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**FREE TRADE AGREEMENTS AND NEW ZEALAND'S
INTERNATIONAL CLIMATE CHANGE OBLIGATIONS**

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Abstract

This paper considers the extent to which New Zealand upholds its international climate change obligations in its actions in international trade. Part one outlines the sources and content of New Zealand's international climate change obligations. Part two discusses the importance of considering environmental and climate change factors in international trade. Part 3 analyses two of New Zealand's most recent significant trade agreements, the Comprehensive and Progressive Trans-Pacific Partnership Agreement, and the Pacific Agreement on Closer Economic Relations Plus. It concludes that, whilst these Agreements include some environmental protection measures, they do not adequately reflect the urgency of the global climate change response or the role that trade must play in it. Part four then looks to the future of New Zealand trade, specifically two upcoming initiatives: the development of a new Agreement on Climate Change, Trade, and Sustainability, and a new 'Trade and the Environment Framework.' It concludes that these upcoming initiatives provide an excellent opportunity for New Zealand to reconsider, and declare, its commitment to upholding its international climate change obligations in its actions in international trade.

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I Introduction¹

The climate change crisis has been labelled “a super wicked” problem.² It threatens the very existence of humankind, and its devastating effects are already being observed in global temperature records and increases in frequency and intensity of extreme weather events. Under the Paris Agreement, 191 Parties, including New Zealand, have agreed to a collective goal of limiting temperature increases to well below 2° C compared to pre-industrial levels.³ The current level of ambition in those Parties’ nationally determined contributions (**NDCs**), however, falls well short of what would be necessary to achieve that goal. Instead, in their 2020 Emissions Gap Report, the United Nations found that, instead of limiting temperature increase to well below 2° C, the world is heading towards a temperature rise in excess of 3° C this century.⁴ Therefore, urgent action is needed to avoid dangerous anthropogenic interference with the climate system.⁵

International trade is highly important for global economic development, but is also responsible for a highly significant percentage of the world’s collective greenhouse gas (**GHG**) emissions every year. In 2013, for example, trade-related emissions were estimated to account for more than a quarter of global emissions.⁶ Recognition from various stakeholders of the urgent need to coordinate trade and climate change policies has increased significantly over the past thirty years, and inclusion of environmental considerations in free trade agreements has proliferated. This paper discusses the extent

¹ I would like to thank my academic supervisor, Bjørn-Oliver Magsig, for his contribution to this research paper and for suggesting this topic which I have thoroughly enjoyed writing about. I would also like to thank my family, and particularly my parents, for their unwavering support and proof-reading assistance throughout the past five years. Finally, I would like to thank my dear friend Islay Aitchison with whom I have shared the ups and downs of the past five years of law school. We have achieved so many wonderful things, and I could not have done this without you.

² Richard Lazarus “Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future” (2009) 94 Cornell L Rev 1153 at 1159.

³ *Paris Agreement* COP Res FCCC/CP/2015/10/Add.1 (29 January 2016) art 2.1(a).

⁴ *Emissions Gap Report 2020* (United Nations Environment Programme, DEW/2310/NA, 9 December 2020).

⁵ Daniel H Cole “The Problem of Shared Irresponsibility in International Climate Change Law” (2015) *Distribution of Responsibilities in International Law* 290 at 291.

⁶ Global Economic Governance Initiative *Trade in the Balance: Reconciling Trade and Climate Policy* (Boston University, online ed, 2016) at 7.

to which New Zealand embodies its international climate change obligations in its actions in international trade. Part one details the sources and contents of New Zealand international climate change obligations. Part two provides an overview of the relationship between trade and climate change, and how this has been conceptualised by scholars, organisations, the United Nations and the World Trade Organisation over the past three decades. Part three uses an analytical framework to assess the extent to which New Zealand is upholding its international climate change obligations in the Comprehensive and Progressive Trans-Pacific Partnership Agreement (**the CPTPPA**) and the Pacific Agreement on Closer Economic Relations Plus (**the PACER Plus**). Part four then considers two of New Zealand's upcoming trade and environment initiatives: the development of a new Agreement on Climate Change, Trade, and Sustainability, and a new 'Trade and the Environment Framework.' It concludes that New Zealand has the opportunity to improve its fulfilment of its climate change obligations in trade, and to become a world leader in demonstrating how the relationship between trade and climate change can become symbiotic.

Part One: New Zealand's International Climate Change Obligations

II New Zealand's International Climate Change Obligations

New Zealand's international climate change obligations come from two key sources, the United Nations Framework Convention on Climate Change (**UNFCCC**), and the Paris Agreement (**Paris**).

A United Nations Framework Convention on Climate Change

1 Background to the UNFCCC

The overarching international agreement on climate change is the 1992 United Nations Framework Convention on Climate Change.⁷ New Zealand is a Party to this alongside

⁷ *United Nations Framework Convention on Climate Change* 1771 UNTS 101 (opened for signature 16 March 1982, entered into force 21 March 1994).

196 other states.⁸ The UNFCCC has been described as the “foundation of the UN climate regime,” however, as a framework convention, it was always intended to be supplemented by additional agreements.⁹ More specific international climate change agreements have been negotiated under the auspices of the UNFCCC, including the Kyoto protocol in 2005, and the Paris Agreement (**Paris**) in 2015.¹⁰

The ultimate objective of the UNFCCC, and related instruments adopted by the Parties, is to achieve stabilization of greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.¹¹ This is to be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change.

In the preamble to the UNFCCC, the Parties acknowledge that human activities have been substantially increasing concentrations of greenhouse gases in the atmosphere, that this will result in additional warming of the Earth's surface and atmosphere, and that this may adversely affect natural ecosystems and humankind. The Parties acknowledge that the global nature of climate change calls for the widest possible cooperation by all countries, and their participation in an effective and appropriate international response.¹²

Parties to the 1992 UNFCCC have made a range of general commitments. These include commitments to:

- formulate and implement national and, where appropriate, regional programmes containing measures to mitigate climate change;¹³
- cooperate in preparing for adaptation to the impacts of climate change;¹⁴

⁸ “New Zealand and the United Nations Framework Convention on Climate Change” (May 2021) Ministry for the Environment <<https://environment.govt.nz/what-government-is-doing/international-action/nz-united-nations-framework-convention-climate-change/>>.

⁹ Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani *International Climate Change Law* (Oxford University Press, Oxford, 2017), at 118.

¹⁰ *Kyoto Protocol to the United Nations Framework Convention on Climate Change* COP 3 UN Doc FCCC/CP/1997/L.7/Add.1 (10 December 1997); and *Paris Agreement*, above n 3.

¹¹ Art 2.

¹² Preamble.

¹³ Art 4.1(b).

- take climate change into account in their relevant social, economic and environmental policies and actions;¹⁵
- exchange relevant information;¹⁶ and
- promote scientific research, technological research, education, training, and public awareness relating to climate change.¹⁷

2 *Economic Considerations*

The practical ability of Parties to implement climate change response measures in accordance with the UNFCCC is restricted by the significant monetary costs associated with such measures. In 2019, for example, an American Financial Services company, Morgan Stanley, released a report suggesting that the cost of reaching net-zero emissions globally by 2050 would be approximately USD\$50 trillion.¹⁸ Implementation of climate change mitigation measures, such as renewable energy, electric vehicles, and carbon capture and storage, is incredibly expensive. Parties' abilities to implement climate change mitigation measures are, therefore, to some extent, tethered to their economic abilities to do so. The UNFCCC recognises this. The preamble to the Convention affirms that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter. Academic commentators suggest further that the statement of the ultimate objective of the Convention in art 2 is carefully worded to "legitimize the consideration of economic... as well as environmental factors in addressing climate change."¹⁹ Article 3.3 requires Parties to take precautionary measures to anticipate, prevent or minimize the causes of climate change, and to mitigate its effect. This provision is qualified, however, by the following passage which confirms that such measures "should be cost-effective so as to ensure global benefits at the lowest possible cost." Article 3.4 goes on to assert that the Parties should promote sustainable development but is similarly qualified to take into

¹⁴ Art 4.1(e).

¹⁵ Art 4.1(f).

¹⁶ Art 4.1(h).

¹⁷ Arts 4.1(g), 4.1(i), 5, and 6.

¹⁸ "Decarbonization: the Race to Zero Emissions" (25 November 2019) Morgan Stanley <<https://www.morganstanley.com/ideas/investing-in-decarbonization>>.

¹⁹ Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani, above n 8, at 125.

account “that economic development is essential for adopting measures to address climate change.”

These references to the importance of economic development throughout the UNFCCC reflect the fact that climate change action involves “political choices” by the Parties regarding how they balance economic, social, and environmental values in decision making.²⁰

3 Support for Developing Country Parties

Developing country Parties are those who are the most significantly economically restricted in their abilities to implement climate change mitigation and adaptation measures. Developing country Parties have historically contributed far less to global greenhouse gas emissions,²¹ have legitimate overriding priorities of economic and social development and the eradication of poverty,²² and are amongst those countries most vulnerable to the devastating effects of climate change.²³ The preamble to the UNFCCC acknowledges this, noting that greenhouse gas emissions from developing country Parties must continue to grow in order to meet their social and developmental needs. The preamble also recognizes that standards applied by some (Developed country) Parties will be “inappropriate and of unwarranted economic and social cost” to others.

In light of the different circumstances and capabilities of developed and developing country Parties, the first stated principle of the Convention is that “developed country Parties should take the lead in combating climate change and the adverse effects thereof.”²⁴ Developed country Parties to the UNFCCC make commitments to:

²⁰ At 126.

²¹ *United Nations Framework Convention on Climate Change*, above n 7 preamble; and Pieter Pauw, Kennedy Mbeva & Harro van Asselt “Subtle differentiation of countries’ responsibilities under the Paris Agreement” (2019) 5 *Palgrave Commun* 1 at 2.

²² Preamble and art 4.7.

²³ Art 3.2.

²⁴ Art 3.1.

- provide financial resources to developing country Parties to assist them in meeting the costs associated with their obligations under the Convention;²⁵
- assist developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation to those adverse effects;²⁶
- promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies to developing country Parties, to enable them to implement the provisions of the Convention;²⁷ and
- give full consideration to what actions are necessary, including in relation to funding, to meet the specific needs and concerns of developing country Parties...²⁸

As a Developed country Party to the UNFCCC, New Zealand is bound by the abovementioned commitments to support and assist developing countries in meeting their climate change obligations and adapting to the adverse effects of climate change.

4 *The UNFCCC and International Trade*

The application of the UNFCCC is broad. Article 3.3, for example, states that climate change measures taken by Parties must be comprehensive, cover all relevant sources and comprise *all sectors*. The obligations accepted by Parties under the UNFCCC therefore clearly extend to cover their actions and policies in the context of international trade. Several provisions in the Convention touch directly on this subject. Article 3.5 states that the Parties should cooperate to promote a supportive and open *international economic system* that would lead to sustainable economic growth and development in all Parties. Article 3.5 similarly addresses international trade, stating that measures taken to combat climate change must not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Article 4.2(a) suggests that Parties may implement climate change policies and measures jointly with other Parties, and may assist other Parties in contributing to the achievement of the objective of the convention.

²⁵ Art 4.3.

²⁶ Art 4.4.

²⁷ Art 5.5.

²⁸ Art 4.8.

As sites of successful international cooperation, Free Trade Agreements (**FTAs**) are well-placed to be utilised to give effect to the object of the UNFCCC. The overlap between the UNFCCC and international trade is indeed reflected in the fact that the secretariat of the World Trade Organization (**WTO**) attends UNFCCC Conferences of the Parties (**COPs**) and the secretariat of the UNFCCC is an ad hoc observer of the World Trade Organization's Committee on Trade and Environment (**CTE**).²⁹

B The Paris Agreement

1 Background to the Paris Agreement

The Paris Agreement is a treaty that was formed under the auspices of the UNFCCC in 2015. New Zealand is one of 191 Parties to the Agreement.³⁰ The objective of Paris is to limit temperature increase to well below 2° C compared to pre-industrial levels, whilst pursuing efforts to limit the temperature increase to 1.5° C above pre-industrial levels.³¹ Paris has been described to have sought “a Goldilocks solution (to climate change) that is neither too strong nor too weak,” as it allows the Parties significant autonomy regarding the form and extent of the climate change measures they implement.³²

The Paris Agreement takes a ‘bottom up’ approach, whereby Parties are required to prepare, communicate, and maintain their own “nationally determined contributions.”³³ These set out each Parties’ policies and targets to mitigate and adapt to climate change.³⁴ Whilst the Parties have the autonomy to determine and prepare their NDCs, these are expected to contribute to the overall objective of the Agreement and must reflect the Party’s “highest possible ambition” towards doing so.³⁵ Parties to Paris are expected, but

²⁹ The Economist Intelligence Unit *Climate Change and Trade Agreements: Friends or foes?* (The Economist Intelligence Unit, online ed, 2019) at 14.

³⁰ “The Paris Agreement” United Nations <<https://www.un.org/en/climatechange/paris-agreement>>.

³¹ Art 2.1(a).

³² Daniel Bodansky “The Paris Climate Change Agreement: A New Hope?” (2016) 110 Am J Int Law 288 at 289.

³³ Art 4.2.

³⁴ The Economist Intelligence Unit, above n 29, at 7.

³⁵ Art 4.3.

not legally bound, to take domestic mitigation measures to achieve the objectives set out in their NDC's.³⁶ Parties must participate in five-yearly assessments of collective progress under the Agreement, and must, on a five-yearly basis submit new, more ambitious NDCs.³⁷ The objective of this voluntary framework is to increase global ambition over time. The Agreement establishes a mechanism to facilitate implementation of, and compliance with, the Agreement.³⁸ This mechanism is facilitative in nature, non-adversarial and non-punitive.³⁹

2 Economic Considerations

Like the UNFCCC, the Paris Agreement recognises that Parties' abilities to implement climate change mitigation and adaptation measures are constrained by their different individual capacities and circumstances.

The preamble to the Agreement states that, in the pursuit of the objective of the convention, Parties are guided by various principles including their differing capabilities in light of their differing national circumstances. The preamble also acknowledges that Parties may be affected not only by climate change but by the impacts of the measures taken in response to it. Article 4.15 states that Parties must take into consideration, in the implementation of the Agreement, the concerns of Parties with economies most affected by the impacts of response measures, particularly Developing country Parties.

Whilst of course tensions exist between economic growth and climate action, Article 7.2 serves as a reminder that, whilst measures to adapt to climate change can be costly, these are imperative to protect people and their livelihoods. Similarly, Article 7.9(e) suggests that Parties shall engage in adaptation planning process, including improving the resilience of their socioeconomic and ecological systems through economic diversification. Finally, Article 10 outlines that the Parties' share a long-term vision on the importance of technology development and transfer to improve resilience to climate

³⁶ The Economist Intelligence Unit, above n 29, at 9.

³⁷ Art 14.

³⁸ Art 15.1.

³⁹ Art 15.2.

change and to reduce emissions. The Agreement recognises that accelerating, encouraging, and enabling innovation is critical for an effective, long-term response to climate change and promoting economic growth.⁴⁰ The Parties, therefore, agree to strengthen cooperative action on technology development and transfer.⁴¹

3 Support for Developing Country Parties

Article 2 of the Paris Agreement reiterates the idea of ‘common but differentiated responsibilities’ as outlined initially in the UNFCCC. Whilst climate change affects and is affected by all nations, they cannot be expected to contribute equally to alleviating the problem. Therefore, Parties’ responsibilities under the Paris Agreement are varied.⁴²

Article 4.4 of Paris states that developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Article 9.1 states that developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the UNFCCC. Article 9.3 states that developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels. Finally, art 11.3 states that developed country Parties should enhance support for capacity-building actions in developing country Parties.

4 The Paris Agreement and International Trade

Much like the UNFCCC, the application of the Paris Agreement is extremely broad. Article 4, for example, asserts that developed countries Parties should undertake absolute *economy-wide* reduction targets. This wording strongly supports the idea that the Parties are bound to consider their climate change obligations in the context of international trade. Consistent with this notion, the preamble to the Agreement recognizes that sustainable lifestyles and patterns of consumption and production play an important role

⁴⁰ Art 10.5.

⁴¹ Art 10.6.

⁴² Farhana Yamin and Joanna Depledge *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press, Cambridge, 2004) at 69.

in addressing climate change. Patterns of consumption and production are central to international trade. Article 6.8 asserts that the Parties recognise the importance of “integrated, holistic and balanced nonmarket approaches.” Non-market approaches include fiscal measures such as implementing carbon taxes and reducing fossil fuel subsidies. Non-market approaches such as these have a place in, and could be enhanced through, international trade agreements.⁴³

C Conclusion

As Party to both the UNFCCC and the Paris Agreement, New Zealand has accepted international legal obligations to implement measures to mitigate and adapt to climate change. Some of the key obligations accepted by New Zealand under these agreements are:

- to take climate change into account in their relevant social, economic and environmental policies and actions;⁴⁴
- to provide financial resources to developing country Parties to assist them in meeting the costs associated with their obligations under the UNFCCC;⁴⁵ and
- to cooperate with other Parties to promote a supportive and open international economic system.⁴⁶

These obligations apply to the government in its actions in the context of international trade. The government has international obligations to coordinate their climate change response measures with social and economic development,⁴⁷ and to ensure that their climate change response comprises all sectors.⁴⁸

Whilst the UNFCCC and the Paris Agreement recognise that economic considerations must factor into Parties' decision-making on climate change, this must not be interpreted

⁴³ “What are Market and Non-Market Mechanisms?” UNFCCC <[What are Market and Non-Market Mechanisms? | UNFCCC](#)>.

⁴⁴ *United Nations Framework Convention on Climate Change*, above n 7, art 4.1(f).

⁴⁵ Art 4.3.

⁴⁶ Art 3.5.

⁴⁷ Preamble.

⁴⁸ Art 3.3.

as an excuse to justify any lack of progress. Parties' nationally determined contributions must represent their highest possible ambition.⁴⁹

Part two of this paper will now consider literature from the past three decades regarding the relationship between international climate change law and international trade. This section will discuss the overlap between the disciplines, focusing on the potentials for synergies, and existing tensions, between the two. Part three will then evaluate two of New Zealand's recent trade agreements for compliance with international climate change obligations. Part four will look to the future, discussing how New Zealand could improve to give greater effect to its climate change obligations in the context of trade.

Part Two: Trade and Climate Change

III The Relationship Between International Trade and Climate Change

As discussed in part one, the need to incorporate trade measures into the international climate change response is implicit in the texts of the UNFCCC and the Paris Agreement. Extrinsic aids also shed light on the relevance of trade practices to climate change. At the 1992 UN Earth Summit, for example, where the UNFCCC was adopted, the message formed from the totality of discussions was that nothing less than a "transformation" of global attitudes and behaviors would bring about the necessary changes to protect the environment.⁵⁰ Such a call for broad transformative change necessitates improvements to international trade practices to support the objectives of the UNFCCC and Paris. The French Special Ambassador to the Paris Climate Conference, Laurence Tubiana, also acknowledged the overlap between trade and climate change in 2016. She voiced her opinion that, until trade measures are amended to uphold climate policies, the world "will go nowhere" on achieving climate goals.⁵¹

⁴⁹ *Paris Agreement*, above n 3, art 4.3.

⁵⁰ Wytze van der Gaast and Katherine Begg *Challenges and Solutions for Climate Change* (1st ed, Springer-Verlag, London, 2012) at 6.

⁵¹ Global Economic Governance Initiative, above n 6, at 6.

The following section provides an overview of relevant literature. It considers how the United Nations and World Trade Organization have acted on, and how various scholars have grappled with, the intersections between trade and climate change over the past three decades.

A *The United Nations on Trade and Climate Change*

In 2015 the United Nations released its sustainable development goals (**SDGs**).⁵² These goals have been adopted by all of the United Nations' member states, including New Zealand. The United Nations describe the goals as representing the world's shared plan to end extreme poverty, reduce inequality and protect the planet by 2030. Goal 13 is to take urgent action to combat climate change and its impacts. Several other goals relate to climate change too. For example, goal six is for clean water and sanitation, goal seven is for affordable and clean energy, goal 11 is for sustainable cities and communities, and goal 12 is for responsible consumption. As many scholars have highlighted over the years, sustainable development is a key commonality between trade and climate policy.⁵³ Trade and climate expert, Dr Rafael Leal-Arcas, describes both of these disciplines as having "irrefutable links" to sustainable development.⁵⁴ Elizabeth Annis suggests that their common dispositions towards sustainable development could support a "symbiotic" relationship between trade and climate change disciplines.⁵⁵

⁵² "Sustainable Development Goals" United Nations Foundation <https://unfoundation.org/what-we-do/issues/sustainable-development-goals/?gclid=Cj0KQCQjw18WKbCUARIsAFiW7JzX5U_p3TtZaRxHwxjjRjXCDGFn6_PKbHI2RlgS235fD_OfTsD8CgAaAhWoeALw_wcB>.

⁵³ Ryerson Neal *Trade and Climate Change: Synergies and Conflicts* (Centre for International Governance Innovation, Canada, 2018) at 12.

⁵⁴ Rafael Leal-Arcas *Working Together: How To Make Trade Contribute to Climate Action* (International Centre for Trade and Sustainable Development, Geneva, Switzerland November 2003) <<https://www.files.ethz.ch/isn/178682/working-together-how-to-make-trade-contribute-to-climate-action1.pdf>>.

⁵⁵ Elizabeth Annis "Climate change and trade in the Pacific Island countries: the PACER Plus agreement" (2016) 47 *Georget. J. Int. Law* 1497 at 1505.

B The World Trade Organization on Trade and Climate Change

The World Trade Organization has, over the past three decades, acknowledged the important role that trade must play in the international climate change response. In 1995, at their Uruguay Round, the WTO established a ‘Committee on Trade and Environment’.⁵⁶ The mandate of the CTE is to identify links between trade and environmental policy and make recommendations on how WTO rules could be modified to align with environmental goals.⁵⁷ Six years later, at the Doha Round in 2001, the WTO considered environmental factors in relation to market access, intellectual property, and labelling requirements.⁵⁸ Again, at Doha, the WTO emphasised the importance of enhancing the “mutual supportiveness” of trade and the environment.⁵⁹ Most recently in June 2021, a group of 16 WTO members, including New Zealand, participated in an ‘Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade.’⁶⁰ Improving technical assistance from WTO members to developing countries, in support of global efforts to reduce plastic waste, was an important feature of those discussions. Researchers from New Zealand presented at the Informal Dialogue about plastic pollution in Pacific Island Countries. A strong call has been made for a formal declaration to be made regarding plastics pollution at the WTO’s upcoming Ministerial Conference in November 2021.

Significantly, all of the WTO member nations are also members of the United Nations who have signed on to the sustainable development Goals. Ryerson Neal suggests that this provides a clear basis for interpreting WTO rules in a way that supports sustainable development.⁶¹

⁵⁶ “The Committee on Trade and Environment (‘regular’ CTE)” World Trade Organisation <https://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm>.

⁵⁷ The Economist Intelligence Unit, above n 29, at 14.

⁵⁸ “Items of focus: the regular CTE’s Doha assignment” World Trade Organization <https://www.wto.org/english/tratop_e/envir_e/cte_doha_e.htm>.

⁵⁹ The Economist Intelligence Unit, above n 29, at 14.

⁶⁰ “Plastics pollution dialogue advances discussions, eyeing MC12 outcome” (21 June 2021) World Trade Organization <https://www.wto.org/english/news_e/news21_e/ega_21jun21_e.htm>.

⁶¹ Ryerson Neal, above n 53, at 12.

Finally, whilst the WTO and CTE have demonstrated some commitment to incorporating climate policy into trade practices, I note that many remain sceptical about their levels of progress and ambition. The Economist Intelligence Unit (**the EIU**) and the Centre for International Governance Innovation have both respectively suggested that the level of effective coordination between trade and climate policy actors remains inadequate.⁶²

C Scholarly Analyses on Trade and Climate Change

For many decades now, scholars have been writing about the relationship between international trade and the environment.⁶³

In 1995, Raymond Cléménçon wrote about the need for coherency and integration between the two disciplines.⁶⁴ Cléménçon argued that climate change policies have strong implications for international economic competitiveness and can thus only hope to succeed in tandem with international trade rules.⁶⁵ At the time Cléménçon was writing his article, the CTE had recently been established. Cléménçon, however, doubted the utility of separate forums, like the CTE, whereby trade actors would consider environmental policy, and vice versa. Cléménçon argued that a forum for discussion between trade and climate actors needed to be developed on neutral grounds.⁶⁶ To date, no such forum has been established. The Economist Intelligence Unit reflected on this in 2016, suggesting that climate and trade policy actors continue to operate “in silos.”⁶⁷

⁶² At 12; and The Economist Intelligence Unit, above n 29, at 14.

⁶³ See Lael Brainard and Isaac Sorkin *Climate Change, Trade, and Competitiveness: Is a Collision Inevitable?: Brookings Trade Forum 2008/2009* (Brookings Institution Press, Washington D.C., 2009); Karl Upston-Hooper “The relationship of the GATT and New Zealand's policy responses to the United Nations Framework Convention on Climate Change” (LLM Research Paper, Victoria University of Wellington, 1996); and Phillip Shannon “GATT and the Environment: Reducing the Environmental Impact of Free Trade” (LLM Research Paper, Victoria University of Wellington, 1994).

⁶⁴ Raymond Clemencon “Global Climate Change and the Trade System: Bridging the Culture Gap” (1995) 4 J Environ Dev 29.

⁶⁵ At 29.

⁶⁶ At 43.

⁶⁷ At 14.

In 2010, in a Policy Research Working Paper for the World Bank, Patrick Messerlin suggested that the trade and climate communities could learn important and valuable lessons from one another and that instead of being mutually destructive, the disciplines could be mutually supportive.⁶⁸ Messerlin highlighted the fact that climate change and trade are both disciplines where broad international cooperation is necessary to promote a public good.⁶⁹ In their attempts to secure international cooperation in the past, both the trade and climate change communities have been disappointed by failed international negotiation attempts. Messerlin suggests that the climate change community, which has been disappointed by the outcomes of several recent initiatives, could “get some comfort, and more importantly, some insights” by looking at how the world trade regime was established after a similar series of challenges in 1947.⁷⁰

More recently, in 2018, the Centre for International Governance and Innovation (**the CIGI**) held a conference in Canada to discuss the interplay between the international climate agenda and the global trade system.⁷¹ Their conference report argues that the connections between trade and climate change continue to receive inadequate attention.⁷² The World Trade Organization, in particular, they suggested has done little to adapt to support global climate change mitigation efforts. They concluded that foundational changes to trade systems may be necessary to uphold environmental protection objectives.⁷³ The CIGI acknowledged that the World Trade Organization has a proven ability to influence international social movements. In 1996, for example, the WTO officially recognized the International Labour Organisation (**ILO**) as the primary institution for workers' rights.⁷⁴ After receiving the WTO's endorsement, the ILO was “reinvigorated” to take concrete actions which have been highly important for global

⁶⁸ Patrick Messerlin *Climate Change and Trade Policy: From Mutual Destruction To Mutual Support* (The World Bank, Washington D.C., 2010) at 27 – 28.

⁶⁹ At 4.

⁷⁰ At 3.

⁷¹ Ryerson Neal, above n 53, at 1.

⁷² At 1 – 2.

⁷³ At 1.

⁷⁴ *Singapore Ministerial Declaration* WT/MIN(96)/DEC, 13 December 1996 (Ministerial Declaration) at [4].

labour markets.⁷⁵ International action groups have also proven successful in the past in influencing the WTO agenda in the same way that the climate community must seek to. In 2001, for example, at their Doha Round, the WTO supported the Food and Agriculture Organization's initiative to deter and eliminate illegal fishing.⁷⁶ Many years later, when the UN included regulation of fishing practices in their sustainable development goals, they recognized the WTO as the primary agent to accomplish that task.⁷⁷ In their conference report, the CIGI propose that the WTO might be better placed to embrace climate goals if climate change agreements and climate policymakers are clearer about what trade tools are required to reach emissions reduction goals.⁷⁸

Finally, in 2019, the EIU in collaboration with the International Chamber of Commerce (**the ICC**) and other related organisations released a paper titled *Climate Change and Trade Agreements: Friends or Foes*. In that paper, the authors stress that if the world is to restrict global warming to 1.5°C, trade must be a central part of the solution.⁷⁹ They identify that there are myriad possibilities for “synergies” between international trade and climate change, but conclude that in the overwhelming majority of trade agreements, these are overlooked. The EIU conclude by urging the WTO and the CTE to improve their coordination with the UNFCCC to embody states' international climate change obligations in future trade agreements.⁸⁰

D Non-Government Organisations (NGOs) and Intergovernmental Organisations (IGOs) on Trade and Climate Change

Several non-government and intergovernmental organisations have commented on the interplay between trade and climate change in recent years.

⁷⁵ Ryerson Neal, above n 53, at 3.

⁷⁶ At 3; and *Ministerial Declaration* WT/MIN(01)/DEC/1, 14 November 2001 (Ministerial Declaration) at [28].

⁷⁷ “Life Below Water” The Global Goals for Sustainable Development <<https://www.globalgoals.org/14-life-below-water>> at 14.6.

⁷⁸ Ryerson Neal, above n 53, at 2.

⁷⁹ At 30.

⁸⁰ At 30.

Just last month, the Overseas Development Institute problematized the lack of alignment between the UNFCCC and WTO agendas.⁸¹ In November 2021, UNFCCC COP 26 is scheduled to be held in Glasgow. The ODI identify that many of the negotiation streams set down for that Conference have direct links to trade policy. The upcoming Conference thus provides an excellent opportunity for the Parties to seek to influence the WTO agenda by providing clear communications as to how trade-tools can support climate goals. The ODI highlight carbon accounting and standards, carbon markets, and climate finance as appropriate starting points for discussion.

In April 2021, the United Nations Conference on Trade and Development (**UNCTAD**), an IGO, released a publication titled *Climate Change, Green Recovery and Trade*.⁸² That publication addresses the 2008 financial, socio-economic and environmental ‘triple crisis,’ the Covid-19 pandemic, and how international cooperation in trade can enable countries to transform their economies through a green recovery. The UNCTAD’s role in an international green recovery includes facilitating dialogue between trade and climate policymakers, assisting countries in assessing, developing, and updating public policy frameworks, and exploring mechanisms towards financing projects that drive sustainable development.⁸³ In this sense, the UNCTAD could serve as the type of neutral forum for climate and trade that Clémenton called for in 1995.

Many of the mechanisms for green recovery discussed in the UNCTAD’s paper, including removal of fossil fuel subsidies, implementation of renewable energy subsidies, and border adjustment carbon taxes are discussed in section IV below.

The following section now moves to discuss how provisions in existing and future trade agreements can give effect to, or hinder, climate goals.

⁸¹ Laetitia Pettinotti and Jodie Keane “Four ways the UK can bring climate and trade agendas together at COP26” (13 September 2021) Overseas Development Institute <<https://odi.org/en/insights/four-ways-the-uk-can-bring-climate-and-trade-agendas-together-at-cop26/>>.

⁸² *United Nations Conference on Trade and Development: Climate change, Green Recovery and Trade* UNCTAD/DITC/TED/2021/2 (April 2021).

⁸³ “Climate change, green recovery and trade” United Nations Conference on Trade and Development <<https://unctad.org/webflyer/climate-change-green-recovery-and-trade>>.

IV Synergies: How Can Trade Agreements Facilitate Climate Action?

There are ample opportunities for the relationship between international trade and climate change to become symbiotic. Trade agreements at bilateral, plurilateral and multilateral levels can be utilised to give effect to climate change goals. The following two sections consider key means' through which trade agreements can be drafted to support, or hinder, climate change progress.

A Use of Climate-Friendly and Environmental Language in Trade Agreements

Use of language, chapters and clauses in trade agreements that refer to climate change and environmental factors are valuable in and of themselves. These serve as a symbolic recognition of the relationship between climate change and trade and signify the Parties' intention for improved coordination between the two.

In 1995, Raymond Clémenton wrote about a prevalent view that the WTO is not an environmental organization "and should not become one."⁸⁴ More recently, in 2018, attendees of the CIGI's trade and climate conference in Canada shared a perception that the WTO agenda is "crowded" and that there is little appetite to add climate change consideration into the mix.⁸⁵ Proliferation of climate change provisions in bilateral and plurilateral agreements between WTO members could change this. This could signify to the WTO its Members' desire for integration between trade and climate policy, placing pressure on the WTO to respond with changes at a multilateral level.

B Removal of Tariff Barriers on Environmental Goods and Services

Trade agreements are an appropriate mechanism through which Parties can endeavor to remove tariff barriers to trade in environmental goods and services. Removing tariffs on environmental goods and services supports global expansion of markets for those goods and services by reducing prices to consumers and providing businesses with access to new markets.⁸⁶ This provides those businesses with access to more competitive suppliers

⁸⁴ At 40.

⁸⁵ At 4.

⁸⁶ The Economist Intelligence Unit, above n 29, at 21.

across the globe, as well as the skills, capital, and finance, that they need to expand. Furthermore, reduced prices to consumers on environmental goods and services would increase demand, creating opportunities for exponential growth in those markets. A World Bank Study in 2017 estimated that elimination of tariff and non-tariff barriers on energy efficiency products, for example, could increase trade in those products by an impressive 60 percent.⁸⁷

At their 2001 Doha Round, the WTO instructed members to negotiate for the removal of tariffs on environmental goods and services.⁸⁸ Many years later, in 2014, a group of 18 WTO members began to do so. Those countries, including New Zealand, Australia, the European Union and the United States, negotiated for an 'Environmental Goods Agreement' that would promote trade in key environmental products, including wind turbines and solar panels.⁸⁹ Unfortunately those negotiations eventually collapsed and broad international cooperation on this opportunity remains yet to be seen. One of the key issues preventing progress in this space is defining which goods and services should be considered 'environmental.' This requires complex considerations of the nature of goods and services, the stages of their life cycles, and their methods of production. This is especially challenging in light of fast-moving technological development in the relevant industries.⁹⁰

Several contemporary trade agreements, including the CPTPPA to which New Zealand is Party, have attempted to distinguish between environmental and non-environmental goods and services.⁹¹ Those agreements do not, however, include any binding obligations on Parties to pursue more than cooperation in this regard.⁹²

⁸⁷ At 21.

⁸⁸ "Eliminating trade barriers on environmental goods and services" World Trade Organization, <https://www.wto.org/english/tratop_e/envir_e/envir_neg_serv_e.htm>.

⁸⁹ "Environmental Goods Agreement (EGA)" World Trade Organization <https://www.wto.org/english/tratop_e/envir_e/ega_e.htm>.

⁹⁰ The Economist Intelligence Unit, above n 29, at 14.

⁹¹ The CPTPPA is discussed in greater detail in section VIII below. Additional trade agreements that have attempted to distinguish between environmental and non-environmental goods and services include

C Removal of Non-Tariff Barriers on Environmental Goods and Services

Alongside tariffs, non-tariff barriers can also make it difficult and expensive for companies to make their environmental goods and services internationally available. Non-tariff barriers include opaque licensing requirements, product standards and testing procedures which can differ greatly between nations.⁹³ Trade agreements can provide efficient platforms for Parties to coordinate their standards for environmental goods and services, or alternatively, to recognize the equivalence of their respective standards.

Over the past ten years, certain trading partners have endeavored to reduce non-tariff barriers to trade in environmental goods and services. Between 2013 and 2018, the European Commission formulated and tested ‘Product Environmental Footprints’ and ‘Organisation Environmental Footprints.’⁹⁴ These establish clear and consistent methods for testing products’ environmental performance across the European Union. Now that the formulation, testing and consultation phases of this project are complete, the European Commission intends to use the blueprints in its future policies.⁹⁵ The European Commission has stated that this is part of a collection of interrelated initiatives that will make sustainable products, services, and business models more viable in the future.⁹⁶

the EU-Singapore Free Trade Agreement, the Comprehensive Economic and Trade Agreement, and the Korean-Australia Free Trade Agreement: The Economist Intelligence Unit, above n 29, at 21.

⁹² At 21.

⁹³ At 21.

⁹⁴ “Single Market for Green Products Initiative” (last updated 23 September 2021) European Commission <<https://ec.europa.eu/environment/eussd/smgp/index.htm>>.

⁹⁵ *Report on 2018-2019 stakeholder consultations regarding the potential future use of the Product and Organisation Environmental Footprint methods* (European Commission, 27 April 2020).

⁹⁶ “Single Market for Green Products Initiative”, above n 94. The United States’ Environmental Protection Agency has implemented a similar initiative, the ‘Energy Efficiency Labelling Programme.’ This has harmonized energy efficiency metrics and testing methods across the United States, Canada, Japan, Switzerland, and Taiwan: “ENERGY STAR International Partners” Energy Star <https://www.energystar.gov/index.cfm?c=partners.intl_implementation>.

D Limiting and Eliminating Fossil Fuel Subsidies

Trade agreements can be used to limit and eliminate subsidies that Governments provide to fossil fuel industries.⁹⁷ Fossil fuel subsidies make greenhouse gas-emitting fuels cheaper to produce and consume, which encourages wasteful consumption discourages investment in renewable energy.⁹⁸ A 2014 University of Oxford study estimated that unnecessary and wasteful fossil fuel consumption, enabled by subsidies, accounted for approximately 36 percent of global carbon emissions between 1980 and 2010.⁹⁹ Across the globe, fossil fuels are subsidized by over \$500 billion US dollars per year.¹⁰⁰ The New Zealand Government has acknowledged that fossil fuels subsidies are “the height of policy incoherence,” and work against international efforts to limit climate change.¹⁰¹

The removal of fossil fuel subsidies could allow for reallocation of government funds towards greener and more climate-resilient economies. This could contribute towards the objective of the Paris Agreement to limit global temperature increases to well below 2 °C degrees above pre-industrial levels.¹⁰² Bilateral, regional, or even WTO trade agreements could provide platforms for countries to form consensus, and make commitments, on the need to remove fossil fuel subsidies.¹⁰³ This opportunity was discussed at the 2017 WTO Ministerial Conference in Argentina.¹⁰⁴ The EU-Singapore Free Trade and Investment Protection Agreements, signed in October 2018, capitalise on this opportunity. Those

⁹⁷ Ryerson Neal, above n 53, at 7.

⁹⁸ The Economist Intelligence Unit, above n 29, at 23.

⁹⁹ Radoslaw Stefanski *Dirty Little Secrets: Inferring Fossil-Fuel Subsidies from Patterns in Emission Intensities* (Oxford Centre for the Analysis of Resource Rich Economies, Oxford, 2014).

¹⁰⁰ Jacinda Ardern “New Zealand leading trade agreement driving action on climate change and the environment” Beehive (26 September 2019) <<https://www.beehive.govt.nz/release/new-zealand-leading-trade-agreement-driving-action-climate-change-and-environment>>.

¹⁰¹ Jacinda Ardern, above n 100; and “Fossil fuel subsidy reform (FFSR)” Ministry of Foreign Affairs and Trade <<https://www.mfat.govt.nz/en/environment/fossil-fuel-subsidy-reform-ffsr/>>.

¹⁰² Art 2.1(a).

¹⁰³ The Economist Intelligence Unit, above n 29, at 5; and Ryerson Neal, above n 53, at 4.

¹⁰⁴ At 4.

agreements formally recognise the need for the Parties to reduce fossil fuel subsidies over time.¹⁰⁵

E Non-Discriminatory Renewal Energy Subsidies

Trade Agreements can provide opportunities for Parties to implement renewable energy subsidies. These could take the place and funding of fossil fuel subsidies as those are eliminated over time. Renewable energy subsidies would lower the cost of renewable energy production, either by raising the price received by producers or lowering the price paid by consumers. This would incentivise the use of renewable energy and help to reduce global greenhouse gas emissions.¹⁰⁶

Renewable energy subsidy schemes would need to be carefully designed to avoid breaching WTO rules by having a distortionary effect on trade.¹⁰⁷ The WTO's Agreement on Subsidies and Countervailing Measures prohibits government subsidies on domestic goods producers if these are tied to the producers' export performance or their use of domestic over imported goods.¹⁰⁸ China, India and Canada and the US have faced legal challenges in the past in relation to their implementation of renewable energy subsidies.¹⁰⁹ In 2011, the Ontario Feed-in Tariff programme in Canada was legally challenged by Japan and the EU.¹¹⁰ Under that scheme, the government had promised to pay generators of renewable power guaranteed prices under 20 to 40-year contracts. That scheme required wind and solar generators to source a minimum percentage of their equipment in Ontario. It was thus held to be in violation of the WTO 'national treatment' principle discussed in section V below. Five years later, in 2016, the United States

¹⁰⁵ EU-Singapore Free Trade Agreement Investment Protection Agreement (last updated 27 Nov 2019) European Commission <<https://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/>>; and The Economist Intelligence Unit, above n 29, at 23.

¹⁰⁶ At 27.

¹⁰⁷ At 27; and Ryerson Neal, above n 53, at 5.

¹⁰⁸ The Economist Intelligence Unit, above n 29, at 27.

¹⁰⁹ At 17.

¹¹⁰ *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* AB-2013-1, 6 May 2013 (Report of the Appellate body) at 5.74.

challenged the legality of a similar ‘National Solar Mission’ in India. That scheme was also held to violate the national treatment principle.¹¹¹

Trade agreements can protect Parties’ rights to implement renewable energy subsidies either by incorporating article XX of the General Agreement on Trade and Tariffs (**the GATT**) into the agreement or by including an express provision allowing such measures.¹¹² Both the Comprehensive Economic and Trade Agreement (**the CETA**) and the EU-Singapore Free Trade Agreement include provisions allowing Parties’ to implement subsidies for environmental purposes, subject to prescribed conditions.¹¹³

F Using Trade Agreements to Place Pressure on Big Emitters

Countries that are more environmentally conscious could use free trade agreements with big emitters to encourage, pressure, and legally bind those countries to more ambitious climate change targets.¹¹⁴ Australia, for example, is a country with very high greenhouse gas emissions.¹¹⁵ The Climate Action Tracker (**CAT**) has suggested that, if all countries took Australia’s approach to emissions, global warming could reach up to 4°C by 2030. New Zealand is one of Australia’s top ten trading partners. Australian exports to New Zealand in 2018 were worth more than AUD\$15 billion, whilst New Zealand imports to Australia were worth more than AUS\$14 billion.¹¹⁶ New Zealand could use its important trading status with Australia as leverage to encourage them to commit to greater emissions reductions targets.

¹¹¹ *India – Certain Measures Relating to Solar Cells and Solar Modules* AB-2016-3, 16 September 2016 (Report of the Appellate body) at 6.4.

¹¹² The exceptions provided in art XX of the GATT are discussed in section V below.

¹¹³ The Economist Intelligence Unit, above n 29, at 27-28.

¹¹⁴ Rafael Leal-Arcas, above n 54, at 2.

¹¹⁵ “Australia” (last updated 15 September) Climate Action Tracker <<https://climateactiontracker.org/countries/australia/>>.

¹¹⁶ “NZ-Australia Closer Economic Relations (CER)” Ministry of Foreign Affairs and Trade <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-australia-closer-economic-relations-cer/>>; and “Australia’s Top 10 Two-Way Trading Partners” (last updated March 2019) Australian Government Department of Foreign Affairs and Trade <<https://www.dfat.gov.au/trade/resources/trade-at-a-glance/Documents/index.html>>.

G Preventing Carbon Leakage

Trade Agreements can be used to prevent ‘carbon leakage’ to protect the integrity of Parties’ domestic carbon taxes and emissions trading initiatives. Carbon taxes increase the price of carbon-intensive goods and services to push producers and consumers towards more environmentally friendly methods of production.¹¹⁷ Carbon taxes can, however, create incentives for businesses to shift their emissions offshore to countries that do not have equivalent carbon taxes. This creates ‘carbon leakage.’ Trade Agreements provide a forum whereby states could implement ‘border adjustment carbon taxes’ (**BACTs**) to prevent carbon leakage. BACTs are levies on imports based on the level of carbon emissions involved in their production. Experts have suggested that whilst BACTs are complex, these could be designed in accordance with WTO rules.¹¹⁸ Mexico is the only country that has addressed BACTs in their NDCs to date.¹¹⁹ Trade agreements could provide an effective forum for Parties who are exploring this opportunity to discuss and coordinate their implementations of BACTs.

H Support for Developing Countries

Finally, trade agreements can be utilised to provide support and assistance to Developing countries to help them achieve their climate change goals. Both the international trade and climate change disciplines have principles to recognise the special circumstances of Developing countries. In international trade, this is the principle of ‘special and differentiated treatment.’¹²⁰ Under the Paris Agreement, this is the principle of ‘common but differentiated responsibilities.’¹²¹ In the climate change context, Developed country Parties to the UNFCCC have obligations to provide financial resources to Developing country Parties to support them in mitigating and adapting to the effects of climate change. Free trade agreements can assist Developed countries in fulfilling these obligations in two key ways. First, trade agreements between Developed and Developing countries could include binding commitments from Developed country Parties to support

¹¹⁷ The Economist Intelligence Unit, above n 29, at 24.

¹¹⁸ Ryerson Neal, above n 53, at 8.

¹¹⁹ Patrick Messerlin, above n 68, at 25.

¹²⁰ At 28.

¹²¹ Preamble.

Developing countries. Those agreements could also establish mechanisms through which Developed country Parties can provide climate finance to Developing country Parties. Second, in trade agreements between Developed country Parties only, those Parties could coordinate their efforts in support of Developing countries. For example, money saved by Developed country Parties through the removals of tariffs or fossil fuel subsidies could be channelled through to Developing country Parties to enable them to meet their international climate change obligations and adapt to the effects of climate change.

V Tensions: How Can Trade Agreements Hinder Climate Change Goals?

Whilst there are many mechanisms through which trade agreements can give effect to climate change goals, there are also several respects in which the disciplines are in tension.

First, international trade and climate change communities have different outlooks regarding government intervention.¹²² From a climate change perspective, government intervention is seen as being necessary to implement the level of action required to prevent climate change. Actors in the climate change field perceive that there are 'missing markets' whereby the social and environmental costs of certain activities are unaccounted for. For example, those who release carcinogens into oceans and the atmosphere do not have to account financially for the cost of their actions. Consequently, climate actors view government interventions, such as carbon taxes, as *correcting* distortions in the market.¹²³ Trade economists, on the other hand, typically consider and condemn governmental interventions as creating market distortions that harm general welfare.¹²⁴ Free trade theorists believe that the free market is the most efficient mechanism for allocation of society's resources. For this reason, free trade agreements

¹²² Jagdish Bhagwati "Reflections on Climate Change and Trade" in Lael Brainard and Isaac Sorkin *Climate Change, Trade and Competitiveness: Is a Collision Inevitable?* (Brookings Institution Press, Washington D.C., 2009) 171 at 171.

¹²³ At 171.

¹²⁴ At 171.

generally seek to prevent governments from enacting policies, including protectionist environmental policies, which unnecessarily restrict trade.¹²⁵

Second, free trade agreements seek to promote economic activities including industry, food production and transport, which have been long recognised to contribute to climate change.¹²⁶ In a short term sense, climate change policies do not necessarily have positive effects on trade and economic growth. This is because the cost of mitigating climate change is immense and environmentally destructive methods of production are, and will continue for some time to be, the most economic choice.¹²⁷ This tension can be reconciled, however, when one takes a more long-term view of the effects that climate change will have on economies. A 2021 report by Swiss Reinsurance Company Ltd, for example, suggests that, even if further mitigation actions are taken to limit temperature increases to 2°C, global GDP can be expected to decrease by 11 percent by 2050.¹²⁸ Climate change poses the biggest long-term threat to the global economy and has been labelled as “by far the greatest economic challenge of the 21st century.”¹²⁹ In this sense, the financial costs associated with climate change mitigation policies can be justified in light of the loss they will help to prevent in the future.

A International Trade is Carbon-Intensive

The most obvious tension between trade and climate change policy is that international trade is inherently carbon-intensive.¹³⁰ Trade involves the import and export of goods across borders all over the world by sea, air and land, which contributes significantly to

¹²⁵ Elizabeth Annis, above n 55, at 1507.

¹²⁶ *Emerging issues for Small Island Developing States: Results of the UNEP/UN DESA Foresight Process* (UNEP, Nairobi, Kenya, 2014) at ix.

¹²⁷ Henry Derwent *What Has Climate to Fear From Trade?* (International Centre for Trade and Sustainable Development and World Economic Forum, Geneva, 2015) at 1.

¹²⁸ “World economy set to lose up to 18% GDP from climate change if no action taken, reveals Swiss Re Institute's stress-test analysis” (22 April 2021) Swiss Re <<https://www.swissre.com/media/news-releases/nr-20210422-economics-of-climate-change-risks.html>>.

¹²⁹ Christine Lagarde, Managing Director of the International Monetary Fund “A New Global Economy for a New Generation” (Davos, Switzerland, January 23 2013).

¹³⁰ Gene Grossman and Alan Krueger *Environmental Impacts of a North American Free Trade Agreement* (National Bureau of Economic Research, Working Paper No. 3914, November 1991).

resource depletion, pollution and emissions.¹³¹ Shipping alone, for example, accounts for 2 to 3 percent of global greenhouse gas emissions.¹³² This tension, labelled ‘scale effects,’ is one of ‘three mechanisms of action through which Grossman and Krueger argue that trade agreements can affect environmental outcomes.’¹³³ Free trade, particularly through tariff reductions, also promotes higher levels of production. Tariff reductions can increase trade in carbon-intensive and environmentally destructive products in the same way that they increase trade in environmental products.¹³⁴

Trade agreements encourage nations to specialize according to their comparative advantages, which might be more, or less, emission-intensive.¹³⁵ Manufacturing goods in Vietnam, for example, is six times as carbon-intensive as manufacturing in the USA.¹³⁶ If trade agreements shift production to more polluting geographies, this increases global emissions. Grossman and Krueger label this mechanism of action ‘composition effects.’¹³⁷

The third mechanism of action through which Grossman and Krueger suggest trade can affect environmental outcomes is ‘technique effects.’ Trade liberalization can increase global emissions via the diffusion of environmentally destructive practices and technologies.¹³⁸ These include, for example, hydraulic fracturing technology and innovative oil exploration machinery.¹³⁹ More positively, however, the necessary corollary of this is that trade liberalisation could also *reduce* global emissions through the transfer of *cleaner* technologies, especially to developing countries.

¹³¹ The Economist Intelligence Unit, above n 29, at 11.

¹³² At 11.

¹³³ Gene Grossman and Alan Krueger, above n 130, at 3.

¹³⁴ The Economist Intelligence Unit, above n 29, at 12.

¹³⁵ Sandeep Mohapatra, Wiktor Adamowicz and Peter Boxall “Dynamic technique and scale effects of economic growth on the environment” (2016) 57 *Energy Economics* 256 at 257.

¹³⁶ The Economist Intelligence Unit, above n 29, at 11.

¹³⁷ Gene Grossman and Alan Krueger, above n 130, at 4.

¹³⁸ At 4.

¹³⁹ The Economist Intelligence Unit, above n 29, at 11.

Through a combination of these effects, trade-related emissions were estimated in 2013 to account for roughly 26 percent of global emissions.¹⁴⁰

B Trade Agreements can Reduce Parties' Ability to Implement New Climate Policies

Trade agreements can 'shrink the policy space' available to governments to implement new environmental policy initiatives.¹⁴¹ Innovative policy measures that governments might seek to implement, for example, renewable energy subsidies, are vulnerable to being challenged as breaches of free trade principles. Policies are in breach of free trade principles if they discriminate between countries on unjustifiable grounds or create a disguised restriction on international trade.¹⁴² Furthermore, many bilateral and plurilateral trade agreements include investor protection provisions that allow investors to sue governments whose policy measures negatively impact their investments. The Economist Intelligence Unit suggest that several climate policy measures already featuring in countries' NDCs could, in future, be considered to breach free trade principles.¹⁴³ Members of the European Union do not enter trade agreements with investor protection provisions of this nature as these are deemed to be incompatible those governments' human rights and climate change obligations.¹⁴⁴ In 85 percent of cases around the world where investment protection provisions have been invoked to prevent progressive policy implementation, it has been in the context of environmental protections.¹⁴⁵

The *Clayton/Bilcon v Canada* case from 2015 provides a helpful illustration of this tension between trade principles and climate policy.¹⁴⁶ In that case, the Canadian government had rejected an application for a quarrying project. They rejected the

¹⁴⁰ Global Economic Governance Initiative, above n 6, at 7.

¹⁴¹ The Economist Intelligence Unit, above n 29, at 5.

¹⁴² At 12.

¹⁴³ At 12.

¹⁴⁴ (24 October 2018) 734 NZPD (Trans-Pacific Partnership Agreement (CPTPP) Amendment Bill — Third Reading, Golriz Ghahraman).

¹⁴⁵ Oliver Hailes and others "Climate change, human health and the CPTPP" (2019) 131 NZMJ 7 at 9.

¹⁴⁶ Stefanie Schacherer "Clayton/Bilcon v. Canada" (18 October 2018) International Institute for Sustainable Development <<https://www.iisd.org/itm/en/2018/10/18/clayton-bilcon-v-canada/>>.

proposal because an environmental impact assessment had found that it raised widespread public concern and had potentially significant adverse environmental effects.¹⁴⁷ A company, Bilcon of Delaware, challenged the decision, initiating arbitration under the North American Free Trade Agreement (**the NAFTA**). The Permanent Court of Arbitration held that the government's decision to reject the application was in breach of their 'minimum standard of treatment' obligations under the NAFTA.¹⁴⁸ The tribunal also held that the government had acted arbitrarily in considering a new standard of "community core values".¹⁴⁹ The tribunal did not consider broader public policy concerns relating to the project and did not weigh the investor's expectations against other public interest objectives, such as sustainable development. The International Institute for Sustainable Development reflect on this case as demonstrating a lack of deference from arbitral tribunals vis-à-vis governments in their actions to protect the environment.¹⁵⁰

The New Zealand Government has faced its own issues with investor protection clauses in trade agreements in the past. In 2000, Helen Clarke was informed that the New Zealand government could not introduce broadcasting quotas, as it wished to, for local broadcasting. This was because of similar provisions in the General Agreement on Trade in Services (**GATS**). Clarke stated:¹⁵¹

We have unilaterally disarmed ourselves on trade but very few others have been so foolish. We're now left with perfectly legitimate calls for more local content and people saying, '*You can't do that because of GATS.*'

¹⁴⁷ Laila Harré "The risks and opportunities of free trade agreements for progressive labour law reform: the case of the TPP" (2021) 31 *Labour & Industry: A Journal of the Social and Economic Relations of Work* 15 at 23.

¹⁴⁸ Stefanie Schacherer, above n 146.

¹⁴⁹ Stefanie Schacherer, above n 146.

¹⁵⁰ Stefanie Schacherer, above n 146.

¹⁵¹ Eugene Bingham "Spectre of trade wrangle over TV quota" *The New Zealand Herald* (online ed, Auckland, 30 June 2000).

More recently, in 2017, provisions in free trade agreements prevented the New Zealand Government from introducing royalties on bottled water exports.¹⁵² Perhaps as an admission of the harmful realities of these provisions, the New Zealand Government has voiced that it will no longer be entering into free trade agreements that include investor settlement schemes.¹⁵³

C WTO Rules

To some extent, WTO rules and principles conflict with climate change policy. In particular, the 'national treatment' and 'most favoured nation' principles limit, or at least complicate, some legitimate climate protection measures that governments might wish to implement.

1 The National Treatment Principle

The national treatment principle can be found in art III of the GATT. This states that a country should impose the same domestic tax(es) on imported goods and on like-products produced domestically. In other words, countries will breach the GATT if they tax imports to a greater extent than they tax like-products produced locally. The purpose of this principle is to maintain a "level playing field" between foreign and domestic products, to enable international trade to flourish.¹⁵⁴ This conflicts with climate policy because, assuming technique effects are consistent between two countries producing like-products, it would be more environmentally friendly for governments to incentivize individuals to buy the locally made version. This is because the locally made version would not require transport (by sea, air, or land) to get to the individual consumer.

The tensions between climate policy and the national treatment principle are evident in Messerlin's discussion of border adjustment carbon taxes. As Messerlin writes, BACTs are aimed to prevent carbon leakage by taxing goods that are produced offshore in

¹⁵² Audrey Young "Winston Peters and David Parker at odds over whether export tax breaches trade deals" *The New Zealand Herald* (online ed, Auckland, 30 November 2017); and Laila Harré, above n 147, at 24.

¹⁵³ (24 October 2018), above n 144.

¹⁵⁴ Patrick Messerlin, above n 68, at 8.

countries that do not have a carbon-taxes,¹⁵⁵ to the extent that they would have been taxed if they were produced in the importing country. In order for these taxes to comply with the national treatment principle, however, the adjustment would need to apply “two-ways.”¹⁵⁶ This would mean that carbon taxes paid in a country like New Zealand (country A), would have to be removed when those products are exported to countries without equivalent taxes (country B).¹⁵⁷ As Messerlin points out, a two-way regime such as this would incentivize continued “dirty production” in the carbon-taxing country A, as any carbon taxes from that activity would be removed if those goods were exported to non-carbon-taxing country B. This problem would be mitigated, of course, if country B also implemented a carbon tax, so that “dirty producers” in country A could no longer avoid carbon taxes.¹⁵⁸ This illustrates the need for coordinated and widespread implementation of carbon taxes across the world. This could indeed be facilitated in trade agreements.

2 *The Most Favoured Nation Principle*

The most favoured nation principle can be found in Article I of the GATT. This states that a country should impose the same tariff on the imports of a given product independently from the country of origin. In other words, the tariffs placed on like-products must be consistent between different nations where those products come from. This rule would prevent countries from imposing tariffs, perhaps as ‘penalties,’ on imports from particular nations whose climate policies are ‘not comparable,’ or, alternatively, on countries that are not part of a global agreement to cut carbon emissions. Messerlin does not perceive this tension to be a significant one. He argues that discriminatory carbon tariffs would be undesirable from both climate change and trade perspectives. The benefits of such measures from a climate change perspective would be minimal, whereas the disadvantages that these would have, from a trade perspective, would be significant.¹⁵⁹ This is because burdens that might be placed through

¹⁵⁵ Or that have lesser taxes.

¹⁵⁶ Patrick Messerlin, above n 68, at 9 – 10.

¹⁵⁷ At 9.

¹⁵⁸ At 9 – 10.

¹⁵⁹ At 20 – 21.

discriminatory tariffs on 'non-comparable' countries would likely lack proportionality to the only marginally more carbon-intensive nature of production in those countries. In this respect, Messrlin argues that proposals for 'carbon tariffs' tend to be based on a misconception that 'non-conforming' economies are exporting carbon-intensive products more massively than developed countries. 2007 data suggests that, in reality, only a small share of carbon-intensive imports come from emerging economies.¹⁶⁰

There is a strong connection between Messerlin's argument above and the recognition, throughout the UNFCCC and Paris, that greenhouse gas emissions from developing country Parties must *continue to grow* in order to meet their social and developmental needs. These are the countries likely to be most affected by discriminatory carbon tariffs.¹⁶¹ Imposing penalties on those Parties whose economies are still emerging would not only run contrary to fundamental trade principles but also the principle of common but differentiated responsibilities embedded in the UNFCCC and the Paris Agreement.

3 GATT Article XX

Article XX of the GATT provides an exception whereby measures will not be considered as means of arbitrary or unjustified discrimination between countries, or as disguised restrictions on international trade, if those measures:

- are necessary to protect human, animal or plant life or health;¹⁶² or
- relate to the conservation of exhaustible natural resources, as long as those measures are made effective in conjunction with restrictions on *domestic* production or consumption.¹⁶³

These exceptions have proven valuable in previous WTO cases. In 1997, for example, a United States requirement that foreign producers use turtle excluder devices when fishing in areas where sea turtles were present was held to be defended under article XX.¹⁶⁴

¹⁶⁰ At 20.

¹⁶¹ For example, China and India, which are not listed in Annex 1 or 2 of the UNFCCC.

¹⁶² Art XX (b).

¹⁶³ Art XX(g).

¹⁶⁴ The Economist Intelligence Unit, above n 29, at 16.

Many bilateral and regional FTAs incorporate art XX of the GATT, or include their own highly similar exceptions.

D Developing Countries

Finally, as Elizabeth Annis wrote in 2016, the inclusion of well-intentioned climate change policies in trade agreements might disproportionately burden developing countries, hindering the extent to which they can participate in international trade regimes. Compliance with new international environmental standards is increasingly important for countries to secure market access for their exports. This can require costly modifications to domestic process and productions methods, and technological upgrades.¹⁶⁵ These might not be economically feasible for Developing countries.

Annis uses the example of labelling requirements to demonstrate this point.¹⁶⁶ For example, in the future, international trading communities might seek to implement compulsory labelling schemes for certain types of products. This would mean that, if a developing country wants to be included in a specific trade agreement, they would have to be able to comply with those labelling requirements. This would require infrastructure and resources that might not be available, for example, to emerging companies in Developing countries. This could mean that developing countries that do not have sufficient resources to comply with stringent environmental standards could be left out of regional or bilateral trade agreements, causing them to lose important opportunities to raise not only their standard of living but also their climate change capabilities. This has the potential to become a cyclical issue to the detriment of developing nations, including Pacific Island Countries, who might miss out on trade opportunities and therefore important economic development. Such a scenario would be highly contrary to the principle of common but differentiated responsibilities in the international climate regime and would likely breach the WTO non-discrimination rules. It is therefore imperative that, if trade agreements evolve to embrace greater climate protection measures,

¹⁶⁵ Robert Read *Trade, Economic Vulnerability, Resilience and the Implications of Climate Change in Small Island and Littoral Developing Economies* (International Centre for Trade and Sustainable Development, Geneva, Switzerland, 2010) at 23.

¹⁶⁶ At 9 – 10.

Developed country Parties support and assist Developing countries in complying with those measures, so that those nations are not discriminated against in international trade.

VI Conclusion

In conclusion, there are many ways in which the relationship between trade and climate change can evolve to become symbiotic. Trade agreements can be utilized as opportunities for Parties to consider measures such as removals of fossil fuel subsidies or implementation of renewable energy subsidies, to give effect to their international climate change obligations. There are also, however, several ways in which the climate change and trade disciplines are in tension. If trade agreements are not carefully considered, these can contribute significantly to climate change by causing Parties' emissions to increase rather than decrease.

The following section moves to analyse two of New Zealand's most recent significant trade agreements. It considers the extent to which those agreements embody the Parties' international obligations and capitalize on the opportunities for synergies between trade and climate change. It also considers any potential environmental harms that the agreements may present.

Part Three: Analysis of Two of New Zealand's Most Recent Trade Agreements

VII Analytical Framework

The following sections analyse how three significant New Zealand trade agreements have been drafted to facilitate, or hinder, climate change action. Each section begins with a contextual overview of the agreement in question and the circumstances that gave rise to its adoption. The sections then consider the extent to which the agreements in question reflect the Parties' international climate change obligations, based on the following considerations:

- A. Does the agreement include language and/or provisions that address climate change and/or the environment?

- B. Does the agreement seek to differentiate between non-environmental and environmental goods and services and does it seek to reduce tariff and non-tariff barriers for trade in the latter?
- C. Does the agreement address the reduction of fossil fuel subsidies and/or the implementation of renewable energy subsidies?
- D. Does the agreement address and seek to improve levels of climate change ambition from heavy GHG-emitting Parties to the agreement?
- E. Does the agreement permit the Parties to implement border adjustment carbon taxes?
- F. Does the Agreement address any burdens placed on developing country Parties, or how Developed country Parties could fulfil their international obligations to support Developing countries?
- G. Does the Agreement include a dispute settlement mechanism through which investors can challenge Parties' implementation of new climate policies?

Analysis of the two agreements in accordance with the above criteria will be coloured by the theoretical and philosophical tensions between climate change and trade outlined in the previous section. The criteria focus more heavily on the ways in which the agreements support, rather than hinder, climate change goals. The criteria are based on practical steps that can be taken by the Parties within existing WTO rules. This allows for more specific analysis and measurement of the levels of ambition in the Agreements in relation to each criterion.

I will rate the level of ambition in the Agreements in relation to each of the criteria as either poor, adequate, promising, or excellent.

VIII The Comprehensive and Progressive Trans-Pacific Partnership Agreement

The Comprehensive and Progressive Trans-Pacific Partnership Agreement (**CPTPPA**) is a free trade agreement involving 11 countries from the Asia-Pacific region.¹⁶⁷ The Parties to the CPTPPA are New Zealand, Malaysia, Singapore, Viet Nam, Brunei Darussalam, Japan, Australia, Canada, Mexico, Peru and Chile. The CPTPPA was signed on 8 March 2018 in Chile after the ratification of the original Trans-Pacific Partnership Agreement (**TPPA**) failed. The TPPA had involved the same 11 Parties as the CPTPPA, as well as the United States of America (**the USA**). Whilst the TPPA was ratified in New Zealand in May 2017, it collapsed when the US signalled that it did not intend to ratify the agreement.¹⁶⁸ The revised CPTPPA was then negotiated between the remaining Parties. 22 items were removed from TPPA in its transformation to the CPTPPA.¹⁶⁹

The CPTPPA is economically significant for New Zealand. It involves three of our top trading partners (Australia, Japan and Singapore) as well as four countries with which New Zealand has never had a free trade agreement (Japan, Canada, Mexico and Peru).¹⁷⁰ The economies included in the CPTPPA account for 13.3 percent of world Gross Domestic Product (**GDP**) which is worth a total of US\$10.6 trillion.¹⁷¹ The members of the CPTPPA are the destination of approximately 31 percent of New Zealand's goods exports, worth NZ\$16.3 billion in 2017.¹⁷²

¹⁶⁷ “Comprehensive and Progressive Agreement for Trans-Pacific Partnership” Ministry of Foreign Affairs and Trade <<https://www.mfat.govt.nz/vn/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/cptpp-overview/>>.

¹⁶⁸ “Trans-Pacific Partnership Agreement (TPP)” Ministry of Foreign Affairs and Trade <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/trans-pacific-partnership-agreement-tpp/>>.

¹⁶⁹ “Trans-Pacific Partnership Agreement (TPP)”, above n 168.

¹⁷⁰ “Comprehensive and Progressive Agreement for Trans-Pacific Partnership”, above n 167.

¹⁷¹ “Comprehensive and Progressive Agreement for Trans-Pacific Partnership”, above n 167.

¹⁷² “Goods Market Access” Ministry of Foreign Affairs and Trade <<https://www.mfat.govt.nz/vn/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/understanding-cptpp/goods-market-access/>>; and *Comprehensive and Progressive Agreement for Trans-Pacific Partnership: National Interest Analysis* (Treasury, February 2018).

A Language

Does the CPTPPA include language and/or provisions that address climate change and/or the environment?

The CPTPPA includes ample reference to the environment. In fact, it includes a 26-page chapter dedicated to the environment.¹⁷³ The objectives of the Parties stated in that chapter include:¹⁷⁴

- to promote mutually supportive trade and environmental policies;
- to promote high levels of environmental protection and effective enforcement of environmental laws; and
- to enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation.

The preamble to the Agreement signals that one of the key objectives of the CPTPPA is to promote sustainable growth. Chapter 20 also addresses environmental issues such as protection of the ozone layer,¹⁷⁵ protection of the marine environment from ship pollution,¹⁷⁶ transition to a low emissions economy,¹⁷⁷ and corporate social responsibility.¹⁷⁸

The significant emphasis placed on environmental issues in the CPTPPA reflects a shift in the past decade whereby contemporary trade agreements have developed to address the relationship between trade and climate.¹⁷⁹ The CPTPPA highlights the importance of WTO rules discussed in section V above, stating that it would be inappropriate for Parties to use environmental laws “in a manner which would constitute a disguised restriction on trade...”¹⁸⁰

¹⁷³ Chapter 20.

¹⁷⁴ Art 20.2.1.

¹⁷⁵ Art 20.5.

¹⁷⁶ Art 20.6.

¹⁷⁷ Art 20.15.

¹⁷⁸ Art 20.10.

¹⁷⁹ The Economist Intelligence Unit, above n 29, at 10.

¹⁸⁰ Art 20.2.3.

Whilst the CPTPPA includes an extensive framework relating to the environment, the words “climate change” do not feature at all in the agreement. The environmental goals included in the agreement are non-binding and based on the Parties’ best endeavours. One commentator has emphasized that, in this sense, the environmental provisions in the CPTPPA are “in stark contrast” to the highly specific commercial provisions in the Agreement.¹⁸¹ Consequently, I consider the use of environmental language and provisions in the CPTPPA to be ‘promising.’

B Environmental Goods and Services

Does the CPTPPA seek to differentiate between non-environmental and environmental goods and services and does it seek to reduce tariff and non-tariff barriers for trade in the latter?

Reducing tariffs is one of the key features of the CPTPPA. Once the agreement is fully implemented, tariffs will be eliminated on approximately 92 percent of all New Zealand exports to CPTPPA partners.¹⁸² This will include reductions and removals of tariffs on environmental goods and services.

Article 20.18 of the CPTPPA states that the Parties recognise the importance of trade and investment in environmental goods and services as a means of addressing global environmental challenges. The Parties agree to endeavor to address barriers to trade in environmental goods and services, including non-tariff barriers. Article 20.18.4 permits Parties to develop bilateral or plurilateral cooperative projects on environmental services. This could include coordination between Parties’ licensing and testing procedures as previously discussed in section IV. The Parties’ commitments in relation to environmental goods and services in the CPTPPA are non-binding. Consequently, I consider CPTPPA’s level of ambition in relation to this opportunity as ‘promising.’

¹⁸¹ Laila Harré, above n 147, at 18.

¹⁸² “Goods Market Access”, above n 172.

C Fossil Fuel and Renewable Energy Subsidies

Does the CPTPPA address the reduction of fossil fuel subsidies and/or the implementation of renewable energy subsidies?

The CPTPPA does not address fossil fuel subsidies. It does, however, preserve the Parties' rights to implement domestic renewable energy subsidies. This is in art 29.1 which incorporates art XX of the GATT into the Agreement. As discussed in section V, art XX of the GATT states that measures necessary to protect human, animal or plant life or health, or that relate to the conservation of exhaustible natural resources,¹⁸³ will not be considered as means' of arbitrary or unjustified discrimination, or as disguised restrictions on trade.

Whilst the CPTPPA preserves the Parties' abilities to implement renewable energy subsidies, it does not create a platform for the Parties to discuss or coordinate their efforts in this regard. I consider the level of ambition in the CPTPPA in relation to removing fossil fuel subsidies as 'poor', and the level of ambition in relation to new renewable energy subsidies as 'adequate.'

D GHG Emissions

Does the CPTPPA address and seek to improve levels of climate change ambition from heavy GHG-emitting Parties to the Agreement?

The CPTPPA does not impose special commitments on heavy GHG-emitting Parties to the Agreement. On the contrary, the CPTPPA can be expected to *increase* the Parties' collective consumption of CO₂ by almost 5 percent by 2035.¹⁸⁴ In her 2019 thesis, *Carbon Implications of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, Syeda Tasnia Hasan calculated that, in order for Parties to the CPTPPA to meet their Paris Agreement commitments, they would need to reduce their domestic

¹⁸³ If such measures are made effective in conjunction with restrictions on domestic production or consumption.

¹⁸⁴ Syeda Tasnia Hasan "Carbon Implications of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership" (MEnvStud Thesis, University Of Waterloo, 2019) at 43.

GHG emissions by an average of 4.87 percent by 2035.¹⁸⁵ Hasan's calculations predicted, however, that by 2035, the Parties' collective emissions could be expected to increase by almost 5 percent. Hasan estimated CO₂ emissions in Australia, Canada, New Zealand and Vietnam to increase by 4.3 percent, 6 percent, 8.1 percent and 8.4 percent respectively as a result of increases in trade exports under the CPTPPA.¹⁸⁶ The level of ambition to reduce Parties' carbon emissions in the CPTPPA is therefore considered to be 'poor.'

E Border Adjustment Carbon Taxes

Does the CPTPPA permit the Parties to implement border adjustment carbon taxes?

The CPTPPA does not focus at all on opportunities for Parties to implement, or coordinate their efforts on, BACTs. The Economist Intelligence Unit suggest that this is indicative of just how "contested" BACTs are.¹⁸⁷ Implementation of BACTs on imports from Parties who have not yet established carbon taxes would necessarily involve complex considerations about the Parties' common but differentiated responsibilities, and the potentially harmful trade effects these could have for those developing country Parties who need access to resources required to achieve sustainable development, and whose existing levels of greenhouse gas emissions must continue to grow to meet their social and developmental needs.¹⁸⁸ As the CPTPPA does not touch on BACTs, it's level of ambition in relation to this opportunity must be considered 'poor.'

F Developing Country Parties

Does the CPTPPA address any burdens placed on Developing country Parties, or how Developed country Parties could fulfil their international obligations to support Developing countries?

¹⁸⁵ At 43.

¹⁸⁶ At 40 – 41.

¹⁸⁷ At 25.

¹⁸⁸ *United Nations Framework Convention on Climate Change*, above n 7, Preamble.

Because the environmental provisions in the CPTPPA are non-binding and based on Parties' "best-endeavour", Developing country Parties to the agreement should not face legal challenges if they are unable to implement specific environmental measures.

Whilst the principle of common but differentiated responsibilities, embodied in the UNFCCC and Paris, suggest that Developed country Parties should take the lead in combatting climate change and the adverse effects thereof, it is Developed Country Parties whose emissions are expected to increase most significantly as a result of the CPTPPA.¹⁸⁹

The CPTPPA takes a unique approach compared to other FTAs whereby the basic rules of the Agreement apply equally among all signatories, including developing country Parties.¹⁹⁰ There is, however, some recognition of the special circumstances of Developing country Parties. For example, art 20.16.6 provides that Viet Nam may request an extension of an additional two additional years to bring subsidy programmes into conformity with Article 20.16.5(a).

The CPTPPA does not address the effects of reduced tariff income that will be endured by Developing country Parties and does not explore any ways in which Developed country Parties can support them. Therefore, I consider the consideration of the circumstances of Developed country Parties to the CPTPPA to be 'poor.'

G Dispute Settlement

Does the agreement include a dispute settlement mechanism through which investors can challenge Parties' implementation of new climate policies?

¹⁸⁹ Syeda Tasnia Hasan, above n 184, at 40 – 41.

¹⁹⁰ Christopher Corr "The CPTPP Enters into Force: What Does it Mean for Global Trade?" (21 January 2019) White & Case <<https://www.whitecase.com/publications/alert/cptpp-enters-force-what-does-it-mean-global-trade>>

The ‘Investor State Dispute Settlement’ (**ISDS**) provisions in the CPTPPA have been highly controversial.¹⁹¹ These provisions give foreign investors a right to sue the Parties, including the New Zealand government, if their investments decline as a result of climate change and environmental policies enacted.

The Green Party of Aotearoa strongly opposed New Zealand's ratification of the CPTPPA for this reason, describing the ISDS provisions as an “egregious threat to our democracy.”¹⁹² As Golriz Ghahraman pointed out in her opposition to the third reading of the Trans-Pacific Partnership Agreement (CPTPP) Amendment Bill, it is highly likely that New Zealand's ongoing ability to implement transformative action on climate change will be hindered by the risk of lawsuit enabled by the CPTPPA's ISDS provisions.

New Zealand has entered into reciprocal side letters with Australia, Brunei Darussalam, Malaysia, Peru and Viet Nam so that the ISDS provisions in the Agreement do not apply as between these Parties.¹⁹³ Risk remains, however, in that foreign corporations could technically use overseas bases to circumvent side-letters and initiate lawsuits.¹⁹⁴

The ISDS provisions in the CPTPPA are considered ‘poor.’

IX The Pacific Agreement on Closer Economic Relations Plus

The Pacific Agreement on Closer Economic Relations Plus (**the PACER Plus**) is a development-centered trade and investment agreement between New Zealand, Australia, Niue, Samoa, Tuvalu, Tonga, Cook Islands, Vanuatu, Kiribati, Solomon Islands and Nauru.¹⁹⁵ The PACER Plus builds on existing trade agreements between New Zealand

¹⁹¹ See Oliver Hailes, above n 145; and Laila Harré, above n 147.

¹⁹² (24 October 2018), above n 144.

¹⁹³ “Investment and ISDS” Ministry of Foreign Affairs and Trade <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/understanding-cptpp/investment-and-isds/>>.

¹⁹⁴ (24 October 2018), above n 144.

¹⁹⁵ “PACER Plus” Ministry of Foreign Affairs and Trade <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/pacer-plus/overview/>>.

and the Pacific Islands, namely the South Pacific Regional Trade and Economic Cooperation Agreement from 1980 and the original PACER Agreement from 2001. PACER Plus negotiations began in 2009 and the Agreement entered into force on 13 December 2020.

In the most recent financial year ending June 2020, two-way trade between New Zealand and the Pacific Islands (excluding Australia) was worth NZ\$3.1 billion.¹⁹⁶ For Pacific Island Countries (**PICs**), the PACER Plus creates greater opportunities for exports to Australian and New Zealand markets and throughout the Pacific region. For New Zealand, the PACER Plus improves market access for suppliers and investors into PICs. The two largest Pacific Island economies, Papua New Guinea and Fiji, have opted not to join the PACER Plus at this stage.¹⁹⁷

The tensions between trade and the environment outlined in section V above are especially relevant in the context of PACER Plus. PICs, who comprise the majority of Parties to the PACER Plus, are amongst countries experiencing some of the worst impacts of climate change anywhere in the world.¹⁹⁸ Kiribati, for example, who are Party to PACER Plus, face projected sea-level rises between five and fourteen cm by 2030.¹⁹⁹ Tuvalu, another PACER Party, is especially vulnerable to sea-level rise, sitting at just 15 feet above sea level.²⁰⁰ Sea-level rise presents a major existential challenge for PICs.²⁰¹ However, this is not the only devastating effect of climate change that PICs are bearing the brunt of. Extreme unpredictable weather events are also increasing in frequency and severity. The UN World Risk Index identify Vanuatu and Tonga, who are both PACER Plus Parties, as the top two “global disaster risk hotspots” where high exposure to natural

¹⁹⁶ “PACER Plus”, above n 195.

¹⁹⁷ “PACER Plus”, above n 195.

¹⁹⁸ Elizabeth Annis, above n 55, at 1498.

¹⁹⁹ *Current and future climate of Kiribati* (Pacific Climate Change Science Program, Australia, 2011) at 7.

²⁰⁰ Leslie Allen “Will Tuvalu Disappear Beneath the Sea?” (August 2004) *Smithsonian Magazine* <<https://www.smithsonianmag.com/science-nature/will-tuvalu-disappear-beneath-the-sea-180940704/>>.

²⁰¹ Elizabeth Annis, above n 55, at 1500.

hazards and climate change coincides with very vulnerable societies.²⁰² The effect that climate change is anticipated to have, and is already having, on PICs is expected to result in significant population displacement.²⁰³ Against this backdrop, the PACER Plus between New Zealand, Australia and nine PICs is uniquely positioned to not only avoid exacerbating climate change but to mitigate its effects.²⁰⁴

A Language

Does the PACER Plus include language and/or provisions that address climate change and/or the environment?

Like the CPTPPA, the PACER Plus does not reference “climate change” anywhere in the Agreement. It does, however, include some references to the environment and sustainable development.

The preamble to the Agreement states that the Parties are confident that the Agreement will strengthen economic partnerships and support sustainable economic development. It states that the Parties are mindful of the links between economic development, social development and environmental protection, and the important role of economic cooperation in promoting sustainable development. The preamble also states that the Parties share a common aspiration to promote high standards of environmental protection, and implicitly references the UNFCCC and Paris, reaffirming the Parties’ commitments to other multilateral environmental agreements. Finally, in Chapter nine, the Parties agree that it would be inappropriate for Parties to attempt to encourage investment by failing to enforce their own environmental standards.²⁰⁵

In 2016, whilst the PACER Plus was being negotiated, Elizabeth Annis shared her disappointment at the Agreement’s lack of reference to climate change. In her view, only one of the nine negotiation issues, ‘development assistance,’ related directly to climate

²⁰² At 1500.

²⁰³ At 1501.

²⁰⁴ Elizabeth Annis, above n 55, at 1499.

²⁰⁵ Art 19.1.

change.²⁰⁶ During the negotiating process, the head negotiator for the PICs revealed that the Parties did not focus exclusively on climate change during the negotiations, but hoped that the opportunities provided to PICs through the PACER Plus would enhance their capacity to respond to the challenges posed by climate change.²⁰⁷ In this sense there are indirect climate change benefits that will flow from the PACER Plus.

Whilst the PACER Plus includes many references to the environment and sustainable development, it does not address or acknowledge climate change. In the context of an agreement involving New Zealand, which has declared a climate emergency, and Pacific Island countries who are incredibly vulnerable to the devastating effects of climate change, this is disappointing. Accordingly, I consider the level of ambition of the PACER Plus in this regard to be ‘poor.’

B Environmental Goods and Services

Does the PACER Plus seek to differentiate between non-environmental and environmental goods and services and does it seek to reduce tariff and non-tariff barriers for trade in the latter?

Like the CPTPPA, the PACER Plus reduces and removes tariffs between the Parties to the Agreement. It also seeks to provide greater certainty between the Parties about tariffs to enable improved efficiencies in clearing customs.²⁰⁸ The Agreement does not, however, address the distinction between non-environmental and environmental goods and services. It therefore cannot be considered to provide any special reductions or removals of tariff or non-tariff barriers to trade in the latter.

The PACER Plus negotiations provided an important opportunity for the Parties to seek to remove barriers on trade and environmental goods and services. This would have had the opportunity to start “a virtuous cycle” whereby trade barriers would fall, prices would decrease and demand would increase, spurring an increase in trade in environmental

²⁰⁶ Elizabeth Annis, above n 55, at 1506.

²⁰⁷ At 1506.

²⁰⁸ “PACER Plus”, above n 195.

goods and services at even lower prices. This opportunity was overlooked in the negotiations and drafting of the PACER Plus. I therefore consider the level of ambition in the PACER Plus in this respect as ‘poor.’

C Fossil Fuel and Renewable Energy Subsidies

Does the PACER plus address the reduction of fossil fuel subsidies and/or the implementation of renewable energy subsidies?

The PACER Plus does not explicitly address the Parties’ rights in relation to reducing fossil fuel subsidies or implementing renewable energy subsidies. The Agreement incorporates the rights and obligations of Parties to the Agreement on Subsidies and Countervailing Measures,²⁰⁹ but also incorporates the exceptions under GATT Article XX.²¹⁰ In this sense, the Parties maintain at least some scope to implement measures necessary to protect human, animal or plant life or health, or that relate to the conservation of exhaustible natural resources.²¹¹ The Agreement includes commitments from New Zealand and Australia to provide financial support to PICs. On top of that financial support channelled through PACER Plus, New Zealand has committed to channelling 20 percent of its Overseas Development Assistance (ODA) to PICs, a substantial percent of which is committed to investments across sectors including renewable energy.²¹² This assistance, however, sits outside of the PACER Plus. I therefore consider the level of ambition in relation to fossil fuel and renewable energy subsidies in the PACER Plus agreement to be ‘poor.’

D GHG Emissions

Does the PACER Plus address and seek to improve levels of climate change ambition from heavy GHG-emitting Parties to the Agreement?

²⁰⁹ Chapter 2 art 7.1.

²¹⁰ Chapter 11 art 1.1.

²¹¹ If such measures are made effective in conjunction with restrictions on domestic production or consumption.

²¹² *Pacific Agreement on Closer Economic Relations (PACER) Plus National Interest Analysis* (Treasury, 6 June 2017) at 63.

The PACER Plus does not commit any of the Parties, including Australia or New Zealand, to any specified emissions reduction targets. The Agreement does not refer to carbon or greenhouse gas emissions at all.

For many years now there has been a sense of frustration towards Australia from PICs. Australia have extremely high levels of carbon emissions per capita,²¹³ and in 2015 the Chief Executive of Greenpeace Australia acknowledged the PICs frustrations, stating: “the view of Australia is very clear: this is a country not doing enough.”²¹⁴

New Zealand's GHG-emissions per capita are also significantly higher than those of the PICs.²¹⁵ It is extremely disappointing that the PACER Plus does not address emissions, particularly in relation to New Zealand and Australia. This may reflect a feeling that emissions reduction is something for the Parties to act on domestically. The level of ambition in the PACER Plus in relation to emissions reduction is therefore considered ‘poor.’

E Border Adjustment Carbon Taxes

Does the PACER Plus Permit the Parties to implement border adjustment carbon taxes?

The PACER Plus is silent on BACTs. It does not discuss opportunities for Parties to implement or coordinate these. In this respect, the PACER Plus must therefore be considered ‘poor.’

F Developing Country Parties

Does the PACER Plus address any burdens placed on Developing country Parties, or how Developed country Parties could fulfil their international obligations to support Developing countries?

²¹³ “Australia”, above n 115.

²¹⁴ Oliver Milman “Pacific nations beg for help for islanders when 'calamity' of climate change hits” *The Guardian* (London, 13 October 2015).

²¹⁵ “CO2 Emissions per Capita” Worldometer <<https://www.worldometers.info/co2-emissions/co2-emissions-per-capita/>>.

Pacific Island Parties to the PACER Plus are Developing countries that have limited financial and technical resources to combat climate change.²¹⁶ The PICs are also amongst those recognised in the UNFCCC as being particularly vulnerable to the adverse effects of climate change, and thus in need of support from developed countries. The PACER Plus, to some extent, recognises the special circumstances of PIC Parties. The preamble to the Agreement states that the Parties recognise the significant differences in the size of the Parties; the unique vulnerabilities and challenges of developing country Parties, and the need to build those Parties' capacities with a view to fostering their enhanced participation in international trade. The preamble also affirms the Parties' intention to take into account the principles of "flexibility" and "special and differential treatment" in relation to Developing country Parties. Furthermore, the dispute settlement chapter in the Agreement suggests that Parties should exercise "due restraint" in raising disputes and that the special situations of Parties are to be considered in consultations and settlements of disputes.²¹⁷

Whilst the PACER Plus recognises the special circumstances of Developing country Parties, and includes development assistance from New Zealand and Australia, the focus of that development assistance is narrow. Those funds are intended to help PICs to implement their obligations under the Agreement, and to realise the economic benefits of the agreement. The funds are not intended to commit Australia and New Zealand to provide financial assistance to the PICs for their climate change response efforts generally. This might represent the Parties' perception that funding of this more general nature is more appropriately determined and facilitated domestically.

Finally, tariff reductions and removals in the PACER Plus will substantially reduce government income in PICs. World Bank estimates have shown PICs to have a high reliance on tariffs for government revenues.²¹⁸ Removals of tariffs under the PACER Plus could mean that PIC governments will have less money available to spend on adequate

²¹⁶ Elizabeth Annis, above n 55, at 1502.

²¹⁷ Chapter 14 art 4.4; and chapter 14 art 5.2.

²¹⁸ Elizabeth Annis, above n 55, at 1507.

climate change mitigation and adaptation strategies.²¹⁹ In this sense, one commentator has suggested that it is Australia and New Zealand to whom the majority of benefits under the PACER Plus accrue.²²⁰ Accordingly, I consider the level of accommodation and support for developing country Parties to the PACER Plus to be ‘poor.’

G Dispute Settlement

Does the PACER Plus include a dispute settlement mechanism through which investors can challenge Parties’ implementation of new climate policies?

During the negotiation phase of the PACER Plus, there was significant concern that the Agreement would constrain PICs’ ability to regulate new environmental policy.²²¹ The final draft of the Agreement, however, contains protections of the Parties’ legislative autonomy. The preamble to the Agreement recognises the Parties’ right to regulate and their resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities and protect legitimate public welfare objectives. Chapter 14 of the Agreement, which focuses on consultations and dispute settlement, touches only on disputes between Parties to the Agreement, suggesting that, unlike the CPTPPA, private investors will not have the right to sue Parties under the PACER Plus. Finally, chapter 11 incorporates the general environmental exceptions from art XX of the GATT as discussed at X above.

I therefore consider the dispute settlement processes outlined in PACER Plus to be ‘promising.’

X Conclusion

Whilst there are some promising elements in both the CPTPPA and the PACER Plus, the levels of ambition in both of the Agreements in relation to each of the criteria are, for the most part, underwhelming. The lack of consideration and support provided to New Zealand’s Pacific neighbours in the 2020 PACER Plus is particularly concerning, and is

²¹⁹ At 1507.

²²⁰ “Civil societies, trade unions raise concerns over PACER-Plus” *RNZ* (New Zealand, 6 May 2015).

²²¹ Elizabeth Annis, above n 55, at 1507.

not indicative of New Zealand having a high level of ambition to combat climate change. Both of these Agreements have been adopted within the last five years, so the lack of integration of climate change obligations in those Agreements cannot be considered historic. New Zealand is currently in the process of negotiating two new trade agreements, one with Britain, and another with Costa Rica, Fiji, Iceland, Norway and Switzerland. It is highly important that levels of ambition, and integration of climate change considerations, improve in these upcoming FTAs.

Part Four: The Future of New Zealand Trade

This section focuses on two upcoming New Zealand trade initiatives that have the potential to transform New Zealand's embodiment of its international climate change obligations in trade. The initiatives discussed are the upcoming Agreement on Climate Change, Trade and Sustainability (**the ACCTS**), and the formation of a new Trade and Environment framework to guide New Zealand's trade negotiators.

XI The Agreement on Climate Change, Trade and Sustainability

The Agreement on Climate Change, Trade and Sustainability (**the ACCTS**) is a plurilateral Agreement that New Zealand is currently negotiating with Costa Rica, Fiji, Iceland, Norway and Switzerland. The Agreement is expected to be the first-of-its-kind in that it will be drafted to bring together interrelated elements of the climate change, trade, and sustainable development agendas.²²² The Ministry of Foreign Affairs has suggested that the ACCTS could contribute to a new era of trade by demonstrating how climate change, sustainable development and trade can be mutually reinforcing.²²³ As the leader of the ACCTS negotiations, New Zealand has a unique opportunity to establish itself as a world leader in this regard.

²²² "Agreement on Climate Change, Trade and Sustainability (ACCTS) negotiations" Ministry of Foreign Affairs and Trade <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/trade-and-climate/agreement-on-climate-change-trade-and-sustainability-accts-negotiations/>>.

²²³ "Agreement on Climate Change, Trade and Sustainability (ACCTS) negotiations", above n 222.

All of the Parties to ACCTS are small trade-dependent nations who believe that trade practices can be reformed to support, rather than hinder, global efforts to prevent climate change. The Parties have expressed that they all have a shared goal of achieving a high-quality agreement with concrete and substantive outcomes, that can be put into force as quickly as possible.²²⁴ The Parties long-term vision is that, once the Agreement is finalised, there will be opportunities for other countries to join if they can comply with the Agreement's terms. In this sense, the Ministry of Foreign Affairs and Trade suggest that ACCTS could serve as a "pathfinder toward multilateral action and provide an example of how trade rules can substantively help address climate change..."²²⁵

Because the ACCTS is still at an early negotiation stage, there is limited public information regarding the specifics of the Agreement. This means that the ACCTS cannot, at this point in time, be analysed in accordance with the complete analytical framework used in section three. ACCTS will therefore be considered in relation to four of the criteria used previously.

A Language

Will the ACCTS include language and/or provisions that address climate change and/or the environment?

The intention behind the ACCTS is particularly powerful in that, instead of being a trade agreement that touches on climate change, it is intended to be an agreement on climate change, trade and sustainability. The use of "climate change" before "trade" in the name of the Agreement is powerful and indicates that climate change concerns will be of equal, if not greater importance to the trade elements of the Agreement. In a joint Trade Minister's statement in January 2020, the Parties to the ACCTS signalled their intention to "use every policy lever" at their disposal, including trade measures, to support the urgency of a meaningful response to the climate change challenge.²²⁶

²²⁴ "Agreement on Climate Change, Trade and Sustainability (ACCTS) negotiations", above n 222.

²²⁵ "Agreement on Climate Change, Trade and Sustainability (ACCTS) negotiations", above n 222.

²²⁶ "Joint Trade Ministers' Statement on the 'Agreement on Climate Change, Trade and Sustainability' Initiative" (24 January 2020) Ministry of Foreign Affairs and Trade

Whilst there are no current drafts of the ACCTS that can be analysed, references to climate change and the environment are plentiful in the existing public resources. This signals that the use of language and provisions relating to climate change in the ACCTS could be expected to be 'excellent.'

B Environmental Goods and Services

Does the ACCTS Plus seek to differentiate between non-environmental and environmental goods and services and does it seek to reduce tariff and non-tariff barriers for trade in the latter?

One of the three key focuses of the ACCTS is the removal of tariffs on environmental goods and new binding commitments for environmental services.²²⁷ This will require the Parties to establish procedures to differentiate between non-environmental, and environmental, goods and services. The Parties have expressed that the removal of tariff barriers on environmental goods and services will reduce prices to consumers in each of the ACCTS countries. This can be expected to accelerate access and uptake of environmental goods and services, and shift consumers away from more environmentally harmful equivalents.

In relation to non-tariff barriers, another of the three key focuses of the ACCTS is to develop and implement voluntary eco-labelling programmes. Consistent licensing and testing procedures and standards between the ACCTS Parties can reduce non-tariff barriers to trade in environmental goods and services for both consumers and providers of environmental goods and services. Whilst the labelling programmes are at this stage intended to be voluntary, the Parties have an intention to develop mechanisms to encourage their uptake.

<https://www.mfat.govt.nz/en/media-and-resources/trade-ministers-express-support-for-the-agreement-on-climate-change-trade-and-sustainability-at-the-world-economic-forum-davos-2020/>.

²²⁷ "Agreement on Climate Change, Trade and Sustainability (ACCTS) negotiations", above n 222.

These initiatives, if implemented carefully, could be highly effective in promoting and increasing trade in environmental goods and services. The Parties must ensure that they create a reliable mechanism to define which goods and services can be considered 'environmental.' If these intended initiatives are implemented well, the reduction and removal of tariff and non-tariff barriers for environmental goods and services in the ACCTS has the potential to be 'excellent.'

C Fossil Fuel and Renewable Energy Subsidies

The final key objective of the ACCTS agreement is for the Parties to eliminate fossil fuel subsidies.²²⁸ Neither the CPTPPA nor the PACER Plus addressed reductions or removal of fossil fuel subsidies by the Parties. The ACCTS is therefore monumental in doing so. Furthermore, the focus is to "eliminate" rather than "reduce" fossil fuel subsidies, suggesting that these could be removed entirely over a period of time. New Zealand is already working on fossil fuel subsidy reform and is thus in a strong position to lead the ACCTS in its goal to eliminate fossil fuel subsidies.²²⁹ The agreement could go further to consider redirecting fossil fuel subsidies to renewable energy. The Parties may consider, however, reallocation of government funds to be more appropriately determined by the Parties domestically. The level of ambition in the ACCTS to eliminate fossil fuel subsidies altogether is 'excellent.'

D GHG Emissions

Information that is publically available about ACCTS at present does not touch on any discussions between the Parties about reducing their GHG emissions. The Parties do, however, appear to have very high standards in relation to countries that want to join the Agreement in the future. The ACCTS has already been discussed in Parliament in Britain. Lords Stevenson and Grimstone both suggested a potential desire in Parliament for Britain to join ACCTS.²³⁰ This is an encouraging sign that the Agreement is already receiving world-wide attention. This desire for a large and powerful nation to join the ACCTS, coupled with the Parties' suggestions that there will be a high bar of compliance

²²⁸ "Agreement on Climate Change, Trade and Sustainability (ACCTS) negotiations", above n 222.

²²⁹ "Fossil fuel subsidy reform (FFSR)", above n 101.

²³⁰ (January 11 2021) 809 UKPD at 447.

before other countries are able to join, suggests that ACCTS could serve an important role in encouraging heavy GHG-emitting countries to commit to improved recognition of climate change in their trade practices. In this sense, the ACCTS is ‘excellent.’

E Conclusion

Whilst the ACCTS is at an early negotiation stage, the three key focus points of the negotiations, and the attention that the Agreement is receiving worldwide, is highly promising. The Parties appear to be highly committed to developing a trade agreement that fully embraces climate change and environmental goals. New Zealand is also currently negotiating a free trade agreement with Britain, and that agreement is expected to incorporate the same three key objectives of the ACCTS.²³¹ This provides a hopeful sign that New Zealand could demonstrate a real shift in its trade practices towards full embodiment of its climate change obligations. It will not be until the agreements are completed and in force, however, until the Agreements’ effectiveness and true level of ambition can be accurately assessed.

XII New Trade and Environment Framework

In addition to free trade negotiations that New Zealand is currently engaged in with Britain and the ACCTS Parties, the Ministry of Foreign Affairs is working on a new Trade and Environment Framework.²³² This is a framework that is used by New Zealand’s trade negotiators and which informs their decisions in entering trade agreements. The existing Trade and Environment Framework that is used by New Zealand’s trade negotiators was created in 2001. The new framework is being developed in relation to the United Nations sustainable development goals.²³³ The Ministry of Foreign Affairs intend for the new framework to enable New Zealand trade negotiators to ensure that New Zealand’s policies in trade, climate change and environmental

²³¹ Alexander Gillespie “What New Zealand should win from its trade agreement with post-Brexit Britain” (8 July 2021) The University of Waikato <<https://www.waikato.ac.nz/news-opinion/media/2021/what-new-zealand-should-win-from-its-trade-agreement-with-post-brexit-britain>>.

²³² “Trade, Environment, and Climate Change” (2021) Ministry of Foreign Affairs and Trade <<https://www.mfat.govt.nz/assets/Trade/Trade-and-Environment-Full-Visual.pdf>>.

²³³ “Trade, Environment, and Climate Change”, above n 232.

management are “mutually supportive.” The Ministry has recognized that when trade agreements are constructed with care, they can provide scope for actions to be taken to mitigate harms that come from increased economic activity. Some of the new principles that have been proposed to be added into the Framework include:

- to advocate that trade and environmental factors in FTAs are enforceable;
- to promote the use of trade policy to support emissions reductions and the transition to a low emissions economy; and
- to seek opportunities to contribute to environmental, climate change and sustainability objectives throughout FTAs

The creation of a modern and robust Trade and Environment Framework creates an opportunity to solidify New Zealand's commitment to upholding its international climate change obligations in trade agreements. It is important that the new framework is developed carefully, and that it is clear in its expression of the role that trade must have in New Zealand's climate change response. The new proposed principles to the Framework are an exciting starting point, alongside the ACCTS, towards improved embodiment of the importance of climate change considerations in trade.

XIII Conclusion

In conclusion, international climate change obligations that New Zealand has accepted under the UNFCCC and Paris apply to New Zealand's actions in trade. Incorporating climate change considerations and mitigation measures in trade agreements is imperative in the global climate change response to limit temperature increase to well below 2° C compared to pre-industrial levels. Close analysis of two of New Zealand's most recent trade agreements suggest that New Zealand's ambition to consider climate change in free trade agreements to date has been lacking. New Zealand has two upcoming initiatives that provide an excellent opportunity to demonstrate an improved commitment towards full integration of trade and climate change policy. Time will only tell as to whether those opportunities will be realized in the ACCTS and the new Trade and Environment Framework.

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