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**BRINGING TOGETHER THE TRADE AND CLIMATE
CHANGE AGENDAS: AN ANALYSIS OF THE SCOPE OF
THE AGREEMENT ON CLIMATE CHANGE, TRADE AND
SUSTAINABILITY**

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Abstract

This paper discusses the international trade and climate regimes. It describes how they are inter-linked in the context of current circumstances in the WTO and the imminent implementation of the Paris Agreement. There are a number of mutually beneficial policies which countries should consider to achieve positive outcomes for both trade and climate change. New Zealand has signed up to the Agreement on Climate Change, Trade and Sustainability which will develop rules for the liberalisation of environmental goods and services; develop disciplines for fossil fuel subsidy reform; and develop guidelines for voluntary eco-labelling schemes. The initiative has been suggested as potential 'pathfinder' toward multilateral action. In the absence of sufficient action at the multilateral level, the ACCTS offers a new type of trade agreement which puts climate change and sustainability at its core. Uncertainty surrounds the potential impacts of the agreement itself in terms of meeting trade or climate change objectives. However, the overall signal that this novel approach sends to the international community on the importance of mutually beneficial trade and climate change agendas is suggested to be significant.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7660 words.

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I Introduction

Global warming is likely to reach 1.5 degrees C between 2030 and 2052 if it continues at the current rate.¹ With such an increase comes a multitude of impacts² which will cause consequences across a range of dimensions spanning health, livelihoods, food security, water supply, human security and economic growth.³ Climate change is a global problem concerning a transboundary externality which requires collective global action across all areas of socioeconomic activity including that of international trade.

Discourse on the nexus between international trade and climate change has been increasing over the past few decades.⁴ When countries implement national, regional or multilateral measures to mitigate and adapt to climate change, these may impact on trade and would potentially be subject to international trade rules. Trade-related measures can also impact on greenhouse gases. These impacts can occur from the scale effect, the composition effect, and the technique effect.⁵ The scale effect occurs as a result of increased output or economic activity resulting from trade liberalisation, thereby increasing emissions. The composition effect occurs when trade liberalisation causes a country to shift production to products where it has comparative advantage. This can lead to an increase or decrease in emissions. The technique effect can contribute to the abatement of pollution, thereby

¹ Masson-Delmotte, V and others *Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Intergovernmental Panel on Climate Change, 2018) at 4.

² These impacts include extreme temperatures, extreme weather vents, mean sea level rise, species loss and extinction, ecosystems degradation. Above n 1, at 7-9.

³ Above n 1, at 9.

⁴ Harro van Asselt *Climate change and trade policy interaction: Implications of regionalism* (Organisation for Economic Cooperation and Development, Trade and Environment Working Papers 2017/03) at 9; Susanne Dröge and others *Mobilising Trade Policy for Climate Action under the Paris Agreement Options for the European Union* (German Institute for International and Security Affairs, RP 1, February 2018) at 7.

⁵ WTO website, The impact of trade opening on climate change. www.wto.org/english/tratop_e/envir_e/climate_impact_e.htm

lowering emissions. This comes about from increased access to and reduced cost of more environmentally-friendly goods, services and technologies.

Actions under both regimes are fundamental to the pursuing of sustainable development and can contribute to the Sustainable Development Goals.⁶ Despite this and the inherent linkages between the two regimes, there is increasing debate regarding the compatibility of climate change policies with international trade rules.⁷

This paper explores the international trade and climate change regimes as they relate to each other. It provides examples of how they can be mutually beneficial and suggests some thoughts on why actions to capitalise on these benefits have been limited. It offers a way forward and analyses the scope of the Agreement on Climate Change, Trade and Sustainability.

II The International Trade Regime

International trade is governed by the World Trade Organisation (WTO). The WTO provides a legal and institutional framework for the implementation and enforcement of a number of trade agreements which fall into six main categories.⁸ One of these agreements is the Agreement Establishing the WTO enacted in 1994. In the first sentence of this Agreement, the link between trade, the optimal use of the world's resources, and the protection and preservation of the environment is established.⁹ This notion of trade being

⁶ See Leal-Arcas, "Both trade and climate have irrefutable links to sustainable development, making it a logical step to explore the potential for mutual cooperation and factor this into response measures" Rafael Leal-Arcas, *Working Together: How To Make Trade Contribute to Climate Action* (Global Platform on Climate Change, Trade and Sustainable Energy, International Centre for Trade and Sustainable Development 1, November 2013) at 1; Khalid Ahmed and Wei Long "Climate change and trade policy: from legal complications to time factor" (2013) 12 JITLP 258 at 266.

⁷ See Patrick Low and others *The Interface Between the Trade and Climate Change Regimes: Scoping the Issues* (World Trade Organisation Economic Research and Statistics Division, Staff Working Paper 01/2011).

⁸ The six categories are: an umbrella agreement (the Agreement Establishing the WTO); agreements for each of the three broad areas of trade that the WTO covers (goods, services and intellectual property); dispute settlement; and reviews of governments' trade policies.

⁹ The first sentence of the Preamble of the Marrakesh Agreement: "*Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living,*

undertaken in a way that seeks to protect and preserve the environment is central to linking trade and climate change under the WTO.

A Key Features of the WTO

There are two features of the WTO that merit comment in the context of trade and climate change. Firstly, the non-discriminatory principle. Article I of the General Agreement on Tariffs and Trade (GATT) stipulates that measures imposed by a WTO member shall not discriminate between different WTO members.¹⁰ This is the most-favoured-nation obligation. Article III of the GATT provides that members shall not discriminate against imported goods vis-à-vis “like” domestically-produced goods.¹¹ This is the national treatment obligation.

Secondly, the Dispute Settlement Understanding¹² enables the WTO to address trade conflicts. Members can bring disputes to the Dispute Settlement Body (DSB) if they believe another member is acting in violation of WTO rules. Members can obtain a ruling from a panel of experts and are afforded an opportunity to appeal the ruling. In the past few decades, more and more cases relating to trade and the environment have arisen.¹³

ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,” WTO Agreement, Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 154, 33 ILM 1144 signed on Apr. 15, 1994, entered into force on 1 Jan 1995), article IV:1 [hereinafter WTO Agreement].

¹⁰ General Agreement on Tariffs and Trade 1867 UNTS 187, 33 ILM 153 (opened for signature 30 October 1947, entered into force 1 January 1948), art I (1) [hereinafter GATT Agreement].

¹¹ Art III (1).

¹² The Understanding on Rules and Procedures Governing the Settlement of Disputes is commonly referred to as the Dispute Settlement Understanding. It constitutes [Annex 2](#) of the WTO Agreement, and sets out the procedures and rules of the dispute settlement system. www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c1s2p1_e.htm

¹³ Das “Making the international trade system work for the Paris Agreement: Assessing the options”, above n 5, at 10560.

B Doha Development Round

Since the establishment of the GATT in 1947,¹⁴ there have been a series of negotiations to further lower trade barriers and improve trade rules. The most recent round is the Doha Development Round which commenced in 2001 and is aimed at improving the trading prospects of developing countries.¹⁵ It also included negotiations on the liberalisation of environmental goods and services. Despite appearing promising with regard to addressing the trade and environment nexus, the round has largely stalled since 2008 due to diverging views and the requirement for a “single undertaking”¹⁶ approach.¹⁷

C Relevant WTO Rules and Principles

1 Definition of a “like” product

As mentioned, GATT Articles I and III require non-discrimination between “like” products from different trading partners, and between a WTO member’s own products and “like” foreign products, respectively. In relation to a policy which appears to discriminate between products, complexity can arise when determining if the product in question is in fact “like”. The Appellate Body has confirmed that the determination of “likeness” must be carried out on a case-by-case basis.¹⁸ One aspect of this determination when it comes to climate-related measures is in investigating the way that a product has been produced – the processes and production methods (PPMs).

2 Process and production methods

In the case of PPMs specifically, a question arises whether products can be treated differently because of the way they have been produced, even if the method of production

¹⁴ The GATT was established in 1947. From 1948, the GATT provided the rules for much of world trade until the establishment of the WTO in 1994.

¹⁵ WTO website, The Doha Round. www.wto.org/english/tratop_e/dda_e/dda_e.htm

¹⁶ The single-undertaking approach means all countries must agree on all issues, unsurprisingly, this makes achieving consensus difficult

¹⁷ Das, above n 5, at 10567.

¹⁸ See *EC – Asbestos* WT/DS135/AB/R, 12 March 2001 (Report of the Appellate Body) at paragraph 102; *Japan – Alcoholic Beverages* WT/DS11/AB/R 4 October 1996 (Report of the Appellate Body) at page 22.

does not create a discernible difference in the product.¹⁹ These are known as non-product-related PPMs (npr-PPMs), and can be questionable under WTO rules.²⁰ Measures related to npr-PPMs could, for example assess products against their embodied carbon, thereby leading to taxes or limited market access if a threshold is breached. This issue emerges in relation to eco-labelling in particular, with a number of countries arguing that measures which discriminate between products based on npr-PPMs should be determined as inconsistent with WTO rules.²¹

3 Article XX

Article XX of the GATT provides a list of specific instances in which a WTO member can circumvent WTO rules. Paragraphs (b) and (g) allow derogation for measures to protect the environment.²² In the evolution of interpretation and dispute settlement in the WTO, the Appellate Body has determined that WTO members have a *right* to invoke Article XX for the level of environmental protection that they consider necessary.²³ Countries must demonstrate that their measure meets the requirements of the chapeau of the Article.²⁴

¹⁹ In the WTO case, *US – Tuna I*, the panel concluded there was no legal reason to distinguish between tuna captured by dolphin-safe practices and tuna captured by dolphin-endangering practices, i.e. there was no discernible difference between the product based on the PPM. See *US – Tuna I* DS21/R – 39S/155, 3 September 1991 (Report of the Panel) at page 40.

²⁰ Low, above n 8, at 7; Erich Vranes “Carbon taxes, PPMs and the GATT” in Panagiotis Delimatsis (ed) *Research Handbook on Climate Change and Trade Law* (Edward Elgar, Northampton, MA, 2016) at 79; Thomas Cottier and Tetyana Payosova “Common concern and the legitimacy of the WTO in dealing with climate change” in Panagiotis Delimatsis (ed) *Research Handbook on Climate Change and Trade Law* (Edward Elgar, Northampton, MA, 2016) at 26.

²¹ WTO website, Labelling www.wto.org/english/tratop_e/envir_e/labelling_e.htm

²² GATT Agreement art XX (b) “necessary to protect human, animal or plant life or health”, art XX (g) “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”.

²³ See *Thailand – Cigarettes (Philippines)* WT/DS371/AB/R, 17 June 2011 (Report of the Appellate Body) at paragraph 172–173; *Brazil – Retreaded Tyres* WT/DS332/AB/R, 3 December 2007 (Report of the Appellate Body) paragraph 210-211; *US – Shrimp* WT/DS58/AB/R, 12 October 1998 (Report of the Appellate Body) paragraph 156-157.

²⁴ GATT Agreement art XX.

...such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...

The provisions in Article XX infer that there is scope for the WTO membership to implement measures to protect the environment, without facing retaliation.

III The International Climate Change Regime

The international climate change regime is governed by the United Nations Framework Convention on Climate Change (UNFCCC). It was adopted in 1992 as a framework for international cooperation to combat climate change by limiting average global temperature increases and the resulting climate change.²⁵ The Convention differentiates between Parties' development status denoting industrialised countries as *Annex I* and developing countries as *Non-Annex I*. Since its inception, Parties to the Convention have negotiated an additional protocol and an additional Agreement. In 1997, Parties to the UNFCCC adopted the Kyoto Protocol. It came into force in 2005 and set legally-binding emissions reduction targets for *Annex I* Parties.

A The Paris Agreement

In 2011, countries agreed to “develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to *all* Parties” (emphasis added).²⁶ This led to the evolution of the Paris Agreement which was adopted in December 2015 and entered into force in November 2016. As of 2017, the 164 members of the WTO were party to the Paris Agreement.²⁷ The UNFCCC and Kyoto Protocol both mention trade using similar language to that of the GATT.²⁸ Conversely, the Paris Agreement does not

²⁵ UNFCCC website, History of the Convention www.unfccc.int/process/the-convention/history-of-the-convention#eq-1

²⁶ UNFCCC Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011 (FCCC/CP/2011/9/Add.1) at Decision 1/CP.17.

²⁷ Bacchus, above n 9, at 2.

²⁸ United Nations Convention Framework on Climate Change A/RES/48/189 (opened for signature 3 June 1992, entered into force 21 March 1994), art 3 (5) [hereinafter UNFCCC] states “Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable

mention trade at all, but offers a forum for discussing trade-related concerns.²⁹ This exclusion of trade from the Paris Agreement may create future issues in effectively linking climate and trade policy in a productive way.

The Paris Agreement lays out the new way forward for international climate action. It's objectives are inter alia to limit global temperature increase to well below 2 degrees C if not, 1.5 degrees C; enable countries to deal with the impacts and adapt to climate change; and mobilise finance flows to be consistent with low greenhouse gas emissions and climate-resilient development.³⁰

B Nationally Determined Contributions

The Paris Agreement is built on a bottom-up approach. It requires all Parties to submit non-legally binding commitments, acknowledging that different countries have different circumstances and abilities with respect to taking climate action.³¹ The commitments are in the form of Nationally Determined Contributions (NDCs). Countries are required to prepare, communicate and maintain successive NDCs that they intend to achieve.³² They must update their NDCs every five years, with each successive NDC representing a progression beyond the previous NDC.³³ Each subsequent NDC is to reflect the country's highest possible ambition, taking into account it's capability and national circumstances.³⁴ It's suggested that the NDCs submitted thus far are not sufficient to meet the agreed 2

discrimination or a disguised restriction on international trade"; Kyoto Protocol to the United Nations Framework Convention on Climate Change 37 ILM 22 (opened for signature 11 December 1997, entered into force 16 February 2005), art 2 (3) [hereinafter Kyoto Protocol] states "the Parties included in Annex I shall strive to implement policies and measures under this Article in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade...";

²⁹ Das, above n 5, at 10556.

³⁰ The Paris Agreement to the United Nations Framework Convention on Climate Change T.I.A.S. No. 16-1104 (opened for signature 12 December 2015, entered into force 4 November 2016) [hereinafter the Paris Agreement].

³¹ Art 4 (3), (4), (6).

³² Art 4 (2).

³³ Art 4 (3).

³⁴ Art 4 (3).

degree C temperature goal.³⁵ This indicates that there is scope to enhance NDCs to be more ambitious and compatible with the Paris Agreement goal. Trade and trade-related measures can play a significant part in enhancing this ambition.

IV Mutually Beneficial Policies

There are myriad of policies that can encourage and support the objectives of the Paris Agreement while mutually benefitting trade. Three of these are outlined below.

A Liberalisation of Environmental Goods and Services

The reduction of trade barriers to environmental goods and services can support climate change objectives.³⁶ Access to lower-cost mitigation and adaptation technologies can support a country to improve its infrastructure, for example, by increasing access to solar panels or inputs to electric car manufacturing. In terms of services, lowering trade barriers can result in climate-friendly practices becoming more accessible and widespread.³⁷ The liberalisation of trade in services related to climate change can play a role in complementing trade in environmental goods related to climate change.³⁸

B Fossil Fuel Subsidy Reform

Fossil fuel subsidy reform is another trade measure that can foster NDC implementation and contribute to the objectives of the Paris Agreement. Fossil fuel subsidies distort prices towards favouring fossil fuels and place a burden on national budgets.³⁹ They also create

³⁵ See Anja Zenker *International Climate Agreements under Review: The Potential of Negotiation Linkage between Climate Change and Preferential Free Trade* (Springer VS, Wiesbaden, 2020) at 2; Joeri Rogelj and others “Paris Agreement Climate Proposals Need a Boost to Keep Warming Well Below 2°C” (2016) 534 *Nature* 631 at 634; United Nations Environment Programme *The Emissions Gap Report* (United Nations Environment Programme 2017) at 1.

³⁶ Clara Brandi *Trade Elements in Countries’ Climate Contributions under the Paris Agreement* (International Centre for Trade and Sustainable Development, 2017) at 4.

³⁷ Jehan Sauvage and Christina Timiliotis *Trade in Services Related to the Environment* (Organisation for Economic Cooperation and Development, Joint Working Party on Trade and Environment, 2017) at paragraph 13.

³⁸ van Asselt, above n 4, at 29.

³⁹ Brandi, above n 36, at 7.

a competitive disadvantage for renewable energies. Increasing the cost of fossil fuels can facilitate the competitiveness of cleaner industries and more efficient technologies. Inclusion of fossil fuel subsidy disciplines in regional trade agreements be used to enact rules on transparency and reporting.⁴⁰

C Labelling and Standards for Low-Emission Goods

A more transparent and justifiable labelling and standards regime has been suggested as a means to achieve both trade and global environmental objectives.⁴¹ The use of standards and labelling of low-emission goods can enhance consumer awareness and increase transparency along global value chains. This can contribute to a country's NDC by promoting climate-friendly consumption and production patterns. Labelling and standards can also create new trade opportunities in low-carbon products.⁴²

V Areas of Friction

Despite there being a number of ways in which the trade and climate change regime can work effectively together, actions so far have been limited.⁴³

A Risk of Dispute

Climate change policies can be trade-creating or trade-diverting. In instances of the latter, conflict is likely to arise. The bottom-up approach of the Paris Agreement obliges each country to develop its *own* climate policies, which could be perceived by the trade community as imposing unilateral trade barriers.⁴⁴ An example of such a climate policy may entail requiring a specific product to be produced using a climate-friendly PPM, which may be perceived to favour domestic industries who use the PPM in question and

⁴⁰ Das, above n 5, at 10575.

⁴¹ The World Bank *International Trade and Climate Change Economic, Legal and Institutional Perspectives* (The International Bank for Reconstruction and Development / The World Bank, 2007) at 8.

⁴² Brandi, above n 36, at 30.

⁴³ The Economist Intelligence Unit *Climate change and trade agreements: Friends or foes?* (Report commissioned by the International Chamber of Commerce) at 13-14.

⁴⁴ Ilmi Granoff, *Trade Implications of Climate Policy after the Paris Outcome* (The Commonwealth Secretariat, Issue 130, 2016) at 7.

discriminate against countries who do not use the PPM. Countries may bring a dispute to the WTO to challenge the consistency of a climate policy with WTO rules. This risk of being questioned before the DSB of the WTO can have a ‘chilling effect’ on countries planning to implement climate policies which impact trade.⁴⁵ Authors suggest that in the advent of the implementation of the Paris Agreement, there will likely be more conflicts and demand to clarify how the trade and climate regimes can interact productively.⁴⁶

B Uncertainty in the WTO

Either country involved in a dispute can appeal a panel’s ruling. This is heard by the Appellate Body of the WTO. This creates uncertainty for countries wishing to implement climate change policies, stemming from two key reasons. Firstly, previous WTO case law on the environment and trade has been dealt with on a case-by-case basis. WTO case law as it pertains to environmental disputes has evolved with some authors claiming that in more recent times, the Appellate Body applies more of a sustainable development dimension to encourage trade liberalisation.⁴⁷ The ad hoc approach does not provide a clear signal to states on how their policies might be addressed under WTO law. It’s plausible that countries are hesitant to implement trade-related climate policies in fear of the unanswered legal questions that might arise leading to an undesired outcome.

Secondly, there is ongoing uncertainty with the Appellate Body judges’ appointments.⁴⁸ Since 2016, the US has blocked the reappointment of judges to the Appellate Body.⁴⁹ This has led to an undermining of WTO members’ ability to make any new appeals. These

⁴⁵ Zenker, above n 35, at 130; Das, above n 5, at 10555.

⁴⁶ Das, above n 5, at 10558; Charles E. Di Leva and Xiaoxin Shi “The Paris Agreement and the International Trade Regime: Considerations for Harmonisation” (2017) 17 SDLP 20 at 29; Dröge, above n 4, at 8.

⁴⁷ Leonardo S. Borlini and Francesco Montanaro “Climate change and trade: challenges and lingering questions on the relationship between renewable energy subsidies and WTO disciplines” (2018) 6 CELJ 81 at 82.

⁴⁸ Das, above n 5, at 10555.

⁴⁹ J. Galbraith “United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process” (2019) AJIL 113(4) 822 at 822.

troubled waters in the WTO may steer countries away from the multilateral trading system and towards more regional or bilateral approaches.

C Diverging Views on Policy Space

Although disputed in some discussions,⁵⁰ the WTO claims to allow sufficient policy space to accommodate the use of trade measures to protect the environment, under certain conditions.⁵¹ Furthermore, some authors suggest WTO case law confirms that governments can in fact adopt measures to address environmental concerns provided such measures are not discriminatory between countries or are a disguised restriction on international trade.⁵² Yet, climate policymakers are increasingly sceptical that WTO rules are not conducive to effectively implementing domestic climate policies.⁵³ Given the close linkages between trade and climate change, and the uncertainties regarding consistency with WTO rules, countries may not share the view that there is sufficient policy space within the WTO to accommodate the use of trade measures for climate change outcomes.

D The Way Forward

Acknowledging the discussion on the current state in the WTO, the imminent implementation of the Paris Agreement and the linkages between trade and climate change, policy makers need to consider alternative ways forward to achieve mutual benefits for both the trade and climate change regimes. As described above in section IV, trade can play a supportive and facilitative role in achieving climate outcomes.⁵⁴ A range of strategies have been proposed to bring the international trade regime in line with the Paris

⁵⁰ Zenker, above n 37, at 129; Henry Derwent *What Has Climate to Fear from Trade?* (E15 Initiative, International Centre for Trade and Sustainable Development and the World Economic Forum, 2015) at 1.

⁵¹ WTO website, Activities of the WTO and the challenge of climate change www.wto.org/english/tratop_e/envir_e/climate_challenge_e.htm

⁵² Richard Baron *Trade and Environment Interactions: Governance Issues* (Organisation for Economic Cooperation and Development, Background paper for the 35th Round Table on Sustainable Development, June 2017) at 13; The Economist Intelligence Unit, above n 45, at 18.

⁵³ Das, above n 5, at 10554.

⁵⁴ Winston Chang “World Trade and the Environment: Issues and Policies” (2017) 22 PER 435 at 445.

Agreement.⁵⁵ One option that offers a relatively prompt, principled and pragmatic solution is regionalism. A region is not limited to that of geographical terms. It can be determined by the interdependencies created by countries' shared interest in a particular subject matter.⁵⁶

The implementation of regional trade agreements (RTAs) has been proposed as a logical solution for trade and climate governance.⁵⁷ Zenker recommends that RTAs can enable countries to find flexibility with WTO rules in relation to implementing trade-related climate policies.⁵⁸ As of late, there has been a proliferation of RTAs as governments pursue trade liberalisation beyond what has been achieved at the multilateral level.⁵⁹

VI Introduction to the ACCTS

The Agreement on Climate Change, Trade and Sustainability (ACCTS) was announced in September 2019 at the United Nations General Assembly Leaders' week by New Zealand, Fiji, Iceland, Norway and Costa Rica. Switzerland has since joined the agreement. This grouping of countries has come together as they are for the most part, strategically aligned on trade policy issues and on climate change and sustainability objectives. They possess a shared interest in believing that trade measures and disciplines can be leveraged to address climate change and sustainable development.⁶⁰

Achieving the Paris Agreement's goals as well as addressing other serious environmental challenges requires a globally transformative approach... In a time where the multilateral trading system faces different challenges, the ACCTS initiative

⁵⁵ See Das, above n 5, at 10559-10577.

⁵⁶ See van Asselt, above n 4, at 12; see also Dröge, above n 4, at 27.

⁵⁷ See Leal-Arcas, above n 7, at 6; Markus W. Gehring and others *Climate Change and Sustainable Energy Measures in Regional Trade Agreements An Overview* (International Centre for Trade and Sustainable Development, Programme on Global Economic Policy and Institutions, Issue Paper No. 3, 2013) at 12; van Asselt, above n 4, at 23; Das, above n 5, at 10568; Baron, above n 54 at 24.

⁵⁸ Zenker, above n 35, at 132.

⁵⁹ Baron, above n 54 at 14; Dröge, above n 4, at 13.

⁶⁰ Joint Trade Ministers' Statement on the 'Agreement on Climate Change, Trade and Sustainability' Initiative, 24 January 2020.

will demonstrate in a practical and meaningful way how trade policy and trade rules can play a critical role in helping to drive this transformation in a substantive, sustainable and inclusive manner.

A Addressing Mutually Reinforcing Agendas

As discussed throughout this paper, there is significant potential to use international trade as part of the solution to achieving the Paris Agreement goal of limiting global average temperature increase to well below 2 degrees C above pre-industrial levels if not 1.5 degrees C. The six countries in the ACCTS are committed to demonstrating how the inter-related elements of climate change, trade and sustainable development agendas can be mutually reinforcing. The signatories suggest that policy coherence is required to address urgent global challenges.⁶¹ The fact that the countries currently signed up are not considered major trading partners, it can be assumed that the ACCTS is not geared towards economic benefit. It is instead aimed more toward demonstrating commitment to achieving positive environmental outcomes.

B Effective Action at a Smaller Scale to Influence Others

The ACCTS can speed up the process of writing the rules and allow more detailed issues to be negotiated with a smaller group of countries. In general, RTAs can enable more innovative approaches to achieving climate and trade outcomes compared with what is achievable at the multilateral level.⁶² New Zealand's Minister for Climate Change, James Shaw suggests that the ACCTS resolves the prisoners' dilemma associated with taking climate action.⁶³ Countries are hesitant to make the first move with regard to unilateral climate action and risk undermining their competitiveness. Das argues that RTAs offer countries an opportunity to experiment and test climate provisions at limited scale with a group of like-minded countries.⁶⁴ The ACCTS is intended to provide a first step in

⁶¹ Above n 65

⁶² Dröge, above n 4, at 29.

⁶³ Craig McCulloch "New Zealand to head five-country climate trade agreement talks - Jacinda Ardern" *Radio New Zealand* (New Zealand, 26 September 2019).

⁶⁴ Das, above n 5, at 10566.

navigating how trade measures and trade policy can be optimised to meet climate change outcomes within a RTA.

C Pathway to Multilateralism

Conceptualised by New Zealand, the agreement is intended to be a treaty-level instrument compliant with the WTO and other international agreements. It is open to all who can meet the established standard; is supportive of multilateral rules and institutions; and provides a pathway to multilateralism over time.⁶⁵ The overarching objective and rationale for establishing the ACCTS is the provision of a pathway toward multilateral action. The *pathway to multilateralism* aspect is key. Dröge suggests that important feature of an effective RTA is that the measures agreed can be potentially multilateralised in the future.⁶⁶ Given the very early stage of the negotiation of the agreement, it is not clear exactly how the signatories plan to “multilateralise” the agreement. *Open plurilateralism*, for which New Zealand is an avid proponent offers a pathway to multilateralism.⁶⁷ This idea is based on pursuing an agreement such as the ACCTS that includes clauses to allow other countries to join who can meet the established standard. It enables small countries to come together to agree deep trading terms which can be afforded to others at a later stage. Open plurilateralism sides with the view that RTAs can be ‘building blocks’ rather than ‘stumbling blocks’ for the multilateral systems. Hoekman and Sabel suggest that this approach “can support the regeneration of the WTO from within.”⁶⁸ An agreement such as ACCTS offers an experiment for reform and resolution of climate change and environmental governance within the WTO.

⁶⁵New Zealand Ministry for Foreign Affairs and Trade website www.mfat.govt.nz/en/trade/free-trade-agreements/climate/agreement-on-climate-change-trade-and-sustainability-accts-negotiations/

⁶⁶ Dröge, above n 4, at 29.

⁶⁷ Open plurilateralism is principle that New Zealand applies to its trade policy, meaning agreements are negotiated with the intention to be expanded to new partners in the future. Another agreement similar to ACCTS in this regard is the Digital Economy Partnership Agreement.

⁶⁸ Bernard Hoekman and Charles Sabal *Open Plurilateral Agreements, International Regulatory Cooperation and the WTO* (European University Institute, Robert Schuman Centre for Advanced Studies, Working Paper RSCAS 2019/10) at 1.

There have been actions in fora such as the Group of 20 (G20), the WTO and the Asia-Pacific Economic Cooperation (APEC) towards utilising trade to meet climate change and sustainable development outcomes, but progress has been slow.⁶⁹ Legally enforceable rules negotiated under the ACCTS are intended to change this.

VII The Current Scope of the ACCTS

The next section will discuss the three areas which the scope of the ACCTS will initially address. The current scope corresponds to the mutually beneficial policies mentioned in *Section IV*, the liberalisation of environmental goods and services; fossil fuel subsidy reform; and eco-labelling. The discussion for each area analyses the current context, rationale for inclusion and potential impact, progress in other fora, and considerations for the negotiations.

A Liberalisation of environmental goods and services

1 Context

The current scope of the ACCTS includes the removal of tariffs on environmental goods and the establishment of new and binding commitments for environmental services. Environmental goods and services are inextricably linked, and can be defined as consisting of activities ‘that produce goods and services to measure, prevent, limit, minimise or correct environmental damage to water, air, soil, as well as problems related to waste, noise and eco-systems.’⁷⁰ The ACCTS’ consideration of both environmental goods and services endorses the close synergy that exists between them.

2 Rationale and potential impacts

(a) Global market for environmental goods and services

There is evidence that globally, the market for environmental goods and services has been on the rise. It was estimated to have reached US\$866 billion in 2011 and is estimated to

⁶⁹ Jacinda Ardern, Prime Minister of New Zealand, Speech at launch of Agreement on Climate Change, Trade and Sustainability (United Nations Headquarters, New York, 26 September 2019).

⁷⁰ OECD *The Environmental Goods and Services Industry, Manual for Data Collection and Analysis* (OECD, Eurostat, 1999) at 9.

reach US\$1.9 trillion this year, in 2020.⁷¹ As will be elaborated on below, the definition of environmental goods and services is a challenging aspect, as it is difficult to articulate the extent and boundaries of the sector. For this reason, data is limited on how much trade in environmental goods and services takes place currently between the ACCTS members.

(b) Reduction of price and increase of uptake

A reduction or removal of tariffs on environmental goods and services is anticipated to result in lower prices for ACCTS member countries' consumers and producers. This is intended to accelerate access and uptake, and contribute to positive environmental outcomes. This might include renewable energy options becoming more affordable for consumers in the ACCTS countries, which could help to mitigate the impacts of and complement the removal of fossil fuel subsidies. The ACCTS could also drive the diffusion of greener technologies and practices between countries.

(c) Signalling impacts

The International Institute for Sustainable Development has reported that applied tariffs on many manufactured goods in Iceland, New Zealand and Norway are already low.⁷² This indicates that the expected economic gains for these countries could be negligible as the reduction in an applied tariff may not be *that* substantial. Nonetheless, the establishment of binding ceilings on tariffs of environmental goods will be important in terms of optics. Binding ceilings on these tariffs demonstrate that ACCTS countries are committed to a direction which favours environmental outcomes and not only export opportunities and revenue generation. This will send an important signal globally which could encourage more countries to take similar action. These tariff removals will also provide environmental goods producers and exporters in the ACCTS countries with certainty. The ACCTS

⁷¹ Bucher, H. and others *Trade in environmental goods and services: opportunities and challenges*. (International Trade Centre Technical Paper, Geneva, 2014) at 9.

⁷² Susanne Droege and Ronald P. Steenblik "Time to ACCTS? Five countries announce new initiative on trade and climate change" (19 September 2019) International Institute for Sustainable Development <<https://www.iisd.org/blog/time-accts-five-countries-announce-new-initiative-trade-and-climate-change>>

members also plan to extend these tariff removals on environmental goods and their concessions on environmental services to all WTO members.⁷³ Even with already low applied tariffs, this concession extension will send an important signal to other countries that ACCTS members are committed to this approach.

3 *Progress in other fora*

Initiatives with varying degrees of success have been established in the past to liberalise environmental goods. Little attention however has been paid to environmental services in major trade negotiating efforts.⁷⁴

(a) Doha Ministerial Declaration

In 2001, WTO members agreed to commence negotiations for “the reduction or, as appropriate, elimination of tariffs and non-tariff barriers to environmental goods and services.”⁷⁵ The Doha Ministerial Declaration expressed WTO members’ desire to negotiate a multilateral agreement for environmental goods and services. However, like much of the Doha round, negotiations have not been concluded. Disagreements over which goods and services should be defined as “environmental” is cited as a reason for the collapse.⁷⁶

(b) Asia-Pacific Economic Cooperation Vladivostok Declaration

Relatively more progress has been achieved by the APEC 2012 Vladivostok Declaration. In this Declaration, APEC members agreed to a common list of environmental goods. They committed to “reduce by the end of 2015, applied tariff rates to 5% or less” for a set of 54

⁷³ Droege, above n 72.

⁷⁴ Sauvage, above n 37, at 14.

⁷⁵ Paragraph 31(iii) of the Doha WTO Ministerial 2001: Ministerial Declaration WT/MIN(01)/DEC/1 20 November 2001.

⁷⁶ Sauvage, above n 37, at 13; Mark Wu “The WTO Environmental Goods Agreement: from multilateralism to plurilateralism” in Panagiotis Delimatsis (ed) *Research Handbook on Climate Change and Trade Law* (Edward Elgar, Northampton, MA, 2016) at 285.

environmental goods.⁷⁷ This initiative has demonstrated the viability of a list-based approach and the opportunity for progress arising from a move away from the multilateral negotiations.

(c) WTO Environmental Goods Agreement

In 2014, negotiations commenced in the WTO for a plurilateral agreement, the Environmental Goods Agreement. The Agreement did not need to be undertaken by all WTO members, but did require a critical mass before it could be implemented. It had been suggested to offer a way forward to advance the Paris Agreement objectives⁷⁸ and was building upon the list of environmental goods agreed upon by APEC. The negotiations appear to be the most progressed effort towards a plurilateral agreement, but similar to previous efforts on environmental goods in the WTO, this has not been concluded.

The above examples of the headway made in relation to the liberalisation of environmental goods demonstrate the difficulty of progressing agreement at the multilateral level and the opportunity that a regional approach can provide.

4 *Considerations for the negotiations*

(a) Agreeing the list

Environmental goods and services are not made up of a discrete list of related activities. In fact, the realm of what is considered “environmental” is relatively amorphous.

One of the reasons for the stalling of the WTO Environmental Goods Agreement is due to the lack of agreement on the definition of environmental goods.⁷⁹ The heterogeneity of what can be considered an environmental good has made the development of a definitive list challenging. For example, they can be classified by considering the different stages of

⁷⁷ Paragraph 17 of the Vladivostok Declaration 8 September 2012.

⁷⁸ Monica Araya *The Relevance of the Environmental Goods Agreement in Advancing the Paris Agreement Goals and SDGs: A Focus on Clean Energy and Costa Rica’s Experience*. (International Centre for Trade and Sustainable Development, Issue Paper, 2016) at 22.

⁷⁹ Bucher, above n 71, at 5.

the life-cycle of the goods and their impact on the environment.⁸⁰ Bucher suggests that a product may be considered “environmental” if it is produced in a manner which causes less environmental harm than a like product, or if its use or consumption has an environmentally beneficial end effect.⁸¹

Lists of environmental goods have been developed by the Organisation for Economic Cooperation and Development (OECD) and APEC.⁸² These differ in their definition of environmental goods and services, emphasising the major challenge of developing an internationally-agreed list. The ACCTS, with a small grouping of countries offers some hope that a list can be agreed upon relatively easily than at the multilateral level. The ACCTS negotiations should endeavour to build on the lists that have been developed by APEC and the Environmental Goods Agreement of the WTO.

Regarding environmental services, trade negotiators have historically referenced the UN’s Central Product Classification for a description of environmental services.⁸³ This is an outdated list with a narrow focus which does not reflect the current and evolving environmental services industry.⁸⁴ Other lists have been developed by Eurostat and the OECD. Similar to the lists for environmental goods, convergence is lacking between classification. The ACCTS negotiations could consider the inclusion of other related, but relevant environmental services in addition to the core environmental activities. These related services include those that might be classified as business or construction services, but are needed to complement the core environmental service.

(b) Maintaining flexibility

The environmental services industry has evolved significantly and will continue to evolve. The ACCTS should also keep the scope of environmentally-related services relatively flexible to allow for technological progress and changes in consumer preference. The

⁸⁰ Bucher, above n 71, at 4.

⁸¹ Above n 71, at 4.

⁸² Ronald Steenblik *Environmental Goods: A Comparison of the APEC and OECD Lists* (OECD Trade and Environment Working Paper, 2005) at 3.

⁸³ Sauvage, above n 37, at 13.

⁸⁴ Above n 37, at 14.

ACCTS could include a mechanism to allow the addition of new items and the deletion of existing items to the list. Not only will this be beneficial for current signatories, but is likely to entice other countries to join the ACCTS.

(c) Ensuring the inclusion of high-tariff goods and services

A consideration for the ACCTS countries to include in their negotiations is that if the applied tariffs are already low on some of the products and services this agreement intends to liberalise, then the costs of these products and services will be unlikely to change. This could result in an outcome counter to the intended impacts of reducing price and accelerating uptake of environmental goods and services. To incentivise significant reductions in price and therefore more uptake by consumers, the countries in the ACCTS must include high-tariff goods and services.

(d) Potential inclusion of non-tariff barriers

As the applied tariffs are already low between some of the countries on many manufactured goods, the ACCTS membership could consider the removal of non-tariff barriers (NTBs). Some authors suggest that trade is more significantly influenced by NTBs than by tariffs.⁸⁵ This hints that there could be more potential for trade liberalisation and positive climate change outcomes with the inclusion of NTBs.

5 Conclusion

As this section has explained, there are a number of positive impacts that could result from the liberalisation of environmental goods and services, however there are some likely challenges the ACCTS negotiations will face. It's important that the ACCTS countries take advantage of what has been achieved in other fora and the fact that they are six countries who should be able to more easily come to an agreement on the tricky aspects such as the definition of environmental goods and services.

Few countries can domestically source the resources, technology and expertise needed to transition to a green economy. Agreeing a set of rules around environmental goods and

⁸⁵ Bucher, above n 71, at 15.

services liberalisation in the ACCTS could encourage other countries to join the agreement. The ACCTS has an opportunity to provide a blueprint on environmental goods and services liberalisation that other agreements can base their rules upon.

B The Elimination of Fossil Fuel Subsidies

1 Context

The current scope of the ACCTS includes the development of disciplines to eliminate fossil fuel subsidies. A fossil fuel subsidy is a financial transfer that creates an incentive for the production and or consumption of fossil fuels. Fossil fuel subsidies are a key barrier to achieving the objectives of the Paris Agreement. As mentioned, subsequent NDCs are expected to demonstrate a countries' increased level of ambition. Major reforms to fossil fuel use are needed to enable countries' to meet this expectation. It is estimated that fossil fuel subsidy reform can reduce 6-8% of global greenhouse gas emissions by 2050.⁸⁶ NDCs of 13 countries explicitly include fossil subsidy reform.⁸⁷ Despite consensus on the overall environmental damage caused by fossil fuel subsidies and their cost on the taxpayer, many countries remain heavily subsidised.

2 Rationale and potential impacts

Fossil fuel subsidies demonstrate the significant policy incoherence between climate change, social and economic outcomes. They emulate the antithesis of what countries should be doing to address climate change. They are estimated to currently cost governments over US\$500 billion each year.⁸⁸ This investment could be diverted into more compelling public goods such as health care and education. It is recognised by the countries that this will be a difficult area to get traction on, but it has the potential to deliver a

⁸⁶ Global Subsidies Initiative *Raising ambition through fossil fuel subsidy reform: Greenhouse gas emissions modelling results from 26 countries* (Geneva: Global Subsidies Initiative of the International Institute for Sustainable Development, 2019) at 13.

⁸⁷ Maksym Chepeliev and Dominique van der Mensbrugge "Global fossil-fuel subsidy reform and Paris Agreement" (2020) 85 *Energy Econ* 104598 at 104598.

⁸⁸ 526 billion reasons for change webpage, New Zealand Ministry for Foreign Affairs and Trade website <https://www.mfat.govt.nz/en/environment/clean-energy-and-fossil-fuels/526-billion-reasons-for-change/>

multitude of benefits. Subsidisation of fossil fuels will continue to hamper green technology efforts by maintaining price distortions and reducing the incentive to produce fossil fuels more efficiently.

3 *Progress in other fora*

(a) Group of 20 and Asia-Pacific Economic Cooperation

There have been efforts by the G20 and APEC to reduce fossil fuel subsidies. The G20 committed in 2009 to “phase out over the medium term inefficient fossil fuel subsidies that encourage wasteful consumption”.⁸⁹ Following this, APEC also agreed in 2009 to “rationalise and phase out over the medium term fossil fuel subsidies that encourage wasteful consumption, while recognising the importance of providing those in need with essential energy services.” Despite these ambitious pledges, slow progress has been made. The G20 has been criticised for still subsidising fossil fuels ten years after committing to rationalise and phase out inefficient subsidies. New Zealand Prime Minister, Jacinda Ardern stated in 2019, that “Despite commitments to phase out such subsidies by groups like the G20 and APEC, we are still struggling to see concrete action. It is time to do things differently.”⁹⁰ In 2019, G20 countries were still paying US\$150bn annually towards fossil fuel subsidies.⁹¹ Some progress has been made in APEC, with fossil fuel subsidies having fallen by 50% since 2011.⁹² However, a number of inefficient subsidies for fossil fuels still exist in some APEC economies.⁹³

(b) WTO

⁸⁹ Paragraph 29 of the Leaders’ Statement: The Pittsburgh Summit. G20. 24-25 September 2009.

⁹⁰ Jacinda Ardern, New Zealand Prime Minister address to the general debate of the 74th Sessions of the General Assembly of the United Nations (24 September 2019).

⁹¹ Laura Merrill and Franziska Funke “All Change and No Change: G20 Commitment on Fossil Fuel Subsidy Reform, Ten Years On” (3 October 2019) International Institute for Sustainable Development <<https://sdg.iisd.org/commentary/guest-articles/all-change-and-no-change-g20-commitment-on-fossil-fuel-subsidy-reform-ten-years-on/>>

⁹² Toshiyuki Shirai *Tracking fossil fuel subsidies in APEC economies, toward a sustained subsidy reform* (International Energy Agency, Insights Series 2017) at 6.

⁹³ Above n 92, at 8.

Progress in the WTO to develop fossil fuel subsidy disciplines has been slow and existing mechanisms for their monitoring do not appear to be effective. Firstly, they are not eligible for challenge under the DSB of the WTO based on the environmental externalities they generate.⁹⁴ Secondly, there is underreporting on fossil fuel subsidies in the WTO.⁹⁵ The Friends of Fossil Fuel Subsidy Reform, of which New Zealand is part of, has suggested that the WTO can play an important role in establishing disciplines on fossil fuel subsidies through enhanced transparency and reporting. In light of slow progress and criticism of lacklustre efforts, the ACCTS provides a small group with the ability to move forward on developing these disciplines which could be incorporated into WTO rules in the future.

4 *Considerations for the negotiations*

(a) Phasing out versus elimination

Horlick proposes an immediate stand-alone phase out of fossil fuel production subsidies.⁹⁶ This is the pathway the ACCTS countries should take, rather than reducing “inefficient” subsidies which has been the objective in previous efforts. If successful, the “elimination” of fossil fuel subsidies will set the ACCTS apart from previous efforts in this field.

(b) Reporting obligations and binding peer review mechanism

Many authors have suggested the need for more transparency of fossil fuel subsidy use, for example better notification or peer review mechanisms.⁹⁷ Given the underreporting and insufficient transparency in the WTO, the ACCTS countries could focus on creating a reporting obligation and a binding peer review mechanism to monitor each others’ progress towards subsidy elimination. Existing peer review mechanisms established by the G20 and APEC are voluntary. The ACCTS can facilitate a move beyond voluntary pledges and toward binding commitments, by acting as a treaty-level instrument to include fossil fuel

⁹⁴ Gary Horlick and Peggy A. Clarke *Rethinking Subsidy Disciplines for the Future. Synthesis of the Policy Options* (E15 Initiative, International Centre for Trade and Sustainable Development 2016) at 6; Das, above n 5, at 10773.

⁹⁵ Horlick, above n 94, at 6.

⁹⁶ Above n 94, at 6.

⁹⁷ Brandi, above n 36, at 32; Horlick, above n 94, at 6.

disciplines. The signatories should endeavour to reduce the risk of any duplication of efforts and ensure the disciplines build on the effective aspects of the G20 and APEC mechanisms.

(c) Social impacts

There are challenges to fossil fuel subsidy reform which will need to be considered by ACCTS countries when negotiating these disciplines. For example, does the ACCTS tackle production and consumption subsidies simultaneously, or look at each type of subsidy separately? One such challenge associated with consumption subsidies is the unintended social impacts that can result from reform, for example, making energy unaffordable for low income households. The money spent on fossil fuel subsidies could be redirected into renewable subsidies to ensure renewable energy is affordable in place of non-renewable. The elimination of subsidies must ensure that access to basic energy services is maintained. The disciplines that are negotiated within the ACCTS could potentially form the basis for disciplines to be applied in the WTO Agreement on Subsidies and Countervailing Measures.

5 Conclusion

The inclusion of fossil fuel subsidy disciplines in the scope of the ACCTS is a welcome and urgently needed initiative. However, it's likely that gaining participation of major countries in terms of trade flows and subsidies, will be difficult. The actual ability of the ACCTS to create a significant difference to climate change outcomes without the inclusion of major subsidisers and major emitters is questionable. Rather, the real potential for the ACCTS lies in signalling to the rest of the world how trade disciplines can be used to meet climate change outcomes. It can demonstrate the political will by its proponents to eliminate fossil fuel subsidies. The signatories must act pragmatically and innovatively to induce a shift towards fossil fuel subsidy elimination which builds on previous efforts in other fora, is sustainable and fair, and motivates other countries' to follow suit.

C Voluntary Eco-Labeling

1 Context

The third area that the scope of the ACCTS will cover is related to the development and implementation of voluntary eco-labelling programmes and associated mechanisms to encourage their promotion and application. According to the Global Ecolabelling Network, eco-labelling can be defined as a “method of environmental performance certification and labelling...” which “identifies products or services proven to be environmentally preferable within a specific category”.⁹⁸ Voluntary eco-labelling programmes relate to those that producers choose to comply with. An eco-label is often awarded by a third party based on a producers achievement of an established standard. The ACCTS membership intend to agree guidelines to inform the development of eco-labelling programmes. This is anticipated to promote the development of high-integrity eco-labels that are both transparent in their criteria and meaningful to consumers.

If voluntary eco-labelling schemes work effectively, they are purported to improve environmental impacts in a number of ways. Firstly, they can educate consumers about the environmental attributes of products and can thereby incentivise consumer demand for environmentally-friendly attributes and lower demand for negative attributes.⁹⁹ Secondly, they can create environmental norms.¹⁰⁰ They can also provide a basis for establishing measurable sustainability goals for sourcing, improvements and transparency.¹⁰¹

Notwithstanding these potential benefits, the evidence is mixed on whether eco-labels affect positive environmental outcomes.¹⁰² As Vitalis states “it is extremely difficult to

⁹⁸ What is Ecolabelling? Global Ecolabelling Network website <<https://globalecolabelling.net/what-is-eco-labelling/#:~:text=Ecolabelling%20is%20a%20voluntary%20method,preferable%20within%20a%20specific%20category.>>

⁹⁹ Jason Czarnezki, Margot Pollans, and Sarah M. Main “Eco-labelling” in Emma Lees and Jorge E. Vinuales *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press, Oxford 2019) at 2.

¹⁰⁰ At 2.

¹⁰¹ At 2.

¹⁰² Vangelis Vitalis *Private Volunatry Eco-label: Trade Distorting, Discriminatory and Environmentally Disappointing* (Round Table on Sustainable Development, OECD 2002) at 2.

isolate and measure the environmental benefits of eco-labelled goods as distinct from benefits achieved through other environmental measures.”¹⁰³

2 *Rationale and potential impacts*

(a) Support the global proliferation of eco-labels

The inclusion of this area in the scope of the ACCTS acknowledges the proliferation of eco-labelling schemes, as more consumers have heightened awareness of and a desire to understand the environmental impacts of their consumption. In 2020, the Ecolabel Index, which tracks eco-labels worldwide lists 457 eco-labels in 199 countries, and 25 industry sectors.¹⁰⁴ These numbers are likely to increase, as consumer preferences drive manufacturers to be more environmentally-friendly. As consumers face more labels to base decision making on and producers face more labels to contend with, there will need to be more coherence and oversight over label standards and verification of compliance with those standards. Kim suggests that the multiple overlapping standards and regulations, and the costs involved in understanding and implementing different standards, can impede trade.¹⁰⁵

(b) Identification and prevention of protectionism

More governance is also warranted to lessen the actual or perceived risk of utilising eco-labelling as a protectionist measure. For example, eco-labels can be thought of as protecting domestic producers under the guise of environmental sustainability especially if competing countries are unable or have limited ability to meet the standards required to display a particular eco-label. For eco-labels to realise their full potential towards incentivising sustainable production without risking trade distortion, they must be better policed.¹⁰⁶ Some authors also recommend that WTO oversight is necessary to determine if eco-

¹⁰³ At 8.

¹⁰⁴ Ecolabel Index website <<http://www.ecolabelindex.com/>>

¹⁰⁵ Hajin Kim “An Argument for WTO Oversight of Ecolabels” (2014) 33.3 *Stanf. Environ. Law J.* 421 at 443.

¹⁰⁶ At 425.

labelling mechanisms are discriminatory.¹⁰⁷ In accordance with the overall aim of the ACCTS as a pathfinder to multilateralism, the negotiation of guidelines related to eco-labelling schemes could be used as a basis for the negotiation of WTO rules.

(c) Garner consumer trust in eco-labels

For voluntary eco-labelling schemes and programmes to work effectively, international coherence around guidelines for their implementation is required. In the US, many eco-labels have been the subject of consumer protection litigation, highlighting a potential gap in consumer trust of eco-labelling schemes.¹⁰⁸ Related to this is the issue of “greenwashing”¹⁰⁹ as a result of asymmetric information. In these instances, consumers’ ignorance is often taken advantage of by producers who make environmental claims about a product without having made the production adjustments to meet these claims. The guidelines developed under the ACCTS could help to alleviate this and support consumer trust in an eco-label by clearly articulating standards and ensuring strong mechanisms for verification.

3 *Progress in other fora*

In New Zealand, Environmental Choice is the official environmental label which has been endorsed by the government and is operated independently.¹¹⁰ It is linked to other overseas eco-labelling schemes under the umbrella of the Global Ecolabelling Network (GEN). The GEN works to “foster co-operation, information exchange and standards harmonisation among members, associates, and other eco-labelling programmes.”¹¹¹ GEN offers a starting point for the ACCTS guidelines as the organisation recognises members that have

¹⁰⁷ At 454.

¹⁰⁸ Czarenksi, above n 99, at 9.

¹⁰⁹ According the Cambridge Dictionary, to “greenwash” is to make people believe that your company is doing more to protect the environment than it really is.

¹¹⁰ Environmental Choice website <<https://www.environmentalchoice.org.nz/>>

¹¹¹ Global Ecolabelling Network website <<https://www.globalecolabelling.net/about/gen-the-global-ecolabelling-network/>>

attained the status of “Type 1” eco-labels as specified in the ISO 14024 standard.¹¹² This means that GEN members with this status have voluntary eco-labelling programmes; have standards which address multiple environmental criteria over the life-cycle of a product or service; have standards which are published and transparent; and have eco-labels that are awarded using independent third-party verification.¹¹³ Out of the ACCTS countries, only New Zealand and Norway¹¹⁴ have eco-labelling schemes that are currently within the GEN.

4 Considerations for the negotiations

(a) Consistency with WTO rules

In addition to the challenge of discerning the impact of eco-labels on environmental outcomes, there are legal challenges that could arise in the WTO related to the use of criteria linked to PPMs. It is usually PPMs that will determine the environmental sustainability of a product, and in particular those which are not necessarily apparent in the final product, a npr-PPM. As discussed in *Section II*, the debate around npr-PPMs is related to the question of, can products be treated differently because of the way they have been produced, even if the method of production does not create a discernible difference in the product? The negotiations of the guidelines for voluntary eco-labelling schemes in the ACCTS must consider this aspect of eco-labelling. The Technical Barriers to Trade Agreement of the WTO covers government-administered voluntary eco-label programmes including the Code of Good Practice for the Preparation, Adoption and Application of Standards.¹¹⁵ The guidelines could include information around best-practice in accordance with WTO rules, in particular consistency with the Technical Barriers to Trade Agreement.

¹¹² The ISO 14024 standard establishes the principles and procedures for developing Type I environmental labelling programmes, including the selection of product categories, product environmental criteria and product function characteristics, and for assessing and demonstrating compliance. ISO 14024:2018 also establishes the certification procedures for awarding the label.

¹¹³ Above n 11.

¹¹⁴ Norway has the Nordic Swan Ecolabel.

¹¹⁵ Technical Barriers to Trade Agreement 1868 UNTS 120, (opened for signature 15 April 1994, entered into force 1 January 1995), Annex 3.

The ACCTS members could look to use previous WTO jurisprudence¹¹⁶ to determine the parameters within which voluntary eco-labelling schemes are most likely to pass muster under the WTO.

5 Conclusion

Relative to the other two areas that the scope of the ACCTS will cover, the eco-labelling dimension lends the least compelling evidence of the anticipated impacts. Firstly, this area is complex with a number of different types of existing schemes and standards applying to a wide range of products. It also is at risk of contravening with WTO rules, and uncertainty remains as to how these schemes can be deemed consistent with WTO rules. There is limited data available on the effectiveness of eco-labels in meeting environmental outcomes and influencing consumer choice.¹¹⁷ However, some authors propose that collaboration across countries on the design, use and promotion of voluntary eco-labelling could make programmes and schemes more effective, and could send clearer signals to consumers and drive the demand for more sustainably produced products.¹¹⁸ Given the unproven impacts of voluntary eco-labelling on positively affecting environmental outcomes, it is questionable how much of an impact these guidelines will have on contributing towards the 1.5 degree C goal of the Paris Agreement.

VIII Conclusion

As this paper has described, trade can and must have a role in global efforts to achieve the Paris Agreement goal of limiting global warming to 1.5 degrees C. There are opportunities for trade to be part of the solution, however there still remain a number of questions as to how trade-related measures can be optimised to achieve climate change goals. As mentioned, regionalism has been proposed as a solution to create cohesive trade and

¹¹⁶ See outcomes of *US – Tuna I* DS21/R – 39S/155), 3 September 1991 (Report of the Panel); and *US – Shrimp* WT/DS58/AB/R, 12 October 1998 (Report of the Appellate Body). The latter bears significance due to the WTO permitting the US to restrict an import based on its PPM and not the product itself.

¹¹⁷ Czarenksi, above n 99, at 17

¹¹⁸ Above n 72.

climate policies. The ACCTS offers a trade agreement which proposes putting climate change and sustainability at the forefront of its *raison d'être*.

This paper has discussed the overarching narrative which surrounds the ACCTS and has provided an analysis of scope. Regarding the former, the ACCTS is a positive initiative in terms of providing progress in achieving mutual climate change and trade outcomes. As the membership of the ACCTS has stated, they recognise the important role for regional agreements to act as a pathway and template for more action at the multilateral level. The attention that the ACCTS has already attracted and the signal it will send when being implemented is valuable in the context of a lack of progress being made at the multilateral level. It provides a clear commitment from the signatories that they are mutually prioritising climate change and trade outcomes. As mentioned, the economic gains from this agreement are predicted to be low as the countries involved are not major trading partners. Nevertheless, the rules that will be negotiated under the ACCTS have the potential to influence other environmental trade agreements.

Regarding the specific areas of scope, the potential impacts of each vary and there are a number of considerations that the negotiations should take into account. The liberalisation of environmental goods and services has the potential to reduce the cost and increase the uptake of these goods and services. However, to achieve these objectives, the countries need to ensure that the liberalisation makes a significant difference to price. The elimination of fossil fuel subsidies offers the most potential in terms of impact on the environment and contribution to the 1.5 degree C goal of the Paris Agreement. This dimension of the ACCTS will also likely be one of the most challenging in terms of getting other countries to join the agreement. Agreeing disciplines to eliminate fossil fuel subsidies is a hard line which some oil-dependent and oil-producing countries will be unable to adopt. The development of guidelines for voluntary eco-labelling schemes is warranted in the advent of further eco-labelling schemes being established. However, this aspect of the ACCTS lacks as much evidence of potential impacts compared to the other two areas under the current scope. The fact that the outcome is a set of guidelines there will be less incentive to adhere to them.

On balance, the overall signal that the ACCTS is sending to the international community on the importance of and the ability to meet mutually beneficial outcomes for the trade and climate change regime is significant. The current scope covers three aspects of these mutually beneficial outcomes for which the actual impacts will not be realised until the agreement has been negotiated and implemented.

As highlighted by Zenker, progress towards the 2 degree C target is likely to be achieved at a very slow pace “unless a key player in the world economy seriously takes the leadership role in the international negotiations on climate change by putting forward the idea of a potential climate-trade agreement.”¹¹⁹ The ACCTS signatories should make it a key objective to seek out high-emitting, major or emerging economies, to give more clout to the agreement and increase its influence on the international community, and on mutual trade and climate change objectives.

¹¹⁹ Zenker, above n 35, at 148.

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