

SEEKING PROGRESS TOWARDS CLIMATE- SUPPORTIVE TRADE: THE EU-NZ FTA NEGOTIATIONS

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Foreword

Greening the EU trade policy is an absolute requirement to achieve the emission reduction targets the EU has given itself. Trade agreements shape the economic relation between countries for decades to come, decades during which both the EU and NZ economy will have to be profoundly transformed. We cannot afford business as usual.

The negotiations of the EU-New Zealand agreement can create hope rather than dread for citizens who care about climate and social justice. This is how we chose to look at them.

An ambitious agreement could address environmentally harmful subsidies, could incentivise the production and trade of green goods and services, could be a blueprint to add binding and enforceable broad commitments on trade and sustainable development, and could integrate world leading level-playing field provisions that would ensure a race to the top between partner countries when it comes to environmental and social standards. It could create a platform for cooperation on other progressive trade measures, to end carbon leakage and reform the WTO.

Will negotiators and political leaders in the EU and New Zealand seize this opportunity? We hope that this short report will provide them with plenty of proposals to break free from an old model of trade policy that is not in line with what our climate commitments require.



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Members on International Trade Committee
of the European Parliament

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Executive Summary

The winds of change are sweeping through the halls of the World Trade Organisation and the offices of trade negotiators. Many of the foundations of trade policy are being questioned. It is no longer sufficient that trade liberalisation be pursued as an aim in itself – as the impacts of trade agreements are pervasive, trade policy needs to play a role in meeting the challenges of our time, including the inter-linked crises of climate change, biodiversity extinction and inequality.

Yet, there is resistance to change. Almost three decades after the signing of the Framework Convention on Climate Change trade rules all too often continue to provide a basis for legal cases to undermine government policy for climate action. Trade rules still primarily protect trade from climate policy, rather than protecting the climate from trade-related impacts.

However, there are now opportunities for trade reform, largely reflecting processes with the EU's institutions and member states, notably the European Green Deal and the EU Trade Policy Review. The New Zealand Ministerial agreement to the recommendations of the Trade for All report also signals a new direction for trade policy, setting out an agenda for a shift towards sustainability.

Trade negotiations tend to be evolutionary, building on provisions in previous agreements. This means that progressive trade partners can introduce advances in trade policy that then become a baseline for the future. This report examines whether the European Union – New Zealand Free Trade Agreement (EU-NZ FTA) can set a new standard in its approach to integrating climate action and sustainability into trade agreements. Even after ten rounds of negotiations over the past two and a half years, this report finds that there are still untapped opportunities to do so.

Trade, Climate and Sustainability Challenges for New Zealand's Primary Sector

Uniquely amongst OECD nations, New Zealand's trade is dominated by the export of primary products. These depend on natural resources that are increasingly under stress. Analysis of New Zealand's climate emissions, biochemical flows, biodiversity, and land use changes shows that costs are being externalised from producers into the environment. Past patterns of trade and trade rules have focused on low-cost commodity production, allowing pollution havens and impacts such as poor river quality, loss of biodiversity and little progress in reducing greenhouse gas emissions. A new generation of trade agreements, integrated into broader government policy, should support incentives for producers to adopt zero carbon, sustainable and regenerative practices.

Such incentives could be provided by a framework of principles and criteria for certified, sustainable production entitled to trade privileges such as tariff- and quota-free market entry. International certification schemes for climate neutrality and organic production already exist and, even at this advanced stage of negotiations, it is not too late for the EU-NZ FTA to make a commitment to support the development of a system of certified agricultural production alongside cooperation in the development of a broader framework for sustainable agriculture, embracing climate, soil, water, biodiversity and social considerations.

Opportunities for Progress in the EU-NZ FTA

Negotiations on the FTA started in July 2018 and there have been ten rounds so far. Both the EU and New Zealand included objectives to promote sustainability and climate action in their negotiating mandates. The closed nature of trade negotiations, with secret texts, little accountability and inadequate assessments make it difficult to analyse the degree to which these aims have been realised. Research and analysis undertaken in this report shows that these objectives are far from achieved. However, there has been progress, and important advances in the EU-NZ FTA are still possible. Achieving these gains will require leadership and strong political direction.

A high priority for New Zealand negotiators is to *eliminate environmentally-damaging subsidies*, specifically in fisheries, agriculture and fossil fuels. While some targeted subsidies have beneficial effects or create little or no impact, there is evidence that a significant proportion of EU subsidies have the effect of increasing capacity and economic activity, introducing trade distortions, increasing emissions and damaging the environment. New Zealand is using trade precedents and international agreements as a basis for their proposals to eliminate environmentally-damaging subsidies.

The EU has previously agreed text in existing trade agreements on fisheries and fossil fuel subsidies, and there appears to be little rationale for not including provisions in the EU-NZ FTA. Negotiations are underway and it is likely the form of the final text on these issues will be part of the trade-offs for the FTA as a whole. The elimination of environmentally-damaging subsidies is an important part of the EU's programme on climate action and sustainability and has trade effects. Commitments in this regard should be included in the final agreement.

Climate change should be integral to the FTA across all chapters, as well as being a major focus of the Trade and Sustainable Development chapter, including strong commitments to the targets and mechanisms of the Paris Agreement. While New Zealand's record on climate action over the past 30 years has been poor, the current government has built a robust framework of a Zero Carbon Act, an independent Climate Commission and an improved Emissions Trading Scheme. Even so, action on agricultural emissions is a major missing element, as detailed in this report.

The New Zealand government will be a willing partner for some provisions on climate in the EU-NZ FTA, including long term commitments to carbon neutrality, but will be reluctant to agree to specific proposals on issues such as a *Carbon Border Adjustment Mechanism*. The EU is also wary of some of New Zealand's proposals, such as elimination of tariffs and Non-Tariff Barriers for a comprehensive list of *environmental goods and services*. Both parties should be bold and

include these issues along with strong protection of the right to regulate, tangible commitments to the Paris Agreement and linking of carbon markets.

Enforceability of social and environmental issues is also a priority for New Zealand. They have proposed that the Trade and Sustainable Development (TSD) chapter is subject to the same Dispute Settlement Mechanism as core FTA issues. This would represent a much stronger form of enforcement than previous EU FTAs, none of which have led to fines or the withdrawal of trade benefits when TSD commitments are not implemented. So far, the EU has not agreed to New Zealand's proposal.

However, there is momentum building for a change in EU Trade Policy. The European Parliament has expressed deep concerns over the EU-Mercosur FTA at least partly because of a lack of enforcement for key provisions on the climate, environment and social equity. The creation of a position of EU Chief Trade Enforcer is a step towards stronger prioritisation of the enforcement dimension.

A credible enforcement mechanism, including a central role for civil society, is now needed and should be included in the EU-NZ FTA. Specific commitments to support civil society participation and public engagement should be built into improved enforcement and accountability processes. These should include transparency of information and reporting (lacking in most aspects of trade policy), objective and independent research on progress and implementation, involvement of experts and affected parties, mechanisms for involvement of civil society and other Non-State Actors, and stronger processes for Parliamentary oversight.

In addition to strengthening enforcement processes and specific provisions, this report also highlights the urgent need for a *reform of the process of EU trade negotiations*. The lack of basic transparency in the negotiations is out of step with commitments to greater transparency at the national level, in the EU and across other international forums. This undermines democratic oversight and accountability as well as limits opportunities for external engagement to build climate, environment and social provisions into the negotiating text. Prior to the completion of negotiations, independent and objective assessments of the draft agreement are needed from the perspective of gender equality, climate change, environment and human rights. This can provide an input to stronger accountability to public and Parliamentary oversight.

In a number of other areas, including much of the Trade and Sustainable Development chapter, there is alignment between the parties. There is a basis for agreement on issues such as implementation of *international treaties, sustainable forest management, animal welfare standards, voluntary certification and labelling, sustainable procurement, trade and gender, the circular economy and responsible business standards*. Negotiations are well advanced on most of these issues, although there are outstanding issues remaining on trade and labour (New Zealand has yet to ratify two core ILO conventions) and *indigenous rights* issues.

Emerging alignment between the parties does not mean that there is sufficient ambition. The negotiations were launched with the aim of an agreement that would integrate climate action,

sustainability and human rights into the trade framework. The EU-NZ FTA was seen as a means to set a new standard for good practice in trade agreements. While there have been advances in this direction, the core of the FTA provisions still prioritises trade liberalisation over sustainability aims. The draft FTA falls well short of the changes that are required to meet the challenges ahead.

Specific challenges to raise the level of ambition are identified in this report. A comprehensive shift towards sustainability will need changes to trade rules, so that they can prevent production that damages the environment, emits greenhouse gases, causes social harm and violates human rights, while providing incentives for sustainable trade. This will require agreements on trade restrictions and preferences built around a framework of transparency, standards-setting, certification and labelling. Specific proposals such as a Carbon Border Adjustment Mechanism, addressing the embedded carbon in traded products, need to be further developed and supported.

This report shows that significant improvements to the draft FTA are still possible. Even at this stage of negotiations, it is not too late to strengthen the text so that broad statements of intention are backed by collaboration on setting a more progressive framework for trade and specific commitments to action. The EU Trade Policy Review and New Zealand's Trade for All report have expressed a higher level of ambition, and this EU-NZ FTA could still make a step change towards a new model for trade. This is a crucial opportunity for change.

Trade, Climate and the Environment in New Zealand

This chapter provides a context for New Zealand's positions on trade negotiations and an agenda for trade agreements that would support the climate and the environment. The first section outlines New Zealand's trade position and priorities, including the government's negotiating objectives.

The following section focuses on the areas where New Zealand's economic activity is breaching the boundaries of ecosystem integrity, with a particular focus on the agricultural and land use sector. The dominance of primary production in New Zealand's exports creates challenges that run counter to the common perception of New Zealand as a climate-leading and sustainable state.

New Zealand's trade policy is partly shaped by these realities, but also by the dominance of neo-liberal thinking and powerful lobby groups. Yet there are opportunities for change and for aligning trade agreements with the challenges ahead. Trade policy needs to be transformed to rapidly reduce emissions and regenerate the damaged natural environment.

Trade and the Economy

The EU is New Zealand's third largest market after Australia and China. New Zealand and the EU have forged a long and close relationship that is founded on support for liberal democratic values; shared values and protection for human rights, including diversity; a commitment to sustainability, climate change and global environmental issues; and respect for a multilateral, rules-based trade system.

The EU is an important trading partner for New Zealand, the fourth largest in two-way trade (behind China, Australia and the US). Total exports of goods and services to the EU were \$7.3bn and imports were \$13.4bn.

New Zealand's goods exports to the EU were \$5.3bn in the year to June 2020 (NZ's third largest destination) and imports amount to \$10.7bn (NZ's largest source of imports). The trade deficit in goods of \$5.4bn is substantial – by far the largest of any of New Zealand's trading partners. The scale of the deficit is likely to remain of the same order of magnitude after the UK's departure from the EU.

New Zealand trade officials consider that there are potential gains from an FTA with the EU, citing the disadvantages stemming from tariffs of 8-22% frozen fish, 9.6% for onions and 8.8% for kiwifruit. Most competitors for these products pay no tariffs. Most EU exports such as wine, cheese, autos and pharmaceuticals attract low or zero tariffs and the EU benefits from an open Most Favoured Nation treatment.

The environmentally significant aspects of the existing pattern of trade can be broadly characterised as exports of meat, fish, dairy products and some horticultural products such as onions from New Zealand; and imports of emissions-intensive, manufactured products, such as motor vehicles and aircraft from the EU. Some products – such as wine and dairy products – flow in both directions.

New Zealand is a strong supporter of multilateral trade, which is considered to provide the best opportunity for a small trade-exposed country to secure fair trade terms. However, since the stalling of WTO negotiations on the Doha Agenda, New Zealand has pursued a range of bilateral and regional trade agreements, most recently including the Regional Comprehensive Economic Partnership (RCEP) with Asian nations, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and an upgrade to the NZ-China FTA¹.

The stated objectives for New Zealand's negotiations are as follows:

1. Adherence to environmental and labour standards, better living conditions for New Zealanders and sustainable and progressive economic growth
2. Reduce the costs for businesses by removing tariffs and other barriers
3. A level playing field with countries that currently pay less due to existing FTAs with the EU
4. Lower costs for consumers on products like food and consumer goods
5. An FTA that works for companies of all sizes, big and small

The political messaging around the negotiations is that New Zealand “is concerned over the EU’s recent poor quality and protectionist offers” in negotiations, as expressed by former Minister for Trade David Parker in July last year². The Minister and other officials have also expressed the view that the EU is not responding to New Zealand proposals that have potential environmental benefits. This is explored in the next section of this report.

Environment and Climate Change

FRAMEWORK

From an environmental perspective, trade agreements should strive to avoid the maintenance or creation of pollution havens which affect the safe operating space for humanity within planetary

1 NZ-China free trade agreement upgrade. Accessed at: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/nz-china-free-trade-agreement-upgrade/>

2 Trade for All and the state of international trade. Accessed at: <https://www.beehive.govt.nz/speech/trade-all-and-state-international-trade>

boundaries. A recent academic revision and updating of work on planetary boundaries³, which also reviews the current status of boundaries, has concluded that four in particular are either at high risk, or are showing increasing risk within a zone of uncertainty. These four boundaries, which we focus on in this analysis, are:

- Biosphere integrity in relation to genetic diversity (biodiversity)
- Biochemical flows (active nitrogen and phosphorus)
- Land-system change (the degradation and loss of functionally important systems, especially forests), and
- Climate change

Given the existing liberal governance regime for the globalisation of economic activity, pollution controls or biodiversity protection actions in any one country can have displacement effects along product supply chains, into other parts of the world. This occurs through, for example, offshoring of pollution-intensive manufacturing and agricultural production, and the movement of poorly regulated fishing fleets, all of which can lead to a pollution haven effect.

A 2017 review of developments in the economics of trade and environment⁴ concluded (p82):

We found considerable new and convincing evidence linking tighter environmental regulation to reduced net exports (or increased net imports) in polluting sectors. This new evidence is clear support for the PHE [pollution haven effect]. Although there is certainly value added in examining how its strength varies across instruments and industries, we view its existence as a settled question.

The creation of pollution havens is particularly undesirable in the case of the four at-risk planetary boundaries listed above.

The EU-UK agreement made public in late December 2020 addresses the risk of pollution havens being created by setting up a mechanism for ensuring a level playing field in relation to environmental regulation affecting trade. This approach seems a good way to address the issues, although its efficacy is untested at this stage.

From an environmental perspective, creating a level playing field between NZ and the EU will be more challenging than between the UK and the EU. The UK has long been covered by, and is familiar with, EU directives, and might be resistant against moving toward a markedly more pollution-intensive path. In the case of the NZ-EU relationship, there are larger differences in the

3 Will Steffen, Katherine Richardson, Johan Rockström, Sarah E. Cornell, Ingo Fetzer, Elena M. Bennett, Reinette Biggs, Stephen R. Carpenter, Wim de Vries, Cynthia A. de Wit, Carl Folke, Dieter Gerten, Jens Heinke, Georgina M. Mace, Linn M. Persson, Veerabhadran Ramanathan, Belinda Reyers, Sverker Sörlin (2015), Planetary boundaries: Guiding human development on a changing planet, Science. Accessed at: <https://science.sciencemag.org/content/347/6223/1259855>

4 Jevan Cherniwchan, Brian R. Copeland, and M. Scott Taylor (2017), Trade and the Environment: New Methods, Measurements, and Results, in Annual Review of Economics. Accessed at: <https://www.annualreviews.org/doi/abs/10.1146/annurev-economics-063016-103756>

environmental impacts of trade patterns, and in the role played by incumbent export sectors which can gain comparative advantage from weak environmental regulation, as shown below.

CRITICAL CLIMATE, EMISSIONS, AND ENVIRONMENTAL ISSUES

Livestock-based industries with high environmental impacts, especially in relation to climate emissions, soil, water and biodiversity resources, play a dominant role in the NZ export profile and exhibit classic pollution haven characteristics. We have reviewed the recent European Environment Agency report⁵ on the state of Europe's environment, but comment here on contrasting EU-NZ institutional settings rather than EU environmental performance.

Regarding *climate emissions*, the EU has a legally-binding, all-gases, 1990-baselined, net zero 2050 commitment, while NZ only has a net zero 2050 target for carbon-dioxide and nitrous oxide. NZ's only all-gases commitment is in its existing Nationally Determined Contribution (NDC) for 2030⁶. If expressed against a 1990-baseline in order to compare it with the EU, the current NZ 2030 target amounts to only 11%, compared with the EU's 55% decrease in emissions. NZ is now considering a draft proposal⁷ which would defer the reduction of most biogenic methane emissions until after 2050.

As discussed further in sections 3 and 4 below, both the EU and NZ provide subsidies for agricultural methane producers. This creates the risk of what could become a joint pollution haven for livestock methane emissions under the proposed trade agreement. Emissions of carbon dioxide from manufacturing of emissions-intensive products is captured under emissions trading schemes in both the EU and NZ, although privileges for trade-exposed industries need to be examined for comparability and acceptability from a pollution haven creation perspective, especially as the EU is considering the design of a carbon border adjustment mechanism.

Regarding *biochemical flows*, in NZ, the ongoing release of high levels of active nitrogen and reactive phosphorus into the biosphere, driven mainly by excessive production and use of artificial fertilisers in agriculture, is a key issue. While both NZ and EU operate regulatory frameworks to reduce nutrient discharges into freshwater, NZ has been unable so far to establish the national nutrient discharge limits proposed in 2019⁸, and it has been unable to ensure⁹ that regional coun-

5 Report The European Environment - state and outlook 2020, Accessed at: <https://www.eea.europa.eu/publications/soer-2020>

6 New Zealand's post-2020 commitment to reduce greenhouse gas emissions under the Paris Agreement. Accessed at: <https://www.mfe.govt.nz/climate-change/why-climate-change-matters/global-response/paris-agreement/new-zealand%E2%80%99s-nationally>

7 NZ draft proposal deferring the reduction of biogenic methane emissions until after 2050. Accessed at: <https://www.climatecommission.govt.nz/get-involved/our-advice-and-evidence/>

8 Action for healthy waterways: A discussion document on national direction for our essential freshwater (2019). Accessed at: <https://www.mfe.govt.nz/publications/fresh-water/action-healthy-waterways-discussion-document-national-direction-our>

9 Salmon (2019) Freshwater Decline - the need for precaution and polluter pays in agriculture in Policy Quarterly. Accessed at: <https://ojs.victoria.ac.nz/pq/article/view/5682>

cils with water management responsibilities achieve their own stated objectives. The result is that water quality has declined in every region since these objectives were set in 1992. These realities point to the risk of an effective pollution haven for diffuse agricultural discharges in NZ, with externalities embodied in traded agricultural commodities and processed primary products.

Regarding *biodiversity*, NZ is endowed with high endemism reflecting its status as an island isolated for millions of years, although it is acutely vulnerable to further exotic species introductions. From a history of large-scale land clearance, it has moved to a strong institutional framework for conserving terrestrial biodiversity, albeit with some exceptions mentioned below. Regarding marine biodiversity, NZ has institutional barriers in its fisheries quota management system. This made it unable to deliver on its commitment under the Convention on Biological Diversity to meet the 'Aichi target No 11' requiring networks of representative marine protected areas covering 10% of coastal and marine areas by 2020. NZ achieved only 1%, with extensive gaps in representativeness. In contrast to the EU, NZ does operate a fisheries management system without capacity-enhancing subsidies. However, there are serious gaps in the sustainability of fisheries management, including bottom trawling and by-catch of seabirds and endangered species.

Regarding *land system change*, NZ may face system change risks under climate change. Exotic plantation forests are expected to be significantly more vulnerable to fire than native forests, while climate change is expected to greatly accelerate soil losses from storm-prone, erodible hill country in pastoral use. Peatlands continue to be degraded by agricultural drainage activities.

APPLYING A LEVEL PLAYING FIELD CONCEPT TO ENVIRONMENTAL ISSUES

Livestock-based industries with high environmental impacts, especially in relation to climate emissions, soil, water and biodiversity resources, play a dominant role in the NZ export profile and exhibit classic pollution haven characteristics. The NZ agriculture system, and livestock sector in particular, are far from sustainable. The major externalities are briefly described below.

Climate emissions - The livestock sector contributes agricultural greenhouse gases comprising almost half the national total but has been exempt from NZ's emissions trading scheme (ETS) since its inception in 2008. Discussions are now being held about the possibility of introducing the sector to the ETS from 2025, but with 95% of agricultural emissions still exempt from charges. Coal is extensively used in dairy processing plants, as is natural gas, and there is only limited offsetting of these emissions through the ETS, due to free credits granted to emissions-intensive, trade-exposed sectors.

Soil resources - A large proportion of NZ's pastoral hill country which supports sheep and beef farming is highly erosion-prone and should never have been deforested for pastoral use. The Government and regional councils are nowadays making funds available¹⁰ to pay farmers to retire the most highly erodible land to forest cover, but there is still a long way to go. 84 million tonnes

10 Hill Country Erosion Programme, Ministry for Primary Industries. Accessed at: <https://www.mpi.govt.nz/dmsdocument/28985-Hill-Country-Erosion-Programme>

of soil enter NZ's rivers each year¹¹ from grazed pastureland. Much of NZ's farmland suffers from soil compaction which – in conjunction with elevated phosphorus levels – is associated with the intensification of dairy farming on grazed pastures. 51% of tested dairy sites¹² had excess soil phosphorus, which contributes to water pollution problems, and 65% suffered from soil compaction, caused by cattle trampling of the soil especially during winter. This impedes drainage, reduces soil biodiversity, facilitates erosion of soil into waterways, and can also result in increased greenhouse gas emissions from cattle urine on soils. Soil compaction also affects 41% of dry stock farming sites.

Freshwater impacts - The livestock sector has had some regulation of uneven quality controlling point source discharges such as dairy shed effluent, but there are longstanding barriers to effective regulation of diffuse discharges to freshwater¹³ almost everywhere. This situation partly reflects lack of effective accountability mechanisms at the property level, which means that farm activities cannot readily be linked to catchment limits. The result is that such limits, where they exist, are commonly overshot, or are being subjected to grandparenting arrangements for up to 80 years before limits are expected to be met. Recent freshwater reforms have set up a larger influence for central government in the writing of regional plans, but the actual effect of the new system will not become apparent until after 2025 when the next generation of plans becomes available.

Biodiversity impacts – The livestock sector has a long history of land clearance and wetland drainage to increase pastoral area and grass-fed production. These trends have been curbed in recent years, but wetland vegetation continues to disappear¹⁴ in Southland and dryland vegetation continues to suffer the effects of livestock intensification through irrigation in several parts of the eastern South Island, notably the Mackenzie basin. Freshwater biodiversity includes a range of endemic fish species which are mostly threatened or endangered¹⁵ by pastoral agriculture activities, and also by alien fish introductions, irrigation, dams and climate change¹⁶. There are further important issues surrounding the need for pest and weed management in areas of remnant indigenous vegetation. A draft national policy statement on biodiversity on private land¹⁷ has been

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- 11 Our land 2018 report, NZ Ministry of the Environment <https://www.mfe.govt.nz/publications/environmental-reporting/our-land-2018> p. 72
 - 12 Our land 2018 report, NZ Ministry of the Environment <https://www.mfe.govt.nz/publications/environmental-reporting/our-land-2018> p.6,8
 - 13 Salmon (2019) Freshwater Decline - the need for precaution and polluter pays in agriculture in *Policy Quarterly*. Accessed at: <https://ojs.victoria.ac.nz/pq/article/view/5682>
 - 14 Hugh A. Robertson, Anne-Gaëlle Ausseil, Brian Rance, Harley Betts, Eva Pomeroy (2019), Loss of wetlands since 1990 in Southland, New Zealand, in *New Zealand Journal of Ecology*. Accessed at: <https://newzealandecology.org/nzje/3355>
 - 15 Stats NZ: Conservation status of indigenous freshwater species – published April 2020. Accessed at: <https://www.stats.govt.nz/indicators/conservation-status-of-indigenous-freshwater-species>
 - 16 Michael K. Joy, Kyleisha J. Foote, Pierce McNie and Marina Piria (2018), Decline in New Zealand's freshwater fish fauna: effect of land use, in *Marine and Freshwater Research*. Accessed at: <https://www.publish.csiro.au/mf/mf18028>
 - 17 Proposed national policy statement for indigenous biodiversity. Accessed at: <https://www.mfe.govt.nz/publications/biodiversity/draft-national-policy-statement-indigenous-biodiversity>

prepared, but there is political opposition to it, and it is not yet clear whether, or to what extent, it will become legally effective under the proposed shake-up to New Zealand's resource management laws¹⁸.

TRANSITIONING TOWARDS SUSTAINABLE LAND USE

Both the NZ meat and dairy sectors have become highly dependent on low-cost, largely unprocessed commodity exports to China, a trade pattern that causes high environmental impacts. Trade regulation could potentially play a role in incentivising more sustainable patterns of land use leading to higher value export production, a key recommendation of the Trade for All Advisory Board report¹⁹.

Some leaders of NZ's primary sector have made a commitment to a strong, sustainable vision and strategy for the future entitled Fit for a Better World.²⁰ This kind of food and fibre producer targets niche, premium opportunities through marketing to consumers seeking high quality produce with climate-neutral and genuine, environmentally friendly attributes. The NZ-EU trade agreement provides an opportunity to advantage such produce in the EU market.

NZ sectors exporting to Europe which are well-placed to take early advantage of such an opportunity include apples, kiwifruit, and wine. Significant parts of the NZ primary sector could achieve climate neutrality certification and organic certification during the lifetime of the proposed EU-NZ trade agreement, which could act as a significant driver of change.

It is therefore important that the provisions of the trade agreement facilitate and encourage this transition. This could be done in various ways but two in particular deserve consideration:

- A framework of principles and criteria for certified, sustainable land-based production entitled to trade privileges such as tariff- and quota-free market entry
- Development of an open, sustainable agriculture and forestry adjustment mechanism to support the desired transition to sustainability

International certification schemes for climate neutrality and organic production already exist but their uptake remains limited. Even at this stage of negotiations, the EU-NZ FTA could still provide an incentive for certified produce, through preferential treatment and support for qualifying certification schemes. A broader, internationally-agreed framework for sustainable agriculture, embracing climate, soil, water and biodiversity considerations, can be developed over a longer period.

18 NZherald: Government confirms it will scrap Resource Management Act, create three new acts. Accessed at: <https://www.nzherald.co.nz/nz/government-confirms-it-will-scrap-resource-management-act-create-three-new-acts/AGC55DLIT2DITCZOBPQBU5JGZI/>

19 Report of the Trade for All Advisory Board, November 2019. Accessed at: <https://www.tradeforalladvisoryboard.org.nz/wp-content/uploads/2019/11/FINAL-with-cover-Trade-for-All-report.pdf>

20 This strategy, prepared and promoted by the Primary Sector Council, is significantly different from an official strategy document with the same title later produced by the NZ government. See <https://www.fitforabetterworld.org.nz/>

This framework could support the extension of the future EU Carbon Border Adjustment Mechanism (CBAM) to include agricultural emissions. Given the dominant role of methane in global emissions, as well as in New Zealand's emissions profile, it is important that CBAM include methane emissions, and ETS schemes be extended to include methane pricing.

The EU trade policy review and the European Green Deal, as well as the Trade for All reset to New Zealand trade policy, could provide an opportunity for a significant step forward towards climate and environment-supportive trade in future.

Enhancing Climate and Sustainability in EU-NZ FTA Negotiations

The following is an overview and assessment of the key policy proposals that have been made or could be made during the EU-NZ FTA negotiations. Some issues have already been agreed in the ten rounds of negotiations that took place over the past two and a half years, but important provisions still remain to be resolved. A number of these, including issues with important climate, social and environmental implications, will need political decisions. There are still opportunities for substantive changes towards a more sustainable and climate-friendly FTA.

Ending Damaging Subsidies

The WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) approaches subsidies primarily from a trade distortion perspective, with no explicit mention of environmental externalities. Most research and commentary highlights the role of subsidies in distorting trade and encouraging over-use of natural resources, with adverse environmental outcomes.

Some published estimates of the scale of global subsidies include externalities, but most tend to focus only on their fiscal value. Therefore, from an environmental perspective, the Dasgupta Review²¹ highlights that most estimates are misleadingly low as they do not consider, or do not properly account for the additional subsidy, which arises from the destruction of natural capital. With this major qualification, Dasgupta suggests that the best available estimates (in US\$) of annual worldwide subsidies are \$35.4 billion for fisheries, \$705 billion for agriculture and \$4.7 trillion for fossil fuels²². While these estimates include some subsidies that have a legitimate public policy purpose, most of these subsidies are significant drivers of over-use, environmental damage and emissions.

NEW ZEALAND'S POSITION ON SUBSIDIES

The removal of subsidies plays a prominent role in New Zealand's political and economic history, as well as its trade policy. This stems from the dismantling of agricultural subsidies and protection for domestic manufacturing in the 1980s. The reforms caused a sharp downturn, with high social and economic costs. However, the removal of subsidies remains a core of economic and trade

21 The Economics of Biodiversity: The Dasgupta Review (2019) Accessed at: <https://www.gov.uk/government/collections/the-economics-of-biodiversity-the-dasgupta-review>

22 as above, Annex 8.1

policy for both National and Labour governments. As a result, subsidies are considered inherently damaging, rather than as a potential tool for policy-makers to achieve beneficial outcomes²³. This contrasts with the EU where subsidies are a more frequently used policy tool and where the net-subsidisation model is reflected in the founding EU treaties in state-aid provisions²⁴.

Despite the removal of most fiscal support, New Zealand still has policies which create implicit subsidies, with damaging environmental effects. A conspicuous example is the exclusion of agricultural greenhouse gases from the NZ emissions trading scheme (ETS). Agricultural gases, mainly methane from livestock, comprise 48% of NZ's total emissions, or 37.7m tonnes a year of carbon equivalent²⁵. At the current carbon price of NZ\$39 (€23), the current value of this subsidy to the agriculture industry is almost NZ\$1.5 (€0.9) billion/year. The ETS price would also rise sharply, if agriculture were brought into the ETS.

There are also implicit subsidies arising from agricultural pollution as noted in the previous section, as well as other externalities across the economy. It should be noted that most of New Zealand's trading partners, including the EU, also have such implicit subsidies associated with externalities which are not usually costed in. Mechanisms such as the proposed Carbon Border Adjustment Mechanism (CBAM) aim to level the playing field and provide incentives for low emissions production.

New Zealand's focus is strongly on the use of fiscal subsidies that disadvantage NZ exports and harm the environment or climate. The government sees FTAs as a potential instrument that can support action in the SCM Agreement on issues such as fisheries subsidies, in the WTO on agricultural subsidies, and in international forums on reducing fossil fuel subsidies.

SUBSIDIES AND THE ENVIRONMENT

From an environmental perspective, failing to recognise the role of externalities in trade policy risks two types of policy failures:

- **Prohibiting subsidies that can have positive social and environmental benefits.** The Agreement on Subsidies and Countervailing Measures (SCM Agreement) has repeatedly been used at the WTO to challenge renewable energy subsidies. A barrier to proactive government measures to favour renewable energy and clean technology has been the regulatory chilling effect of actual or threatened legal action under trade agreements. These legal cases claim protectionism on the basis of preferences for local production, local content rules or other forms of discrimination.

23 Horlick, G., & Clarke, P. A. (2017). Rethinking subsidy disciplines for the future: Policy options for reform. *Journal of International Economic Law*, 20(3), 673-703, at 694.

24 Borlini, L., & Dordi, C. (2017). Deepening international systems of subsidy control: The (different) legal regimes of Subsidies in the EU bilateral preferential trade agreements. In *Columbia Journal of European Law*, 23(3), 551-606, at 589.

25 About New Zealand's Greenhouse Gas Inventory. Accessed at: <https://www.mfe.govt.nz/climate-change/state-of-our-atmosphere-and-climate/new-zealands-greenhouse-gas-inventory#:~:text=The%20Agriculture%20sector%20was%20responsible,5.2%20Mt%20CO2%2De>

Whilst states should be aware of disguised protectionism, they should allow action that will lead to more effective climate action, including tools such as subsidies or variable import levies to achieve a balance between lowering the costs of renewable energy goods and building the capacity for domestic renewable energy production²⁶. Rights to regulate provisions in FTAs and other trade agreements are important in order to allow states to prioritise climate action as part of their commitments under the Climate Convention and the Paris Agreement.

More fundamental change to the WTO SCM Agreement (and a range of other trade agreements) is needed. Trade policy-makers often acknowledge these issues but typically argue that re-defining subsidies to reflect externalities is too difficult and risks allowing disguised protectionism and a plethora of trade disputes. They are unwilling to open up the WTO SCM Agreement²⁷. Until they do so, carve-outs and strong and binding right to regulate provisions are a vital protection for public policy interventions.

- **Failing to sufficiently prioritise subsidies that create social and environmental costs.** The focus of trade policy tends to be on fiscal subsidies which are perceived to put exporters at an unfair commercial disadvantage. However, implicit subsidies are also incurred when producers are not required to pay for the costs of social and environmental damage, which is externalised onto society. The definition of subsidies in trade policy should reflect the full costs of the product, not just its fiscal costs. These two forms of subsidies may be mutually reinforcing where fiscal subsidies encourage higher production, further exacerbating social and environmental damage, as can be the case for fisheries, agricultural and fossil fuel subsidies.

A best practice FTA should align subsidies with the purposes of promoting products and services that create positive public benefits and correcting market failures and externalities. Disciplines on subsidies should focus on the policies that result in unfair trade advantages and incentives for higher production, particularly resulting in socially and environmentally-damaging outcomes.

FISHERIES SUBSIDIES

According to the FAO, “fish stocks are already in the worst state since records began”. Subsidies contribute to overfishing by reducing costs for the fishing industry. UNCTAD²⁸ estimates that at least \$20bn of the \$35bn in global subsidies directly contribute to over-fishing. Since the Doha Round was launched in 2001, fishing subsidies have increased, and fish stocks have declined around the world.

26 Sierra Club (2016). Discussion Paper: A New, Climate-Friendly, approach to Trade. Accessed at: <https://content.sierraclub.org/creative-archive/sites/content.sierraclub.org/creative-archive/files/pdfs/1433%20New%20>

27 Accessed at: https://www.wto.org/english/tratop_e/scm_e/subs_e.htm

28 UNCTAD Regulating Fisheries Subsidies Accessed at: <https://unctad.org/project/regulating-fisheries-subsidies#:~:text= Fishing%20subsidies%20are%20estimated%20to,to%2034.2%20percent%20in%202017.>

The EU maintains one of the world's largest subsidy programmes. WWF reports that few EU fleets are profitable with no public support; most are either running losses or returning low profits. In several member states, the cost of fishing is now greater than the value of catches, even ignoring the billions of Euro lost in potential revenue due to overfishing. Overall, the fisheries sector receives more than its fair share of the EU budget when compared to its contribution to GDP²⁹.

The Ministerial Decision from the WTO Ministerial Conference MC11 in Buenos Aires in December 2017 committed its membership to continue negotiations to prohibit harmful fisheries subsidies for conclusion by December 2019, before the fisheries subsidies related Sustainable Development Goal (SDG) target deadline in 2020. However, WTO fisheries negotiations are yet to be concluded. The EU is an active participant in negotiations.

In evidence to Parliament, New Zealand's lead negotiator, Vangelis Vitalis added to previous comments on fossil fuel subsidies: "... I am really struggling to understand the European Union's position on fishery subsidies, where we have essentially the same position at the World Trade Organisation where we both want ambitious commitments on this. But the EU won't do it in our free trade agreement."

New Zealand's Proposal

New Zealand's proposal is for the EU-NZ FTA to include provisions on fisheries subsidies, using the text from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)³⁰ as a baseline. CPTPP includes disciplines and transparency requirements in relation to fish subsidies that contribute to overfishing, overcapacity and illegal, unreported and unregulated (IUU) fishing.

Fisheries subsidies in CPTPP Environment chapter

Article 20.16: Marine Capture Fisheries

5. The Parties recognise that the implementation of a fisheries management system that is designed to prevent overfishing and overcapacity and to promote the recovery of overfished stocks must include the control, reduction and eventual elimination of all subsidies that contribute to overfishing and overcapacity. To that end, no Party shall grant or maintain any of the following subsidies within the meaning of Article 1.1 of the SCM Agreement that are specific within the meaning of Article 2 of the SCM Agreement:

*(a) subsidies for fishing that negatively affect fish stocks that are in an overfished condition; and
(b) subsidies provided to any fishing vessel while listed by the flag State or a relevant Regional Fisheries Management Organisation or Arrangement for IUU fishing in accordance with the rules and procedures of that organisation or arrangement and in conformity with international law.*

29 WWF (2011). Reforming EU Fisheries Subsidies. Accessed at: http://awsassets.panda.org/downloads/lr_reform_fisheries_subsidies.pdf.

30 CPTPP text. Accessed at: <https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/20.-Environment-Chapter.pdf>

6. Subsidy programmes that are established by a Party before the date of entry into force of this Agreement for that Party and which are inconsistent with paragraph 5(a) shall be brought into conformity with that paragraph as soon as possible and no later than three years of the date of entry into force of this Agreement for that Party.

Given the recent difficulties in concluding the WTO fisheries negotiations, inclusion of such an article in the EU-NZ FTA can help build momentum for disciplines that would make a meaningful contribution to sustainable fisheries. The inclusion of Japan and Vietnam in the CPTPP agreement shows the willingness of major distant-water fishing nations to participate in such disciplines.

New Zealand negotiators have indicated that they regard the CPTPP as a base and would like to further strengthen the text on sustainable fisheries management. In particular, this may include stronger measures to combat IUU fishing and to help deter trade in products from species harvested from those practices.

Cooperation in action on sustainable fisheries management could also form a part of the EU-NZ FTA. There is a precedent in the Korean-NZ FTA which includes IUU fisheries and the impact of climate on marine ecosystems. Such cooperation could have a particular focus on promoting sustainable fisheries and tackling IUU in the Pacific.

Korea-NZ FTA³¹: Chapter 14 Agriculture, Forests and Fisheries Cooperation

Article 14.6: Fisheries and Agriculture

2. The Parties shall endeavour to co-operate, as appropriate, in the field of fisheries and aquaculture. Areas of co-operation may include the exchange of information regarding sustainable management of fisheries resources, for example in relation to:

- (a) marine pests;*
- (b) recreational fishing;*
- (c) the impact of climate change on marine ecosystems;*
- (d) fisheries economics and resource management;*
- (e) policy and regulatory requirements, including with respect to the Parties' Exclusive Economic Zones;*
- (f) illegal, unreported and unregulated fishing; and*
- (g) any other fisheries and aquaculture matter as may be identified and agreed by the Parties.*

Challenges for the Negotiations

Negotiations over subsidies for marine fisheries and disciplines on IUU fishing is likely to be a crucial issue. There appear to be significant positions in the negotiation stances of New Zealand and the EU that may need to be resolved at the ministerial level. An ambitious agreement would

31 Korea-NZ FTA. Accessed at: <https://www.mfat.govt.nz/assets/Trade-agreements/Korea-NZ-FTA/NZ-Korea-FTA-consolidated-text.pdf>

include specific disciplines and transparency requirements in relation to fish subsidies that contribute to overfishing, overcapacity and IUU fishing.

AGRICULTURAL SUBSIDIES

Subsidies linked to social and environmental benefits can play an important role in biodiversity conservation and diverse landscapes, and support for small farmers and communities. However, subsidies encouraging higher levels of agricultural production can lead to over-production, unsustainable land use and trade distortions. This can have an adverse impact on ecosystems, the wider environment and greenhouse gas emissions.

New Zealand's Proposals

The New Zealand government has dismantled most forms of direct agricultural subsidy (aside from state support for research and emergencies) and is seeking to 'level the playing field' for its exporters. As noted above, New Zealand provides implicit subsidies in the form of unaccounted environmental externalities, including a lack of a pricing mechanism for agricultural emissions and agricultural pollution, particularly nitrate run-off.

The baseline for negotiations is the WTO Agreement on Agriculture (AoA) and the subsequent Nairobi Package for the elimination of export subsidies. In the 8th round of EU-NZ FTA negotiations, New Zealand submitted a proposal on limitations to agricultural subsidies.

EU Proposals

The stated aims of the EU's agricultural subsidies are to support food security, small farmers and the environment. However, they have been widely criticised for supporting the commercial interests of large landowners and linked to over-production³². New Zealand has concerns about subsidised direct competition from EU agriculture as well as distortions in third country markets.

Challenges for the Negotiations

Despite the importance of this issue for the agricultural lobby in New Zealand, there appears to be little expectation from MFAT negotiators that agreement will be possible, especially given the history of contentious and intractable negotiations under the WTO Doha Agenda.

The EU has pushed back on the proposal. The EU's report on the 9th round of negotiations in November 2021 stated that both sides have agreed the reference to Green Box subsidies (non-trade distorting subsidies permitted under the WTO AoA) in the anti-dumping/anti-subsidy context. This will need to be resolved at a later stage of negotiations.

An ambitious agreement would restrict the payment of environmentally-damaging, production-related subsidies, while strengthening each Party's support for the transition to low emissions, regenerative and socially-supportive agricultural systems. A collaborate approach could focus on the development of a certification system that would support and encourage trade in verified

32 Gebrekidan, S., Apuzzo, M., & Novak, B., The Money Farmers, New York Times, 3 November 2019. Accessed at: <https://www.nytimes.com/2019/11/03/world/europe/eu-farm-subsidy-hungary.html#:~:text=The%20European%20Union%20provides%20%2465,how%20much%20land%20they%20farm.>

sustainable agricultural products.

FOSSIL FUEL SUBSIDIES

A fossil fuel subsidy is ‘any government action that lowers the cost of fossil fuel energy production by raising the price received by producers or lowering the price paid by consumers’. Globally, just over half of fossil fuel subsidies are for oil products, with the rest split almost equally between natural gas and electricity. Fossil fuel subsidies cause a range of negative impacts, including slowing the transition to clean energy³³.

New Zealand’s Proposals

New Zealand’s position is that the EU-NZ FTA should include a commitment to fossil fuel subsidy reform. In evidence to the Parliamentary Select Committee on Trade, MFAT’s lead negotiator, Vangelis Vitalis is quoted³⁴:

“I still cannot understand why that is so difficult for the European Union, particularly as they have three sentences in the Singapore EU free trade agreement that explicitly reference fossil fuel subsidy reform. That they can’t even agree that with us, I find very disappointing.”

MFAT’s report on the 8th round of EU-NZ FTA negotiations stated: “New Zealand’s proposals include provisions on fossil fuel subsidy reform and environmentally harmful subsidies, but these are not agreed by the EU.”

EU Proposals

As noted, the EU-Singapore FTA addresses fossil fuel subsidy reduction. It recognises the need for parties to ensure that, when developing public support systems for fossil fuels, proper account is taken of the need to reduce GHG emissions and to limit distortions of trade as much as possible. It also recognises the social consequences of a transition away from fossil fuels. However, it falls short of a commitment to a just transition as is recognised by the European Commission’s Green New Deal in their ‘Just Transition Mechanism’³⁵.

The EU-Singapore FTA also commits the parties to share the goal of progressively reducing subsidies for fossil fuels through measures to alleviate the social consequences associated with the transition to low-carbon fuels. The agreement provides safeguards, permitting the participants to use subsidies where necessary to achieve a public interest objective, provided the amounts are

33 Dawar, K., Haider, A., & Green, A. (2019). Climate change and trade agreements: friends or foes?. Economist Intelligence Unit. Accessed at: <https://iccwbo.org/content/uploads/sites/3/2019/03/icc-report-trade-and-climate-change.pdf>.

34 Harman, R. Politik. How Brexit could damage NZ. 13 December 2019. Accessed at: <https://www.politik.co.nz/2019/12/13/how-brexit-could-damage-nz/>

35 European Commission “*Green Deal: Coal and other carbon-intensive regions and the Commission launch the European Just Transition Platform*”. Accessed at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1201.

limited to the minimum required, and they have limited effects on trade. The article does not apply to subsidies to the coal industry, which should not be excluded from future FTAs.

EU-Singapore FTA Chapter 12: Trade and Sustainable Development:

Article 12.11 (3):

The Parties recognise the need to ensure that, when developing public support systems for fossil fuels, proper account is taken of the need to reduce greenhouse gas emissions and of the need to limit distortions of trade as much as possible. While subparagraph 2(b) of Article 11.7 (Prohibited Subsidies) does not apply to subsidies to the coal industry, the Parties share the goal of progressively reducing subsidies for fossil fuels. Such reductions may be accompanied by measures to alleviate the social consequences associated with the transition to low carbon fuels. In addition, both Parties will actively promote the development of a sustainable and safe low-carbon economy, such as through investment in renewable energies and energy efficient solutions.

Other International Initiatives

New Zealand has not yet signed an FTA that includes the reduction or elimination of fossil fuel subsidies but is working with like-minded countries on a proposal for a new form of trade agreement – the Agreement on Climate Change, Trade and Sustainability (ACCTS). This has elimination of fossil fuel subsidies at its core (alongside market access for environmental goods and services and guidelines for voluntary mechanisms).

In addition to provisions on climate subsidies in the FTA, New Zealand is reaching out to the EU and others to join the original ACCTS participants (Costa Rica, Fiji, Iceland, Norway and Switzerland) once the initial negotiations conclude, which New Zealand hopes will take place at the CoP-26.

New Zealand negotiators point to the EU's participation in international initiatives for the elimination of fossil fuel subsidies, including the G20's repeated calls since 2009 to "rationalize and phase out over the medium term inefficient fossil fuel subsidies that encourage wasteful consumption"³⁶. They argue that the EU already supports disciplines on fossil fuel subsidies, they have trade-distorting impacts and should be included in the FTA.

New Zealand has also taken a lead role in the Friends of Fossil Fuel Subsidy Reform. Several EU nations (Denmark, Finland and Sweden) are participants, as well as Norway and Switzerland. The coalition is raising awareness and building support for international action, including calling for a renewed Ministerial Statement on Fossil Fuel Subsidy Reform at the 12th WTO Ministerial Conference.

36 Merrill, L and Funke F. (2019). All Change and No Change: G20 Commitment on Fossil Fuel Subsidy Reform, Ten Years On. *IISD*. Accessed at: <https://sdg.iisd.org/commentary/guest-articles/all-change-and-no-change-g20-commitment-on-fossil-fuel-subsidy-reform-ten-years-on/#:~:text=September%202019%20marked%20ten%20years,the%20Pittsburgh%20Summit%20in%202009.>

Challenges for the Negotiations

Fossil fuel subsidies are a high priority for New Zealand's international action on climate change, as emphasised by Prime Minister, Jacinda Ardern: "We should be past the point of debate around fossil fuel subsidies. If you agree that we must act on climate change, then we can surely agree that the time for phasing out fossil fuel subsidies and reinvesting these funds to improve the wellbeing of our planet is now."

Given the importance of fossil fuel subsidy elimination to New Zealand, it is likely that this issue will need to be resolved at the Ministerial level.

An ambitious agreement would bring the EU and New Zealand together around a commitment to phase out fossil fuel subsidies domestically and to cooperate in doing so internationally.

Trade and Sustainable Development

The EU-NZ FTA provides an opportunity for establishing a higher standard FTA, making a contribution to sustainable development on specific issues and avoiding the undermining of high social and environmental standards.

The agreement is likely to include general provisions that recognise the need for effective enforcement of labour and environmental laws, including commitments to not weaken or reduce laws or standards to attract or secure trade or investment advantage.

The chapter is likely to have a specific article on ensuring the right to regulate, responding to widespread criticism of the ways in which trade agreements have prevented governments from legislating in the public interest. The provisions are likely to reflect those in other NZ and EU FTAs, which include a necessity test and the following provisions:

- Express right to regulate, often based on GATT Article XX(a), but not applied to all chapters of the FTA (most notably to subsidies, Technical Barriers to Trade (TBT) and investment)
- Includes right to regulate to protect human, animal or plant life or health under GATT XX(b)
- Reaffirmation of the right to regulate concerning investment, but with questionable legal effect

New Zealand policy is supportive of a strong chapter. Specific provisions are likely to include:

- Implementation of international treaties
- Sustainable management of the marine environment and aquaculture, including combating illegal, unreported and unregulated fishing (IUU) and excluding IUU products from trade
- Trade and biodiversity, including cooperation for enforcement of CITES and trade-relat-

- ed aspects of the Convention on Biological Diversity
- Conservation and sustainable management of forests and preventing trade in illegal logging
- Promotion of high animal welfare standards (in the chapter on Sanitary and Phyto-Sanitary Measures)
- Support for voluntary climate and sustainability assurance schemes
- Cooperation in supporting waste reduction and a transition towards a circular economy
- Promotion of responsible supply chain management and responsible business conduct by each party in line with commitments made under instruments such as the OECD Guidelines for Multinational Enterprises

New Zealand's proposals, and their support for EU proposals, are built on similar provisions in previous FTAs and the CPTPP. The government regards this FTA with the EU as an opportunity to strengthen a number of these provisions.

A best practice FTA should commit both parties to adopt and implement a broad range of trade-adjacent multilateral agreements related to sustainable development. These commitments should be enforced through a binding mechanism that includes the participation of civil society. The EU and New Zealand should cooperate to ensure that the WTO's Dispute Settlement Mechanism is not used as a means to prioritise trade rules above multilateral social, health and environmental agreements and internationally-agreed codes and principles.

ADDRESSING CLIMATE CHANGE

Climate change will be a major issue addressed under the Trade and Sustainable Development chapter. A problem for New Zealand in making bold proposals on climate change is that its rhetoric on climate action has gone far beyond its actions. This limits the degree to which New Zealand will be willing to move beyond initiatives on fossil fuel subsidies.

New Zealand has not agreed a climate change chapter in any previous FTA and climate change has been conspicuous by its absence from the CPTPP, the Regional Comprehensive Economic

Carbon Border Adjustment Mechanism

The EU is developing a proposal for a broad and WTO compatible Carbon Border Adjustment Mechanism (CBAM) for June 2021 (linked to CoP 26). The New Zealand government does not yet have a policy on CBAM, although the Prime Minister has given her support to cooperation on carbon pricing: "Surely if we're all committed to living up to the Paris Agreement, we can find ways to cooperate on putting a price on emissions whilst still competing on the quality and price of our goods and services."

The previous Minister for Trade, David Parker (currently Minister for the Environment) has expressed more specific support: "... the European Union confirmed they will introduce carbon border adjustments in 2023. I know these are contentious and create trade risks, but our efforts to decarbonise and to clean up our own system of production could be undercut by high carbon

imported substitutes. Multilateral rules have so far been ineffective. Perhaps as a country working with others, we could be a pathfinder here too.”

However, it appears that the government may now be more aware of the risks to New Zealand’s exports. The new Trade Minister more recently stated: “It remains unclear how such tariffs could affect New Zealand’s trade. Trade Minister Damien O’Connor said such “ad hoc” trade interventions appeared a long way off, and he had not yet considered joining Australia in protest. He suggested such trade tariffs would not fit within World Trade Organisation (WTO) obligations.”

This is still a live issue for New Zealand and there are indications they want to be involved in the development of a mechanism but are cautious of ensuring its alignment with WTO rules. They would insist that the instrument includes principles that are compatible with existing trade agreements, such as being predictable, least trade restrictive, non-discriminatory, evidence-based etc).

Other Provisions

There are other measures proposed in the FTA to support climate action and protect the rights of states to regulate. These include disciplines on subsidies, tariff reductions on environmental goods, removal of Non-Tariff Barriers on environmental goods and services and protection of the right to regulate for climate action. Examples of ambitious language on climate exist in the EU-UK TCA, and should be taken as model.

EU-UK TCA Title XI: Level Playing Field for Open and Fair Competition and Sustainable Development:

Article 8.5 Trade and Climate Change

1. The Parties recognise the importance of taking urgent action to combat climate change and its impacts, and the role of trade and investment in pursuing that objective, in line with the UNFCCC, the purpose and goals of the Paris Agreement adopted at Paris on 12 December 2015 by the Conference of the Parties to the United Nations Framework Convention on Climate Change at its 21st session (the “Paris Agreement”), and with other multilateral environmental agreements and multilateral instruments in the area of climate change.

...

(c) shall facilitate the removal of obstacles to trade and investment in goods and services of particular relevance for climate change mitigation and adaptation, such as renewable energy, energy efficient products and services, for instance through addressing tariff and non-tariff barriers or through the adoption of policy frameworks conducive to the deployment of the best available solutions.

New Zealand’s Position

Commitment to the Paris Agreement and its obligations is consistent with New Zealand’s current climate and trade policy, although it has not yet been included in past trade agreements.

Possible content of other climate change provisions may include cooperation, linking of ETS schemes and commitment to work towards a just transition that is respectful of the impact on workers and vulnerable groups in society.

EU Position

In terms of precedents, CETA mentions carbon markets as a potential “cooperation activity” in trade-related aspects of climate change regimes (although it does not explicitly mention a Carbon Border Adjustment Mechanism). The recently concluded EU-UK TCA also provides an example of aligned carbon markets, with language that appears to anticipate the EU’s proposed CBAM.

EU-UK FTA Title XI: Level Playing Field for Open and Fair Competition and Sustainable Development:

Article 7.3: Carbon pricing

1. Each Party shall have in place an effective system of carbon pricing as of 1 January 2021.
2. Each system shall cover greenhouse gas emissions from electricity generation, heat generation, industry and aviation.
3. The effectiveness of the Parties’ respective carbon pricing systems shall uphold the level of protection provided for by Article 7.2 [Non-regression from levels of protection]
4. By way of derogation from paragraph 2, aviation shall be included within two years at the latest, if not included already. The scope of the Union system of carbon pricing shall cover departing flights from the European Economic Area to the United Kingdom.
5. Each Party shall maintain their system of carbon pricing insofar as it is an effective tool for each Party in the fight against climate change and shall in any event uphold the level of protection provided for by Article 7.2 [Non-regression from levels of protection]
6. The Parties shall cooperate on carbon pricing. They shall give serious consideration to linking their respective carbon pricing systems in a way that preserves the integrity of these systems and provides for the possibility to increase their effectiveness.

Challenges for the Negotiations

The EU-UK TCA commits to inclusion of aviation into a carbon pricing system within two years. This is not current New Zealand policy and would be a new initiative. It would be welcome from a climate action perspective, but is likely to be opposed by Air New Zealand and aviation lobbyists, especially during the current restrictions on entry to New Zealand and while long haul flights are severely curtailed. Reduction of emissions from shipping are also missing from the Paris Agreement and should be included in the FTA.

A major gap in the UK-EU TCA is the limited scope, especially the lack of coverage of methane and agricultural emissions more broadly. This is a particular problem, given New Zealand’s emissions profile and the issues discussed in Chapter 1. A future work programme should look at the inclusion of agriculture as part of cooperation on carbon pricing and emissions reductions, as outlined in section 1.2.4 above.

As noted above, New Zealand’s policy on a CBAM remains uncertain and they are likely to be cau-

tious about including any form of commitment to action. There is scope for EU-NZ cooperation in the development and implementation of a well-designed CBAM scheme to support domestic climate action and penalise the 'free-riders' that would otherwise have an unfair trading advantage. However, any mechanism will need to be coherent with the UN Framework Convention on Climate Change and its provisions of common but differentiated responsibilities.

New Zealand's international focus for trade and climate change remains firmly on the removal of fossil fuel subsidies and trade barriers to climate-friendly goods and services. They should be encouraged to extend their scope of trade and climate measures to include the above issues.

An ambitious agreement would ensure that climate change issues are integrated throughout the FTA, with specific commitments on aviation, a work programme on incentivising low emissions agriculture and cooperation on developing a border tax adjustment framework.

TRADE AND THE ENVIRONMENT

The FTA offers the opportunity to move beyond a trade liberalisation framework to ensure that environmentally-damaging trade is restricted and to facilitate trade in verifiably-sustainable products and services.

New Zealand's Position

New Zealand has signalled that they will have a particular focus on combatting the illegal trade in wild flora and fauna; illegal, unreported and unregulated fishing (IUU); illegal logging; and trade in related products. Their proposals are based on the CPTPP agreement, including dispute settlement under the FTA as a whole, with potential trade disciplines, fines and trade sanctions. There are specific procedures requiring consultation that must be used before the dispute settlement provisions of CPTPP are initiated.

New Zealand has also called for cooperation with the EU on emerging green technologies and climate-friendly innovations, and initiatives which promote sustainable, low-emissions development.

Challenges for the Negotiations

In negotiations, the EU and New Zealand have agreed to explore the conservation and management of natural ecosystems, voluntary sustainability assurance schemes, circular economy and corporate social responsibility, which are in line with commitments made under instruments, such as the OECD Guidelines for Multinational Enterprises. The negotiations are close to agreement.

An ambitious agreement would provide substance and tangible commitments to the current model of FTAs. A broad agenda has been agreed but it is not yet clear whether both parties are willing to go beyond aspiration and agree specific actions and deliverables that would shift trade patterns away from environmental harm towards certified sustainable trade.

As an example, the EU and New Zealand have shared aims for the sustainable management of forests. The FTA should agree to cooperate in adopting specific regulations that restrict trade in timber and non-timber forest products that damage natural forests and ecosystems, as well as breaching the rights of the communities and indigenous peoples. This could be achieved by re-

quiring importers to undertake due diligence in complying with a clearly-defined set of social and environmental standards³⁷, building on existing certification systems.

TRADE AND LABOUR

Labour provisions in the CPTPP are the most comprehensive in New Zealand's trade agreements. They include a requirement for parties to enforce their labour laws, establishment of a Labour Council of senior governmental representatives, a mechanism for stakeholders to make public submissions and dispute settlement as part of the overall FTA.

Recent EU FTAs have similar provisions and include support for a Civil Society Forum to dialogue at least once per year. However, the EU does not include a dispute settlement mechanism and the provisions of the trade and labour chapter are not subject to the dispute settlement mechanism for the FTA.

New Zealand's Position

New Zealand is supportive of the International Labour Organisation's (ILO's) overarching objectives of promoting decent work in the global economy, including the recognition and reinforcement in each party's domestic law of the ILO's Fundamental Labour Principles and Rights at Work.

However, in the past, the New Zealand government has adopted provisions that are inconsistent with ILO core Conventions. In particular, the Employment Relations (Film Production Work) Amendment Act in 2010 stripped numerous labour rights from workers in the film and gaming industries for the express and publicly stated purpose of attracting investment and services.

In recent years, the Labour government has strengthened protection for the rights of workers, including the restoration of the rights of workers in the film and gaming sectors, and has proposals to go further. This shows the importance of ratification of core ILO Conventions, to provide an acceptable standard for employment legislation.

However, a sticking issue for New Zealand is ratification of two ILO fundamental conventions:

- Convention 87 - Freedom of Association and Protection of the Right to Organise³⁸. In order to ratify Convention 87, the right to freedom of association in the New Zealand Bill of Rights Act 1990 should be amended to expressly include the right to collectively bargaining and the right to strike, and legal restrictions on the right to strike should be removed.

37 Greenpeace (2020). A new EU regulation to protect the world's forests and ecosystems. EU Policy Briefing. August 2020. Accessed at: <https://www.greenpeace.org/static/planet4-eu-unit-stateless/2020/09/20200904-a-new-EU-regulation-protect-worlds-forests-ecosystems.pdf>

38 C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Accessed at: https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312232:NO

- Convention 138 - Minimum Age³⁹. The New Zealand government considers that it is not exploitative for older children to work, and such part time work is common in New Zealand. However, this position may not be inconsistent with Convention 138, which allows older children to work part-time where it is compatible with schooling.

As a member of the ILO, New Zealand is bound to implement the provisions of the core conventions and reports that it does so, including the two conventions that it has not ratified. However, as shown above, ratification provides an important foundation for future policy.

Challenges for the Negotiations

Reports from the negotiations suggest that there is ongoing work on the wording around New Zealand's non-ratification of Conventions 87 and 138. The EU's position is that New Zealand should ratify these conventions.

New Zealand parliamentary action would be required in order to ratify the conventions, particularly Convention 87. It is possible that the Labour government is likely to accede to these conventions in future but there are no immediate plans to do so. The final wording of the FTA may reflect this position.

An ambitious trade and labour chapter would also include a strong dispute settlement mechanism, supported by mandated participation of civil society, with a right to make submissions and participate in decision-making processes.

Energy and Raw Materials

Sustainable production of raw materials should be a crucial element in trade policy. Extraction of raw materials can raise serious issues of human rights violations, breaches of the rights of indigenous peoples, biodiversity loss, pollution and damage to communities. Trade agreements should regulate raw materials that have been extracted through damaging processes and provide incentives for sustainable production and processing.

Regulation can be provided through the development of an agreed certification system, backed by a monitoring and enforcement mechanism. There are a number of principles to provide a framework, including the precautionary principle, polluter pays, prior and informed consent and the human rights framework, including the rights of Indigenous People. The principles should include transparency and the involvement of stakeholder groups, especially affected communities⁴⁰.

39 C138 - Minimum Age Convention, 1973 (No. 138). Accessed at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312283:NO

40 Alternatives for the Raw Materials and Energy Chapters in EU Trade Agreements, Powershift and ATTAC Deutschland, May 2020. Accessed at: <https://power-shift.de/wp-content/uploads/2020/05/Alternatives-for-the-%E2%80%98Raw-materials-and-Energy-Chapters%E2%80%99-in-EU-trade-agreements-web.pdf>

New Zealand's Position

New Zealand has not previously included a specific chapter on Energy and Raw Materials in any previous FTA. However, New Zealand has sustainability objectives that they are seeking to have reflected in the negotiations, including the promotion of renewable energy and the use of environmental impact assessment.

EU Position

The EU's recent FTA with the UK includes other issues under this chapter, such as renewable energy targets, commitments to eliminate discriminatory barriers to renewables, and grid integration for renewable energy.

Challenges for the Negotiations

An ambitious FTA would recognise the importance of raw materials and energy for aims including climate action, sustainability, human rights and inclusive development. Parties should agree to collaborate on the development of a framework for sustainable production, trade and use of raw materials and energy.

Environmental Goods and Services

Negotiations on environmental goods and services are addressing a reduction in tariffs on goods and the removal on Non-Tariff Barriers (NTBs) that restrict trade in goods and services or inhibit the transition to sustainability and low emissions. The aim is to allow easier access to the products and services than can benefit the environment. These issues are part of the tariff negotiations and have yet to be concluded.

Broad consultation with those potentially affected is required to protect legitimate regulation that should not be regarded as a trade barrier. Both the EU and New Zealand have barriers to trade and investment that protect the environment, uphold labour standards or promote climate action. As well as concern over goods trade, there are public concerns over essential services where, for example, regulations to ensure public accountability for the delivery of water can be seen as a barrier to investment.

The failure to distinguish between legitimate regulation in the public interest and perceived barriers to trade have undermined progressive policies and resulted in grossly inflated claims of economic benefit from FTAs and regional trade agreements.

New Zealand's Proposal

Prior to round eight of the EU-NZ FTA negotiations in June 2020, New Zealand tabled a proposal for environmental goods and services. This would be a part of the market access negotiations generally, and part of the overall tariff schedule, but there would be a separate list for environmental goods.

New Zealand's proposal was based on the schedule of 133 product categories in the ANZTEC agreement⁴¹, covering elimination of tariffs, facilitating entry of people to deliver environmental services, encouragement to remove NTBs and promotion of sound regulation. Since this agreement with Chinese Taipei is now eight years old, New Zealand has proposed to update the schedule.

EU Position

Reportedly, the EU would prefer to have the goods included as part of the overall goods schedule. A compromise may be for an announcement of a list at the conclusion of negotiations but not to have the goods listed as a separate schedule.

The scope of the coverage has yet to be resolved. The EU has not yet responded with a specific proposal. It is possible that they would prefer the list to be based on a shorter list of 54 product categories agreed by APEC in 2012⁴². An issue for the negotiations will be EU sensitivities over the ANZTEC list including products such as bicycles where there is significant domestic manufacturing. It is likely that some products will be duty free immediately, while others are phased in.

Challenges for the Negotiations

The negotiations on reduction or elimination of tariffs and non-tariff barriers for environmental goods are still underway. There have been a number of initiatives over almost two decades to reduce tariffs and improve access for products that are beneficial for the environment or for action on climate change. However, the negotiations have typically stalled at the point that domestic interests, generally in the form of local product manufacturers, are threatened.

There are potential benefits from these negotiations, but there are also risks. Public consultation is needed to ensure that issues of public concern are not being overlooked and regulations to protect the public interest are not being removed.

If provisions on a Trade and Environment Committee were incorporated into the EU-NZ FTA, this could be a forum for the continual evolution of the environmental goods list to reflect innovation and new product categories.

Services and Investment

New Zealand has signalled that it is seeking services negotiations to adopt a negative list approach, so that sectors are liberalised unless specifically excluded, rather than the positive list, or opt-in approach used in the WTO's General Agreement on Trade in Services (GATS). This is also the EU's current approach, consistent with its recent FTAs.

41 ANZTEC agreement. Accessed at: <https://www.nzcio.com/assets/NZCIO-documents/ANZTEC-Final-Text-10-July-2013-NZ.pdf>

42 APEC List of Environmental Goods. Accessed at: https://www.apec.org/meeting-papers/leaders-declarations/2012/2012_aelm/2012_aelm_annexc.aspx

The negative list approach entails heightened risk that a government will restrict its ability to regulate in the public interest.

There are serious risks that can arise from commitments to services and investment liberalisation, especially in negotiations that are lacking in transparency. It is impossible for governments to anticipate future disruptions in markets, technologies, role of government and social expectations, as has already been seen in adverse impacts from the digital economy and the consequences of financial liberalisation.

Service sectors reach deeply into social equity (through sectors such as health, education and water services) and the environment (waste, environmental services, energy services, and tourism), and can restrict the use of a wide range of regulations (laws, regulations, permits, licencing and zoning).

As an example, some trade pacts limit the ability of states to ban such fossil fuel services such as fracking and offshore drilling. Such bans could breach rules barring, for example, limitations on the number of fracking or offshore drilling firms operating in a country. Even policies that restrict, rather than ban, climate-polluting practices can contradict status quo trade rules, if they inadvertently affect foreign firms more than domestic firms.

Caution is required on services and investment commitments and, in some cases, there should be stronger carve-outs and a roll-back of existing commitments to provide necessary policy and regulatory space for social, environmental and climate policies that may be required in the future.

New Zealand's Proposals

New Zealand is seeking liberalisation of trade and investment in the EU's private education, professional services, transport services and aviation services. These commitments cover cross-border supply, investment and movement of professionals to deliver services.

The negotiations will potentially extend liberalisation across New Zealand's local government bodies, with potential restrictions on a range of local government powers, including awarding of permits and licences, as well as the regulation of service provision.

EU Proposals

The EU is seeking liberalisation in particular of financial services, telecommunications and maritime services. The inclusion of financial services is of concern, in the light of financial instability and past crises, such as the Global Financial Crisis, that have exposed lax regulation of complex financial instruments.

Challenges for the Negotiations

Services offers in the EU-NZ FTA were updated in July and further negotiations will be required. There is a lack of transparency on the specific sectors subject to current negotiations, as there is on other aspects of the negotiations.

This is of concern, as these negotiations pose potential risks to the rights of the EU and NZ to regulate in the public interest, including a range of policies and legislation that may be required in

the future to meet the mounting crises of climate change, biodiversity extinction and inequality, as well as unforeseen changes in technology, the environment, and social expectations.

The high level of public concern over TTIP and TPP negotiations in the EU and New Zealand provides evidence of the deep level of concern that focuses on investment and services provisions. The lack of transparency in the EU-NZ FTA is worrisome. A democratically-sound process would include full transparency, supported by objective social and environmental assessment of the services and investment proposals prior to the completion of negotiations.

Technical Barriers to Trade

In early scoping discussions, New Zealand and the EU agreed a non-exhaustive list of areas to consider, including automotive, green technology, organic farming standards, pharmaceuticals, and wines and spirits.

New Zealand's Proposals

New Zealand has previously committed to sector-specific commitments for wine and distilled products, information and communications technology products, pharmaceuticals, cosmetics, medical devices, pre-packaged foods and food additives and organic products. They are seeking commitments in these areas.

EU Proposals

The EU's FTAs, including the EU-Singapore FTA, commonly include specific commitments on marking and labelling. New Zealand has not committed to these types of provisions in the past and prefers a general approach to the application of rules across all types of potential technical barriers to trade. However, MFAT negotiators recognise the particular difficulties that marking and labelling requirements can create for exporters and have agreed to consideration in the FTA.

Challenges for the Negotiations

Negotiations are continuing, and there are important issues at stake, including possible restrictions on labelling, regulation and labelling of toxic chemicals and harmful substances, standards for organics and climate emissions and regulations relating to genetically-modified organisms. As with other chapters, full transparency through release of the draft text is needed to assess the likely social or environmental implications from the outcomes.

A best practice FTA could provide collaboration to support the development of internationally-recognised performance standards, certification processes and labelling to support sustainable trade. This should be coupled with protection to ensure that sustainability standards are not undermined by trade measures against NTBs.

Procurement

Governments are major buyers of goods and services, but status quo trade rules regarding procurement expose green or sustainability policies to challenge as having an unintended “effect of creating an unnecessary obstacle to trade”. Both parties are in favour of including sustainability provisions in the procurement chapter.

An ambitious FTA would explicitly enable governments to use sustainability criteria throughout their procurement processes, as well as allowing space for local content provisions and the development of local initiatives that build capacity for the future.

New Zealand’s Proposals

Both the EU and New Zealand are parties to the WTO Agreement on Government Procurement Agreement (GPA) commitments. However, the FTA negotiations are extending further to encompass local government and State-Owned Enterprises. The EU has signalled this as a priority. Such commitments would extend access to New Zealand procurement beyond the WTO GPA, the CPTPP and existing FTAs.

The EU made an initial proposal on the environmental, social and cultural elements of government procurement, followed a New Zealand amended proposal. The New Zealand proposal builds on the NZ-Korea FTA, which includes provisions specifically allowing technical specifications for procurement to include the conservation of natural resources and protection of the environment.

EU proposals

The EU’s FTAs with Singapore and the UK have included provisions that allow social and environmental specifications in government procurement, but these fall short of a more proactive approach to encouraging sustainable procurement.

Challenges for the Negotiations

The EU-NZ FTA text on sustainable procurement was substantially agreed in round 9 negotiations, held in November 2020. There has been little consultation with local government and local communities on the implications for their procurement processes.

Trade for All Issues

New Zealand has grouped a number of issues together under a ‘Trade for All’ umbrella. These have been highlighted by the work of the Trade for All Advisory Board and included in their recommendations which the government has agreed to implement⁴³. The government has formed the Inclusive Trade Action Group⁴⁴, a joint forum with Canada and Chile that aims to make trade poli-

43 Trade For All Agenda. Accessed at: <https://www.mfat.govt.nz/en/trade/nz-trade-policy/trade-for-all-agenda/>

44 Inclusive Trade Action Group (ITAG). Accessed at: <https://www.mfat.govt.nz/en/trade/nz-trade-policy/inclusive-trade-action-group-itag/>

cies more inclusive and ensure that the benefits of trade and investment are more broadly shared.

These issues have been left until fairly late in the negotiations (with discussion commencing in round 9), so attention is required to ensure they receive the priority they deserve.

Gender Equality

Trade has traditionally been a male dominated area, and women have had less opportunity to participate and benefit. The intersection of trade and gender issues is important. However, while it is welcome that previous trade agreements have recognised gender as an issue, the measures included have been widely criticised as having little impact towards including roles for women in policy making and trade. Importantly, the potential for women to be more affected by impacts of trade, such as increased inequality, reduced access to affordable medicines, a lack of labour rights and poor working conditions, is hereby higher.

The CPTPP, for example, agreed to “consider undertaking cooperative activities aimed at enhancing the ability of women, including workers and business owners, to fully access and benefit from the opportunities”⁴⁵.

New Zealand’s Proposals

Gender equality issues were subsequently a key pillar of the report of New Zealand’s Trade for All Advisory Board, and a Global Trade and Gender Arrangement⁴⁶ has been established as part of the Inclusive Trade Action Group with Canada and Chile. The EU-NZ FTA proposed elements include:

- Acknowledgement of the importance of incorporating a gender perspective into economic and trade policy issues to ensure that economic growth can benefit everyone.
- Connections with other international agreements focused on gender equality, for example the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
- A framework for New Zealand and the EU to undertake joint cooperation activities on a broad range of issues related to gender and trade, such as capacity building; education, business development services; and sharing methods and procedures for gender-focused data collection and analysis.

Challenges for the Negotiations

The first substantive discussions on trade and gender did not take place until round 9 in November 2020. New Zealand reported a degree of commonality between the parties, with further negotiations to take place between rounds.

45 CPTPP text. Accessed at: <https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/23.-Development-Chapter.pdf>

46 New Zealand joins initiative to boost women’s role in global trade. Accessed at: <https://www.beehive.govt.nz/release/new-zealand-joins-initiative-boost-women%E2%80%99s-role-global-trade>

A gender-sensitive approach would include an objective assessment of the likely differential impact of the proposed FTA on women and girls, with participation of experts and civil society, prior to completion of the negotiations.

Trade and Indigenous Issues

Almost all New Zealand's FTAs include a standard Treaty of Waitangi (the treaty signed between New Zealand Māori and the British Crown in 1840) clause. The wording of the trade clause was supported by the Waitangi Tribunal in 2016 in stating that it "offers a reasonable degree of protection to Māori interests affected by the TPPA."

New Zealand's Proposal

Currently, this Treaty of Waitangi clause remains a bottom line for negotiators⁴⁷. The clause references the Treaty of Waitangi between Māori and the state and protects the New Zealand Government's ability to adopt any policy it considers necessary to fulfil its obligations to Māori. New Zealand's lead negotiator in reporting to the New Zealand Parliament stated: "We have not been successful with the European Union thus far, but it remains something that we continue to pursue with them"⁴⁸.

However, there have been widespread calls for deeper engagement with Māori and stronger protection for issues important to such as recognition of traditional knowledge and appropriation of cultural goods and services. The government has signed a Memorandum of Understanding with a group of recognised Māori leaders, Te Taumata⁴⁹, to deepen MFAT's engagement with Māori on trade policy and Māori priorities within trade.

These developments provide the foundation to further integration of Māori priorities in future trade agreements. A starting point for further agreement with the EU could be New Zealand's proposal to establish a framework for cooperation on indigenous issues.

Challenges for the Negotiations

New Zealand's proposal has not yet been agreed by the EU. Reports on the last session suggesting there should be some other form of incorporation of these issues give cause for concern.

Māori concerns over the previous TPP negotiations have not yet been reflected in stronger provisions in trade agreements. These issues are crucial to uphold the rights and heritage of Māori, and to provide real opportunities for their social, cultural and economic development.

47 Māori interests in the EU-NZ FTA, Accessed at: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/eu-fta/maori-interests/>

48 R. Harman (2019) How Brexit could damage NZ, in *Politik*. Accessed at: <https://www.politik.co.nz/2019/12/13/how-brexit-could-damage-nz/>, *Politik*

49 Trade Engagement with Treaty Partners. Accessed at: <https://www.mfat.govt.nz/en/trade/nz-trade-policy/consultation-with-maori/#Taumata>

Regional Economic Development

New Zealand's Trade for All agenda has inclusion as a core element, including economic opportunities for regional development. While regional development has not been a feature of previous trade agreements, New Zealand has proposed to include cooperation to:

- Understand the role of international trade in growing domestic regional economies and their productivity,
- ensure the benefits of trade can be shared across society and
- promote trade agreements to SMEs as an important driver of their internationalisation.

The Trade for All issues were introduced by New Zealand in the 9th negotiating round in November 2020, and it is, as yet, unclear whether regional development will be included in the final agreement.

Compliance and Enforcement

While social and environmental provisions have been included a Trade and Sustainable Development chapter in eleven past EU FTAs since 2008, they have not been consistently implemented, and there is no mechanism to ensure this occurs. Previous EU FTAs have established processes to address non-compliance (such as the establishment of a panel), but these can only develop recommendations and fall short of being enforceable⁵⁰.

Pressure for enforceability is building. Politico reports that the EU-Mercosur FTA, concluded in June 2019 may never be ratified due to concerns over the environmental impact of the accord, particularly in terms of destruction of the Amazon rainforest⁵¹.

Enforcement of the trade and sustainable development provisions in the EU-Mercosur FTA relies on a Committee of Experts making recommendations to the parties for their action in case of non-compliance. This falls well short of the enforcement mechanism for the substantive parts of the FTA and reflects the unwillingness of the parties to be bound by the sustainable development provisions in the FTA.

There is an expectation in each of the EU's three legislative bodies — the European Commission, Parliament and Council — that the EU-NZ FTA will include more enforceable rules on sustainable development issues.

Dutch Trade Minister Sigrud Kaag and her French counterpart Franck Riester launched a paper in February 2020 proposing “staged ... tariff reductions linked to the effective implementation of [environmental] provisions ... including the possibility of withdrawal of those specific tariff lines

50 Kettunen et al. (2020). An EU Green Deal for trade policy and the environment: Aligning trade with climate and sustainable development objectives (IEEP Brussels/London), *supra n 17*, P14. Accessed at: [https://ieep.eu/uploads/articles/attachments/9c951784-8c12-4ff5-a5c5-ee17c5f9f80b/Trade%20and%20environment_FINAL%20\(Jan%202020\).pdf](https://ieep.eu/uploads/articles/attachments/9c951784-8c12-4ff5-a5c5-ee17c5f9f80b/Trade%20and%20environment_FINAL%20(Jan%202020).pdf).

51 Vela, Jakob Hank. (2020). EU-New Zealand chart course towards Green trade deals. *Politico*. Accessed at: <https://www.politico.eu/article/eu-gets-serious-about-green-trade-rules/>

in the event of a breach of those provisions.⁵² The paper also includes a streamlined notification process to respond to FTA breaches.

Parliamentarians say the EU's trade agreement with New Zealand, which is currently under negotiation, will be the first to include the new mechanisms. An article in Politico reported: "We are working on modernizing the sustainability chapter and the government in New Zealand is open to the idea," said Bernd Lange, chair of Parliament's trade committee. His colleague Anna Cavazzini from the Greens agreed: "New Zealand wants to work with us to include more enforceable environmental targets, so it will be the perfect country to try this new mechanism out with."

Pressure for enforceability is bolstered by the Commission's announcement of the role of a Chief Trade Policy Enforcer as part of the European Green Deal, covering implementation of environmental and labour standards and participation of civil society.

New Zealand's Proposal

New Zealand's proposal is for enforcement for the Trade and Sustainable Development (TSD) chapter to be included under the Dispute Settlement Mechanism of the FTA. New Zealand negotiators are working from the basis of the CPTPP Environment chapter but expect to go further in the EU negotiations.

The CPTPP establishes an Environment Committee, with specified contact points. The chapter calls for transparency, public participation and consultations. These lack specific commitments and mechanisms. In case of a potential breach there is an escalation path from the contact point to the Senior Representatives, Ministers, and if there is no agreement, to dispute settlement.

Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP) Article 20.23: Dispute Resolution

1. If the consulting Parties have failed to resolve the matter under Article 20.20 (Environment Consultations), Article 20.21 (Senior Representative Consultations) and Article 20.22 (Ministerial Consultations) within 60 days after the date of receipt of a request under Article 20.20, or any other period as the consulting Parties may agree, the requesting Party may request consultations 20-24 under Article 28.5 (Consultations) or request the establishment of a panel under Article 28.7 (Establishment of a Panel).

Importantly, the CPTPP also envisages the use of temporary remedies, such as compensation, suspension of benefits and the payment of a monetary assessment, in case of non-compliance.

Amongst other improvements to the above CPTPP provisions, New Zealand is calling for clarity on the use of proceeds from any fine that is levied for non-compliance. This could

⁵² Non-Paper from Netherlands and France of EU trade policy. Accessed at: <https://nl.ambafrance.org/Non-paper-from-the-Netherlands-and-France-on-trade-social-economic-effects-and>

include setting aside some or all of the funds to address the non-complying measure.

Challenges for the Negotiations

The trade disputes text was the subject of negotiations during round 9, held in November 2020. Both the EU and New Zealand report that they anticipate agreement will be reached shortly. The final issues discussed were those related to the ability to request consultations (but not a dispute panel) for trade measures that are proposed only, and procedures related to the selection of a mediator and panellists in any future state-to-state dispute.

Enforcement issues are likely to be of political interest and it is likely that decisions will be referred to Ministers.

Improvements

While enforcement is strengthened by the New Zealand proposal for inclusion of the TSD chapter under the FTA Dispute Settlement Mechanism, there need to be specific commitments related to processes for civil society and public engagement as part of improved enforcement and accountability. These should include transparency of information and reporting (lacking in most aspects of trade policy), objective and independent research on progress and implementation, the right to lodge complaints, involvement of experts and affected parties, mechanisms for involvement of civil society and other Non-State Actors and Parliamentary oversight.

As an example, trade union participation should be invited in the implementation of effective labour provisions across the whole FTA, and not limited to the specific trade and labour chapter. This should involve the New Zealand Council of Trade Unions (CTU) and the European Trade Union Confederation (ETUC).

The EU-Mercosur FTA includes a provision for the Trade and Sustainable Development Committee to inform civil society and to take account of their views, but this falls well short of a formal complaints mechanism or a more formal role in enforcement.

Conclusion

Nine proposals for an ambitious EU-NZ Free Trade Agreement

An ambitious agreement would

1. Restrict the payment of environmentally-damaging, production-related subsidies, while strengthening each Party's support for the transition to low emissions, regenerative and socially-supportive agricultural systems. A collaborate approach could be focus on the development of a certification system that would support and encourage trade in verified sustainable agricultural products. It should also include specific disciplines and transparency requirements in relation to fish subsidies that contribute to overfishing, overcapacity and IUU fishing.
2. Bring the EU and New Zealand together around a commitment to phase out fossil fuel subsidies domestically and to cooperate in doing so internationally.
3. Ensure that climate change issues are integrated throughout the FTA, with specific commitments on aviation, a work programme on incentivising low emissions agriculture and cooperation on developing a border carbon adjustment framework.
4. Agree to cooperate in adopting specific regulations that restrict trade in timber and non-timber forest products that damage natural forests and ecosystems, as well as breaching the rights of the communities and indigenous peoples.
5. Include an ambitious trade and labour chapter would also include a strong dispute settlement mechanism, supported by mandated participation of civil society, with a right to make submissions and participate in decision-making processes.
6. Recognise the importance of raw materials and energy for aims including climate action, sustainability, human rights and inclusive development. Parties should agree to collaborate on the development of a framework for sustainable production, trade and use of raw materials and energy.

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7. Provide collaboration to support the development of internationally-recognised performance standards, certification processes and labelling to support sustainable trade. This should be coupled with protection to ensure that sustainability standards are not undermined by trade measures -against Non-Tariff Barriers.
 8. Include a gender-sensitive approach with an objective assessment of the likely differential impact of the proposed FTA on women and girls, with participation of experts and civil society, prior to completion of the negotiations.
 9. Contains an enforceable trade and sustainable development chapter. There needs to be specific commitments related to processes for civil society and public engagement as part of improved enforcement and accountability. These should include transparency of information and reporting, objective and independent research on progress and implementation, the right to lodge complaints, involvement of experts and affected parties, mechanisms for involvement of civil society and other Non-State Actors and Parliamentary oversight.

This report was written for the European Parliament Greens/EFA group, by Barry Coates. Research was provided by Guy Salmon and Injy Johnstone.

With the European Commission embarking – under a new Trade Commissioner – on the European Green Deal, the ongoing FTA negotiation with New Zealand provides an important opportunity to build climate action, environmental sustainability and labour rights into EU FTAs. An analysis of New Zealand proposals is important because, according to reports, the EU has so far failed to respond positively to a number of key climate, environment and labour proposals made by NZ negotiators.

The research for this paper was undertaken between December 2020 and February 2021. An Official Information Act request for the text of New Zealand's negotiating proposals was not accepted, despite repeated commitments from the government to improve transparency in trade negotiations. The information in this paper has been sourced from EU and New Zealand official reports and negotiating summaries, analysis of trade agreements, media articles, research reports and interviews with trade officials.

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