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**Protecting New Zealand from Weaponised Trade:
Assessing the compliance of weaponised trade practises
with international law obligations.**

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Abstract

Increasingly states are recognising the ability for economic power to act as political leverage. Such measures are known to demonstrate the recent weaponization of trade. Such actions seem to be at odds with the values and norms which underpin international obligations. However, despite this, states have demonstrated that they are still able to comply with their international law obligations. This therefore impacts the ability of states to achieve redress for the imposition of politically motivated trade measures, referred to as *weaponised trade measures*. This paper considers this issue in the New Zealand context in order understand how economically powerful states are able to be seemingly compliant with international obligations while still undermine the foundations of this system. In doing so it considers the integral link that exists between such obligations and the political environment that they sit in. As measures that push the boundaries of compliance continue to be utilised it highlights the limits of the WTO's ability to deal with such measures. Therefore, acts which fall into the legal grey zone are subject to control of those states who maintain a degree of economic leverage. This paper therefore demonstrates the limitations of the WTO to deal effectively with geopolitical tensions. As conflict shifts towards the grey-zone and the lines between war and peace are blurred it can be difficult for states like New Zealand to rely on the security of rules-based trade system to protect themselves from weaponised trade.

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I Introduction

As transnational trade increases, so do economic and resource dependencies. Therefore, the dependency level is relative to economic power, giving states with limited dependencies a significant degree of control. States with larger trading capacities can have leverage over smaller states by exploiting these dependencies to ensure a favourable environment. Increasingly, this leverage has been used to gain more favourable outcomes in case of international political dispute.¹ Policies that do so are known as actions of weaponised trade. Primarily these are policies which seek to retaliate against or punish states for political action. Weaponised trade policies have been the subject of increasing concern for the international community, mainly due to the way that they disregard the values and norms that underpin the international trading system.² This has raised questions as to whether these policies are, or can be, compliant with the existing international law framework.

Weaponised trade is a particularly crucial issue for small trade-dependent states like New Zealand. New Zealand's economy is heavily dependent on the trading relationships it has built with other states and, as a relatively smaller trading partner, is exposed to the trade policies of others. New Zealand is, therefore, vulnerable to both the occurrence and effect of weaponised trade policies. This vulnerability has been subject to particular concern within the current dynamics of New Zealand's relationships with China and the United States. While doing its best to manage relationships with both countries, this has exposed New Zealand to threats of weaponised trade, with both countries utilizing these measures on occasion.

New Zealand is known for being a strong supporter of multilateralism and upholding the international rule of law because of the way it provides security against the damaging behaviour of other states.³ However, the case of weaponised trade has demonstrated that

1 European Council "G7 Leaders' Statement on Economic Resilience and Economic Security" (press release, 20 May 2023) at 3.

2 At 3.

3 Dr Penelope Ridings "A New Zealand Perspective on International Law" (Beeby Colloquium on International Law 2020 Victoria University of Wellington, Wellington, 25 November 2020).

the protection of international law cannot be relied on all situations. The rules of the international trading system are increasingly being circumvented by larger states like China and the United States, leaving smaller states with minimal means of recourse. In doing so, it shows little regard for the norms and the spirit of international trade law. However, where acts have the ability to comply with international law, difficulties arise in protecting states like New Zealand from weaponised trade.

This paper will argue that weaponised trade exists within a grey area of international law, with such policies violating the underpinning spirit but not necessarily the explicitly established obligation of international trade law. These grey-zone characteristics of weaponised trade have allowed those states with greater economic power to avoid international criticism and opposition to the use of weaponised trade policies. These states have also demonstrated, in implementing weaponised trade policies, that they are not concerned with upholding these norms if it can achieve a political benefit. Therefore, the limited scope of international law to deal with such grey-zone trade measures means that it can be difficult to protect states like New Zealand from weaponised trade. Instead, it allows states with economic leverage to use the system to their advantage. Furthermore, given the broad spectrum of actions weaponised trade covers means that an all-encompassing adjustment to international trade law is unlikely to these resolve issues.

This discussion will focus on how states have used the grey area of international law to implement weaponised trade policies and the effects that this has had on state like New Zealand. Section 1 looks at understanding the concept of weaponised trade and how it can be distinguished from other forms of economic behaviour. Of particular importance is the subjective grey-zone nature of policies and the limits that this imposes on the ability of international law to deal with them. Section 2 examines these issues in the context of the United States-China conflict and how these great powers have utilised weaponised trade. Particularly, it considers how these states have been able to impose measures that are largely compliant with international law despite their disregard for the values that it intends to embody. Section 3 then discusses the risks this raises for New Zealand due to their relationships with both states. In light of this, Section 4 considers the measures that New

Zealand has had to take to resolve these issues. These measures have primarily focused on how New Zealand can work within the political realm to mitigate these issues. Through its response New Zealand has aimed to reinforce the rules and norms of the international trade system. Section 5, then looks to consider why this has been more effective. In doing so it considers the way our international legal system is considerably affected by the dominance of states with economic strength. Overall, this discussion aims to demonstrate the issues behind the apparent compliance of grey-zone tactics and the effect that this has on the way that states interact, especially where there are inequal trading capabilities.

II Conceptualising Weaponised Trade

The term ‘weaponised trade’ has become increasingly common in the media and discussions about trends concerning international trade practises.⁴ However, there is debate within the international community about when a trade measure should be labelled as *weaponised*. Despite its common usage, the ability to describe a policy as *weaponised* can be very subjective to the relative position of parties. As a result, identifying these policies can be difficult, especially when a state rejects the accusation that they are participating in trade practices that could be described as weaponised. This debate creates difficulties in using the term and in understanding where how such practices comply, or do not comply, with international trade law.

A Key Characteristics of Weaponised Trade

The primary focus of weaponised trade policies is to coerce another state to behave in a way that is more favourable to themselves by punishing them for an action that is in conflict with their national interest.⁵ Because of this broad use, the term can absorb many different purposes and take on various forms. Toohey and others put forward the definition that “weaponised trade is the manipulation of existing trade relations to advance (geo)political objectives.”⁶ This definition indicates that the primary purpose of these policies is to

4 Lisa Toohey and others *Weaponised Trade: Mapping the Issues for Australia* (July 2022) at 27.

5 Markus Wagner *Weaponised Trade: A New Concept for an Increasingly Complex World* (Konard Adenauer Foundation, Occasional Analysis Paper #14, December 2022) at 3.

6 Toohey, above n 4, at 12.

achieve a purpose that does not necessarily have a direct link to a trade benefit. Instead, these policies are more often reactive to the actions of another state, initiating a response that aims to coerce another state to change their behaviour.⁷ Therefore, they are externally orientated in the way that they focus on producing outcomes outside of the state, as opposed to shaping a benefit for the state itself.⁸ As a result they can be primarily characterised as a form of offensive economic engagement.⁹

However, as weaponised trade focuses on what the trade policy aims to achieve, a degree of plausible deniability is afforded to states regarding their intentions. As a result, the use of weaponised trade policies is often described as a form of *grey-zone warfare*. Grey Zone warfare is that which consists of the implementation of gradual steps to allow states to achieve their political aims without having to revert to military force.¹⁰ The use of such tactics has resulted in a blurring of ordinary conceptions of war and peace.¹¹ Instead it creates a spectrum of behaviour with more difficult distinctions between acceptable and unacceptable actions. By utilising various dimensions of state power, often in an aggressive manner, states can craft a strategic environment that better supports their interests.¹²

Weaponised trade is an example of the use of economic power. This is reflected in how states increasingly choose to discuss trade policies that they implement. Trade policies are increasingly adopting rhetoric that focuses on ideas of “‘protection’, ‘security’, ‘national interest’ and ‘defence’”.¹³ Using these terms to discuss new trade policies has indicated a shift in the way that states are thinking about their trade.¹⁴ Instead of trade being separate to a state’s security, the way that trade is being discussed and talked about indicates an

7 Wagner, above n 5, at 3.

8 At 3.

9 Toohey, above n 4, at 15.

10 Michael J Mazarr *Mastering the Gray Zone: Understanding a Changing Era of Conflict* (United States Army War College Press, Pennsylvania, 2015) at 58.

11 Toohey, above n 4, at 19.

12 At 19.

13 Rebecca Harding and Jack Harding “Strategic Trade as a means to Global Influence” in Andreas Klasen (ed) *The Handbook of Global Trade* (John Wiley & Sons Ltd, Newark 2020) 143, at 144.

14 At 144.

integral connection between trade and security. In doing so, it begins to blur the line between standard economic practice and that which could be argued to be a trade policy which is weaponised.

B Weaponised or Competitive Trade?

In most circumstances, weaponised trade policies can be distinguished from trade policies with a competitive characteristic. However, this line remains blurred. States will always seek to give effect to their national interests and produce benefits for themselves. It is the inherent effect of this such actions will not always benefit other states and are likely to disadvantage them.¹⁵ Particularly where such connections exist between two states of unequal trading power, dependencies can arise, resulting in the trade policies of one state having ongoing effects on another state.¹⁶ This does not necessarily mean that these policies are weaponised.

The distinction between competitive trade and weaponised trade policies is not one that can be made easily. Particularly as states increasingly choose to adopt grey-zone tactics that exist on a spectrum of conflict.¹⁷ For example, United States and China demonstrates how trade measures can achieve both. In 2018, the United States imposed significant import tariffs on Chinese steel, solar panels, washing machines, and aluminium.¹⁸ These measures were two-fold in their reasoning. Not only did it aim to help protect manufacturing jobs in the United States, but also were used to prevent China from harming United States interests.¹⁹ At the time China was beginning to emerge as a direct competition to the United States, therefore the imposition of such measures aimed to hamper China's economic success. This demonstrates the way that such measures are not black and white. Instead, they take advantage of the close relationship between trade and security to achieve a political aim. However, this does not need to be explicitly separate from such measures that secure a competitive advantage.

15 Wagner, above n 5, at 4.

16 Harding and Harding, above n 13, at 143.

17 Toohey, above n 4, at 19.

18 Wagner, above n 5, at 5.

19 At 5.

The WTO recognises states' right to be able to restrict or closely manage their trade where there are risks to their national security objectives.²⁰ However, the imposition of weaponised trade measures tests the boundaries of this right. Now days trade is playing a crucial role in the way that states gain and maintain power.²¹ Often, weaponised trade policies secure further advantages for states beyond merely protecting their national security objectives. In the case a weaponised trade policy, the focus is not on the economic benefits but on how it can be used as a political tool.²² This distinction remains blurred, hence the reference to weaponised trade as sitting within the grey zone.

C Weaponised Trade Policies within International Trade Law

As a result of the grey-zone nature of these policies, the use of weaponised trade creates additional difficulties when assessing whether a country is meeting their obligations at international law. The WTO has worked to create an international trading system that is predictable and reliable in to separate trade from everyday political activity.²³ In particular, it is underpinned by the fundamental principles of the General Agreement on Tariffs and Trade (GATT) such as non-discrimination and encouraging liberalised trade by reducing barriers to trade.²⁴ In doing so, the WTO provides a legal mechanism to enable countries to challenge trade measures that cannot be reasonably justified and therefore fall outside of acceptable trade, even where a security justification is sought out.²⁵ In doing so it has assisted states managing their trading relationships in the event that difficulties arise.

20 At 18.

21 Harding and Harding, above n 13, at 145.

22 At 145.

23 Yong-Shik Lee "Weaponising International Trade in Political Disputes: Issues Under International Economic Law and Systemic Risks" (2022) 56 J.W.T 405 at 406.

24 Julia Ya Qin "WTO Reform: Multilateral Control over Unilateral Retaliation – Lessons from the US-China Trade War" (2020) 12 Trade L. & Dev 456 at 468.

25 Toohey, above n 4, at 18.

It is a governing principle of the WTO that trade should be governed by law as opposed to power.²⁶ This is to ensure that trade is fair and reliable. However, the case of weaponised trade presents a threat to this as states are increasingly implementing trade as a way of exerting their power over other states. The growing use of grey-zone warfare has meant that trade has become a key tool to exert power while avoiding military escalation.²⁷ Therefore using weaponised trade policies is therefore inherently damages the ability to build trade relationships according to the norms of the international trading system. Therefore, these policies violate the rules and norms underpinning this trade system.

While there is a clear violation of the spirit of international trade law, issues arise in regulating this form of behaviour due to its grey-zone nature. The grey-zone nature of weaponised trade means that often blurs the line between accepted and unaccepted trade practises. As a result, there is often limited scope at international law to deal with such policies because the spectrum of behaviour that weaponised trade encompasses. Instead, states can utilise the grey area of the law to justify policies or avoid the need to comply with it.

One argument states accused of imposing weaponised trade measures have been known to raise is for the application of Article XXI(b) of the GATT. This Article says that “nothing in this agreement shall be construed... (b) to prevent any party from taking any action which it considers necessary for the protection of its essential security interests”.²⁸ Despite many states raising arguments under this section, there has been a lot of debate about how far it can extend. Particularly whether the self-judging element applies to the entire clause or merely the ability for a state to judge what actions would be necessary to protect their security interests.²⁹ If it were to be the case of the former, then it would be sufficient for

26 Kristen Hopewell, “Beyond US-China Rivalry: Rule Breaking, Economic Coercion, and the Weaponization of Trade” 116 AJIL 58, at 61.

27 Mazarr, above n 10, at 1.

28 The General Agreement on Tariffs and Trade 55 UNTS 187 (30 October 1947), art XXI (b).

29 Tatiana Lacerda Prazeres “Trade and National Security: Rising Risks for the WTO” 19 World T.R. 137, at 138.

states to invoke the clause for the exception to apply.³⁰ In *DS512 Russia – Measures concerning Traffic in Transit* much discussion was had about whether a dispute resolution panel has the ability to review a state’s invocation of Article XXI(b). Despite opposition from Russia and the United States, as a third party, the Panel ultimately concluded that Article XXI(b) was not wholly self-judging and, therefore, can be subject to review by a dispute resolution panel.³¹ However, despite this, states, notably the United States, continue to arguing for alternative interpretation of this Article.

However, even where such exceptions are not able to apply, there remains limits the to scope of international law. There is no provision in international law which explicitly prevents the use of economic coercion.³² Furthermore, states do not possess a fundamental right to be free from economic coercion.³³ Therefore, in order to deal with such measures there needs to be scope under the GATT to respond to the specific act which has occurred. However weaponised trade can take a variety of different forms and may not necessarily be cover the full range of behaviour that weaponised encompasses.

For example, the use of informal measures that lack little official statement regarding why or how these measures are implemented, but instead utilise vulnerabilities existing in their relationship. Such measures could include selective purchasing by state-owned enterprises, subsidies for a domestic industry, practical barriers to trade, or making claims of violating laws relevant to that trade.³⁴ In resolving a dispute within the WTO settlement system, the burden of proof rests on the party who is asserting a particular claim.³⁵ Therefore in the absence of any direct statement indicating their intention it can be difficult to prove that any breach of WTO rules in relation to way that the particular act has been weaponised and therefore unfairly imposed creating further barriers for Australia.

30 At 138.

31 *Russia – Measures concerning traffic in Transit* WT/DS512/R, 5 April 2019 (Report of the Panel) at 7.102.

32 Antonios Tzanakopoulos “The Right to be Free from Economic Coercion” (2015) 4 CJICL 616, at 631.

33 At 633.

34 Toohey, above n 4, at 14.

35 World Trade Organisation *Legal issues arising in WTO dispute settlement proceedings* at [10.6].

The limitations of the WTO and its dispute resolution measures have also been a critical challenge for states wishing to respond to weaponised trade through the WTO's dispute settlement processes.³⁶ Panel reports, such as that in *DS543 United States – Tariff Measures on Certain Goods from China*, the panel acknowledges the difficulty of dealing with the broader global economic tensions due to the ability of the panel to only deal with those issues to which it is specifically instructed.³⁷ Therefore, limited relief can be afforded to states especially where a weaponised trade measure sits as part of a wider issue.

This reflects the way that the relief provided to states in the event of a dispute resolution process is limited by the process itself. Often complaints taken to the WTO for resolution take a long time to resolve the cases limiting the immediate relief that can be provided by them.³⁸ However, the nature of these disputes often require immediate relief in order to protect the complainant.³⁹ However, states are prevented from pursuing self-help measures. This is the result of Article 23 of the Dispute Settlement Understanding (DSU) which has been said to prevent those who seek redress for a breach of a trade obligation by another from requiring that they do so through the multilateral system, without resorting to unilateral self-help methods.⁴⁰ This prevents states from carrying out retaliatory action. Given the nature of such conflicts, being that of grey-zone warfare, this requirement creates additional difficult limits for states in their ability to respond to weaponised trade policies. Especially in light of the geopolitical conflicts that often precede the imposition of weaponised trade policies. It puts states in a conflicting position of choosing between achieving redress through establishing a breach of international law obligations or through political and economic retaliatory measures.

36 Toohey, above n 4, at 33.

37 *United States – Tariff measures on certain goods from China* WT/DS543/R, 13 September 2020 (Report of the Panel) at 9.3.

38 Wendy Cutler and others *Responding to trade Coercion: A growing threat to the global trading system*. (Asia Society Policy Institute, December 2021) at 6.

39 At 6.

40 World Trade Organisation *WTO Analytical Index: DSU – Article 23(DS Reports)* (online looseleaf) at 1.2.1.3.

The use of a rules-based approach to navigating international trade has been crucial to ensure that a broader range of countries are able to have better support for their concerns.⁴¹ However, bypassing these traditional rules of trade has given larger economic powers an unfair advantage.⁴² While doing so violates the spirit of international law, it is clear that there is not always scope to definitively say that an action is non-compliant with the international law. This grey area of international law creates additional problems for states that have relied on the supposed security of this system.

III The Use of Weaponised Trade by Great Powers

The United States and China have been prominent users of weaponised trade. In recent years, both the United States and China have utilised their dominant economic position to shape their relationships with other states, particularly amid the growing conflict between the two.⁴³ While these two states are not the only users of weaponised trade policies, they are arguably the most significant, especially within the New Zealand context. It is, therefore, important to consider how the United States and China use weaponised trade.

A China

China has often been criticised for its use of coercive trade policies in retaliation against behaviour which is perceived to be threatening to or interfering with its domestic policies.⁴⁴ Increasingly experience has shown that if a state speaks out against China, China will respond with various form of economic coercion to encourage the retraction of those statements. Countries which have been subject to economic threats include South Korea, Canada, Japan, Norway, the United Kingdom and most recently Australia.⁴⁵ However These measures have often been imposed citing other concerns, such as environmental and

41 Ben Czapnik and Bryan Mercurio “The Use of Trade Coercion and China’s Model of ‘Passive-Aggressive Legalism’” (2023) 26 J Intl Econ L 322, at 340.

42 At 340.

43 Hopewell, above n 26, at 58.

44 Czapnik and Mercurio, above n 41, at 324.

45 At 322.

health in order to bypass legal commitments.⁴⁶ Drawing on the experience of these other states, it is likely that if New Zealand were to challenge or oppose China on an issue that China considered to crucial, then New Zealand would also be subject to retaliatory economic measures. As one of the world's largest economies, the loss of trade as a result of these measures are often insignificant for China in comparison to the effect that the policies target; such would be the case for New Zealand.

An example of China's use of weaponised trade is the ongoing trade war between China and Australia. China took action in response to statements made by Australia regarding the way that China has handled the Covid-19 pandemic and other critical domestic issues, such as Xinjiang, the Taiwan Strait, and Hong Kong from weaponised trade.⁴⁷ As the relationship continues to deteriorate China has imposed a wide range of weaponised trade measures being imposed on Australia. These measures have included an 80% tariff on Australian barely imports, up to 218% tariff on Australian wine imports, and further informal import restrictions on Australian beef, cotton, timber and lobster, as well as coal.⁴⁸ These measures are intended to cause significant economic disruption for Australia. Similarly, to New Zealand, nearly 40% of Australian exports are sent to China, therefore creating a considerable dependency on this market.⁴⁹

In response, Australia has lodged disputes with the WTO dispute resolution body, relating to barley and wine tariffs respectively, to help protect Australian exporters.⁵⁰ One of these disputes remain to be resolved by WTO panels, and the other has been suspend subject to a mutually agreed solution between the parties.⁵¹ Both have involved considerable

46 Wagner, above n 5, at 6.

47 At 6.

48 At 6.

49 Hopewell, above n 26, at 61.

50 *China - Anti-dumping and countervailing duty measures on barely from Australia* WT/DS598/1, 21 December 2020 (Request for Consultations by Australia); *China – Anti-dumping and countervailing duty measures on wine from Australia* WT/DS602/1, 28 June 2021 (Request for Consultations by Australia).

51 *China - Anti-dumping and countervailing duty measures on barely from Australia* WT/DS598/R, 24 August 2023 (Report of the Panel), at 4.4.

extension of the consideration time frames and largely remain live ongoing issues.⁵² This has meant considerable delays in secure outcomes for Australian businesses effected by these measures. However, despite the identified limits of the dispute settlement process, it remains one of the only ways that small and medium-sized countries can respond to these practices.⁵³

As China continues to rise as a prominent actor within the international order, they have claimed to support a free and open liberal trading order.⁵⁴ However, their use of weaponised trade as a means of coercing particular responses from states directly seems to be in direct conflict with this. The conflict between China's rhetoric and action reflects the way that it seeks to adjust the system to better suit its interests. Weaponised trade is a key avenue through which they are able to benefit from the international trade system but not be restricted by it when other means may suit their interests better. Notably, China has often sought to ensure compliance to the letter of the law but challenges the underlying principles behind it to help gain control of the narratives.

B The United States

While China is the up-and-coming power in the international system, the United States has long had leverage on the international economic order. As China's influence within the system grows, the United States has endeavoured to maintain control within the global trading system. The use of weaponised trade demonstrates an assertion not only of the political power of the United States but also the extent of their political power within the international system.

The United States often attempts to justify them as necessary to defend and protect national interests and protect national security interests. While the United States has long been considered a leader in the international trading system, recently, particularly under the

52 *China - Anti-dumping and countervailing duty measures on barely from Australia* WT/DS598/10, 12 July 2023 (Communication from the Panel); *China – Anti-dumping and countervailing duty measures on wine from Australia* WT/DS602/6, 6 October 2022 (Communication from the Panel).

53 Cutler, above n 38, at 6.

54 Hopewell, above n 26, at 61.

leadership of former President Trump, the United States has frequently chosen to adopt coercive trade practices not only in response to the United States-China trade conflict but also against some of their major trading partners.⁵⁵ The use of these policies is usually invoked and justified through domestic legislation. An example of this was the use of Section 232 of the United States trade Expansion Act of 1962. Section 232 was used to justify tariffs imposed on steel and aluminium imports on ‘national security grounds’ against a broad range of countries.⁵⁶, including the European Union, Canada, Japan and Australia, amongst others, many of whom that are typically considered to be allies of the United States.⁵⁷

These measures were dealt with by various WTO complaints raised by the effect member states.⁵⁸ In these cases, the United States has also continued to justify their actions as a means to protect national security under Article XXI(b). Recently, in *DS544 United States – Certain Measures on Steel and Aluminium Products*, the United States raised arguments again relating to a justification under Article XXI(b) and again criticised the outcome in DS512.⁵⁹ They stood by their view that the tariffs imposed under section 232 were necessary to protect their essential security interests. The United States believes that, when Article XXI(b) is invoked, panels must limit their findings to recognise that Article XXI was invoked.⁶⁰ While the outcome of these arguments has largely been unsuccessful, it has not deterred the United States from implementing politically motivated trade measures. In doing so, they continue to advocate for their use of weaponised trade as well as the use of their interpretation of the law. Similarly, to China, it shows a desire to take control of the legal limits to advocate for their own narrative regarding their trade measures.

55 Hopewell, above n 26, at 59.

56 At 59.

57 At 59.

58 Qin, above n 24, at 498.

59 *United States – Certain measures on steel and aluminium products* WT/DS544, 9 December 2022 (Report of the Panel), at 7.106

60 At 7.105.

The use of section 301 of the United States Trade Act is another example of where domestic legislation has been used as a justification for trade measures. This provision allows the United States to take trade action against another state if they have imposed “discriminatory policies or practices that burden or restrict US commerce”.⁶¹ Such measures have been imposed against a broad range of countries such as France, Spain, the United Kingdom and more.⁶² China has been a notable target of action under Section 301, as the United States believes that they have taken actions that have put the future of the United States economy at risk⁶³

C Effect of the Justification of weaponised trade by Great Powers

Both the United States and China have demonstrated that they are unopposed to adopting weaponised trade policies, and defying the rules and norms set out by the WTO.⁶⁴ This has included various measures to restrict the trade exerted against each other as result of their great power conflict. As China’s international power and influence expands, the power clash between the two states continues. A significant degree of this conflicts relates to the different norms and values that each believes should underpin international order, including the rules and norms of the global trading system.⁶⁵ The effects of this competition have not been limited to the two competing powers themselves, but has had broad reaching impacts on the geopolitical conditions in which others act in, as has been the experience for New Zealand. As the conflict between the two states continues, there exists an active risk for other states depending on the stance that they take and weaponised trade policies as a tool used in retaliation to countries who actively take a side.⁶⁶ The position of these two countries within the international system and the broad spheres of influence that they have has captured a broad spectrum of countries that could be affected, including New Zealand.

61 Trade Act of 1974, 19 U.S.C. 2101 § 301(b)(ii).

62 Hopewell, above n 26, at 60.

63 Robert Lighthizer “Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action” (press release, 10 July 2018).

64 Hopewell, above n 26, at 59.

65 Gregory Shaffer “Governing the Interface of U.S.-China Trade Relations” (2021) 115 AJIL 622 at 636.

66 Hopewell, above 26, at 58.

IV New Zealand's Challenging Geopolitical Position

New Zealand has positioned itself between both states within this current trade war. New Zealand is equally dependent on both the United States and China for its security and trade, respectively. However, the need to maintain both of these relationships has often led to criticism against New Zealand for having ulterior motives when making a decision that favours either side. With both countries having been known to use *weaponised* or *coercive* trade policies, there is a potential risk for New Zealand that these criticisms could develop into weaponised trade measures. As discussed, both countries have adopted a range of different weaponised trade strategies in response to various political tensions. It is likely that similar situations could arise within the context of their relationship with New Zealand. These relationships therefore present a considerable risk for New Zealand.

New Zealand's foreign policy is one that is primarily focused on its trade. Therefore, it is highly dependent on stable trading relationships.⁶⁷ The most significant of these relationships for New Zealand being China. By 2019, China was New Zealand's "largest goods market, the largest source of international students, the second largest source of tourists and a significant foreign investor".⁶⁸ Approximately 30% of New Zealand's total exports are sent to China making it the most significant export destination.⁶⁹ With 1 in 4 jobs being dependent on the export market, the relationship between has a significant degree of benefit to New Zealand. As a result, New Zealand's economic success in recent years and for the future is closely linked to its trade relationship with China.⁷⁰ Therefore, the maintenance of a good trade relationship with China has become integral to New

67 David J. McCraw "New Zealand's Foreign Policy under National and Labour Governments: Variations on the "Small State" Theme?" 1994 67 *Pacific Affairs* 7, at 14.

68 New Zealand Foreign Affairs & Trade *Protocol to Upgrade the New Zealand-China Free Trade Agreement: National Interest Analysis* (January 2021) at 3.

69 The Embassy of the People's Republic of China in New Zealand "Fact Sheet: Economic Cooperation between China and New Zealand" (7 April 2022) <http://nz.china-embassy.gov.cn/eng/zxgxs/202204/t20220407_10665216.html?>

70 Anne-Marie Brady "A Strategic Partnership: New Zealand-China Relations in the Xi Jinping Era and Beyond" in Anne-Marie Brady (ed) *Small States and the Changing Global Order* (Springer, Switzerland 2019) 127 at 127.

Zealand's economic prosperity. New Zealand has had a diplomatic relationship with China for 50 years, but the focus of this relationship has primarily centred on trade. Therefore, maintaining an amicable relationship with China generally is an integral part of New Zealand's trade strategy because of the leverage that China has over New Zealand's economic prosperity.

Despite the benefits that this relationship brings, it also exposes New Zealand to significant risks in the context of the China-United States conflict. While New Zealand is China's most significant trading partner, China does not have any notable dependencies on their trade with New Zealand. For example, New Zealand sends 97% of its total lobster and crab exports to China, however this only makes up 5% of China's imports of lobster and crab.⁷¹ Many other key exports for New Zealand sit in similar circumstances such as logs, milk, cream and infant formula.⁷² This is considered a high risk export situation for New Zealand. This means that New Zealand is highly exposed to the Chinese market but has very little leverage within it. New Zealand's focus on its trade relationship with China has led to a highly concentrated trade dependency on the Chinese market.⁷³ This trade dependency leaves New Zealand vulnerable to China's decisions with respect to its trade with them. While in comparison to other countries New Zealand is not the most exposed to the Chinese market. However New Zealand's trade relationship with China is growing much faster than any other country.⁷⁴ With such a high dependency on this market, any disruption to trade in this area would likely have broad reaching effects on New Zealanders given the large percentage of those who depend on exports for their livelihood.

A further complication for New Zealand, is the way that this relationship affects its relationship with the United States. Despite being dependent on China for its trade, New Zealand remains dependent on the United States for its security. This alliance with the United States has often influenced the shape and direction of New Zealand's policy towards

71 Sense Partners *In Perspective: The New Zealand-China Trade and Business Relationship 2022 Update* (New Zealand China Council, 2022), at iv.

72 At iv.

73 At 6.

74 At 7.

China, in all aspects but trade. New Zealand's security alignment with the United States, as reaffirmed by the Washington and Wellington Declarations, includes an expectation that New Zealand aligns with the United States were necessary to uphold "shared democratic values and common interests" that underpin the security alliance.⁷⁵ The United States' perspective on whether New Zealand is upholding its end of the security arrangement also has influenced its relationship with the Western allies more broadly, including with Australia and the United Kingdom. This has required New Zealand to walk a fine line between the two countries in recognition of its trade and security dependencies, respectively.

An example of this was the way that New Zealand approached the issue of human rights abuses in Xinjiang. While there was unanimous support across Parliament to condemn the human rights abuses that were occurring in Xinjiang, New Zealand chose not to formally acknowledge the situation as a genocide.⁷⁶ In doing so New Zealand demonstrated a desire to prioritise its relationships with China. However, the decision to do so was criticised as being promoted by their trade relationship with China. In cases such as this many other Western countries have criticised New Zealand for their silence or inability to take a hard lined approach. Countries like the United States see New Zealand as prioritising economic opportunities over upholding its commitment to ensuring a collective front against China's challenge to the United States led-international system.⁷⁷

This contentious geopolitical position has been key to shaping the environment in which New Zealand acts and the risks that it is exposed to. However, the nature of this grey-zone warfare effects the way that New Zealand is able to respond. New Zealand is a trade dependent economy and therefore has largely supported legal norms of international trade that have helped to shape and maintain a favourable environment for New Zealand.⁷⁸

75 Office of the Spokesman "Wellington Declaration on a New Strategic Partnership between New Zealand and the United States" (press release, 4 November 2010)

76 (5 May 2021) 751 NZPD 2338-2339.

77 For example, (22 April 2021) 692 GBPD HC 1225.

78 New Zealand Foreign Affairs & Trade "NZ Trade Policy" <<https://www.mfat.govt.nz/en/trade/nz-trade-policy/>>

However, if these acts are able to be compliant with international law, despite being non-compliant with its norms, then the system that New Zealand would usually rely on is not only undermined, but also to a certain degree ineffective.

V New Zealand's Response to Weaponised Trade

As a result of the position that New Zealand has found itself in it has had to turn to other means in order to protect against weaponised trade. As demonstrated by the experience of states who have attempted to pursue legal means to hold other states to their obligations at international law, international law does not have sufficient scope to ensure this level of compliance. New Zealand has instead demonstrated that political means have been more effective in order to encourage a greater degree of compliance with the spirit of the law.

A Mitigating the Specific Risk for New Zealand without Legal Avenues

Currently, the lack of an ability to rely on international law has impacted on the mechanisms available to New Zealand to deal with the risk of weaponised trade. Usually, New Zealand would rely on the stability of the rules-based trading system to hold states to accountable to their obligations. How in this case, the WTO rules has proven to be ineffective to helping to manage economic grey-zone conflicts, such as the United States-China trade war, and their flow on effects.⁷⁹ Given these circumstances, New Zealand has demonstrated the effectiveness of political avenues in order to manage the risk.

New Zealand has shown that the restrained management of relationships becomes a crucial option for protection where countries in a similar position can no longer be certain that they can seek security in the international law. In the case of New Zealand, this has resulted in a careful look in how they deal with issues relating to China. Foreign Minister Nanaia Mahuta has said that New Zealand “take[s] seriously the way in which we look after our relationship with China”.⁸⁰ New Zealand views engagement with China and construct a

79 Hopewell, above n 26, at 61.

80 Jane Patterson “Nanaia Mahuta: We take NZ’s relationship with Chian ‘seriously’” *The New Zealand Herald* (online ed, 27 March 2023).

mutually beneficial bilateral relationship, as the best way to manage the security risk.⁸¹ As a result, New Zealand maintains a 'no-surprises policy' with China. This acts as part of these mechanism to prevent them from acting in a way which is seen as offensive to China. New Zealand's communication with China in this sense is strategic.⁸² While this has been prioritised differently by different governments, the maintenance of this relationship to secure a stable trading partnership has been a key issue on both sides in recent years. While this approach has not come without its criticisms, it has proved largely effective to allowing New Zealand to walk a fine line between the two countries and limit their exposure to weaponised trade.

By contrast to New Zealand, Australia has been much more outspoken on these issues and has more closely aligned their position with that of the United States. As the relationship deteriorates further Australia has adopted a harsh *drums of war* rhetoric against China.⁸³ Despite following similar pathways of the course of establishment of their bilateral relationships and respective free trade agreements, this is one area where the two countries have begun to diverge.⁸⁴ Australia has developed a strong political position against China, exposing themselves to these measures in the first place. Whereas New Zealand's more strategic management of the relationship, while not providing complete protection, has shown that it is capable of mitigating the risk. As we the trade war between China and Australia develops, the New Zealand government has been able to learn from the experience in Australia to learn how to build and strengthen the strategies that have been proven to prevent trade from being used as a political weapon.⁸⁵ New Zealand's balancing of both relationships has shown an acknowledgement of the inherently political nature of the trade measures, and is sensitive to the influence that geopolitics is increasingly having on how states view their trade with others.

81 New Zealand Government "Prime Minister to Visit China to meet with Leaders" (press release, 25 March 2019).

82 Corey Wallace "Australia and Aotearoa New Zealand's Layering of Strategic Relations" (2021) 45 *Asian Perspective* 587. at 609.

83 Mike Pezzullo, Secretary, Department of Home Affairs "The Longing for Peace, the Curse of War" (ANZAC Day Message, 25 April 2021).

84 Wallace, above n 82, at 588.

85 Wagner, above n 5, at 9.

However, New Zealand still acknowledges the need for trade diversification. As previously discussed, a large number of key exports for New Zealand provide low levels of leverage in trade relations with China while also being focused largely on the Chinese market. This makes New Zealand particularly susceptible to weaponised trade from China. As a result, there has been growing recognition in New Zealand for better levels of trade diversification. This has been echoed in the recent sentiments of the Labour government and Prime Minister Hipkins who wants to make sure New Zealand has a diverse network of trade relationship. This has been evident in New Zealand's recent efforts to further develop their trade networks including the recent establishment of a free trade agreement with United Kingdom and the European Union. If this can be achieved, New Zealand can be better protected from the economic harm that results from these policies.

B Dealing with Weaponised Trade as a Trend in the International System

Furthermore, New Zealand has participated in action to achieve a broader reaching change in relation to economic coercion and weaponised trade. New Zealand is a strong supporter of the regional and international institutions because of the way that they allow for New Zealand to ensure their interests are heard. In the case of weaponised trade, the WTO, while there is the ability to promote open and transparent trade this is currently being abused by larger powers in the system. Therefore, in order to resolve these issues New Zealand has required to take an active stance in respect of this position and work with others to create agreement as to ensuring that there is a legal framework to prevent against weaponised.

As a small state New Zealand benefits from an environment ensures states operate in accordance with agreed upon multilateral rules. Because of this New Zealand has taken an active interest in WTO dispute settlements, where relevant to weaponised trade, joining as a third party to proceedings.⁸⁶ Additionally, New Zealand issued a third party statement in relation to *DS543 United States – Tariff Measures on Certain Goods from China*, raised in

86 New Zealand Foreign Affairs & Trade “Current Disputes”
<https://www.mfat.govt.nz/en/trade/trade-law-and-dispute-settlement/current-wto-disputes/>.

respect of United States tariffs imposed under s301 of the US Trade Act 1974.⁸⁷ New Zealand’s statement did not specifically speak to support for the interests of one state or the other. Rather New Zealand’s interest in this dispute was to advocate for the “preservation of the role of the multilateral rules-based global trading system”.⁸⁸ They saw this as being under threat due to “unilateral trade action, taken by multiple members, in order to influence other Member’s trade practices”.⁸⁹ They also see a further risk for weaponised trade policies to spread if they are continued to be permissible, because it disincentivises others to comply.⁹⁰ This third party statement reiterates New Zealand’s commitment to multilateral rules, and the threat that weaponised trade poses to this. They acknowledge the extent to which this a broad reaching issue, and not confined to one or a few particular countries.

Recently, New Zealand has further demonstrated this position through its endorsement of the ‘Joint Declaration against Trade-related economic coercion and non-market policies and practices’, released on 8 June 2023.⁹¹ The declaration was endorsed in recognition of the way that current trade behaviour has undermined the rules-based trading system and affirms a commitment to better deter this behaviour.⁹² In particularly the countries party to the declaration, being Canada, Japan, New Zealand, Australia, the United Kingdom and the United States, are concerned with the “use...of, measures affecting trade...to pressure, induce, or influence a foreign government into taking, or not taking, a decision or action in order to achieve a strategic political or policy objective”.⁹³ In light of this the declaration

87 *United States – Tariff measures on certain goods from China* at 1.9.

88 *United States – Tariff measures on certain goods from China* 30 October 2019 (Third Party Oral Statement of New Zealand), at 2.

89 At 5.

90 At 7.

91 New Zealand Foreign Affairs & Trade “Joint Declaration Against Trade-Related Economic Coercion and Non-Market Policies” (9 June 2023) <<https://www.mfat.govt.nz/en/media-and-resources/joint-declaration-against-trade-related-economic-coercion-and-non-market-policies-and-practices/>>

92 New Zealand Foreign Affairs & Trade, above n 91.

93 New Zealand Foreign Affairs & Trade, above n 91.

indicates that combating this will require the address to have the appropriate support to be addressed within the WTO, particularly in the dispute resolution process.⁹⁴

VI The Future of Weaponised Trade

The way that states have responded to this issue that indicates that weaponised trade is has both a legal and a political problem. New Zealand's management of the issue in particular acknowledges the dominance of the political element over the legal. The way that New Zealand has responded to weaponised trade reflects the strong influence that the geopolitical dynamics play in shaping how countries view their understanding of their legal obligations. It is therefore clear that countries that choose to engage in weaponised trade policies will disregard the norms of international law if in doing so that can make more easily justify the actions that they choose to take.

New Zealand's careful management of their relationships demonstrates an acknowledgement of the risk due to the power that the United States and China hold over them economically. The fact that these states have economic leverage over them. For example, New Zealand's decision to join the joint declaration was criticised by the Chinese Embassy in New Zealand. They argued that the joint did not reflect an "independent judgment" and implies that those who are party to the agreement of hypocrisy.⁹⁵ Following these criticisms, there was concerns in New Zealand about how this would affect relationships with China, especially in light of an upcoming Prime Ministerial visit to China. It reflects that the way that weaponised is primarily an issue of relationships. Any issue relating to power and the concerns with its use that exist in the context of weaponised trade, will arise in attempts to achieve a legal solution.

The issue of weaponised trade, while having economic consequences, is primarily a political issue. This is because of the way that it is implemented to retaliate against another

94 New Zealand Foreign Affairs & Trade, above n 91.

95 The Embassy of the People's Republic of China in New Zealand "Statement by the Spokesperson of the Chinese Embassy in New Zealand on Issue of "Economic Coercion" (press release, 11 June 2023).

state as a result of some form of political tension. When weaponised trade is invoked, it gives power to the state that with the economic upper hand allowing them to leverage that power. To this extent, their conceptualisations of international law become more important than the letter of the law itself. Particularly as states continue to utilise the grey zone, there comes the ability to reshape the norms that underpin international trade.⁹⁶

China in particular has had a record of selective compliance with international law. China has often expressed concern with the dominance of western norms within international law standards.⁹⁷ While China has largely complied with their obligations as a WTO member, this has not necessarily indicate satisfaction with the norms that underpin these obligations. As China's economic influence and assertiveness has grown over the years, so has its ability to express their dissatisfaction with the strong Western foundation of the rules and norms of international trade. As a result, China's compliance with these the rules of international trade has been described as "creative compliance" in which they adhere to the rules through a careful analysis of the situation and finding opportunities to exploit legal vagueness and existing loopholes.⁹⁸ In doing so China can both achieve its economic integration into the trade order that secured its growth, while ensuring the protection of its own domestic policy.⁹⁹ China's adoption of weaponised policies reflects this view – compliance with the letter of the law, but not the spirit of what it intends to achieve.¹⁰⁰

A similar position could be said to be held by the United States. Particularly as China's economic growth continues to rival that of the United States. As China has grown in economic power, so has the United tendency to adopt weaponised trade measures. In doing so the United States have continuing advocate for their understanding of the laws applicable to weaponised trade. Such an understanding allows the United States to maintain

96 Mazarr, above n 10, at 10.

97 Tim Ruhlrig *How China approaches international law: Implications for New Zealand* (European Institute for Asian Studies, 2018) at 2.

98 At 9.

99 Mattew Parry and Ulrich Jochhiem *China's compliance with selected fields of international law* (European Parliamentary Research Service, 2021), at 3.

100 At 3.

an authoritative position as it limits the opposition to their weaponised trade measures. This likely reflects an attempt by the United States to assert their dominance within the system and the control that they have over it.¹⁰¹ This assertiveness has been reflected in the way that they have chosen to flout international law and use their position to further influence a favourable economic environment. Enforcement of outcomes at the WTO rely on states acceptance of their obligations at international law, but what the case of weaponised trade has indicated is that this is something that neither the United States nor China currently accepts.¹⁰²

Therefore, while these states seemingly comply with the obligations that they have at international law, their economic leverage allows them to bypass the end to comply the underpinning spirit of the law. These difficulties exist would likely exist even in the event that these international law was amended in an attempt to better encompass these measures. This is because of the use of the legal grey-zone. The spectrum of behaviour that is encompassed by weaponised trade cannot be easily captured. Additionally, as discussed, the lines between what is and isn't a weaponised trade practise can easily be blurred because they are not necessarily limited in the outcomes that they produce. This blurring of lines within the grey zone is something that states like New Zealand are increasingly having to deal with. It is likely that this will continue to shape the way that states interact as military based conflict becomes less desirable and instead other means of retaliatory actions, such as coercive trade measures appear more effective.

VII Conclusion

This discussion has sought to demonstrate that the fundamental characteristics of weaponised trade are closely associated with the difficulty of assessing the compliance, or lack thereof, of weaponised trade measures with international law obligations. As a grey-zone tactic, weaponised trade is able to be compliant with the letter of the law even if it does not necessarily comply with the spirit of the law. Because of the important connection that trades has to geopolitical power, these countries are able to maintain a position of

101 Shaffer, above n 65, at 628.

102 Hopewell, above n 26, at 62.

power that allows them to argue for a narrative that supports the actions that they have chosen to take. In doing so, they have made use of the legal grey-zone in which weaponised is able to sit.

The key threats for New Zealand, being the United States and China, have both demonstrated that they seek to use trade measures to exert their dominance not only within trade spheres, but also within the international system. It is clear the current WTO rules have been inefficient to prevent China and the United States using weaponised trade as a form of political retaliation.¹⁰³ While the issue is more sorely felt by smaller and middle powers, it is difficult to see how stronger international legal standards could give small powers leverage about the larger states who are using them. It goes back to the reason why these policies are effective – they are used by states who have power and leverage, against those who are dependent on them. New Zealand’s view, as indicated by their third-party statement in DS543 and the participation in the 2023 Joint Declaration, demonstrates a desire to develop global trade rules in order to prevent themselves and others from the use of arbitrary power by larger states.

However, those who are choosing to engage in weaponised trade are already choosing to do so in violation of the rules and norms of the international system. The ability to be compliant with international obligations means that states are able to more easily disregard these norms and instead challenge them. Particularly due to the grey-zone nature of weaponised trade such a solution at international law is unlikely to be reach. As the lines between acceptable and unacceptable trade practice continue to blur it will become more and more difficult to judge the compliance of these practises.

The use of grey-zone warfare is instead best regulating through political means. The aims of the policies are primarily political, rather than trade based. Therefore, they are of an extra sensitive nature, and thus better dealt with through political solutions, rather than

¹⁰³ At 62.

purely legal. To attempt to resolve this issue through a WTO legal process, neglects to acknowledge the geopolitical context that caused the issue in the first place.

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