certain conditions are met, and FTA Parties are empowered by a GATT exception to make FTA provisions above and beyond the WTO's framework. WTO rules balanced against these exceptions makes the WTO FTA system more responsive to WTO Members' domestic policy concerns and empowers Parties to tackle climate change through trade.

²⁷ See 2.11.A.

²⁸ Lisa Lechner shows how as public interest in FTAs grow, so does the inclusion of non-trade issues. in "The Trend to More and Stricter Non-Trade Issues in Preferential Trade Agreements" in Manfred Elsig, Michael Hahn, and Gabriele Spilker (eds) *The Shifting Landscape of Global Trade Governance* (Cambridge University Press, Cambridge, 2019) at 233.

A. Article XX GATT and Article XIV GATS

The exceptions in Article XX of the GATT and in Article XIV of the General Agreement on Trade in Services (GATS) allow states to legislate in the public interest. These Articles temper trade liberalisation because they allow members to legislate contrary to the WTO rules. For example, Article XX or Article XIV could allow a WTO member to breach the WTO rules and ban seal imports from another WTO Member due to their domestic concerns about public morality.²⁹ An analysis of these articles show that they enable other, non-trade, norms to be considered under trade law. Their negative function enables states to domestically regulate for climate-related interests.

The Article XX is the most relevant Article for states who want to implement measures that are trade restrictive and climate related. The Articles allow WTO Members to adopt measures that are contrary to the GATT if the measures are, amongst other things:³⁰

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- [...]
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

However, these measures are contingent on a proviso that dictates that the measures adopted by Members must not be applied “in a manner which would constitute arbitrary or unjustifiable discrimination where the same conditions prevail, or a disguised restriction on international trade (known as the “chapeau”).³¹ In other words, the chapeau requires that the government’s proposed regulatory measures do not unnecessarily limit trade liberalisation. The Appellate Body in *US-Shrimp* outlines that the Articles are applied through a two-tiered test, where the measures are first judged against whether they meet the criteria for the exception.³² If the measures

²⁹ *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products* WT/DS400/AB/R, WT/DS401/AB/R 22 May 2014, (Reports of the Appellate Body).

³⁰ GATT, above n 19, Art XX.

³¹ *Brazil-Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007 (Appellate Body Report).

³² *US-Shrimp Appellate Body Report*, WT/DS58/AB/R, 12 October 1998 (Appellate Body Report) at 118-119.

meet the criteria for the exception, then they are weighed against the chapeau so that they do not apply in a manner that results in unjustified or arbitrary discrimination, or a disguised restriction on trade.

As many commentators note, this balance of rights and obligations has largely avoided any great environmental injustice.³³ Instead, many decisions speak to environmentally beneficial outcomes. For example, *China- Rare Earths* shows that to justify state measures under the Article XX exceptions, they must relate to an environmental goal. In that case, the Appellate Body held that China's export quotas on certain materials did not relate to any justified conservation goal under Article XX (g).³⁴ The design and structure of China's measures had no nexus with the conservation objective and the measures were not made in conjunction with domestic restrictions under Article XX(g).³⁵

Moreover, the *EC-Seal products* and *Brazil-Tyres* decisions show that even justified measures under the relevant paragraph of Article XX can still be harmful to the environment due to their incompatibility with the chapeau. In *EC-Seal products*, the European Commission's ban of seal products was justified under Article XX (a) as necessary to address public morality concerns about inhumanly killed seals.³⁶ However, the chapeau caught the ban because the indigenous community exception to the ban was arbitrary and unjustifiable.³⁷ The ban's exception for indigenous communities was drafted poorly, meaning that commercial hunts could enter the EU market under the exception and Canadian Inuit were unable to make use of the ban's exception.³⁸ The European Commission could have avoided this result if they drafted the indigenous community exception to the ban more clearly, so that it was less prone to abuse.³⁹ In a similar way, Brazil's import bans on retreaded and used tyres from the

³³ Carrie Wofford "A Greener Future at the WTO: the Refinement of WTO Jurisprudence on Environmental Exceptions to GATT" (2000) 34(2) HarvEnvtlLRev 563; Steve Charnovitz "The WTO's Environmental Progress" (2007) 10(2) Journal of Int Economic Law 685; Armin Rosencranz and Aditya Vora Viral "Environment and Trade – Tracing the History of GATT Articles XX(b) and (g) Disputes" (2015) 45(6) Environmental policy and Law 292; Joel Trachtman "WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe" (2018) 58 HarvIntl LJ 273, at 308.

³⁴ *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, 7 August 2014 (Appellate Body report), at [5.29].

³⁵ See analysis in Michael J Trebilcock and Joel Trachtman, above n 23, at 223-224.

³⁶ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, above n 29, at [5.203].

³⁷ At [5.338]-[5.339].

³⁸ At [5.338].

³⁹ Michael J Trebilcock and Joel Trachtman, above n 23, at 222-223.

EU were provisionally justified as necessary to protect human, animal or plant life or health under Art XX(b). However, Brazil was caught under the chapeau as their regulations allowed imports of waste tyres from Common Market of the South (MERCOSUR) states and imports through Brazilian tyre importers, despite their ban on EU tyres.⁴⁰ Brazil may have avoided getting caught under the chapeau if they had higher environmental protection and not allowed for any imports at all.⁴¹

Nevertheless, there are still critiques around how the Articles will apply to new domestic regulations around climate change.⁴² Trachtman questions whether Articles XX(a) and (b)'s "necessity test" can justify environmental measures.⁴³ Articles XX(a) and (b) require state measures to be necessary to qualify for the Article XX exception. This "necessity" test requires the weighing and balancing of several factors including the importance of the values at stake,⁴⁴ trade-restrictiveness of the measure, the measures contribution to its objective and the least trade restrictive alternatives available.⁴⁵ Trachtman notes that some measures required by Multilateral Environmental Agreements (MEA) might not be justified under this "necessity test", because they might "not be the least WTO inconsistent means to achieve the environmental goal."⁴⁶ Even Article XX(g), that does not contain the necessity test has uncertainties. Article XX(g) has never been applied to climate regulations and there are doubts to whether climate regulations would be "primarily aimed at" ⁴⁷ the conservation of an exhaustible natural resource because most cases are about species

⁴⁰ *Brazil-Tyres* (Appellate Body), above n 31.

⁴¹ Brazil could have justified their import ban under MERCOSUR too but chose not to, said Michael J Trebilcock and Joel Trachtman, above n 23, at 234.

⁴² See discussion on how Articles XX limit the scope of an international climate law in Ahmad SAS Al-Tayer and AFM Maniruzzaman "Addressing the Global Climate Change Problem in GATT/WTO Law: The Vision of a New International Climate Law based on International Distributive Justice" (2011) 17(6) JWIT 631; See critique around the ability for the US to implement a carbon border tax adjustment under Article XX in Arjun Ponnambalam "U.S. Climate Change Legislation and the Use of GATT Article XX to Justify a Competitiveness Provision in the Wake of Brazil-Tyres" (2008) 40 GEOJINT'L L 261; See WTO jurisprudential setbacks to the ability to effectively implement national measures addressing climate change in Joel Trachtman "WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe", above n 33.

⁴³ Joel Trachtman "WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe", above n 33.

⁴⁴ *EC – Seal Products*, above n 36, at [5.213]-[5.214].

⁴⁵ *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R, 7 June 2016 (Appellate Body Report) [5.71]-[5.74].

⁴⁶ Joel Trachtman "WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe", above n 33, at 301.

⁴⁷ Interpretating the "relating to" standard in Article XX(g) *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996 (Appellate Body Report), at [19].

or mineral conservation.⁴⁸ Also, due to enormity of the climate change problem, the requirement that states' measures produce some measurable positive effects on conservation may be difficult.⁴⁹ Holistically these issues may impact states domestic abilities to effectively implement measures to address climate change through trade.

To solve these issues, Trachtman asserts that WTO Member states should amend the GATT, adding a clause that permits "even-handed and proportionate measures to protect the environment".⁵⁰ Trachtman's idea is similar to Bacchus' proposal for a climate waiver to WTO rules.⁵¹ However, these waivers may run into concerns about their effect on "green protectionism", if measures deliberately restrict trade flows but have no positive impact on climate change. Whatever the proposal, these kinds of issues are not yet on the WTO agenda at the upcoming Ministerial Conference.⁵²

Despite this judicial uncertainty, the EU has begun to justify its potentially trade limiting climate adjacent measures under those WTO exceptions. The EU has pushed to create carbon border tax adjustment measures, an internal tax applied on certain imported high carbon goods to account for their carbon emissions.⁵³ These measures aim to prevent carbon leakage when goods are produced in a country without carbon pricing mechanisms.⁵⁴ To be consistent with WTO law, the EU's internal carbon tax must be non-discriminatory under Article III.2 of the GATT.⁵⁵ But commentators think that even if the EU's taxes are not GATT compliant, they could be justified under the Article XX and Article XIV exemptions.⁵⁶

⁴⁸See *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* above n 34; *US-Shrimp Appellate Body Report*, above n 32 .

⁴⁹*United States — Standards for Reformulated and Conventional Gasoline*, above 47, at [21].

⁵⁰ Joel Trachtman "WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe", above n 33, at 309.

⁵¹ See discussion in: James Bacchus *The Case for a WTO Climate Waiver* (Centre for International Governance Innovation, Special Report, 2017), at 20; James Bacchus *Global Rules for Mutually Supportive and Reinforcing Trade and Climate Regimes* (International Centre for Trade and Sustainable Development and World Economic Forum, E15 Expert Group on Measures to Address Climate Change and the Trade System – Policy Options Paper, 2016), at 15.

⁵² A WTO body that meets every two years and brings together all WTO members to make decisions about any matters under any of the WTO multilateral trade agreements like the GATT or GATS. World Trade Organisation "Twelfth WTO ministerial Conference News" (5 October 2021) www.wto.org/.

⁵³ Jennifer A Hillman *Changing Climate for Carbon Taxes: Who's Afraid of the WTO?* (Georgetown University Law Centre, Climate and Energy Policy Paper Series, July 2013).

⁵⁴ Hans van Leeuwen "European Parliament backs carbon border tax" (March 11 2021) Australian Financial Review www.afr.com/.

⁵⁵ James Bacchus "The Case for a WTO Climate Waiver", above n 51, at 11.

⁵⁶ Bacchus "The Case for a WTO Climate Waiver", above n 51; Joel Trachtman "WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes" (2017) 70(2) Natl Tax J 469; Jennifer A Hillman, above n 53 .

The EU's actions clearly demonstrate that the WTO framework provides for "a *negative* regulatory space",⁵⁷ because the Article XX and Article XIV exemptions do not prevent states from adopting domestic legislation.⁵⁸ However, this dissertation argues that trade law can go further and allow trading partners to impose *positive* legal obligations on each other.⁵⁹ WTO Members can impose positive obligations on each other through FTAs, and make these agreements conditional on Parties increasing or aligning their domestic climate regulations. As this dissertation will explain, Parties should use FTAs as a tool to integrate climate change and trade. The design and function of FTAs gives states freedom to build off the WTO framework and link trade with climate-related concerns.

B. Free Trade Agreements

1. Design

The design of FTAs makes them the perfect tool for Parties to mutually impose positive obligations around trade and climate change. FTAs require less political energy to achieve consensus than the WTO would, because FTAs contain fewer, and often like-minded, states. FTA Parties can avoid the political gridlocks that occur at the WTO, where any decisions require consensus between its 164 members.⁶⁰ Furthermore, the potential copycat nature of environmental FTA provisions means that Parties with climate concerned FTAs could influence wider state behaviour. Meidinger notes that there may be a large amount of copy-cat behaviour in international legal agreements that contain environmental measures.⁶¹ This potential replicatory trend means that climate-related provisions in *any sized* FTA could diffuse into larger regional or multilateral trade agreements, like the proposed Agreement on Climate Change, Trade and Sustainability (ACCTS).⁶² New Zealand already aims for this outcome in their trade policy through their stance as a "concerted plurilateralist". New Zealand is

⁵⁷ Katie Sykes "Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection" (2016) 5(1) TEL 55 at 68.

⁵⁸ At 57.

⁵⁹ At 68.

⁶⁰ World Trade Organisation "Understanding the WTO: The Organisation: Whose WTO is it anyway?" www.wto.org/.

⁶¹ Errol Meidinger "TPP and Environmental Regulation" in Eleanor M Fox and Micheal J Trebilcock (eds) *Megaregulation Contested: Global Economic Ordering After TPP* (Oxford University Press, Oxford, 2019) 175, at 193.

⁶² Ministry of Foreign Affairs and Trade "Agreement on Climate Change, Trade and Sustainability (ACCTS) negotiations" www.mfat.govt.nz/.

hoping to work with global allies to make high quality “building block” agreements that other states can then join.⁶³

1. Function

The function of FTAs also allows states to impose positive climate-related obligations on each other. FTAs enable Parties to create their own rules, so they can accordingly condition their FTAs on measures that prevent climate degradation or increase climate action.

FTAs are exempt from the WTO rule of non-discrimination, so Parties can offer special trade concessions to each other beyond what the WTO mandates. The only requirements that FTAs must follow are that the “duties and other restrictive regulations of commerce are eliminated on substantially all the trade” between the Parties,⁶⁴ and that after the establishment of an FTA, duties and other regulations of commerce on third Parties “...shall not be higher or more restrictive...” than before.⁶⁵ These rules give FTA Parties a greater ability to level the playing field and prevent the misuse of comparative advantage in trade law. If one FTA Party has higher domestic climate-related measures, they could condition the FTA on the other Party raising or not regressing their climate-related measures. Following an FTA, these provisions could prevent states from losing their market share to trade partners with lower climate regulatory costs, and a race to the bottom with climate-related measures.⁶⁶

Moreover, the WTO’s focus on aligning regulatory measures means that states could use FTAs as a tool to cooperate on climate-related trade measures. Climate change requires collective action and states can use FTAs to align their climate-related measures to reduce carbon emissions or enhance climate friendly trade.⁶⁷ As Chapter Three will discuss, FTA Parties can create climate-related provisions around MEAs and climate-related measures, back them with non-regression provisions, and make Parties accountable to them through dispute settlement provisions. FTA Parties could also include climate-related obligations for private actors (see Chapter Five).

III. FTAs as a Tool for Climate Protection

⁶³ David Parker “Trade for All and the State of International Trade” (Address to the Trade for All Advisory Board, July 23, 2020).

⁶⁴GATT, above n 19, Art XXIV.8(b).

⁶⁵Article XXIV.5(b).

⁶⁶ Michael J Trebilcock and Joel Trachtman, above n 23, at 216.

⁶⁷ The trade of climate-related goods and services, e.g., wind turbines, electric vehicles etc.

Some actors dispute Parties use of FTAs to promote climate-related measure alignment and climate-positive trade. Developing states contest the fairness of the base rules of the WTO system and the use of FTAs as a tool of environmental protection. Others question whether this inclusion of other norms in FTAs goes beyond the WTO's mandate of trade liberalisation. This dissertation argues that these challenges can be overcome, and that the use of FTAs to address climate change enhances the WTO FTA system's legitimacy.

Developing states contest how the WTO system constrains their ability to create green industrial measures.⁶⁸ Under WTO rules, government subsidies cannot be contingent on measures that require firms to use domestic manufacturers' goods as inputs (measures known as local content requirements). Cases like *India-Solar Cells* and *US-Renewable Energy* ruled that government subsidies for renewable energy production that contain local content requirements are inconsistent with the GATT.⁶⁹ These rules prohibiting local content requirements base themselves on the idea that these kinds of regulations are protectionist, prevent the even expansion of renewable energy technologies, and the efficient allocation of natural resources.⁷⁰ However, scholars like Bigdeli assert that these bans often delegitimise industries in the developing world, despite past evidence that local content measures lead to high growth and performance.⁷¹

Bigdeli thinks that developing states should have the right to develop green industrial measures, and that they should not be forced to limit such regulations due to WTO local content rules.⁷² Bigdeli argues that the economic arguments against green industrial measures are indeterminate, and that these industrial measures legitimately address developing countries environmental concerns.⁷³ In a similar vein, Alam

⁶⁸ Sadeq Z Bigdeli "Clash of Rationalities: Revisiting the Trade and Environment Debate in Light of WTO Disputes over Green Industrial Policy" (2014) 6(1) Trade Law Dev 177; Shawkat Alam "Trade and the Environment: Perspectives from the Global South" in Shawkat Alam and others (eds) *International Environmental Law and the Global South* (2015, Cambridge University Press, Cambridge) 297.

⁶⁹ After the US disputed India's government subsidies around local content requirements India subsequently raised a dispute about the US's local content requirements in their subsidies, for discussion see: *India — Certain Measures Relating to Solar Cells and Solar Modules* WT/DS456/AB/R, 16 September 2016 (Appellate Body Report) and *United States — Certain Measures Relating to the Renewable Energy Sector*, WT/DS510/R, 27 June 2019 (Panel report).

⁷⁰ George Banks and Timothy Fitzgerald "A sectoral approach allows an artful merger of climate and trade policy" (2020) 162 Climatic Change 165.

⁷¹ Sadeq Z Bigdeli, above n 68, at 299.

⁷² At 202.

⁷³ At 202.

critiques developed states' desires to condition FTAs on raised domestic environmental measures.⁷⁴ Alam argues that environmental obligations on the global South are too onerous if they do not offer to transfer resources between the states (like financing and technical support).⁷⁵ For Alam, conditioning FTAs on raised environmental measures breaches the principle of common but differentiated responsibility; developed states do not recognise the different capacity of developing states to confront environmental issues.⁷⁶

These arguments are important and incorporating climate-related issues within trade law is not always a win-win.⁷⁷ Without proper consideration for the capacities of developing states, the WTO's rules only reinforce climate injustice. If developed states only dictate climate-related regulations, alternative, but similarly effective ways of regulating for climate action are closed off. Without offers of technical support and guidance, developing states might not have the capacity to deal with the required changes. These concerns reinforce the idea that the WTO's FTA system should not be viewed in isolation. Parties negotiating FTAs with developing states should be conscious of these capacity-related issues. Anything less delegitimises FTA Parties' ability to tackle climate change through trade law because they fail to ensure a just transition.

Furthermore, Parties incorporating climate-related FTA provisions may raise fears that trade law has gone beyond its agenda, leading to incoherence and fragmentation in international law.⁷⁸ Incorporating climate concerns into FTAs may encroach on the specialist domain of international environmental law and their system of MEAs. The WTO Committee on Trade and the Environment itself says "... the most effective way to deal with international environmental problems is through the environmental agreements."⁷⁹ Because the WTO systems' primary purpose is to liberalise trade, meddling in climate issues may go beyond its mandate.

⁷⁴ Shawkat Alam, above n 68, at 297.

⁷⁵ At 301.

⁷⁶ At 301.

⁷⁷ Sadeq Z Bigdeli, above n 68, at 208.

⁷⁸ For discussion of this fragmentation problem with international environmental law see Martti Koskenniemi *International Law Commission Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report of the Study Group, finalised by M Koskenniemi UN Doc A/CN.4/L.682 (13 April 2006), at 8.

⁷⁹ World Trade Organisation "Understanding the WTO: Cross-Cutting and New Issues- The environment: a specific concern" www.wto.org/.

Yet, including climate provisions in FTAs can create a norm of climate accountability and enhance coherence between these two systems in international law. The Paris Agreement aims to hold the increase of global temperatures to well below 2C with a goal of 1.5C.⁸⁰ But the Paris Agreement provides only a goal, and the IPCC states that this goal requires net zero carbon emissions by 2050.⁸¹ To get to net zero, trade and correspondingly trade law, must play its part in decarbonisation. By linking trade with climate change through FTAs, Parties could be held accountable to their Paris Agreement pledges and their efforts to reduce carbon emissions from trade (for further discussion see Chapter Three). Parties' use of FTAs to tackle climate change is not saying that trade law is *the* way to enhance state's climate action, rather *a* way. FTA Parties cannot fix all climate-related international trade issues by incorporating climate-related provisions in their agreements, but these provisions can help achieve this end goal.

Finally, Parties incorporating climate-related concerns makes the WTO FTA system more legitimate. This inclusion of climate-related concerns in FTAs, aligns with public desires that trade law should work for everyone,⁸² and reflects Ruggie's idea of re-embedded liberalism.⁸³ To Ruggie, the international trade law system should concern itself with the political desires of society so international trade policies should be judged against whether they further domestic welfare.⁸⁴ The WTO system balances trade liberalisation concerns against non-trade issues, meaning that it is already open to this conception of embedded liberalisation. However, Parties can still go further and reform parts of the WTO system to make it better. Parties incorporating climate change concerns in their FTAs provides them with this occasion. In an era where

⁸⁰ Paris Agreement (signed 22 April 2016, entered into force 4 November 2016), Art 2(a).

⁸¹ *Summary for Policymakers* (Intergovernmental Panel on Climate Change, Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty. World Meteorological Organization, Geneva, Switzerland, 32 pp, 2018).

⁸² *Report of the Trade for All Advisory Board*, above n 6; *Trade for all: towards a more responsible trade and investment policy* (European Commission, 978-92-79-50488-4, October 2015).

⁸³ John Gerard Ruggie "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order" (1982) 36 INTL ORG 379.

⁸⁴ At 396.

governments pledge to make trade agreements work for everyone,⁸⁵ states should use climate conscious FTAs to shift the narrative of the FTA system towards embedded liberalisation. Consequently, Parties re-legitimise FTAs and ensure that they are fit for the challenges of the 21st century.⁸⁶

IV. The Untapped Opportunity

This Chapter has shown that the WTO's system of trade liberalisation can incorporate climate-related concerns. Parties can use this base to create positive climate-related FTA provisions which enhance the FTA system's overall legitimacy. However, the next two chapters will illustrate that Parties underutilise this opportunity to incorporate climate concerns in their FTAs. Chapter Three shows how states can use FTAs to enhance climate action, and Chapter Four uses this methodology to evaluate current FTA practices. Consequently, EU/UK-NZ FTA Parties can and should improve on current practices in their forthcoming agreements.

⁸⁵ "Our international trade needs to deliver for kiwis" David Parker "Trade for All and the State of International Trade", above n 63; "Trade is not an end in itself. It is a tool to benefit people" *Trade for all: towards a more responsible trade and investment policy*, above n 82, at 35; "Britain's future as an open, enterprising economy where everybody shares the benefits of trade" Elizabeth Truss, International Trade Secretary United Kingdom "Policy Exchange speech: Liz Truss sets out Britain's new trade policy" (Policy Exchange, 14 September 2021; "The President knows that trade policy should respect the dignity of work and value Americans as workers and wage-earners, not only as consumers" *The 2021 Trade Policy Agenda and 2020 Annual Report of the President of the United States on the Trade Agreements Program* (The Office of the United States Trade Representative, March 2021), at 1.

⁸⁶ Harlan Grant Cohen "What Is International Trade For?" (2019) 113(2) AJIL 326.

CHAPTER THREE: A METHODOLOGY TO ASSESS CLIMATE-RELATED FTA PROVISIONS

I. Uncertainty in the Methodology

This chapter's methodology outlines how any state can use FTAs to enhance climate action through positive climate-related trade provisions. However, this methodology has uncertainties as there is no guarantee that including climate-related provisions in FTAs will positively impact climate action.

As the Introduction outlined, there are doubts as to whether trade law can positively impact environmental outcomes. The OECD reported no statistically significant relationship between environmental provisions in FTAs and positive environmental outcomes.⁸⁷ However, this dissertation argues that this doubt around the impact of FTA environmental provisions should not be a reason not to include them. This view is backed by the very OECD report that did not find any significant relationship. The report noted that "...environmental provisions may still have an additional positive effect on the environment beyond the RTA itself".⁸⁸ The OECD report did not go into any detail about these effects, but an assessment made by the UK elaborates on the OECD's idea. The UK found that although an FTA with NZ could increase carbon emissions, it could also improve environmental protection standards and the trade of environmentally friendly goods and services.⁸⁹ As Chapter Two discussed, including climate obligations in FTAs has huge normative weight. FTAs alone cannot solve the climate crisis, but if viewed in tandem with other decarbonisation efforts, FTAs can be a tool for climate action through trade.

⁸⁷ Inmaculada Martinez-Zarzoso, above n 16, at 7.

⁸⁸ At 8.

⁸⁹ *UK-New Zealand Free Trade Agreement: The UK's Strategic Approach* (United Kingdom Department for International Trade, 17 July 2020), at 68.

II. Methodology

This methodology focuses on how FTA Parties can create positive obligations around climate action and trade. FTA Parties can: commit themselves to climate-related FTA provisions, secure their commitments through non-regression provisions, and add an extra layer of accountability to their commitments through the FTA dispute settlement provisions.

A. Climate-Related FTA Provisions

Chapter Two discussed that FTAs can enable trading partners to impose positive legal obligations on each other to enhance climate action. FTA Parties can do this through climate-related provisions that make parties cooperate on and align their climate-related domestic measures. In this dissertation, the term “climate-related FTA provision” applies to any FTA provision about climate-related: pledges, MEAs, domestic regulation alignment, and non-regression. This definition does not include conservation-related provisions. Specifically, this dissertation focuses on two areas where states can cooperate and align their domestic climate-related regulations: Paris Agreement pledges and climate-related measures.

1. Paris Agreement pledges

As Chapter Two mentioned, trade partners can and should enshrine their Paris Agreement pledges in their FTAs. The Paris Agreement is the largest and most important international pledge regarding climate change, so the extent to which states incorporate its goals in their FTA is significant. The inclusion of the Paris Agreement ensures that Parties are held to their commitments (see 3.II.C) and creates a norm of decarbonisation in trade law.

2. Climate-related measures

FTAs can provide opportunities for states to cooperate on climate-related regulations, align their domestic regulations to facilitate the trade of climate goods and services, or ensure the integrity of a climate-related regime.⁹⁰ In this dissertation, a “climate-related measure” encompasses aligning states’ specific product regulations around energy efficiency or vehicle emissions as well as state’s broader policies around fossil

⁹⁰ E.g. by aligning states’ carbon markets or climate related financial disclosure measures (see Chapter 5)

fuel subsidy reductions, Multilateral Environmental Agreement (MEA), and carbon markets.⁹¹

These climate-related FTA measures have broader coverage than the definition of a standard in the WTO's Technical Barriers to Trade Agreement (TBT) (which only covers products or goods).⁹² Nevertheless, similar to the TBT, cooperation around the alignment of climate-related FTAs standards can reduce non-tariff barriers to trade. Moreover, the alignment of climate-related FTA measures can also positively impact trade emissions. The OECD reported that Canada's alignment of their domestic regulations to some of the US's energy efficiency and emissions standards may have reduced Canada's overall emissions.⁹³

B. Non-regression Provisions

FTA Parties can back up their climate-related provisions with non-regression provisions. Non-regression is a principle of international law that prevents the weakening of domestic standards after a treaty or convention has been entered.⁹⁴ In the WTO system, the GATT's overarching goal is to prevent this non-regression of negotiated trade liberalisation standards.⁹⁵ But these non-regression principles are also common in environmental and labour FTA provisions, subject to the WTO rules around protectionism.⁹⁶ Various FTAs include provisions for domestic Parties to not waive or regress from their environmental and labour laws as a means to facilitate trade or investment.⁹⁷ For example, the Agreement between New Zealand and the

⁹¹ For further discussion on harmonisation see Rochelle Cooper Dreyfuss "Harmonization: Top Down, Bottom Up-and Now Sideways?" in Eleanor M Fox and Micheal J Trebilcock (eds) *Megaregulation Contested: Global Economic Ordering After TPP* (Oxford University Press, Oxford, 2019).

⁹² Arkady Kudryavtsev "The TBT Agreement in context" in Tracey Epps and Micheal J Trebilcock (eds) *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar, 2013) 27-28.

⁹³ Christophe Bellmann and Colette van der Ven *Greening regional trade agreements on non-tariff measures through technical barriers to trade and regulatory co-operation* (OECD, Trade and Environment Working Papers 2020/04, 2020), at 33.

⁹⁴ Michel Prieur "Le principe de non régression face à la logique du marché" (2014) 44(1) EPL 130.

⁹⁵ World Trade Organisation "Understanding the WTO: The Organisation: Whose WTO is it anyway?", above n 60.

⁹⁶ See for example, the NZ-Korea FTA (signed 23 March 2015) Chapter 16; EU-Vietnam (signed 30 June 2019), Chapter 13; United States Mexico Canada Agreement (USMCA) (signed 30 November 2018) Chapter 24.

⁹⁷ Contrast the NZ-Korea FTA, above n 96, Art 16.2.6; EU-Vietnam, above n 96, Art 13.3.2; USMCA, above n 96, Art 24.2.5; The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 8 March 2018), Art 9.16.

Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Cooperation (ANZTEC) states that:⁹⁸

each party shall not weaken, derogate from, or fail to enforce or administer in a sustained or recurring manner, its environmental laws, regulations and policies in a manner affecting trade or investment between the Parties;

This general non-regression principle is well established in EU, UK and NZ trade policy, as they all include this principle in their most recent FTAs.⁹⁹ However, these non-regression provisions can also apply to specific FTA pledges. Especially with climate-related pledges, a reference to a Party's emission reduction measures is important. Including a Party's domestic emission reduction commitments in FTAs adds an extra layer of international accountability and strengthens the Paris Agreement (See 3.II.B). As Chapter Four will discuss, Parties do not specifically reference their climate change commitments in these non-regression provisions. Trade partners should back up their Paris Agreement pledges with a specific clause about the non-regression of their domestic emission reduction goals (See 4.III).

C. Justiciability of Climate-related FTA Provisions.

The justiciability of climate-related FTA provisions is essential to this methodology. Justiciability means that an FTA obligation is subject to binding dispute settlement or enforcement action. Without justiciable non-regression and climate-related FTA provisions, trading partners cannot hold each other to account. Accordingly, the strength of climate-related trade provisions is lessened, along with the ability of FTAs to create positive legal obligations. Moreover, justiciable trade-climate FTA provisions are more effective than provisions that are only amenable to negotiation-based FTA dispute settlement mechanisms. Justiciable, arbitration-based dispute settlement offers an extra layer of assurance to Parties; motivates Parties to comply with the FTA; addresses a lacuna in international environmental law; and accords with recent trends of environmental provision justiciability in FTAs.

⁹⁸ ANZTEC (signed 10 July 2013), Art 2.3(A).

⁹⁹ *Trade, Environment and Climate Change Discussion Paper, 2021* (Ministry of Foreign Affairs and Trade, 2021); UK-Japan FTA (signed 23 October 2020), Art 16.2; EU-UK FTA (signed 30 December 2020), Art 7.2.

1. *Effectiveness*

This dissertation argues that justiciable climate-related FTA provisions are more effective than negotiation-based clauses. This justiciability focus is based on studies around labour provisions in FTAs,¹⁰⁰ and the observation that their effectiveness “...largely depends on their implementation and enforcement mechanisms.”¹⁰¹ The research about labour provisions in FTAs debates the efficacy of diplomatic and arbitration-based enforcement approaches to labour provisions in FTAs.¹⁰² After considering those studies, this dissertation argues that arbitration-based enforcement mechanisms are desirable for climate-related FTA provisions. This preference is for several reasons.

First, the economic concessions tied to the reciprocal obligations in international trade law mean that Parties have greater incentives to comply with orders following arbitration-based dispute settlement.¹⁰³ Dispute settlement in FTAs usually allow the successful Party to withhold concessions (i.e., raise tariffs) to compel the losing Party to come into compliance. Applied to climate-related provisions, this trade benefit gives reluctant states a motive to keep their state practice aligned with their climate commitments. Moreover, including these “hard” dispute settlement compliance measures, compliments rather than replaces the dialogue and cooperation inherent in resolving FTA disputes.¹⁰⁴ The justiciability of climate-related FTA provisions will not lead floodgates to litigation. State practice shows that FTA Parties rarely use arbitration chapters, and only after they have exhausted the FTAs negotiation processes.¹⁰⁵

¹⁰⁰ There was no research available around the justiciability of environmental FTA provisions due to them only just becoming justiciable after the CPTPP. See 4.IV for further discussion

¹⁰¹ Henner Gött “Labour Standards in International Economic Law: An Introduction” in *Labour Standards in International Economic Law* (Springer, Cham, 2018), at 5.

¹⁰² Patrick Abel “Comparative Conclusions on Arbitral Dispute Settlement in Trade-Labour Matters Under US FTAs” in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer, Göttingen, 2018), at 153; Evgeny Postnikov and Ida Bastiaens. “Does dialogue work? The effectiveness of labor standards in EU preferential trade agreements” (2014) 21(6) *Journal of European Public Policy* 923.

¹⁰³ Patrick Abel, above n 102, at 153; Susanne Droege and others “The Trade System and Climate Action: Ways Forward under the Paris Agreement” (2017) 13 *SCJINTIL&Bus* 195.

¹⁰⁴ Marco Bronckers and Giovanni Gruni “Retooling the Sustainability Standards in EU Free Trade Agreements” 24(1) *J Intl Econ L* 25, at 38.

¹⁰⁵ Dispute settlement provisions in NZ FTAs have never been used. The point draws from US experiences with FTA labour provision dispute settlement under the Central-American Free Trade Agreement and the North American Agreement on Labor Cooperation (a North American Free Trade Agreement (NAFTA) side agreement) see discussion in Patrick Abel, above n 102, at 155.

Second, the justiciability of climate-related trade provisions fills a gap in international environmental law. It is well known that the Paris Agreement lacks a dispute resolution procedure due to its bottom-up approach.¹⁰⁶ In comparison, FTAs provide detailed chapters on dispute settlement procedures.¹⁰⁷ Moreover, the FTA's rules-based enforcement system means that an FTA Party can unilaterally initiate arbitration proceedings against a Party that they perceive to be in breach.¹⁰⁸ This approach differs from international environmental law which is generally negotiation-based, and both Parties must mutually agree to initiate proceedings.¹⁰⁹ There are some exceptions, like the dispute settlement provisions in the United Nations Convention on the Law of the Sea (UNCLOS),¹¹⁰ but that agreement is the exception rather than the rule.

Rules based FTA dispute resolution mechanisms allow states greater opportunities to hold each other to account than negotiation-based mechanisms.¹¹¹ However, these opportunities still mean that relative state power may factor into disputes between developed states and developing states. The US raised all the disputes under the Central America Free Trade Agreement's (CAFTA) labour provisions,¹¹² and the majority of disputes under the North American Agreement on Labor Cooperation (A NAFTA side agreement) concerned Mexico.¹¹³ Nevertheless, in NAFTA a third of cases were filed against the United States by Mexico, because Mexico had various concerns about migrant worker treatment, freedom of association, and discrimination.¹¹⁴ These issues with power and dispute settlement are less likely to apply in an EU/UK-NZ FTA as all states have similar development levels. However, if FTA parties include dispute

¹⁰⁶ Susanne Droege and others, above n 103.

¹⁰⁷ See example in NAFTA (signed 8 December 1993), Chapter 20.

¹⁰⁸ Although parties usually agree to require consultation before these are initiated. See the CPTPP Article that requires parties to result to cooperative technical consultations before having recourse to dispute settlement, above n 97, Art 7.17.

¹⁰⁹ James Harrison "Reflections on the Role of International Courts and Tribunals in the Settlement of Environmental Disputes and the Development of International Environmental Law" (2013) 25(3) JEL 501.

¹¹⁰ United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994), part XV.

¹¹¹ Rachel Brewster "Rule-Based Dispute settlement in International Trade Law" (2006) 92 Va L Rev 251.

¹¹² *Social dimensions of free trade agreements* (International Labour Organisation and International Institute for Labour Studies, Studies on growth with equity ISBN 978-92-9-251028-2, 2015), at 52.

¹¹³ At 43.

¹¹⁴ At 44.

resolution chapters for climate-related provisions more widely, then the impact of power on the process should be considered.

Third, FTA parties backing up climate-related FTA provisions with dispute settlement provisions accords with wider trend of this practice.¹¹⁵ This trend is similarly highlighted in state policy; NZ's draft document on trade and climate change proposing the justiciability of environmental chapters.¹¹⁶ The UK similarly desires making environmental chapters justiciable,¹¹⁷ but the EU is more hesitant with plans to review their stance towards justiciability.¹¹⁸

III. Conclusion

This methodology shows that there are many positive FTA provisions that states can use to link trade with climate concerns. If EU/UK-NZ FTA negotiators want to create ambitious agreements, their FTAs should include enforceable climate-related and non-regression provisions. To find examples of these provisions, the EU/UK-NZ FTA Parties could consider copying current state FTA practice. The next Chapter (Four) will evaluate FTAs against this methodology with the EU/UK-NZ FTA in mind.¹¹⁹

¹¹⁵ R V Ranuradha "WTO to the TPP: Evolution of environmental Provisions in Trade Agreements" in Julien Chaisse, Henry Gao and Chang-fa Lo (eds) *Paradigm Shift in International Economic Law Rule-Making? The TPP as a New Model for Trade Agreements?* (Springer, Singapore, 2017) 241, at 246.

¹¹⁶ *Trade, Environment and Climate Change Discussion Paper*, above n 99.

¹¹⁷ *UK-New Zealand Free Trade Agreement: The UK's Strategic Approach*, above n 89, at 12.

¹¹⁸ *EU Trade Policy Review – An Open, Sustainable and Assertive Trade Policy* (Publications Office of the European Union, ISBN 978-92-76-28778-0, 2021).

¹¹⁹ This dissertation mostly consider Post-Paris Agreement FTAs between developed states, as both NZ, EU and UK fall into these categories. Specifically, I looked at the: NZ-China FTA upgrade (signed November 2016); EU-UK FTA, above n 99; the EU-Japan FTA (signed 17 July 2018) and the UK-Japan, above n 99, are substantially the same agreement; EU-Singapore FTA (signed 19 October 2018); NZ-Korea FTA, above n 96; EU-South Korea (EU-Korea) (signed 6 October 2010); Canada European Union Trade Agreement (CETA) (signed October 30 2016); USMCA, above n 96, and the CPTPP, above n 97; ANZTEC, above n 98; NAFTA, above n 107; EU-Vietnam, above n 96.

CHAPTER FOUR: FTA ANALYSIS

I. Approach to FTA Analysis

This Chapter uses the methodology from Chapter Three to evaluate current climate related FTA practices. Holistically, it shows that states do not integrate climate-related provisions enough in their FTAs, and that an EU/UK-NZ FTA can improve on these practices. This Analysis first acknowledges how language affects the interpretation of climate-related FTA provisions. Then it considers the use of non-regression and regulatory alignment provisions in FTAs, noting where appropriate how each type of obligation is enforced. Finally, it considers the justiciability of climate-related provisions and environmental chapters in FTAs. The chapter concludes on how EU/UK-NZ FTA Parties should improve current practices.

A. Interpreting FTA Obligations

This Analysis interprets obligations in FTAs in accordance with the normal rules of international treaty interpretation. The Vienna Convention on the Law of Treaties (VCLT) requires that the ordinary meaning of a word is found and viewed in its wider context.¹²⁰ The process is not a science, and Article 31 of the VCLT demands a careful examination of a plethora of factors including: the natural or ordinary meaning of the word; the immediate and wider context of the treaty, namely its preamble and annexes; any agreement or instrument relating to the treaty; subsequent practice in the treaty's application; any special meanings given by the parties to a term; and any relevant rules of international law.

The strongest language of obligation, words denoting that Parties must do something, is commonly expressed in FTAs by saying that the Parties “shall” do something. Accordingly, this analysis shows that when FTA Parties use the word “shall” followed by words that include “cooperate”, “keep”, “improve”, “continue”, they imply that they will take immediate action. When FTA Parties follow the word ‘shall’ with “endeavour”, “take all possible steps”, “encourage”, and “strive”, they imply that work is continuous towards an objective. Furthermore, when FTA Parties use “will”, they take a middle ground and express a desire or intention rather than an obligation. At the other end of the scale is “may”, which FTA Parties use to state that a provision is not obligatory.

¹²⁰ (signed 23 May 1969, entered into force 27 January 1980), at Art 31.

Context is crucial to the interpretation of treaty obligations.¹²¹ In the FTAs this dissertation considered, the strength of a Party's MEA pledge changed with the treaty's wider context. For example, a Party's FTA commitment to implement the Paris Agreement was weakened if the FTA did not also reference the Party's domestic emissions reduction targets. Moreover, FTA Parties including cooperative provisions that recognise that "xx is important" or that "cooperation may cover xx" were weakened if they were not backed up with substantive provisions (such as ones that pledge to end fossil fuel subsidies or harmonise carbon prices). Those "fluffy" provisions could help Parties cooperate on climate-related issues and make climate action a relevant norm of international trade law. But those cooperative climate-related FTA provisions are always stronger when backed by substantive obligations.

B. Using the Language of Climate Change

The use of the language of climate change in FTAs has a recent history, first mentioned in the EU-South Korea (EU-Korea) FTA in 2011.¹²² This FTA's mention of climate change was part of the EU's commitment to their new generation of FTAs, ones underpinned by social and environmental trade concerns.¹²³ However this usage has not taken off. Only the UK has included the words "climate change" in an FTA without the EU, and this UK-Japan FTA was essentially the same agreement as the EU-Japan FTA (that UK was Party to) (EU/UK-Japan FTA).¹²⁴ Other states have preferred to opt for more flexible environmental language. This choice in language does not mean that climate change is not considered by these states, and references to carbon markets, pollution abatement, and environmental programmes all tie to movement in the climate change space.¹²⁵ Even so, in this decade of climate action, it is crucial that FTA use the language of climate change. Climate concerns can only become part of an FTA's agenda if states let it, and the absence of climate-related language does not create norms or enhance climate action in FTAs. Moreover, FTAs take time to negotiate and the public demands climate action now.¹²⁶ The attention around the absence of climate

¹²¹ Vienna Convention on the Law of Treaties, above n 120, at Art 31.

¹²² EU-Korea FTA, above n 119, Annex 13.

¹²³ Virág, Forizs and Lars Nilsson "Trade Effects of the EU-Korea Free Trade Agreement: A Comparative Analysis of Expected and Observed Outcomes" 18(1) (2017) The Estey Centre JIntLTP.

¹²⁴ EU-Japan FTA, above n 119, and UK-Japan FTA, above n 99.

¹²⁵ See for example, the NZ-Korea FTA Annex that cities ways to address the adverse effects of trade on climate, above n 96, Annex 16.

¹²⁶ Matthew Taylor, Jonathan Watts and John Bartlett "Climate crisis: 6 million people join latest wave of global protests" (27 September 2019) www.theguardian.com/.

change in the proposed Australia-UK FTA¹²⁷ shows the public importance of including these issues in FTAs. Therefore, EU/UK-NZ FTA Parties should use the language of climate change whenever possible.

II. Climate-related FTA Provisions

A. General Cooperation Provisions

Many FTAs have general climate-related cooperation provisions that list areas for potential cooperation on climate-related measures.¹²⁸ These general provisions provide trade partners with a broad mandate to cooperate on specific measures. However, states can cooperate at any point, leading to concerns that these general FTA cooperation provisions do nothing to increase state action. This dissertation submits that general cooperation provisions backed with specific obligations are best practice, and the sections below will explore FTA Party practices in these areas. Nevertheless, this dissertation acknowledges that these general provisions on their own can provide a mandate for cooperation. Therefore, this dissertation will evaluate general climate-related cooperation provisions on the language of their commitment and the breadth of cooperation coverage.

The European Union-United Kingdom FTA's (UK-EU FTA) general climate-related cooperation provisions are mandatory but not extensive; "the parties shall work together on trade-related aspects of environmental policies and measures, including in multilateral fora...".¹²⁹ Beyond this statement, the cooperation "may" cover initiatives to promote environmental goods and services through tariff and non-tariff barriers; initiatives on promoting a circular economy and green growth.

¹²⁷ "UK 'cut climate pledges' to clinch Australia trade deal" (9 September) www.bbc.com/; Steve Cannane "UK government accused of dropping FTA climate commitments due to Australian pressure" (9 September 2021) Australian Broadcasting Corporation www.abc.net.au/; Daniel Hurst "Morrison accused of hurting Australia's reputation to please Nationals after climate goals cut from UK trade deal" (9 September 2021) www.theguardian.com/; Rebecca Masters "It was about trade: Morrison confirms he didn't want climate goals in UK trade agreement" www.9news.com.au/.

¹²⁸ See EU-Singapore, above n 119, Art 12.10; CETA, above n 119, Art 24.12;

¹²⁹ EU-UK FTA, above n 99, Art 8.4.5.

The older CPTPP makes cooperation mandatory with a wider breadth of cooperation opportunities. The parties “...shall cooperate to address matters of joint or common interest.”¹³⁰ This section further lists areas of cooperation that are quite extensive and “may” include:¹³¹

energy efficiency; development of cost-effective, low emissions technologies and alternative, clean and renewable energy sources; sustainable transport and sustainable urban infrastructure development; addressing deforestation and forest degradation; emissions monitoring; market and non-market mechanisms; low emissions, resilient development and sharing of information and experiences in addressing this issue.

Such provisions give a wide mandate for cooperation and list important areas that link trade and climate. In juxtaposition, United States–Mexico–Canada Agreement’s (USMCA) environmental chapter contains the weakest language on cooperation:¹³²

The Parties recognize the importance of cooperation as a mechanism to implement this Chapter, to enhance its benefits, and to strengthen the Parties’ joint and individual capacities 24-23 to protect the environment, and to promote sustainable development as they strengthen their trade and investment relations.

The Parties are not obliged to cooperate under the USMCA, rather they only “recognise its importance”. The Parties’ goal for cooperation:¹³³

[...] to expanding their cooperative relationship on environmental matters, recognizing it will help them achieve their shared environmental goals and objectives, including the development and improvement of environmental protection, practices, and technologies.

USMCA’s environment chapter is similarly wide around its areas of potential cooperation and mentions the Parties’ prior 1994 North American Agreement on Environmental Cooperation (NAAEC) ¹³⁴

After considering the above options, EU/UK-NZ FTA Parties should use mandatory language like the EU-UK FTA or the CPTPP for their general cooperation provisions. This language is the strongest and really demonstrates that Parties consider climate action to be a paramount concern. Also, EU/UK-NZ FTA Parties should cast a wide

¹³⁰ CPTPP, above n 97, Art 20.15.2.

¹³¹ Article 20.15.2.

¹³² USMCA, above n 96, Article 24.25.1.

¹³³ Article 24.25.2.

¹³⁴ Article 24.25.3.

net around areas for potential domestic regulatory cooperation like in the CPTPP or USMCA. This broad coverage means that there is still a mandate for Parties to work together to achieve specific climate-related measures that may not make it an initial agreement.¹³⁵

B. Paris Agreement Pledges

This Analysis focuses on the extent to which Parties have included their Paris Agreement pledges in their FTAs. The EU-Singapore FTA was the first agreement to mention the Paris Agreement, and only three subsequent FTAs mention it.¹³⁶ The EU-UK FTA is noteworthy for its strength and depth of commitment through its integration of the Paris Agreement.

In the EU-UK FTA the negotiators preface the Paris Agreement's inclusion by mentioning climate action in the preamble. The Parties state that "the fight against climate change; [...] constitutes essential elements of this and supplementing agreements".¹³⁷ This preamble contextualises and centres the importance of climate change under the agreement, setting a strong agenda for climate-related cooperation.

The threat of climate change and the importance of the Paris Agreement is highlighted under Title II, Basis For Cooperation, and the Parties consider that:¹³⁸

[...] climate change represents an existential threat to humanity and reiterate their commitment to strengthening the global response to this threat. The fight against human-caused climate change as elaborated in the United Nations Framework Convention on Climate Change (UNFCCC) process, and in particular in the Paris Agreement adopted by the Conference of the Parties to the United Nations Framework Convention on Climate Change at its 21st session (the "Paris Agreement"), inspires the domestic and external policies of the Union and the United Kingdom.

The seriousness of the climate threat is backed by a clause that mandates allegiance between the Parties in the trade-climate arena. In Article COMPROV (Common

¹³⁵ For example, if Parties were unable to agree on a specific provision around Carbon markets.

¹³⁶ EU-Singapore FTA, above n 119; EU-UK FTA, above n 99; EU-Japan FTA, above n 119; UK-Japan FTA, above n 99.

¹³⁷ EU-UK FTA, above n 99, Preamble (page 19).

¹³⁸ Article COMPROV (common provision) 5(1).

provision) 5.2 “The Parties shall advocate the fight against climate change in international forums”, and:¹³⁹

[...] Each Party shall respect the Paris Agreement and the process set up by the UNFCCC and refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement.

This use of “shall” makes these provisions more explicit and onerous than those in other FTAs. The UK and EU agree to be bound to the Paris Agreement and its processes, and they allow the FTA to be cancelled if the Paris Agreements’ objects and purposes are materially defeated.¹⁴⁰

In contrast, the EU/UK-Japan FTA’s agenda only recognises the “....importance of achieving the ultimate objective...” of the United Nations Framework Convention on Climate Change (UNFCCC) “in order to address the urgent threat of climate change, and the role of trade to that end.”¹⁴¹ It has weaker obligations than the EU-UK FTA, and EU/UK-Japan FTA Parties merely “reaffirm their commitments” to effectively implement the UNFCCC and the Paris Agreement.”¹⁴² The reaffirmation of commitments does not create a positive obligation and means that states only need to state their dedication to achieve their Paris Agreement pledges.

The international climate pledges are further diluted in the CPTPP. The CPTPP does not mention the Paris Agreement (despite being entered into after its signing) and the Parties only acknowledge that the “transition to a low emissions economy requires collective action.”¹⁴³ The CPTPP’s language is even weaker than EU/UK-Japan, as the absence of the word effectively takes away any necessity to adhere to the Parties’ stated commitments under the Paris Agreement. Instead, CPTPP only affirms parties’ “... commitment to implement the multilateral environmental agreements to which it is a party.”¹⁴⁴

Given these alternatives, it is easy to see how the EU-UK FTA’s approach to the Paris Agreement’s pledges is the most desirable.

¹³⁹ Article COMPROV (common provision) 5(1).

¹⁴⁰ Article INST (Institutional Provision) 35.4.

¹⁴¹ EU-Japan FTA, above n 119, Art 16.4.4.

¹⁴² Article 16.4.

¹⁴³ CPTPP, above n 97, Art 20.15.1.

¹⁴⁴ Article 20.4.1.

C. Climate-related Measures

1. MEAs

As the Methodology discussed, FTAs can include obligations that incorporate climate-related MEAs in states domestic regulations.¹⁴⁵ The strength of FTA Parties including these climate-related MEAs depends on the detail around the MEAs underlying obligation, and the Parties degree of commitment to it. Climate-related MEA obligation evaluation is beyond the focus of this dissertation, but, this dissertation can still evaluate FTA Parties commitments to MEAs. FTA Parties including MEAs could make MEA pledges and domestic measures to achieve MEAs justiciable (as 3.II.C discussed).

In the USMCA the Parties' commitment to their MEA obligations is strong, with a provision stating that the Parties "shall adopt, maintain, and implement laws, regulations, and all other measures necessary to fulfil its respective obligations under the following multilateral environmental agreements".¹⁴⁶ However, the listed MEAs are mostly conservation focused, including agreements like the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and International Convention for the Regulation of Whaling.¹⁴⁷

The Canada and European Union Comprehensive Economic and Trade Agreement (CETA) does not specify any MEAs but has stronger language than the EU-UK FTA. Each Party in CETA agrees to "effectively implement in its law and practices, in its whole territory, the multilateral environmental agreements to which it is party."¹⁴⁸

The EU-UK FTA has much weaker language regarding climate-related MEAs than USMCA and CETA. The EU-UK FTA only specifies that Parties "shall work together to strengthen their cooperation" in various international fora.¹⁴⁹ Unlike USMCA, but similar to CETA, the EU-UK FTA does not mention many MEAs and lists the Montreal Protocol, CITES, and various marine agreements.¹⁵⁰

The differences in wording and MEA inclusion matters for the justiciability of climate-related MEA standards under FTAs. Where many MEAs are included, it is clear what

¹⁴⁵ (note that this analysis does not relate to Paris Agreement pledge, see 4.11.B).

¹⁴⁶ USMCA, above n 96, Art 24.8.4.

¹⁴⁷ Article 24.8.4.

¹⁴⁸ CETA, above n 119, Art 24.4.

¹⁴⁹ EU-UK FTA, above n 99, Art 8.5.3.

¹⁵⁰ Articles 8.5.3, 8.6 and 8.8.

Parties' obligations are, and in the absence of inclusion, strong language can fill an accountability gap. The USMCA's obligation provision is more onerous than the EU-UK FTA and makes Parties align their domestic regulations with their MEAs commitment. USMCA's language matters for FTAs that do not include the Paris Agreement, but whose Parties have ratified the agreement. The open language of Article 24.4 CETA means that theoretically the Parties could be bound to implement the goals of the Paris Agreement in their domestic laws. However, the weaker language around the matter leaves it more open to interpretation. The EU/UK-NZ FTA should follow USMCA's more binding approach.

Therefore, an EU/UK-NZ FTA should include MEAs where Parties' MEA obligations are clearly defined and adherence to implementing its standards domestically is obligatory.

2. Carbon markets

In the EU-UK FTA, Parties "...shall have in place an effective system of carbon pricing as of 1 January 2021."¹⁵¹ This obligation extends to cooperation, and both Parties:¹⁵²

[...] shall give serious consideration to linking their respective carbon pricing systems in a way that preserves the integrity of these systems and provides for the possibility to increase their effectiveness.

States with similar carbon pricing mechanisms should commit to similar provisions (like in the EU-UK FTA) that link domestic carbon pricing systems. However, where states differ on carbon pricing, there still may be room for Parties to commit themselves to carbon market related harmonisation measures. Trade partners could commit to have a carbon market in the first instance, or that their carbon pricing systems cover specific greenhouse gases (GHG). The EU-UK FTA's Article 7.3.2 provides a good example of a potential harmonisation provision, detailing that each Parties' carbon market "shall cover greenhouse gas emissions from electricity generation, heat generation, industry and aviation".

On the other hand, while CETA contains less stringent regulatory integration obligations, the agreement still enables cooperation around carbon markets. In CETA the Parties are not obliged to cooperate like in the EU-UK/FTA. CETA uses the word

¹⁵¹ EU-UK FTA, above n 99, Art 7.3.1.

¹⁵² Article 7.3.6.

“commit” in lieu of the word “shall”, indicating a pledge rather than an action. The Parties commit to cooperate on “...issues relating to carbon markets...”¹⁵³ and the promotion of carbon accounting.¹⁵⁴ Nevertheless, CETA’s language of commitment is more effective than older agreements, like the NZ-Korea FTA. The NZ-Korea FTA provides only an “...indicative list of areas of potential cooperation...” in Annex 16-A. This weak phrasing does not give the Parties a strong foothold to cooperate on the listed “...issues relating to global carbon markets”.¹⁵⁵

It is unlikely that EU/UK-NZ FTA Parties would agree to integrate their carbon market pricing, like the EU-UK FTA aspires to do. Therefore, a CETA-like cooperation provision around carbon pricing would be best for EU/UK-NZ FTA Parties. However, EU/UK-NZ FTA Parties could contain provisions like the EU-UK FTA that harmonise specific parts of each market. An EU/UK-NZ FTA including provisions about which sectors the Parties’ carbon markets cover (like the EU-UK FTA) or provisions about each markets’ use of international carbon credits could be beneficial to maintain each market’s integrity.

3. *Fossil fuel subsidies*

Eliminating fossil fuel subsidies is widely touted as a way to link the objectives of trade liberalisation and climate action.¹⁵⁶ States provide billions of dollars of subsidies each year to fossil fuel intensive industries,¹⁵⁷ meaning that fossil fuels are cheaper for consumers and less prone to competitive market forces. These subsidies are not disciplined under the WTO rules, and so FTA pledges to remove these subsidies would have benefits for market liberalisation and climate action.¹⁵⁸

¹⁵³ CETA, above n 119, Art 24.12.1(e)

¹⁵⁴ Article 24.12.1(h).

¹⁵⁵ NZ-Korea FTA, above n 96, Annex 16-A and Article 16.8.1(d).

¹⁵⁶ ACCTS negotiations, above n 62; *Discussion Paper: A New, Climate-Friendly Approach To Trade* (Sierra Club, 2016); *EU Trade Policy Review – An Trade Policy*, above n 118; The Economist Intelligence Unit *Climate change and trade agreements. Friends or foes?* (International Chamber of Commerce and Qatar Chamber, 2019), at 21-29.

¹⁵⁷ David Coady and others *Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates* (International Monetary Fund, Working Paper No. 19/89, 2 May 2019).

¹⁵⁸ With research even claiming that removing fossil fuel subsidies could reduce emissions by an average of 6 per cent across the modelled countries if combined with other measures. For discussion, see Jonas Kuehl and others *Cutting Emissions Through Fossil Fuel Subsidy Reform and Taxation* (International Institute for Sustainable Development, Global Studies Initiative, July 2021).

Despite signs of a growing global mandate,¹⁵⁹ the EU-Singapore FTA is the only FTA to mention fossil fuel subsidies, and the Parties:¹⁶⁰

[...] recognise the need to ensure that, when developing public support systems for fossil fuels, proper account is taken of the need to reduce greenhouse gas emissions and of the need to limit distortions of trade as much as possible.

The Parties go on to share “...the goal of progressively reducing subsidies for fossil fuels ...”¹⁶¹ but this pledge has caveats. Coal, one of the world’s most polluting and subsidised fossil fuel,¹⁶² is excluded. This exception makes the provision unsatisfactory and shows that, in reality, their commitments to reduce fossil fuel subsidies has little teeth. EU/UK-NZ FTA Parties reforming this provision to include coal would remedy this deficiency.

D. Outside of the Environment Chapter

As the Methodology established and this Chapter discussed, FTAs should include broad range of climate-related FTA provisions that are backed with specific changes to a Party’s domestic measures. However, this Analysis found that these climate-related provisions are usually confined within an FTA’s Trade and Environment chapter (also commonly referred to in EU FTAs as a Trade and Sustainable Development chapter).¹⁶³ The placement of these climate-related provisions limits the breadth of their application as they apply only to environmental topics.¹⁶⁴ Because climate action requires sectorial wide decarbonisation¹⁶⁵ it is myopic to confine climate-related provisions to traditionally *environmental* topics. Parties should integrate climate-related provisions outside of their FTA’s trade and environment chapter. The EU-UK FTA illustrates how to do this integration. It also shows that FTA Parties have more machinery to collaborate on climate-related trade measures if they also include climate-related FTA provisions outside of the environment chapter.

¹⁵⁹ G7 Leaders “Ise-Shima Leaders Declaration” (G7 Ise-Shima Summit, 26-27 May 2016), with UK potentially pushing for a newer pledge according to Alberto Nardelli and John Follain “U.K Aims to Secure G-7 Pledge to End Subsidies for Fossil Fuels” (May 18 2021) www.bloomberg.com/; ACCTS negotiations, above n 62.

¹⁶⁰ EU-Singapore FTA, above n 119, Art 12.11.3.

¹⁶¹ Article 12.11.3.

¹⁶² David Coady and others, above n 157.

¹⁶³ See EU-UK FTA non-regression clause referred to below at [IV.C](#), for an example exception.

¹⁶⁴ Like the trade of endangered animals or the conservation of the natural environment.

¹⁶⁵ *Summary for Policymakers*, above n 81.

1. *The EU-UK FTA*

The EU-UK FTA is the only FTA that integrates climate-related provisions outside of its environment chapter. Its Energy Chapter contains a climate-related provision with the primary objective “to support security of supply and environmental sustainability, notably in contributing to the fight against climate change in those areas”.¹⁶⁶ This climate-related pledge is backed up by a cooperation provision (ENER(Energy).25) around climate-related standards:

the Parties shall promote cooperation between the regulators and standardisation bodies located within their respective territories to facilitate the development of international standards with respect to energy efficiency and renewable energy, with a view to contributing to sustainable energy and climate policy.

Similarly, the TBT Annex-1 Article 8.2 about Motor Vehicles and Equipment and parts thereof, includes a climate-related cooperation provision. The Parties pledge to cooperate and exchange information under Article 8.1. But the subsequent cooperation provisions have weaker obligations than the Energy Chapter, Article 8.2 stating that:

Areas of cooperation under this Article may include in particular:

(b) the exchange, to the extent possible, of research, information and results linked to the development of new vehicle safety regulations or related standards, advanced emission reduction, and emerging vehicle technologies;

(c) the exchange of available information on the identification of safety-related or emission-related defects and non-compliance with technical regulations;

Although these examples differ in the strength of their obligations, they illustrate how climate-related provisions could be integrated into an FTA outside of its environment chapter.

Moreover, Parties including climate-related FTA provisions outside of the environment chapter have more machinery to collaborate on climate-related measures. Some FTAs set up specific environment committees alongside their environment chapter that must meet,¹⁶⁷ whereas others like the EU-UK FTA merely

¹⁶⁶ EU-UK FTA, above n 99, Art ENER(Energy).1.

¹⁶⁷ The CPTPP’s environment committee must meet at first yearly, then every two years, with a review of the committees’ work after five, above n 97, Art 20.19.

contain a commitment for the Parties to “regularly” meet with each other”.¹⁶⁸ Because of this difference of commitments in FTA environment chapters, it is particularly important for Parties to include climate-related provisions FTA wide. The inclusion allows for finicky climate-related trade measures like standard harmonisation can be kept front of mind when Parties meet to discuss broader efforts to lower regulatory barriers to trade.¹⁶⁹ This broader inclusion also allows for the greater justiciability of climate-related provisions in situations where the environment chapter itself is not subject to dispute settlement (4.IV for further discussion).

Therefore, an EU/UK-NZ FTA Parties should learn from the EU-UK FTA and integrate climate-related provisions in topics outside its trade and environment chapter.

III. Non-Regression Provisions

All FTAs this dissertation reviewed, prohibited some form of regression from states’ own environmental laws to encourage trade and investment.¹⁷⁰ Most FTAs stated that each Party “shall not waive or otherwise derogate from” their environmental laws, regulations or policies.¹⁷¹ However, most Parties did not include references in their FTAs to what their environmental laws, regulations or policies were. As the methodology discussed (3.II.B), it is especially difficult for each Party to hold each other to account on their climate-related pledges without reference to their emission reduction goals. Only the EU-UK FTA referenced their domestic emission reduction goals. The Parties’ dictated a climate level of protection on top of an environmental level of protection that Parties cannot derogate from:¹⁷²

2. A Party shall not weaken or reduce, in a manner affecting trade or investment between the parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection.

¹⁶⁸ EU-UK FTA, above n 99, Art 7.6 Cooperation on Enforcement.

¹⁶⁹ For example, whenever the FTAs’ TBT committee meets, rather than only when the FTA’s environment committee meets.

¹⁷⁰ EU-Singapore FTA, above n 119, Art 12.12; UK-Japan FTA, above n 99, Art 16.2.2; CETA, above n 119, Art 24.5; USMCA, above n 96, Art 24.4; CPTPP, above n 97, Art 20.3.6; NZ-China FTA Upgrade, above n 119, Art 22.3.1.

¹⁷¹ UK-Japan FTA, above n 99; CETA, above n 119; EU-Singapore FTA, above n 119; USMCA, above n 96.

¹⁷² EU-UK FTA, above n 99, Art 7.2 Non-regression from levels of protection.

This climate level of protection is defined by the Parties in Article 7.1.3:

For the purposes of this Chapter, “climate level of protection” means the level of protection with respect to emissions and removals of greenhouse gases and the phase-out of ozone depleting substances. With regard to greenhouse gases, this means:

(a) for the Union, the 40 % economy-wide 2030 target, including the Union’s system of carbon pricing;

(b) for the United Kingdom, the United Kingdom’s economy-wide share of this 2030 target, including the United Kingdom’s system of carbon pricing.

The EU-UK FTA’s articulation of their climate standard is necessary as it shows each Party’s commitment to be bound to their targets both domestically and internationally. This is positive as it clearly emphasises the Parties’ bottom lines with trade, that neither state can undercut their domestic climate standards to gain trade advantages.

The EU/UK-NZ FTA should aim to enshrine the Parties’ climate change measures. The appropriate target for NZ should be based on their 2030 estimated emissions target in line with the Climate Change Response (Zero Carbon) Amendment Act 2019.¹⁷³

IV. Justiciability of Climate-Related FTA Provisions

A. General Justiciability

As outlined in the Methodology, this dissertation prefers that climate-related FTA provisions are subject to the FTA’s dispute settlement chapter. Most climate related FTA provisions are contained in an FTAs’ environment chapters. Therefore, this dissertation evaluates first whether environment chapters in existing FTAs are amenable to dispute settlement. Currently, there is a difference between the EU’s non-justiciable approach to environment chapters and the United States’ justiciable approach. This contrast is highlighted through comparing the language of dispute settlement mechanisms in the EU-Singapore FTA, the EU-UK FTA and the CPTPP’s environment chapters (The US is not a member of the CPTTP but was involved in the original negotiations of the environment chapter).

¹⁷³ Part 1A subs 5Q.

1. EU-Singapore FTA

The EU-Singapore FTA dispute settlement procedures are the most informal. Its dispute settlement mechanisms do not apply to its Sustainable Development Chapter which has its own special procedure. If there is a dispute, first the Parties can consult each other and then have recourse to a special panel of experts.¹⁷⁴ This expert panel can seek advice from the relevant organisations and issues an interim and final report with non-binding recommendations.¹⁷⁵ Following the report, Parties can discuss how the appropriate measures are to be implemented.¹⁷⁶ As this dissertation's methodology detailed, under this form of dispute settlement, compliance with the FTA cannot be guaranteed.

2. EU-UK FTA

The EU-UK FTA does not differ hugely with its informal consultation and panel-based approach for its environment chapter.¹⁷⁷ The chapter makes it clear that following a dispute, "... the responding Party does not need to follow these recommendations in ensuring conformity with the Agreement."¹⁷⁸

3. The CPTPP

The CPTPP's Environment Chapter uses the FTAs' normal dispute settlement procedure in case of breach.¹⁷⁹ This move is desirable as it normalises dispute settlement for breach of any clause in an environment chapter. However, recourse to dispute settlement still requires three levels of consultation.¹⁸⁰ The CPTPP's environmental consultation process increasingly escalates diplomatic negotiation processes so requires a high amount of political capital to get the dispute to arbitration. Streamlining this process to a simple two step negotiation and then arbitration process could lower barriers to dispute resolution. The two-step process could also avoid the procedural problems of the US's compulsory arbitration scheme for FTA labour disputes. US partnered FTAs, like CAFTA, have overcomplicated dispute resolution

¹⁷⁴ EU-Singapore FTA, above n 119, Art 12.6.1.

¹⁷⁵ Article 12.17.8.

¹⁷⁶ Article 12.17.9.

¹⁷⁷ EU-UK FTA, above n 99, Art 9.3.1.

¹⁷⁸ Article 9.2.9.

¹⁷⁹ CPTPP, above n 97, Art 20.23.

¹⁸⁰ Article 20.23.

processes. US partnered FTAs have generated more than 40 preliminarily proceedings, but only one of those proceedings made it to an arbitration tribunal.¹⁸¹

The CPTPP's dispute settlement chapter also allows for interested third Parties to take part in the dispute.¹⁸² This process differs from both the EU-UK and EU-Singapore dispute settlement provisions that do not allow for third party participation.¹⁸³ The CPTPP's third-Party participation provisions are attractive and could be advantageous in climate related FTA disputes. Although third Parties, like non-state actors, are unable to directly claim against a state, they could participate in these climate related disputes by making submissions and presenting their views to the panel. There are risks that these articles could be hijacked by powerful, non-state actors with environmentally regressive agendas. But these risks are minimal in relation to FTA environment chapters. The positive nature of the obligations in FTA environment chapters and the corresponding ability for environmentally conscious non-state actors to participate in the process mitigates the concerns. Moreover, these provisions about third party participation in FTA dispute settlement could further add legitimacy to FTAs. These additions would add transparency to a system seen by many as secretive and elitist.¹⁸⁴ Therefore, a streamlined CPTPP style dispute resolution system for environmental chapters is the most desirable option for the EU/UK-NZ FTA Parties.

B. Fossil Fuel Subsidies

A fossil fuel subsidy clause in an EU/UK-NZ FTA could remedy the justiciability gap in the area. Fossil fuel subsidies are yet to be challenged in any FTA or WTO dispute settlement body because they are unlikely to breach the WTO Agreement on Subsidies and Countervailing Measures (ASCM).¹⁸⁵ Several countries have tried unsuccessfully to push for fossil fuel subsidy reform in the WTO.¹⁸⁶ A workable fossil fuel subsidy clause in an EU/UK-NZ FTA could achieve reform in the wait for wider action.

¹⁸¹ Patrick Abel, above n 102, at 155.

¹⁸² CPTPP, above n 97, Art 28.14.

¹⁸³ Other than allowing expert advice for evidence.

¹⁸⁴ As Chapter One addressed.

¹⁸⁵ This is because the most common government subsidies for fossil fuels are to do with consumption and are not "specific" within the meaning Article 2 of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Commonly known as the ASCM Agreement). They also are unlikely to be actionable under ASCM's Article 5 definition because they might not cause adverse effects to the interests of other members. For further discussion see Dick De Bievre, Ilaria Espa and Arlo Poletti "No iceberg in sight: on the absence of WTO disputes challenging fossil fuel subsidies" (2017) 17 IntEnvironA 411.

¹⁸⁶ Ministry of Foreign Affairs and Trade "New Zealand relaunches campaign to deliver Joint Ministerial Statement on Fossil Fuel Subsidy Reform (FFSR) at WTO MC12" (20 July 2021) www.mfat.govt.nz/.

Nevertheless, the biggest barrier to clause reform is the lack of political will. The EU and UK agreed in principle to phase out fossil fuel subsidies but have not comprehensively ended the practice.¹⁸⁷ If politically possible, NZ should push for the EU and UK to include a fossil fuel subsidy clause in an EU/UK-NZ FTA.

C. The EU/UK FTA's Non-Regression Provision

In most FTAs, non-regression clauses are not treated differently to other environmental provisions. However, the EU-UK FTA has two novel features which differentiates it from the usual EU approach.

1. Rebalancing measures

First, Article 9.4 bypasses the informal dispute settlement mechanisms and allows either of the Parties to take rebalancing measures if there are “significant divergences” in the other’s labour and social, environmental or climate protection policies and priorities.¹⁸⁸ These rebalancing measures are not defined in the FTA but are likely to encompass the usual trade dispute settlement remedies, like tariffs or export bans, to compel the Party into compliance. As always, there is a procedure to be followed and the normal arbitration process commences in the event of disagreement to a rebalancing measure.¹⁸⁹ Article 9.4.2 clarifies that:

If *material impacts* (emphasis added) on trade or investment between the parties are arising as a result of significant divergences between the parties in the areas referred to in paragraph 1, either Party may take appropriate rebalancing measures to address the situation. Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation.

The bar of ‘material impact’ in Article 9.4.2 seems akin to the ‘material injury’ standard in Article 3 of the WTO’s Agreement on Implementation of Article VI of the GATT 1994 (WTO Anti-dumping Agreement).¹⁹⁰ This similarity has implications, as it would require a Party to prove the trade advantage that the other gained from lowering their

¹⁸⁷Most recently at the 2020 G20 Leaders’ Summit, G20 Leaders “Leaders’ Declaration Riyadh Summit” (Press release, November 21 2020), at 7.

¹⁸⁸ EU-UK FTA, above n 99, Art 9.4.1.

¹⁸⁹ Article 9.4.3.

¹⁹⁰This ASCM Agreement, determines that the dumping of products of one country into another at less than the normal value of the products is condemned if it causes or threatens material injury. If it is determined to cause or threaten material injury, the complainant can levy an anti-dumping duty on the defendant. Above n 190.

climate measures .¹⁹¹ In the case of divergent climate measures, it may be impossible to make these kinds of comparative calculations of what trade advantage a Party gains. Such clauses become unworkable and undisputable under this interpretation.¹⁹²

For non-regression clauses, this bind is not inevitable. Instead, EU/UK-NZ FTA Parties could use the language of the CPTPP instead of the EU-UK FTA to produce a workable clause. If a Party in the CPTPP “... fails to effectively enforce its environmental laws through a sustained or recurring course of action or inaction...”, the Parties only need to fail “... in a manner affecting trade or investment between the Parties...”. In *U.S. v. Guatemala* the Panel applied this “manner affecting trade” standard to a dispute about Guatemala regressing its labour standards. In this case, to “affect trade”, proof of material influence or impression was not necessary. Instead, the test “... would simply require proof of some effect on an employer or economic sector engaged in trade.”¹⁹³ The court was clear that the effects on prices or quantities sold in international trade was not necessary to fulfil this test, as it would be “practically impossible.”¹⁹⁴ This standard is much less onerous than the EU-UK FTA’s material impacts test and proves that the language of the EU-UK provision could be easily modified to be more justiciable.

Therefore, an EU/UK-NZ FTA’s non-regression clause should be justiciable and use the “manner affecting trade” standard.

2. Ability to cancel the FTA

Second, the EU-UK FTA allows either Party to cancel the FTA if they consider that there has been a serious and substantial failure by the other.¹⁹⁵ Article INST (Institutional Provision).35.4 further defines that “...an act or omission which materially defeats the object and purpose of the Paris Agreement...” will constitute a serious and substantial failure, opening the possibility of cancellation or suspension. Acts that defeat the object and purpose of the Paris Agreement are not defined,

¹⁹¹ ASCM Agreement, above n 190, Art 3.1.

¹⁹² Marco Bronckers and Giovanni Gruni, above n 104, at 31.

¹⁹³ *US-Guatemala - Issues Relating to the Obligations Under Art 16.2.1(a) of the CAFTA-DR (U.S. v. Guatemala)* (2017), at [168].

¹⁹⁴ At [176].

¹⁹⁵ EU-UK FTA, above n 99, Art INST (Institutional provision).35.1.

however, hypothetically, a Party pulling out of the Paris Agreement or making no steps towards its implementation could trigger cancellation.

This specific reference to the Paris Agreement is a desirable provision in an EU/UK-NZ FTA. The ability for an FTA partner to cancel the FTA due to the breach of the Paris Agreement enhances the importance of the pledge. Moreover, the inclusion of these clauses gives FTA Parties an economic incentive to adhere to the Paris Agreement and consequently their various emissions pledges and climate-related cooperation measures throughout the FTA. Although this pledge may not be agreed to by a large community of states, it provides actors like the UK, EU and NZ, who have similar climate change ambitions, the opportunity to condition FTAs on their climate-related goals. Without these teeth, tying climate change to FTAs does not fully address the interconnection of trade and climate change.

Therefore, EU/UK-NZ FTA Parties should include provisions that enable the cancellation of the FTA if the Parties breach the Paris Agreement.

V. Application to an EU/UK-NZ FTA

All considered, this analysis shows that states have underutilised the opportunity to add climate-related FTA provisions to their FTAs.

EU/UK-NZ FTA Parties should:

1. Use the language of climate change throughout their agreements;
2. Learn from current FTA practice and strongly commit themselves to general climate-related cooperation provisions backed with commitments to specific climate-related measures (that use the language of climate change);
3. Incorporate specific climate-related measures around the Parties pledges under the Paris Agreement, cooperation and harmonisation measures around MEAs standards, carbon markets, and fossil fuel subsidies;
4. Integrate these general and specific climate-related provisions outside of the FTAs' environment chapter. This integration should follow the example set out in the EU-UK FTA;
5. Back climate-related FTA provisions with non-regression provisions. Specifically, there should be a non-regression clause around Parties' emission reduction targets;
6. Make the climate-related FTA provisions justiciable and subject to the FTAs' dispute settlement processes. These processes should be simple and allow for non-state actors to participate in disputes;
7. Amend specific climate-related measures to enhance their justiciability. Amend particular provisions around harmonising Parties' fossil fuel subsidy regimes and non-regression.

If Parties make these improvements, an EU/UK-NZ FTA would be more climate conscious. The inclusion of these improved climate-related provisions in an EU/UK-NZ FTA could be picked up by other states in their future FTA negotiations, as well as by negotiators for WTO Agreements.¹⁹⁶ These wider implications add to the impact that improved climate-related EU/UK-NZ FTA provisions could bring.

¹⁹⁶ Due to their replicatory tendency, see 2.II.B.

CHAPTER FIVE: FILLING THE GAPS

I. New Climate-related FTA Provisions

As Chapters Two and Three noted, states should use FTAs to impose positive legal obligations on each other to enhance their climate action. But Chapter Four shows that states underutilise climate-related FTA provisions,¹⁹⁷ and that an EU/UK-NZ FTA should improve on this lack of state practice. This Chapter builds on Chapter Four's analysis and focuses on two underutilised areas of climate-related FTA provisions. Namely, how EU/UK-NZ FTA Parties can create new climate-related FTA provisions in two areas: outside of the FTA's environment chapter, and in relation to private actors.

A. Outside of the Environment Chapter

Chapter Four showed that FTA Parties should back up general provisions around climate-related FTA cooperation measures with specific provisions outside of the environment chapter. This section builds on these observations and suggests how EU/UK-NZ FTA Parties could create these provisions outside of the environment chapter.

EU/UK-NZ FTA Parties could add climate-related goals to any FTA chapter about regulatory cooperation (outside of the environment chapter). As Chapter Four discussed, the EU-UK FTA includes climate-related goals in its Energy Chapters and in one of its TBT Annexes. EU/UK-NZ Parties FTA could go further and make cooperation or standardisation of climate-related measures a goal of any FTA chapter related to regulatory cooperation. This inclusion would make climate concerns a natural consideration of any initiative to lower trade barriers and align with the Paris Agreement's goal of sectorial wide decarbonisation by 2050.

¹⁹⁷ Namely, regarding their Paris Agreement Pledges, and their Climate-related measures around MEAs, Carbon Markets and Fossil Fuel Subsidies.

For example, the TBT Chapter of the NZ-Singapore CEP lists the objectives of the agreement under article 6.2:

The objectives of this Chapter are to increase and facilitate trade through furthering the implementation of the TBT Agreement and building on the work of APEC on standards and conformance. Wherever possible, the Parties shall aim to reduce compliance costs by:

- (a) eliminating unnecessary technical barriers to trade in goods between the Parties;
- (b) enhancing cooperation among the Parties' regulatory agencies responsible for standards, technical regulations and conformity assessment procedures applicable to goods;

If this provision was replicated in a future FTA, Parties could add a further clause to read:

- (c) eliminating unnecessary technical barriers to trade to facilitate climate-friendly trade between the Parties.

This provision would be a beneficial addition to an EU/UK-NZ FTA's TBT Chapter. Climate friendly trade could be defined further through a specific (non-exhaustive) provision where Parties list areas of cooperation around energy efficiency, ecolabelling and vehicle emissions measures. Adding these provisions to an EU/UK-NZ FTA's TBT chapter could facilitate more trade in climate friendly goods between Parties and build a base for further regulatory cooperation. This provision would not lock in any specific regulatory change but could add momentum to the possibility of the EU or UK joining negotiations on the Agreement on Climate Change, Trade and Sustainability (ACCTS).¹⁹⁸

EU/UK-NZ FTA Parties could also add these general and specific climate-related provisions to their Agriculture chapters (or general trade in goods chapters). For example, the EU, UK and NZ could collaborate around Agricultural technology (Agritech) provisions to increase trade in the area and facilitate agricultural emission reduction. Agricultural emissions (methane in particular) accounts for just under half

¹⁹⁸ A proposed New Zealand led initiative "to bring together some of the inter-related elements of the climate change, trade and sustainable development agendas." Ministry of Foreign Affairs and Trade New Zealand, above n 62.

of New Zealand's total GHG emissions¹⁹⁹ compared to a respective 10% for the EU and UK.²⁰⁰ Collaboration in this sector could benefit all three Parties, since each aim to cut methane to some extent in both the short and medium term.²⁰¹

To start, the Parties could agree to a general climate-related provision about cooperating on agricultural emission reduction. They could borrow language from the EU/UK-Japan FTA which has a chapter on agricultural cooperation. The scope of cooperation in the EU/UK-Japan FTA Agriculture Chapter covers, amongst other things:²⁰²

(b) cooperation with a view to improving farm management, productivity and competitiveness, including the exchange of best practices regarding sustainable agriculture, as well as the use of technology and innovation;

Adding a clause to this chapter to include climate change or emissions reduction technology would be a valuable addition to this Agriculture Chapter. An EU/UK-NZ FTA could include:

cooperation on agricultural emission reduction, in particular the exchange of best practices, technology, and innovation regarding on farm methane reduction.

This general cooperation provision could be backed with specific FTA provisions. For example, an EU/UK-NZ FTA could include provisions in the TBT chapter to ensure a decrease in regulatory barriers for on farm emissions reduction technologies or change in tariff classifications so that methane reducing agricultural technologies are tariff free.

¹⁹⁹ Statistics New Zealand "New Zealand's greenhouse gas emissions" (15 October 2020) www.stats.govt.nz/.

²⁰⁰ *EU agricultural policy and climate change* (European Parliament, 2020); *Agricultural Statistics and Climate Change* (United Kingdom, Department for Environment Food and Rural Affairs, 9th Edition, September 2019).

²⁰¹ New Zealand's climate change regime includes agricultural emissions and specifically aims to reduce methane by 24% to 47% less than 2017 emissions by 2050, Climate Change Response Act 2002, s 5Q 1(a)ii; EU 35-37% ; *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on an EU strategy to reduce methane emissions* (European Commission, COM(2020), 14 October 2020) ; UK is evaluating their strategy *Methane Strategy* (European Scrutiny Committee United Kingdom, Thirty-eight Report of Session 2019-21, 2 March 2021) at 1.16.

²⁰² EU-Japan Chapter 19, Article 19.2(2).

Cutting regulatory red tape around foreign involvement in New Zealand's Agritech sector could ease the development of new technologies and increase trade in these technologies. Commitments to this end could be included in an FTA's services and investment chapter. For example, there could be a general clause added into an FTA's services and investment chapter that reads:²⁰³

The Parties affirm the importance of sustainable and climate-positive services and investments within their territory. To this end, the Parties aim to incorporate rules within their jurisdictions to facilitate and incentivise the entry of sustainable and climate-positive services and investments.

Another, more specific list could be added, detailing specific areas where parties hope to encourage sustainable and climate positive investments (E.g., around Agritech or Green Hydrogen).

These clauses could reduce regulatory barriers to trade and could solve current issues, as climate-related EU Agritech companies have had regulatory difficulties entering NZ.²⁰⁴ These regulatory changes would also complement NZ's goals around its Agritech sector.²⁰⁵ The NZ Government's report on Agritech noted that the lack of global regulatory standardisation holds back its industry.²⁰⁶ The report also mentioned that NZ's Agritech industry should learn from practices in the Netherlands and Denmark. Because these countries form part of the EU, an EU-NZ FTA would be the best FTA to include climate-related Agritech cooperation provisions.

Nevertheless, interstate cooperation around the harmonization of these kinds of specific regulations is likely to be difficult. Regulatory equivalence or standardisation agreements require a lot of willpower and are likely to be contested and political.²⁰⁷ Most agreements on regulatory equivalence or standardisation are created in the "shadow of the law", with details worked out through FTA negotiating committees

²⁰³ The CPTPP has a similar provision about "Corporate Social Responsibility" in their investment chapter, above n 97, Art 9.17.

²⁰⁴ Gerard Hutching "Dutch company DSM keen to trial methane cutting tech this year" (13 March 2019) www.stuff.co.nz/; Jamie Morton "Dutch company's methane blocker hits NZ roadblock" (29 July 2019) www.nzherald.co.nz; Jane Byrne "Fonterra joins forces with DSM to lower methane emission in pasture-based cattle farming" (2 Feb 2021) www.feednavigator.com/.

²⁰⁵ *Agritech Industry Transformation Plan* (Ministry of Business, Innovation and Employment New Zealand, ISSN (Online): 978-1-99--001912-8, July 2020).

²⁰⁶ At 42.

²⁰⁷ Kalypso Nicolaidis and Gregory Shaffer "Transnational Mutual Recognition Regimes: Governance without Global Government" (2005) 68 *Law & Contemp Probs* 263, at 264.

rather than in the FTA's main text. Without motivated trade negotiators trying to find agreement on matters such as Agritech market access or vehicle emissions standards, FTA's role to combat climate change is limited. The OECD reports that greening FTAs through regulatory cooperation provisions is "where innovation is happening and where the highest potential for enhanced environmental outcome lies."²⁰⁸ Therefore, it is crucial that Parties try.

B. Private Actors

Current FTAs fail to consider how private actors can also be held responsible for climate-related trade concerns. Private actors reap the benefits of FTAs through eased access into overseas markets but are not specifically regulated by FTA provisions. States' efforts to re-legitimise their FTAs by including climate-related provisions are limited if these climate-related provisions only apply to states. Concerns about the lack of private actor responsibility in FTAs are widespread and are something that states should account for.²⁰⁹ These concerns are especially relevant with climate change, where there is growing public awareness that private actors have unduly contributed to global emissions.²¹⁰ Therefore, adding FTA provisions about private actors could maintain their social licence, and improve their climate performance.

This lacuna around private actor climate responsibility could be filled by states including specific FTA mechanisms for states to hold private actors to account. This section proposes that EU/UK-NZ FTA Parties can do this by incorporating climate-related corporate responsibility and climate-related financial disclosure provisions.

1. Climate-related corporate responsibility

Corporations are not bound to any climate-related standards under international law which makes the inclusion of climate-related corporate responsibility standards difficult.²¹¹ However, states could use an FTA to promote private initiatives that guide companies towards greater climate responsibility. The EU-UK FTAs' Article 8.10.1

²⁰⁸ Inmaculada Martinez-Zarzoso, above n 16, at 8.

²⁰⁹ The Trade for All Advisory Board NZ noted public feedback that government's trade negotiations prioritises corporations at the expense of other citizens and groups, above n 6, at 40.

²¹⁰ Richard Heede "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement produces 1854–2010" (2014) 112 *Climatic Change* 229. For an updated (not peer reviewed) estimate see Climate Accountability Institute "Carbon Majors" (8 October 2019) www.climateaccountability.org/; Shannon Hall "Exxon Knew about Climate Change almost 40 years ago" (26 October 2015) *Scientific American* www.scientificamerican.com/.

²¹¹ Lisa Benjamin *Companies and Climate Change* (Cambridge University Press, Cambridge, 2021), at 105.

attempts to promote this by talking about trade and responsible supply chain management:

The Parties recognise the importance of responsible management of supply chains through responsible business conduct and corporate social responsibility practices and the role of trade in pursuing this objective.

But the language surrounding this pledge is weak, and the international instruments that Article 8 lists are not specifically climate focused.²¹² A potential EU/UK-NZ FTA provision could go further and say:

Recognising the importance of corporate responsibility in businesses' climate change pledges, the Parties shall encourage private entities to reduce their carbon emissions.

Subsequent provisions could link to other FTA obligations, for example, around each state's carbon markets and the requirements that it covers all industries.²¹³ Global voluntary climate initiatives could also be referenced, like The Principles on Climate Obligations of Enterprises²¹⁴ or the United Nation's Race to Zero Campaign.²¹⁵ given the widespread trend of companies pledging to reduce their emissions in line with the Paris Agreement's goals,²¹⁶ FTA provisions around corporate responsibility make sense. Although these provisions do not create binding legal obligations for corporations, they put the spotlight on their responsibilities to reduce emissions. An EU/UK-NZ FTA should include these corporate responsibility provisions.

²¹² Like the OECD Guidelines for Multinational Enterprises and the UN Global Compact mentioned in the EU-UK FTA, above n 99, Art 8.10.2(b).

²¹³ Or others specific measures discussed at 4.II.B.

²¹⁴ For corporations with international supply chains, there are relevant principles about enterprises considering their suppliers' GHG emissions. Expert Group on Global Climate Change *Principles on Climate Obligations of Enterprises* (Expert Group on Climate Obligations of Enterprises, second edition, 2020), Principle 18.

²¹⁵ Where parties pledge to reach net zero GHGs as soon as possible and by mid-century at the latest, have a plan to do this within 12 months, and then report publicly about their progress see United Nations "Race to Zero Campaign" United Nations Climate Change www.unfccc.int/.

²¹⁶ Like the more than 100 organisations in New Zealand's Climate Leaders Coalition "Who" www.climateleaderscoalition.org.nz/, or the companies who are a part of the United Nation's Race to Zero Campaign.

2. *Climate-related financial disclosure regimes*

FTAs could also create opportunities for Parties to collaborate and align their climate-related financial disclosure regimes. A climate-related financial disclosure regime is a framework proposed by the International Taskforce on Climate-related Financial Disclosures (TCFD) to manage risks to financial markets from climate change.²¹⁷ Numerous states are proposing financial market regulations in line with the TCFD's recommendations to help companies disclose "clear, comparable and consistent information about the risks and opportunities presented by climate change."²¹⁸ An EU/UK-NZ FTA that includes provisions to align the states' climate-related financial disclosure regimes could assist the global uptake of the TCFD recommendations. These provisions should concern themselves with specific financial market climate-related disclosures (CFD), or more general climate-related disclosures for companies with multinational value chains.

A provision about aligning each state's CFD regimes would be suitable in an EU/UK-NZ FTA. The EU, UK, and NZ all plan to implement some form of a CFD regime;²¹⁹ however, there is a danger that the quality of disclosure differs between the regimes, going against TCFD recommendations that aim to be applicable to all organisations in the global economy.²²⁰ States could include a provision in FTAs to align their respective CFD regimes to the TCFD framework and mandate the inclusion of climate-related supply chain risks in financial disclosures, so as to emphasise the risks that climate change poses to international trade.²²¹

²¹⁷ Task Force on Climate-Related Financial Disclosures "About" www.fsb-tcfd.org/.

²¹⁸ Task Force on Climate-Related Financial Disclosures *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (Task Force on Climate-Related Financial Disclosures, June 2017), at 1.

²¹⁹ European Commission "Corporate sustainability reporting" www.ec.europa.eu/ ; Department for Business, Energy and Industrial Strategy United Kingdom "Closed consultation: Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs" (24 March 2021) www.gov.uk/; Ministry for the Environment New Zealand "Mandatory climate-related disclosures" (April 2021) www.environment.govt.nz/.

²²⁰ Task Force on Climate-Related Financial Disclosures, above n 218, at 2-4.

²²¹ Abhijeet Ghadge, Hendrik Wurtmann and Stefan Seuring "Managing climate change risks in global supply chains: a review and research agenda" (2020) 58(1) *International Journal of Production Research* 44; Marit Achenbach "Transparency of Climate-Related Risks and Opportunities: Determinants Influencing the Disclosure in Line with the Task Force on Climate-Related Financial Disclosures" (2021) 4(1) *Glocality* 1.

A potential EU/UK-NZ FTA provision could read:

1. The Parties shall endeavour to cooperate on their climate-related financial disclosure regimes with the goal to implement the TCFD's recommendations. Each Party shall work towards an effective national regime of climate-related financial disclosures that, amongst other things, covers climate-related supply chain risks.

This inclusion would add international accountability to each regime and support the TCFD's goal of clear, comparable and consistent information disclosure.²²² More generally, states in the EU/UK-NZ FTA should also commit to encourage corporate climate-related disclosures amongst private actors with multinational supply chains. This clause could follow the above provision and read:

- a. Parties shall encourage corporate responsibility to implement the TCFD recommendations economy wide. In particular, Parties shall encourage corporate responsibility around climate-related supply chain risks.

The inclusion of these general, non-finance industry specific provisions could help private actors be more accountable to their states. This type of clause would encourage private actors to be aware of climate change and factor it into their management regimes.²²³ Many private actors have overseas trading partners and complex supply chains, meaning that they may be more vulnerable to the risks of climate change.²²⁴ The TCFD states that that climate-related supply chain issues could pose an acute physical risk and a reputational transition risk to corporations.²²⁵ Adding these concerns to FTAs would help private actors with transnational supply chains better understand and mitigate their climate risks. States including these climate-related disclosure FTA provisions complements the TCFD strategic recommendations that every organisation considers the impact of climate change on their supply chains.²²⁶

²²² Task Force on Climate-Related Financial Disclosures, above n 218, at 1.

²²³ At 1.

²²⁴ Abhijeet Ghadge, Hendrik Wurtmann and Stefan Seuring above n 221; Marit Achenbach, above n 221.

²²⁵ Task Force on Climate-Related Financial Disclosures, above n 218, at 72.

²²⁶ At 20.

II. Conclusion

This chapter explored how EU/UK-NZ Parties can create new climate-related FTA provisions in two areas, outside of the environment chapter and in relation to private actors. Outside of an environment chapter, states can add general climate-related goals to FTA Chapters on regulatory cooperation and services and investment; and back these goals up with area specific FTA provisions. In relation to private actors, Parties should include FTA provisions that emphasise and encourage corporations to be responsible for their climate emissions and climate-related risks.

Similar to Chapter Four's recommendations, these proposed improvements are not exhaustive and could apply to any Party negotiating an FTA. Understandably, these changes are technical and require greater thought and political willpower from FTA Parties. But with tariff rates low across the board, these more detail-focused FTA provisions can do more to facilitate climate friendly trade and reduce emissions than tariff reduction. Importantly, the inclusion of climate-related provisions in FTAs establishes that international trade law can concern itself with climate change. Ultimately, broadening FTAs focus by integrating climate-related provisions unlocks Parties' abilities to tackle the climate crisis through trade.

CHAPTER SIX: CONCLUSION

New Zealand is a trading nation, but in recent times the legitimacy of international trade has waned in the public eye. Faced with these concerns and the current climate crisis, the EU, UK and NZ have responded by stating that they want to be more receptive to the public and integrate climate action in their upcoming FTAs. However, concerns about the climate impact of international trade have led to scepticism about whether trade law and climate action can be integrated.

This dissertation has responded to these concerns and shown that the WTO system can account for climate action. The GATT and GATS exemptions, for domestic regulatory concerns and FTAs, illustrated that the WTO system is not only concerned with trade liberalisation. States can and should use the WTO's FTA system as a tool to impose positive climate-related obligations on their trade partners. Despite some concerns, Parties using FTAs to incorporate climate change is both necessary and beneficial; necessary to confront the climate crisis and beneficial because it makes the FTA system more legitimate to the public.

Currently, this opportunity for FTA Parties to incorporate climate-related issues is wasted. This point was shown through the analysis conducted in accordance with the methodology. FTA Parties should commit themselves to climate-related FTA provisions, secure their commitments through non regression provisions and add accountability to their pledges through FTA dispute settlement mechanisms. However, the analysis showed that Parties have not widely incorporated these climate-related FTA provisions, nor have even used the language of climate change in their FTAs.

EU/UK-NZ FTA Parties can and should improve on current FTA practices. They should make an agreement that: uses the language of climate change through its agreement; commits to climate-related FTA cooperation provisions throughout its agreement (outside of the environment chapter); backs up these climate-related FTA provisions with non-regression clauses that also relate to Parties' specific emission reduction goals; and subjects all these provisions to binding dispute settlement processes.

Finally, this dissertation explored new areas where Parties can integrate climate-related FTA provisions. It highlighted two areas: outside of an FTAs environment

chapter and in relation to private actors. Outside of an FTA's environment chapter, FTA Parties should work on lowering barriers to trade to encourage climate friendly trade and investment. In relation to private actors, Parties should include provisions to encourage climate-related corporate responsibility that ensures the integrity' of Parties climate-related financial disclosure regimes and encourages more corporations to undertake climate-related disclosures generally.

To conclude, trade law presents states with an opportunity to confront the climate crisis. Trade partners can use the positive obligations in their FTAs to uphold the integrity of their climate-related regimes and accelerate their uptake of climate-related goods and services. Obligations that make the FTA system more legitimate. But negotiations to incorporate climate-related FTA provisions will not happen overnight. If EU-UK/NZ FTA Parties want to lead this shift in FTA focus, they must be creative, they must be methodical, and they must be brave.

BIBLIOGRAPHY

WTO Agreements

Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Commonly known as the ASCM Agreement).

General Agreement on Trade and Tariffs (signed 1948, last updated by the Marrakesh Agreement 15 April 1994).

Free Trade Agreements

ANZTEC (signed 10 July 2013).

CETA (signed 30 October 2016)

CPTPP (signed 8 March 2018)

EU-Japan FTA (signed 17 July 2018)

EU-Singapore FTA (signed 19 October 2018).

EU-South Korea FTA (signed 6 October 2010).

EU-UK FTA (signed 30 December 2020).

EU-Vietnam (signed 30 June 2019).

NAFTA (signed 8 December 1993).

NZ-Korea FTA (signed 23 March 2015).

NZ-China FTA Upgrade (November 2016).

UK-Japan FTA (signed 23 October 2020).

USMCA (signed 30 November 2018).

General and Environmental International Agreements

CORSIA

MARPOL (signed 17 February 1973, entered into force 2 October 1983).

Paris Agreement (signed 22 April 2016, entered into force 4 November 2016).

United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994).

Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980).

New Zealand Legislation

Climate Change Response Act 2002.

Cases

Brazil-Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, 3 December 2007 (Appellate Body Report).

China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, WT/DS431/AB/R, 7 August 2014 (Appellate Body report).

Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear, WT/DS461/AB/R, 7 June 2016 (Appellate Body Report).

European Communities — Measures Prohibiting the Importation and Marketing of Seal Products WT/DS400/AB/R, WT/DS401/AB/R 22 May 2014, (Reports of the Appellate Body).

European Union - Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels - Constitution of the Panel established at the request of Indonesia, WT/DS593/10, 12 November 2020 (Note by the Secretariat).

India — Certain Measures Relating to Solar Cells and Solar Modules WT/DS456/AB/R, 16 September 2016 (Appellate Body Report).

United States — Certain Measures Relating to the Renewable Energy Sector, WT/DS510/R, 27 June 2019 (Panel report).

United States — Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996 (Appellate Body Report)

US-Guatemala - Issues Relating to the Obligations Under Art 16.2.1(a) of the CAFTA-DR (U.S. v. Guatemala) (2017), at [168].

US-Shrimp Appellate Body Report, WT/DS58/AB/R, 12 October 1998 (Appellate Body Report).

Books and Chapters in Edited Books

Arkady Kudryavtsev “The TBT Agreement in context” in Tracey Epps and Micheal J Trebilcock (eds) *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar, 2013).

Errol Meidinger “TPP and Environmental Regulation” in Eleanor M Fox and Micheal J Trebilcock (eds) *Megaregulation Contested: Global Economic Ordering After TPP* (Oxford University Press, Oxford, 2019) 175.

Henner Gött “Labour Standards in International Economic Law: An Introduction” in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer, Cham, 2018),

Lisa Benjamin *Companies and Climate Change* (Cambridge University Press, Cambridge, 2021).

Lisa Lechner “The Trend to More and Stricter Non-Trade Issues in Preferential Trade Agreements” in Manfred Elsig, Michael Hahn, and Gabriele Spilker (eds) *The Shifting Landscape of Global Trade Governance* (Cambridge University Press, Cambridge, 2019).

Manfred Elsig, Michael Hahn, and Gabriele Spilker “Current Challenges and Future Scenarios” in Manfred Elsig, Michael Hahn, and Gabriele Spilker (eds) *The Shifting Landscape of Global Trade Governance* (Cambridge University Press, Cambridge, 2019).

Michael J Trebilcock and Joel Trachtman *Advanced Introduction to International Trade Law* (Edward Elgar, Northampton Massachusetts, 2020).

Patrick Abel “Comparative Conclusions on Arbitral Dispute Settlement in Trade-Labour Matters Under US FTAs” in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer, Göttingen, 2018).

R V Ranuradha “WTO to the TPP: Evolution of environmental Provisions in Trade Agreements” in Julien Chaisse, Henry Gao and Chang-fa Lo (eds) *Paradigm Shift in International Economic Law Rule-Making? The TPP as a New Model for Trade Agreements?* (Springer, Singapore, 2017) 241.

Rochelle Cooper Dreyfuss “Harmonization: Top Down, Bottom Up-and Now Sideways?” in Eleanor M Fox and Micheal J Trebilcock (eds) *Megaregulation Contested: Global Economic Ordering After TPP* (Oxford University Press, Oxford, 2019).

Shawkat Alam “Trade and the Environment: Perspectives from the Global South” in Shawkat Alam and others (eds) *International Environmental Law and the Global South* (2015, Cambridge University Press, Cambridge) 297.

Government Reports and Publications

Agricultural Statistics and Climate Change (United Kingdom, Department for Environment Food and Rural Affairs, 9th Edition, September 2019).

Agritech Industry Transformation Plan (Ministry of Business, Innovation and Employment New Zealand, ISSN: 978-1-99--001912-8, July 2020)

Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on an EU strategy to reduce methane emissions (European Commission, COM(2020), 14 October 2020).

EU agricultural policy and climate change (European Parliament, 2020).

EU Trade Policy Review – An Open, Sustainable and Assertive Trade Policy (Publications Office of the European Union, ISBN 978-92-76-28778-0, 2021).

EU-NZ Free Trade Agreement: summary of negotiation objectives (Ministry of Foreign Affairs and Trade New Zealand).

Methane Strategy (European Scrutiny Committee United Kingdom, Thirty-eight Report of Session 2019-21, 2 March 2021).

Negotiating directives for a Free Trade Agreement with New Zealand (Council of the European Union, 7661/18 EU Restricted, 8 May 2018).

Report of the Trade for All Advisory Board (Trade for All Advisory Board New Zealand, 978-0-473-50649-0, November 2019), at 4.

The 2021 Trade Policy Agenda and 2020 Annual Report of the President of the United States on the Trade Agreements Program (The Office of the United States Trade Representative, March 2021).

Trade for all: towards a more responsible trade and investment policy (European Commission, 978-92-79-50488-4, October 2015).

Trade, Environment and Climate Change Discussion Paper, 2021 (Ministry of Foreign Affairs and Trade New Zealand, 2021).

UK-New Zealand Free Trade Agreement: The UK's Strategic Approach (Department for International Trade United Kingdom, 17 July 2020).

Non-Governmental Organisation Publications

Christophe Bellmann and Colette van der Ven *Greening regional trade agreements on non-tariff measures through technical barriers to trade and regulatory co-operation* (OECD Publishing, Trade and Environment Working Papers 2020/04, 2020).

David Coady and others *Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates* (International Monetary Fund, Working Paper No. 19/89, 2 May 2019).

Discussion Paper: A New, Climate-Friendly Approach To Trade (Sierra Club, 2016).

Expert Group on Global Climate Change *Principles on Climate Obligations of Enterprises* (Expert Group on Climate Obligations of Enterprises, second edition, 2020).

Inmaculada Martinez-Zarzoso *Assessing the Effectiveness of Environmental Provisions in Regional Trade Agreements* (OECD Publishing, OECD Trade and Environment Working Papers 2018/02, 2018).

James Bacchus *Global Rules for Mutually Supportive and Reinforcing Trade and Climate Regimes* (International Centre for Trade and Sustainable Development and World Economic Forum, E15 Expert Group on Measures to Address Climate Change and the Trade System – Policy Options Paper, 2016)

James Bacchus *The Case for a WTO Climate Waiver* (Centre for International Governance Innovation, Special Report, 2017).

Jane Kelsey *Analysis of the Trans-Pacific Partnership Agreement from a NZ Perspective Expert paper 1 - Treaty Making, Parliamentary Democracy, Regulatory Sovereignty and The Rule of Law* (New Zealand Law Foundation, December 2015).

Jennifer A Hillman *Changing Climate for Carbon Taxes: Who's Afraid of the WTO?* (Georgetown University Law Centre, Climate and Energy Policy Paper Series, July 2013).

Jonas Kuehl and others *Cutting Emissions Through Fossil Fuel Subsidy Reform and Taxation* (International Institute for Sustainable Development, Global Studies Initiative, July 2021).

Martti Koskenniemi *International Law Commission Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report of the Study Group, finalised by M Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006).

Social dimensions of free trade agreements (International Labour Organisation and International Institute for Labour Studies, Studies on growth with equity ISBN 978-92-9-251028-2, 2015),

Summary for Policymakers (Intergovernmental Panel on Climate Change, Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty. World Meteorological Organization, Geneva, Switzerland, 32 pp, 2018)

Task Force on Climate-Related Financial Disclosures *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (Task Force on Climate-Related Financial Disclosures, June 2017)

The Economist Intelligence Unit *Climate change and trade agreements. Friends or foes?* (International Chamber of Commerce and Qatar Chamber, 2019).

Speeches and Press Releases

David Parker “New Zealand and UK launch free trade talks” (press release, 17 June 2020).

David Parker “Trade for All and the State of International Trade” (Address to the Trade for All Advisory Board, July 23, 2020).

Elizabeth Truss, International Trade Secretary United Kingdom “Policy Exchange speech: Liz Truss sets out Britain’s new trade policy” (Policy Exchange, 14 September 2021).

G20 Leaders “Leaders' Declaration Riyadh Summit” (Press release, November 21 2020), at page 7.

G7 Leaders “Ise-Shima Leaders Declaration” (G7 Ise-Shima Summit, 26-27 May 2016).

Journal Articles

Abhijeet Ghadge, Hendrik Wurtmann and Stefan Seuring “Managing climate change risks in global supply chains: a review and research agenda” (2020) 58(1) International Journal of Production Research 44.

Ahmad SAS Al-Tayer and AFM Maniruzzaman “Addressing the Global Climate Change Problem in GATT/WTO Law: The Vision of a New International Climate Law based on International Distributive Justice” (2011) 17(6) JWIT 631.

Arjun Ponnambalam “U.S. Climate Change Legislation and the Use of GATT Article XX to Justify a Competitiveness Provision in the Wake of Brazil-Tyres” (2008) 40 GEOJINT'L L 261.

Armin Rosencranz and Aditya Vora Viral “Environment and Trade – Tracing the History of GATT Articles XX(b) and (g) Disputes” (2015) 45(6) Environmental policy and Law 292.

Carrie Wofford “A Greener Future at the WTO: the Refinement of WTO Jurisprudence on Environmental Exceptions to GATT” (2000) 34(2) HarvEnvtlLRev 563.

Dick De Bievre, Ilaria Espa and Arlo Poletti “No iceberg in sight: on the absence of WTO disputes challenging fossil fuel subsidies” (2017) 17 IntEnvironA 411.

Evgeny Postnikov and Ida Bastiaens. “Does dialogue work? The effectiveness of labor standards in EU preferential trade agreements” (2014) 21(6) Journal of European Public Policy.

George Banks and Timothy Fitzgerald “A sectoral approach allows an artful merger of climate and trade policy” (2020) 162 *Climatic Change* 165.

Harlan Grant Cohen “What Is International Trade For?” (2019) 113(2) *AJIL* 326.

James Harrison “Reflections on the Role of International Courts and Tribunals in the Settlement of Environmental Disputes and the Development of International Environmental Law” (2013) 25(3) *JEL* 501.

Joel Trachtman “WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes” (2017) 70(2) *Natl Tax J* 469.

Joel Trachtman “WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe” (2018) 58 *HarvIntl LJ* 273.

John Gerard Ruggie “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order” (1982) 36 *INTL ORG* 379.

Kalypso Nicolaidis and Gregory Shaffer “Transnational Mutual Recognition Regimes: Governance without Global Government” (2005) 68 *Law & Contemp Probs* 263.

Katie Sykes “Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection” (2016) 5(1) *TEL* 55.

Marco Bronckers and Giovanni Gruni “Retooling the Sustainability Standards in EU Free Trade Agreements” (2021) 4(1) *J IntlEconL* 25.

Marit Achenbach “Transparency of Climate-Related Risks and Opportunities: Determinants Influencing the Disclosure in Line with the Task Force on Climate-Related Financial Disclosures” (2021) 4(1) *Glocality* 1

Michel Prieur “Le principe de non régression face à la logique du marché” (2014) 44(1) *EPL* 130.

Rachel Brewster “Rule-Based Dispute settlement in International Trade Law” (2006) 92 *Va L Rev* 251.

Richard Heede “Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement produces 1854–2010” (2014) 112 *Climatic Change* 229.

Sadeq Z Bigdeli “Clash of Rationalities: Revisiting the Trade and Environment Debate in Light of WTO Disputes over Green Industrial Policy” (2014) 6(1) Trade Law Dev 177.

Sadeq Z Bigdeli “Clash of Rationalities: Revisiting the Trade and Environment Debate in Light of WTO Disputes over Green Industrial Policy” (2014) 6(1) Trade Law Dev 177 at 197.

Stefan Mayr, Birgit Hollaus and Verena Madner “Palm oil, the RED II and WTO law: EU sustainable biofuel policy tangled up in green?” (2020) 30(2) RevEurCompInt 233.

Steve Charnovitz “The WTO’s Environmental Progress” (2007) 10(2) Journal of Int Economic Law 685.

Susanne Droege and others “The Trade System and Climate Action: Ways Forward under the Paris Agreement” (2017) 13 SCJINTIL&Bus 195.

Virág, Forizs and Lars Nilsson “Trade Effects of the EU–Korea Free Trade Agreement: A Comparative Analysis of Expected and Observed Outcomes” 18(1) (2017) The Estey Centre JIntLTP 14.

Internet Materials

Alberto Nardelli and John Follain “U.K Aims to Secure G-7 Pledge to End Subsidies for Fossil Fuels” (May 18 2021) www.bloomberg.com/.

Baz Macdonald “NZ has so many cows. Why do we import millions of tonnes of dairy?” www.renews.co.nz/.

Chris Bramwell “Will TPP undermine NZ’s sovereignty?” (3 February 2016) Radio New Zealand www.rnz.co.nz/.

Climate Accountability Institute “Carbon Majors” (8 October 2019) www.climateaccountability.org/.

Daniel Hurst “Morrison accused of hurting Australia’s reputation to please Nationals after climate goals cut from UK trade deal” (9 September 2021) www.theguardian.com/.

Department for Business, Energy and Industrial Strategy United Kingdom “Closed consultation: Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs” (24 March 2021) www.gov.uk/.

European Commission “Corporate sustainability reporting” www.ec.europa.eu/.

Gerard Hutching “Dutch company DSM keen to trial methane cutting tech this year” (13 March 2019) www.stuff.co.nz/.

Hans van Leeuwen “European Parliament backs carbon border tax” (March 11 2021) Australian Financial Review www.afr.com/.

It’s Our Future press release “Hamilton TPPA Rally demands referendum” (16 November 2015) www.scoop.co.nz/.

Jakob Hanke Vela “EU-New Zealand chart course toward green trade deals” (1 November 2020) www.politico.eu/.

Jamie Morton “Dutch company’s methane blocker hits NZ roadblock” (29 July 2019) www.nzherald.co.nz.

Jane Byrne “Fonterra joins forces with DSM to lower methane emission in pasture-based cattle farming” (2 Feb 2021) www.feednavigator.com/.

Matthew Taylor, Jonathan Watts and John Bartlett “Climate crisis: 6 million people join latest wave of global protests” (27 September 2019) www.theguardian.com/.

Matthew Theunissen and Teulia Fuatai “Thousands protest TPPA in downtown Auckland” www.nzherald.co.nz/ (29 March 2014)

Ministry for Culture and Heritage “Māori explore the world” (19 February 2019) New Zealand History www.nzhistory.govt.nz/.

Ministry of Foreign Affairs and Trade “EU-NZ Free Trade Agreement” www.mfat.govt.nz/.

Ministry of Foreign Affairs and Trade “New Zealand relaunches campaign to deliver Joint Ministerial Statement on Fossil Fuel Subsidy Reform (FFSR) at WTO MC12” (20 July 2021) www.mfat.govt.nz/.

Ministry of Foreign Affairs and Trade New Zealand “Permanent Mission to the World Trade Organisation Geneva” www.mfat.govt.nz/.

New Zealand's Climate Leaders Coalition "Who"
www.climateleaderscoalition.org.nz/.

Rebecca Masters "It was about trade': Morrison confirms he didn't want climate goals in UK trade agreement" www.9news.com.au/.

Secretary General Press Release "Secretary-General Calls Latest IPCC Climate Report 'Code Red for Humanity', Stressing 'Irrefutable' Evidence of Human Influence" (9 August 2021) www.un.org/.

Shannon Hall "Exxon Knew about Climate Change almost 40 years ago" (26 October 2015) Scientific American www.scientificamerican.com/.

Statistics New Zealand "Goods and services trade by country: Year ended March 2020" (2 June 2020) www.stats.govt.nz/.

Statistics New Zealand "New Zealand's greenhouse gas emissions" (15 October 2020) www.stats.govt.nz/.

Steve Cannane "UK government accused of dropping FTA climate commitments due to Australian pressure" (9 September 2021) Australian Broadcasting Corporation www.abc.net.au/.

Task Force on Climate-Related Financial Disclosures "About" www.fsb-tcfd.org/.

UK 'cut climate pledges' to clinch Australia trade deal" (9 September) www.bbc.com/.

United Nations "Race to Zero Campaign" United Nations Climate Change www.unfccc.int/.

World Trade Organisation "Principles of the trading system" www.wto.org/.

World Trade Organisation "Statistics: Evolution of trade under the WTO: handy statistics" www.wto.org/.

World Trade Organisation "Twelfth WTO ministerial Conference News" (5 October 2021) www.wto.org/.

World Trade Organisation "Understanding the WTO: Basics: The case for open trade" www.wto.org/.

World Trade Organisation “Understanding the WTO: Cross-Cutting and New Issues- The environment: a specific concern” www.wto.org/.

World Trade Organisation “Understanding the WTO: The Organisation: Whose WTO is it anyway?” www.wto.org/.

Yvette McCullough “NZ begins free trade talks for ‘comprehensive’ deal with UK” (17 June 2020) Radio New Zealand www.rnz.co.nz/.