

WORKING PAPER

Beyond non-regression: Mainstreaming climate action into FTAs

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[Emily Lydgate](#) ^[1]

Abstract

While integrating climate objectives into FTAs remains unusual, it is an area of rapid innovation. This chapter focuses on EU and New Zealand, both of whom have used FTAs to support climate-related goals. The EU has increased the enforceability of requirements to uphold the Paris Agreement and domestic climate regulation, while New Zealand has used FTAs to further regulatory cooperation, emphasizing fossil fuel subsidy reform. The UK also features in the analysis as a country that has completed recent FTAs with both. Innovative FTA provisions between countries who self-identify as climate leaders may appear limited in their scope and influence: outliers rather than frontrunners. However there is evidence to suggest they have already contributed to broader climate cooperation, and can do so further, by: propelling discussion other fora, including the WTO and Paris Agreement; addressing technical challenges for climate cooperation across different regulatory systems; breaking down silos between trade and climate agreements; and furthering a learning process about effective models for achieving climate cooperation through trade.

Introduction

As of September 2022, 140 countries, covering 90% of global emissions, have agreed or are considering seriously net-zero CO₂ emissions targets.^[2] Successful implementation of net-zero targets implies significant reform of countries' trade strategies and patterns. Broadly speaking, countries will need to increase trade and investment in low-carbon goods and services, and decrease trade and investment in high-carbon goods and services. Free Trade Agreements clearly have the potential to play a supporting role in this process. For example, they can remove tariffs between Parties on goods that support climate change mitigation and adaptation, and liberalise services in this area. They can increase regulatory cooperation to overcome trade barriers based on differing regulation and standards, such as energy efficiency standards or approaches to carbon pricing. They can support technology transfer and innovation. Or they can also address concerns about asymmetric costs of climate regulation between countries and the need to level the playing field between producers.^[3] In practice, such opportunities for alignment between FTA and climate objectives remain relatively undeveloped. A 2021 WTO analysis concludes that only 18% of FTAs notified to the WTO refer to climate change, global warming, greenhouse gas emissions or low emissions economy. It concluded that 'compared to other environmental topics, such as biodiversity or sustainable fishery or forestry management, specific provisions on climate change are relatively fewer and less detailed.'^[4]

Some of the largest FTAs, including the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), the Agreement between the United States of America, the United Mexican States, and Canada (USMCA) and the Regional Comprehensive Economic Partnership (RCEP), do not mention climate change by name at all. Failure to endorse climate change mitigation or adaptation as an explicit objective does not preclude its inclusion in some form. For example, CPTPP supports climate-related objectives by encouraging Parties to cooperate in support of transition to a low-emissions economy in a way appropriate to their domestic circumstances and capabilities.^[5] But refusal to identify climate change by name in an FTA clearly limits its ability to support mitigation and adaptation as a core strategic objective.

The lack of widespread integration of climate objectives into FTAs results from several factors. First, trade agreements are traditionally understood as supporting primarily trade and economic objectives, with environment integrated in the form of flanking measures.^[6] More specifically, environmental goals have been represented in many FTAs, including those of the US and EU, only through broad best endeavours clauses to uphold high levels of environmental protection, agreement to adhere to relevant multilateral environmental agreements and so-called non-regression clauses through which Parties promise to uphold and enforce existing domestic environmental laws (which include by default climate legislation).^[7] The latter are animated by concerns about preventing competitive deregulation that takes place in order to benefit trade and investment.

FTAs have also traditionally recognised countries' ability to pursue climate-related regulatory objectives as an exception to non-discrimination obligations, and often incorporate by reference GATT Article XX, which provides WTO parties a right to regulate in order to achieve public interest objectives, if particular criteria are met. These include regulations which are 'necessary to protect human, animal or plant life or health'.^[8] The exception provides some support for countries' introduction of trade-restrictive national climate regulation, but does not position climate change mitigation as a shared objective.

Second, elevating the importance of climate objectives in an FTA beyond the status of non-regression obligations, or exceptions to the rules, requires consensual commitment by FTA partners. While almost all countries have agreed in principle on the need to limit global warming to 1.5 degrees C in the context of the Paris Agreement, the speed and the means by which they contribute to this objective vary, and are informed by countries' level of development, their domestic political leadership, and other factors. Third, global recognition of the climate crisis is an emerging norm, and many FTAs were negotiated before countries agreed to their current levels of commitment to climate action. This also means that the inclusion of climate provisions in FTAs is an area of relatively rapid innovation. Distinct features are emerging of an EU-led and New Zealand-led approach. The EU's approach emphasizes 'mainstreaming' sustainability objectives, including climate objectives, throughout FTAs, and introducing stronger enforcement mechanisms to reinforce commitment to climate action. New Zealand's approach has focused on regulatory cooperation, particularly through commitments to phasing out harmful fossil fuel subsidies. Both have moved to increase the prominence of climate objectives in Free Trade Agreements. The chapter foregrounds recent FTAs which showcase these new strategies: the UK-EU Trade and Cooperation Agreement (2020), UK-New Zealand FTA (2022) and EU-New Zealand FTA (2022) and the ACCTS (in negotiation). The UK features prominently as a country which been active in its FTA negotiations after leaving the EU, and which shares a relatively ambitious approach to domestic climate action. In the conclusion I argue that the innovations that they introduce have larger relevance for international climate and trade cooperation.

The EU approach: embedding the 'fight against climate change' in FTAs

Background and context

In its regional integration, the EU has increasingly emphasized the need to ensure that market opening does not create competitive disadvantages for EU producers stemming from non-traded inputs, including low environmental standards.^[9] To achieve a level playing field, the EU-Ukraine DCFTA, for example, requires Ukraine to align not only with EU product standards, but also regulations covering air quality, climate change and environmental impact assessment, among others.^[10] The EU's approach to more distant trade partners with which regulatory harmonization remains minimal has differed, but is animated by a similar concern: securing a favourable climate for EU producers by preventing competitive deregulation. Since 2009, the EU has negotiated dedicated Sustainable Development chapters which include obligations not to reduce levels of protection, often referred to as non-regression or non-derogation clauses. For example, Article 13.7(2) of the EU-Korea FTA states that:

A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties.^[11]

Not all environmental regulation is equally likely to provide a competitive advantage. The requirement not to lower environmental standards is bounded in scope to regression that results from, or affects, trade or investment. Article 1:2(a) of the EU-Korea FTA also identifies one of the objectives of the agreement as: 'to promote foreign direct investment *without lowering or reducing* environmental, labour or occupational health and safety standards in the application and enforcement of environmental and labour laws of the Parties'. [emphasis added]

TSD chapters also often include best endeavours clauses; in the EU-Canada Comprehensive Economic and Trade Agreement ('CETA'), Parties '...shall seek to ensure [their] laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve such laws and policies and their underlying levels of protection.'^[12] Such commitments are self-evidently broad and aspirational. Core components include affirmation of both Parties' intention to effectively implement existing Multilateral Environmental Agreements to which both are Parties, and to guarantee public participation in environmental regulatory and decision-making processes and access to environmental remedies.^[13]

In the past, the EU has excluded trade and sustainable development (TSD) chapters from state-to-state dispute settlement mechanisms. Instead, disagreements are subject to consultation. If there is no settlement, a panel of experts will be convened, which can examine failure to comply with obligations and make non-binding recommendations.^[14] Thus countries cannot suspend concessions for non-compliance. Marx, et al., argue that 'the main added value of TSD chapters may ... not lie in the 'harmonisation' of social and environmental standards between the partners, but rather in fostering dialogue and cooperation to achieve sustainable trade in the long run.'^[15] EU FTA commitments have been characterized as 'cooperative' because they function largely through the FTA's establishment of monitoring bodies. For example, CETA establishes a Committee on Trade and Sustainable Development (CTSD) of high-level officials from both countries who monitor implementation of CETA TSD chapters. A Civil Society Forum promotes dialogue and receives reports from the CTSD. CETA also establishes Domestic Advisory Groups (DAGs) of NGO, academic, business and trade union representatives. EU non-regression clauses have often been criticised on a number of grounds, including their lack of targeting to the specific circumstances in participating countries, their lack of enforcement and lack of adequate support for the Domestic Advisory Group that is formed to help facilitate environmental cooperation.^[16]

Reforms to EU strategy

The EU has indicated that it will strengthen the role of sustainability in its FTAs, including stronger integration of climate aims. In June 2022 the Commission produced a Communication, 'The power of trade partnership: together for green and just economic growth', which presents a new FTA strategy.^[17] The EU's strategy elevates the importance of climate action. Most significantly, it further develops the proposal set out in the Commission's Green Deal^[18] to impose sanctions on FTA parties for non-compliance with the Paris Agreement:

The Commission now proposes the possibility of trade sanctions as a matter of last resort, in instances of serious violations of core TSD commitments, namely the ILO fundamental principles and rights at work, and of the Paris Agreement on Climate Change. In such instances, trade sanctions would be appropriate as a means to foster compliance. In the case of the Paris Agreement, the intention would be to capture failure to comply with obligations that materially defeats the object and purpose of the agreement.... This approach will build on and reinforce the respect of core labour rights and of the Paris Agreement as essential elements of our trade agreements.

The Paris Agreement relies upon participating countries to define their own contribution to reducing emissions. In this sense, the likelihood of being able to establish that either Party took actions that would 'materially defeat the object and purpose of the Paris Agreement', short of withdrawal from the Agreement itself, seems unlikely.

However, at least symbolically, the elevation of climate change to an essential element is significant. With reference to the Vienna Convention on the Law of Treaties (VCLT), it means that either Party can partly or fully suspend the agreement if it is breached.^[19] In sum, the proposal positions climate change inaction as a basis for unilateral FTA suspension, elevating its status to accompany traditional EU FTA 'essential elements' of democratic principles, the rule of law and human rights.

As part of a commitment to 'mainstreaming' sustainable development objectives into FTAs, the document also states that the EU will 'prioritise market access for environmental goods and services, in particular in the area of renewable energy and energy efficiency, for instance through addressing tariff and non-tariff barriers, as well as access to and investment into raw materials and goods needed for the green transition.' It will also use sustainability impact assessment to support a more holistic and country-specific approach to integrating sustainability objectives, including on climate, into FTAs.^[20]

The UK-EU TCA [TCA]

Though negotiated before the Commission's new FTA strategy was published, the TCA, which came into force in May 2021, has already put into practice some of the recommendations above. Like past FTAs, the TCA relies upon non-regression as a mechanism to guarantee that Parties will maintain environmental protection. But it departs from existing FTA non-regression requirements, which remain thematically open-ended. Instead, it specifies quantitative climate-related regulatory commitments which must be maintained, and which take reference in shared domestic (rather than international) commitments. It also has much stronger enforcement mechanisms, which uphold the non-regression commitments, but also a shared commitment to the Paris Agreement. These changes take the form of five distinct innovations.

Innovation 1: 'Fight against climate change': an essential element of the Agreement

In keeping with the new EU FTA strategy, the very first sentence in the TCA Preamble affirms that the 'fight against climate change' is an essential element of the agreement, acting as a guiding principle for the whole agreement. The chapter establishing the 'Basis for Cooperation' for the TCA also affirms that 'climate change represents an existential threat to humanity', and gives this 'fight' a material form as a requirement to 'respect the Paris Agreement and the process set up by the UNFCCC and refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement.'^[21]

Innovation 2: Affirming a shared net-zero target

The TCA reaffirms both Parties' ambition for 'economy-wide climate neutrality by 2050,' [22]

the first time that a shared net-zero emissions commitment was integrated into an FTA. This commitment is phrased as an 'ambition' rather than a target or objective, and there is no specific outcome duty attached to it. While either Party can initiate a dispute for non-compliance with this requirement, there is no option for sanctions.^[23] Instead, the enforcement process parallels the EU's standard FTA enforcement model, as described above in the example of CETA. However, it establishes an expectation for climate planning and action that is quantitative, measurable and long term as one of the 'principles and objectives' of the Level Playing Field requirements of the TCA.

Innovation 3: the inclusion of interim climate reduction targets

As well as the general objective of maintaining a climate neutrality ambition, the TCA includes a commitment to uphold both Parties' 'climate level of protection' as set out in interim greenhouse gas reduction targets. This includes specific quantitative interim targets that both Parties have committed to in domestic legislation. These targets do not reflect both sides' increased climate ambition after committing to net-zero targets. Thus the 40% reduction by 2030 target has been revised up to 55% in EU and 68% in UK. However integrating quantitative climate benchmarks into an FTA is novel, and the targets are covered by the non-regression requirement, such that, if an arbitral tribunal agrees that regression has occurred, either Party can apply sanctions.^[24]

Innovation 4: commitment to effective carbon pricing

The Parties also commit to non-regression on upholding an 'effective system of carbon pricing'. This requirement is also linked to binding dispute settlement. Parties shall 'give serious consideration' to pursuing linked ETS schemes.^[25] This situates dialogue on carbon pricing effectiveness within the institutional framework of an FTA and its implementing committees, notably the Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development.

Innovation 5: Rebalancing mechanism

The TCA outlines a so-called 'rebalancing' mechanism, which specifies that 'significant divergences in [climate protection] can be capable of impacting trade or investment between the Parties in a manner that changes the circumstances that have formed the basis for the conclusion of this Agreement....If material impacts on trade or investment between the Parties are arising as a result of significant divergences ... either Party may take appropriate rebalancing measures to address the situation.'^[26] Like the essential elements clause, this invokes VCLT, under which a fundamental change of circumstances is a grounds for terminating or withdrawing from a treaty.^[27]

The mechanism defines two processes, one dealing only with the areas of subsidy control, labour and social standards and environment and climate, and a second dealing with any issue arising from any trade provision.

This mechanism is accompanied by a bespoke fast-tracked dispute settlement process. The rebalancing mechanism also provides for reviews of the whole of the trade provision in the TCA that could end in its termination. These can be triggered by either party every four years if it feels the arrangement has become unbalanced or more frequently if “measures [on subsidies, labour or environment, including climate protection] ... have been taken frequently by either or both Parties, or if a measure that has a material impact on the trade or investment between the Parties has been applied for a period of 12 months.”

Whilst the non-regression requirements typically focus on preventing the deregulation of current environmental standards, rebalancing addresses divergence in future policies and priorities. This provides a mechanism for approximate alignment of environmental ambitions. Rather than providing for active harmonisation or regulation, it functions through the threat of suspension of all or part of the TCA’s trade provision for failure to keep pace.

Analysis: Convergence without harmonisation: an outcome benchmarking approach

The overall approach of the TCA might be described as outcome benchmarking.^[28] It combines high-level ambitions with specific quantitative targets underpinned by strong enforcement mechanisms, with the potential for sanctions from the failure to keep pace with future levels of climate protection. This provides a hybrid between the alignment with environmental legislation required in ‘deep’ EU Association Agreements and the EEA Agreement, and non-regression requirements that the EU has negotiated in its ‘shallow’ trade agreements with countries such as Canada and Korea.

These innovations are significant. In contrast with ‘shallow’ FTA Trade and Environment chapters described above, it moves beyond the dual approach of reaffirming international standards and existing domestic regulation as benchmarks. Instead it embeds a small number of specific benchmarks. These are mostly quantitative in nature, or in the case of carbon pricing have a quantitative result (ETS price), making compliance assessment relatively concrete and objective, though the carbon pricing commitment to ‘effectiveness’ retains significant interpretative complexity.

The inclusion of a keeping pace requirement is also innovative, both from an international trade perspective and also an international environmental law one. Broadly defined, non-regression in international law encompasses any commitment not to lower existing levels of protection. It is not a widely-recognized principle of international law.

However, based on its inclusion in the Paris Agreement and the Rio + 20 Declaration, a growing movement of academics and international lawyers have argued that there is a sufficient basis for it to comprise an emerging principle of international environmental law.^[29]

One critique of non-regression is that it fixes expectations of environmental protection at the point where a treaty was agreed. The TCA addresses this issue through its inclusion of the rebalancing mechanism which includes the expectation that Parties will dynamically update.

The contentious nature of negotiations is evident through the many enforcement mechanisms that underpin agreed climate benchmarks. The novel nature of these provisions makes their interpretation highly unpredictable. The Rebalancing mechanism relies upon the interpretation of several concepts which have no precise equivalents in existing EU treaties, such as whether 'significant divergence' has had a 'material impact on trade and investment.' In its justification of rebalancing measures, a party is required to show that a proposed response is 'strictly necessary and proportionate in order to remedy the situation', and the tribunal would need to decide what the situation was that required 'remedy.' Rebalancing measures are not defined. In practice, this means that an arbitral tribunal required to interpret them would hold significant influence..

New Zealand: Climate and trade agreements, and fossil fuel subsidies

The ACCTS

Like the EU, New Zealand has also elevated the importance of climate objectives in recent FTAs. Indeed, New Zealand has gone further than the EU, by leading negotiations for the first FTA that explicitly defines its objective as climate-related: the Agreement on Climate Change, Trade and Sustainability (ACCTS), announced in September 2019, in partnership with Fiji, Iceland, Norway and Costa Rica.

The centrality of climate-related objectives is clear not only from the name of the FTA itself, but also in the Joint Leaders' Statement on its launch, in which the Prime Ministers of ACCTS countries made clear that its purpose is to aid in achieving the aims of the Paris Agreement.^[30] In subordinating trade aims to climate aims, the ACCTS has flipped the hierarchy of traditional FTAs, in which climate or environmental aims are included as flanking measures. In so doing, regardless of its ultimate success in facilitating the low-carbon transition, the ACCTS has provided an innovative model which goes beyond any existing FTA in mainstreaming climate objectives into a trade agreement. Uniquely among the FTAs considered in this chapter, the ACCTS also includes signatories from both developed and developing countries.

The ACCTS aims to support the Paris Agreement through identifying areas in which trade-related measures can reinforce climate action. These include three core objectives: removal of tariffs on environmental goods and new binding commitments for environmental services, introducing disciplines to eliminate harmful fossil fuel subsidies, and developing guidelines on voluntary eco-labelling programmes.^[31]

The negotiation of the ACCTS is ongoing, and the only information in the public domain is a periodic high-level summary of progress, but New Zealand has also undertaken related innovations through recent FTAs with the UK and the EU, examined below.

The UK-New Zealand and EU-New Zealand FTA

New Zealand's FTAs with the UK and the EU reveal its approach to climate cooperation through more traditional FTAs. The UK-New Zealand FTA contains a few climate-related firsts. These include the most comprehensive list of environmental goods being liberalised of any FTA to date^[32] (a less notable achievement given that the FTA eliminates all tariffs between the parties, though some on a slower timescale).^[33] Also, like the UK-EU TCA, the FTA is also one of the first to reference Parties' net-zero by 2050 ambition, and sets out that they will pursue efforts to limit warming to 1.5 degrees C above pre-industrial levels.^[34] Unlike the TCA, this is a high-level commitment not tied to dispute settlement.

Most notably, the FTA contains unprecedented commitments on fossil fuel subsidy reform, including through a dedicated article, in which Parties agree to 'take steps to eliminate harmful fossil fuel subsidies where they exist, with limited exceptions in support of legitimate public policy objectives'. It affirms both sides' commitment to the Powering Past Coal Alliance, and commits both to ending new direct financial support and export credits for fossil fuel energy, except in narrow circumstances.^[35]

The EU-New Zealand FTA, signed less than a year later, also contains commitments on fossil fuel subsidy reform, but the language is weaker: rather than eliminating, it commits both Parties to 'progressively reducing fossil fuel subsidies.' They also 'reaffirm their commitment to work to meet this objective in accordance with national circumstances, while taking fully into account the specific needs of populations affected.' The EU-New Zealand FTA also affirms the Parties' commitments to the Paris Agreement, which is included as an essential element of the FTA, but does not reiterate their ambition to net-zero emissions by 2050.^[36]

Analysis: The scope and force of FTA obligations on fossil fuel subsidies

As part of the Cairns Group of agricultural exporters, New Zealand has long been an advocate of the elimination of trade-distorting domestic agricultural subsidies, and more recently has become an international leader advocating reduction of fossil fuel subsidies, as discussed further in the conclusion.^[37] The novel nature of these FTA obligations on fossil fuel subsidies, and the differences in phrasing between the EU-New Zealand FTA and UK-New Zealand FTA, prompt further reflection on their interpretation and legal weight.

As set out above, key differences include that, in the former, Parties agree to 'progressively reducing' them, the latter, 'eliminating' them, the former describes them as 'inefficient' fossil fuel subsidies, the latter, 'harmful', and both commitments are qualified, but in different ways: in the UK-New Zealand FTA there are 'limited exceptions in support of legitimate public policy objectives', while in the EU-New Zealand FTA, there is a broader carve out responding to national circumstances and taking into account the needs of local populations.

On first glance, the UK and New Zealand have made much stronger commitments: elimination versus reduction, with narrower exceptions. However, this conclusion is complicated by the different ways that countries measure fossil fuel subsidies. The UK adopts the methodology of the International Energy Agency, based on a 'price-gap' approach, which examines the difference between a benchmark price and the price offered to consumers. As a result, the UK Government asserts that it does not provide any fossil fuel subsidies.^[38] In contrast, the EU and the OECD adopt an inventory approach, that includes direct government support and tax expenditures.^[39] The implications are significant: the OECD considers the UK fossil fuel tax regime to include subsidies, and a Commission report in 2016, just before the UK left the EU, concluded that it was the largest provider of fossil fuel support in the EU.^[40] In contrast, while New Zealand has faced controversy about its climate commitments, particularly its high agricultural emissions,^[41] its international leadership on fossil fuel subsidies reflects its lack of defensive interest in this area, and its domestic commitment to subsidy phase-out. The FTA commitment does not establish any particular criteria for defining fossil fuel subsidies, leaving that to the discretion of Parties. Thus it does not require the UK to change any of its current practices. This underscores the strategic importance of a common definition for fossil fuel subsidies, and the influence that a stricter definition would have in increasing the legal weight of the commitment.

Similarly, the UK and New Zealand have already agreed to phase out export finance for fossil fuel development, so while it is ground-breaking to include this in an FTA, it does not bind them to undertake anything beyond what it has already agreed domestically. There are additional sources of interpretative ambiguity that would seem to weaken the legal weight of the commitment. First, in order to be relevant, fossil fuel subsidies must be 'inefficient' (EU FTA) or 'harmful' (UK FTA). The term inefficient has been used more broadly in fossil fuel subsidy commitments, as detailed below. Commitments to phase out environmentally harmful subsidies have been discussed in multilateral fora, such as the WTO in the context of fisheries subsidies, so the use of the term 'harmful' may be intended to create continuity with these discussions.^[42] In either case, not all fossil fuel subsidies are covered, but only some, and the criteria for their identification remain discretionary. Further, both commitments contain an implicit proportionality element: countries are able to provide subsidies if they meet unspecified public policy and public interest objectives. When viewed together, all these factors make it appear unlikely that either side could successfully demonstrate that the other had failed to meet its obligation. Despite these limitations to the transformative value of the commitment, it is still a significant advance in integration of trade and climate objectives, with wider ramifications examined below.

Conclusion: The influence of FTA innovation on broader trade and climate cooperation

There is common ground between the FTAs examined in this chapter; all include elements of regulatory cooperation as well as liberalisation of environmental goods and services, but the EU has amplified obligations on levelling the playing field for climate regulation, and New Zealand has focused on commitments to fossil fuel subsidy reform. The innovations documented above are limited to a few countries, and could be dismissed as unrepresentative of overall trends. However, they likely influence cooperation on trade and climate more broadly, through at least four different means, detailed below.

Propelling discussion other fora, including the WTO and Paris Agreement

First, they help inform and propel plurilateral/multilateral initiatives. The clearest example is New Zealand's advocacy of elimination of fossil fuel subsidies. As well as emphasizing fossil fuel subsidy reform as an objective of the ACCTS and in its FTAs with the UK and EU, it has led the Friends of Fossil Fuel Subsidies Reform, which, together with the UK as host of the COP26 in 2021, issued a statement calling for 'support for accelerated action to eliminate fossil fuel subsidies.'^[43] In November 2021 at COP 26, the Glasgow Climate Pact, pursuant to the Paris Agreement, called upon Parties to 'accelerate efforts towards the phasedown of unabated coal power and the phase out of inefficient fossil fuels subsidies.'^[44] In December 2021, a group of 45 WTO Members proposed a Fossil Fuel Subsidies Ministerial Statement 'seeking the rationalisation and phase out of inefficient fossil fuel subsidies that encourage wasteful consumption along a clear timeline.'^[45] Through these initiatives, fossil fuel subsidies reform has become a part of the negotiating agendas of the WTO and Paris Agreement. Inclusion in the Glasgow Climate Pact is particularly significant due to its multilateral scope, with almost 200 signatories, and was considered one of the COP 26's most significant accomplishments.^[46] While the causal relationship between FTA and pluri- or multilateral action is difficult to pin down precisely, New Zealand's efforts to promote fossil fuel subsidies reform through multiple channels likely mutually reinforce each other. It sets out a strategy for how the two interact; with respect to the ACCTS, it writes:

We consider that there is an important role for plurilateral agreements like ACCTS to play as a pathfinder and template for action. Our vision is that ACCTS will demonstrate in practical terms how trade rules can support climate and broader environmental objectives while generating momentum towards an eventual multilateral set of solutions.
^[47]

The Commission's FTA strategy also interacts with multilateral climate commitments, primarily through reinforcing existing commitments. It positions multilateral environmental agreements as a 'compass' for its FTA strategy, and states that its strategy for Trade and Sustainable Development commitments in FTAs, including on climate, will be 'anchored' in multilateral agreements and cooperation.^[48] Through the incorporation of the Paris Agreement as an essential element of FTAs, the EU uses its negotiating influence to reinforce existing international commitments to address climate change, introducing additional diplomatic and economic pressure for EU trade partners to implement existing decarbonisation plans.

Addressing technical challenges for climate cooperation across different regulatory systems

Another way in which FTA climate provisions can influence pluri- or multilateral action is by helping to bridge the divide between distinct approaches to national regulation. As set out above, fossil fuel subsidies are to some extent in the eye of the beholder. Establishing a shared definition would aid greatly in efforts to benchmark meaningful national action. At the time of writing, the most recent round of negotiations for the ACCTS aims to address this issue, and included presentations from the OECD and IEA on how to define fossil fuel subsidies.^[49] Achieving progress between smaller groups of countries may have a demonstration effect which can help unlock wider cooperation and add to greater transparency on global fossil fuel subsidy use. (Certainly, as the UK-New Zealand FTA demonstrates, the absence of an agreed definition may permit a relatively unambitious approach to self-declaration of such subsidies, a general risk with international climate cooperation.)

Technical cooperation under the remaining two pillars of the ACCTS may play a similar role. While most countries have now agreed to decarbonise, under the Paris Agreement, each determines the policy tools they employ to achieve their self-determined domestic targets. This can lead to unnecessary trade barriers when countries attempt to achieve the same or similar goals in different ways. Eco-labelling is an example: different standards across countries can act as non-tariff barriers that hinder trade of green goods and services. The OECD estimates that there are over 400 different eco-label schemes across 200 countries in 25 industry sectors.^[50] The ACCTS eco-labelling group is attempting to define guidelines for eco-labels to reduce these barriers. Such guidelines could prove useful more broadly. Also, negotiations on environmental goods and services have long been stalled at the WTO, in part because of difficulties with drawing boundaries around the categories.^[51] The ACCTS negotiations include environmental goods and services working groups identifying a common set of environmental goods and environmental services criteria.^[52] Breakthroughs in the ACCTS may propel new proposals in other FTAs or at the WTO.

Breaking down silos between trade and climate agreements and objectives

This chapter began by identifying a failure among many FTAs to integrate climate change objectives, but the lack of integration is also evident in international climate agreements. The Paris Agreement has a voluntary, bottom-up approach whereby countries determine their own national contributions to mitigating climate change. It lacks guidance on how to address the trade implications of decarbonisation. These include the need to cooperate in order to facilitate trade and investment in low carbon goods and services, but also the need to address competitiveness concerns that arise when countries with high climate ambitions introduce costly regulation on their domestic industry. This gives rise to potential for trade conflict and unilateral trade restriction.^[53]

The FTAs documented above break down existing international law silos between trade and climate agreements. An increase in such agreements is likely as countries seek to address competitiveness concerns and promote climate cooperation through trade, evident through new agreements not considered in this chapter, including the Singapore-Australia Green Economy Agreement,^[54] and the Indo-Pacific Framework for Economic Prosperity, which contains 'Clean Economy', including decarbonisation, as one of four pillars,^[55] and the proposed 'Global Arrangement on Sustainable Steel and Aluminium' (GASSA).^[56] While it is very unlikely that the FTAs examined above directly inspired these agreements, they show that the EU and New Zealand are at the forefront of a broader trend.

Learning about effective models and methods for climate cooperation through trade

A final way in which these FTAs contribute to broader climate and trade action is through testing new models of international treaty-making and cooperation. With respect to the TCA, at first glance, it's not surprising that countries that consider themselves to be climate leaders have agreed ground-breaking FTA climate cooperation provisions. But in practice, the so-called level playing field, of which the climate provisions form a part, was one of the most contentious areas in EU-UK negotiations.^[57] Unlike most FTA negotiations, the TCA formalises the UK's divergence from existing EU regulation, rather than attempting to increase alignment. The UK's geographic proximity, importance as a trade partner, and historic integration, led to concerns in the EU about UK competitive environmental deregulation. These concerns encompassed climate-related deregulation.^[58]

Thus, while the TCA arose in response to the unique circumstances of the EU-UK negotiation, it is an experiment with wider significance. The untested nature of its provisions makes its impacts difficult to predict, and the balance it strikes between cooperative and competitive aims skews toward the latter through the emphasis on multiple enforcement mechanisms. But it goes beyond the multilateral and self-determined approach of the Paris Agreement by embedding long-term coordination of high-level domestic climate policy aims, and also departs from the traditional FTA focus on harmonisation or mutual recognition of product standards more narrowly.

A question that hangs over new climate-related trade restrictions, in particular Border Carbon Adjustment, is the extent to which they can be alleviated through new forms of regulatory coordination and cooperation. The TCA provides one potential answer to the question of how countries with differing climate regulation can establish equivalence in their level of climate protection. It provides food for thought for future climate cooperation, including climate clubs.^[59]

The implementation of New Zealand's new FTAs with the UK and EU will also be instructive in understanding how their provisions, in particular on fossil fuel subsidies, will operate in practice. Equally, the failure of these FTAs to achieve their purported aims also provides useful demonstration value for other countries addressing the crucial problem of how to ensure that trade and trade agreements support global decarbonisation efforts.

Footnotes

¹⁴ Reader in Environmental Law, University of Sussex; Centre for Inclusive Trade Policy; Deputy Director, UK Trade Policy Observatory. Email: e.lydgate@sussex.ac.uk. A revised version is intended for publication in a forthcoming edited collection from Oxford University Press, *The Sustainability Revolution in International Trade Agreements*.

¹⁵ <https://climateactiontracker.org/global/cat-net-zero-target-evaluations/> (visited 21/10/2022).

¹⁶ Number of academic articles and policy briefings have set out these possibilities. See, eg: Pascal Lamy, Geneviève Pons, Pierre Leturcq, 'How to Green Trade Agreements,' Jacques Delors Institute, 2020, <https://institutdelors.eu/en/publications/greening-eu-trade-4-how-to-green-trade-agreements/> (accessed 01/11/22); Jean-Frédéric Morin & Sikina Jinnah 'The untapped potential of preferential trade agreements for climate governance' (2018), *Environmental Politics*, 27:3, 541-565; Rafael Leal-Arcas, 'Climate Change Mitigation from the Bottom Up: Using Preferential Trade Agreements to Promote Climate Change Mitigation' (2013), *Carbon & Climate Law Review* 7(1), 34-42.

¹⁷ WTO, Trade and Climate Brief: Information note 2, 3 November 2021. Available at: https://www.wto.org/english/news_e/news21_e/clim_03nov21-2_e.pdf (accessed 21/10/2022).

¹⁸ TPP, Article 20.15 'Transition to a Low Emissions and Resilient Economy'. Available at: <https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/20.-Environment-Chapter.pdf>.

¹⁹ Critiquing this conception in 2007 in the context of the WTO, Lang wrote: 'It is not self-evident, of course, that the major international institution presiding over the global trade system has no business addressing the social and environmental impacts of that system, and that such impacts are not 'trade issues.' Andrew Lang, 'Reflecting on 'Linkage': Cognitive and Institutional Change in the International Trading System, (2007) 70(4) *Modern Law Review*, 537.

²⁰ See, eg: Peter Draper, Nkululeko Khumalo, Faith Tigere, 'Sustainability Provisions in Regional Trade Agreements: Can they be multilateralized?' Overview Paper, July 2017, Inter-American Development Bank and International Centre for Trade and Sustainable Development.

²¹ d.

²² See, eg, Sieglinde Gstöhl, Dominic Hanf, 'The EU's post-Lisbon Free Trade Agreements: Commercial Interests in a Changing Constitutional Context,' (2014), *European Law Journal* 20(6), 733-748.

²³ Association Agreement between the EU and Ukraine, Title V: Economic and Sector Cooperation, Chapter 6: Environment.

²⁴ EU-Korea Free Trade Agreement (entered into force December 2015), Article 13.7.

²⁵ EU-Canada Comprehensive Economic and Trade Agreement (signed August 2014), Article 24.3.

²⁶ See, eg, CETA Articles 24.4, 24.6-7.

²⁷ See European Commission non-paper, 2017, 'Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)'. Available at : http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf (accessed 01/11/22)

²⁸ See Marx, et al., 'Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements', (2016) *Leuven Centre for Global Governance Studies*, 15, 102.

²⁹ See, eg, James Harrison, et al., 'Governing Labour Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters' (2018) *Journal of Common Market Studies* 57(2), 260-277; Axel Marx, et al., above n. 15.

³⁰ The power of trade partnerships: together for green and just economic growth, European Commission, Brussels, 22.6.2022 COM(2022) 409 final. Available at : <https://circabc.europa.eu/ui/group/8a31feb6-d901-421f-a607-ebbdd7d59ca0/library/8c5821b3-2b18-43a1-b791-2df56b673900/details> (accessed 01/11/22).

³¹ See European Green Deal, European Commission, Brussels, 11.12.19, COM(2019) 640 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1596443911913&uri=CELEX:52019DC0640#document2> (accessed 2 July 2022).

³² Pursuant to the Vienna Convention on the Law of Treaties (VCLT), Parties can terminate or suspend a treaty in the event of a material breach, which consists of the violation of an 'essential' provision. Vienna Convention on the Law of Treaties, Concluded at Vienna on 23 May 1969, No. 18232, United Nations, Article 60. <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> (accessed 18 June 2022).

³³ European Commission, above n. 17, at 7.

[21] UK Trade and Cooperation Agreement (TCA) (entered into force 1 May 2021), Title II: Basis for cooperation. Article 764.

[22] XI, Article 355(3).

[23] XI, Article 357; see also Articles 408-9.

[24] XI, Article 390(3), 391.

[25] XI, Article 392.

[26] XI, Article 411.

[27] T, above n. 19, Article 62.

[28] Lydgate, 'Climate equivalence and international trade' (October 2022), Working Paper, EUI RSC, 2022/64, Global Governance Programme-479, [Global Economics]. Available at: <https://cadmus.eui.eu/handle/1814/74966> (accessed 01/11/22).

[29] eg Michel Prieur 'The principle of non-regression', in L Kramer and E Orlando (eds), *Principles of Environmental Law*, (Cheltenham: Edward Elgar, 2018), 251-259.

[30] Joint Leaders' Statement on the launch of the 'Agreement on Climate Change, Trade and Sustainability' initiative, 24 September 2019. Available at: [ACCTS-FINAL-Joint-Statement.pdf](https://www.mfat.govt.nz/assets/ACCTS-FINAL-Joint-Statement.pdf) (mfat.govt.nz) (accessed 28/10/22).

[31] [New Zealand Foreign Affairs and Trade, Agreement on Climate Change, Trade and Sustainability \(ACCTS\) negotiations](https://www.mfat.govt.nz/assets/ACCTS-FINAL-Joint-Statement.pdf) (accessed 01/11/22).

[32] New Zealand Free Trade Agreement (signed 28 February 2022), Article 22.7 and Annex 22a.

[33] FTA's approach to tariff liberalization is summarized in this report: House of Commons Library, 'UK-New Zealand Free Trade Agreement,' 1 November 2022. Available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-9487/> (accessed 01/11/22).

[34] New Zealand FTA, Article 22.6.

[35] New Zealand FTA, Article 22(8)2.

[36] Lack of consistency and published cross-cutting strategy explain why UK FTA strategy did not play a more explicit role in this analysis. For example, the UK's recent FTA with Australia contains no commitments on phasing out fossil fuel subsidies, and there is no mention of net zero targets or carbon pricing. UK-Australia Free Trade Agreement (signed 16 December 2021), Chapter 22.

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[38] <https://questions-statements.parliament.uk/written-questions/detail/2021-12-10/90854>

[39] Imperley, 'Explainer: The challenge of defining fossil fuels' (Carbon Brief, 12 June 2017). Available at: <https://www.carbonbrief.org/explainer-the-challenge-of-defining-fossil-fuel-subsidies> (accessed 15/09/22).

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[41] eg; New Zealand Ministry for the Environment, Available at: <https://environment.govt.nz/facts-and-science/climate-change/agriculture-emissions-climate-change/> (accessed 18/01/22).

[42] eg: WTO (2022), Implementing the WTO Agreement on Fisheries Subsidies: Challenges and Opportunities for Developing and Least-Developed Country Members, available at: https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/implementationfishagreement22_e.htm (accessed 18/01/22).

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[48] power of trade partnerships: together for green and just economic growth, above n. 17, 2, 5.

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[59] Trade equivalence and international trade, above n. 28.