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## NET ZERO EMISSIONS AND FREE TRADE AGREEMENTS: EFFORTS AT INTEGRATING CLIMATE GOALS BY THE UNITED KINGDOM AND AUSTRALIA

MARGARET A YOUNG  AND GEORGINA CLOUGH\* 

**Abstract** The negotiation of the free trade agreement (FTA) between Australia and the United Kingdom promised to integrate trade and climate policies. As a leader of the United Nations Framework Convention on Climate Change (UNFCCC) conference in Glasgow, the UK seemed well-placed to exert pressure on Australia, a country that was yet to embrace a target of net zero emissions by 2050. This article asks whether the FTA achieves this aim. It explains the link between trade liberalisation and climate change, referring to the scale and composition of economic activity and drawing upon examples from energy, agriculture, building and transportation sectors, as well as strategic factors. It provides an original analytical framework to assess the FTA's contributions to climate change goals, pointing to: (1) provisions to strengthen climate commitments, including net zero targets; (2) provisions to facilitate trade and investment in climate-related areas; and (3) provisions relating to enforcement and cooperation. It compares selected initiatives of other FTAs, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the European Union–Canada Comprehensive Economic and Trade Agreement (CETA), the UK–New Zealand FTA and the Singapore–Australia Green Economy Agreement. It reviews the FTA's negotiating process and its aftermath, including complaints about public participation. The article's conclusion that the FTA makes minimal contribution to climate change mitigation has implications for the broader quest for mutually supportive trade and climate policies, and, now that a net zero target has been legislated by the newly elected Australian Parliament, for the FTA's future implementation.

**Keywords:** trade agreements, climate change mitigation, policy integration, net zero, climate–trade nexus, Paris Agreement.

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## I. INTRODUCTION

It wasn't a climate agreement, it was a trade agreement ... and in trade agreements, I deal with trade issues. In climate agreements, I deal with climate issues.<sup>1</sup>

Trade is inextricably linked to climate change. Increases in greenhouse gas (GHG) emissions result from the enhanced production and economic activity, and the transportation of goods, that results from trade. Yet trade might also help mitigate climate change, depending on what is being traded, and by whom. Trade liberalisation may result in fewer GHG emissions if it reduces the cost and use of low-carbon goods, or if it incentivises trading partners to improve their climate policies. To the extent that GHG emissions are embedded in global trade flows, trade policy can be an important lever to address the import of 'embedded emissions' from goods produced outside of the territory in which they are consumed.<sup>2</sup> The integration of climate change commitments within trade relations is increasingly seen as crucial by trade ministries around the world,<sup>3</sup> and advanced by scholarship across multiple disciplines.<sup>4</sup> Yet mutually supportive climate and trade law is not assured, given the disparate and at-times conflicting goals of the underpinning international legal regimes.<sup>5</sup> Current proposals for legal development include border carbon adjustment measures,<sup>6</sup> the phasing out of fossil fuel subsidies,<sup>7</sup> and the reduction of

<sup>1</sup> Australian Prime Minister Scott Morrison (at that time) cited at a press conference on 8 September 2021 in S Coates, 'Australia and UK Government at Odds on Why Key Climate Targets Were Stripped Out of Future Trade Deal' (*Sky News*, 9 September 2021) <<https://news.sky.com/story/australia-and-uk-governments-at-odds-over-why-key-climate-targets-were-stripped-out-of-future-trade-deal-12402967>>.

<sup>2</sup> On the associated concept of 'carbon footprint', see further below (n 21) and associated text. See also WTO, "Trade and Climate Change: Overview of Trade Policies Adopted to Address Climate Change, Information Brief No 1" (3 November 2021) <[https://www.wto.org/english/news\\_e/news21\\_e/clim\\_03nov21-1\\_e.pdf](https://www.wto.org/english/news_e/news21_e/clim_03nov21-1_e.pdf)>.

<sup>3</sup> See Coalition of Trade Ministers on Climate, 'Coalition Launch Statement' (19 January 2023) <[www.tradeministersonclimate.org/](http://www.tradeministersonclimate.org/)>

<sup>4</sup> See, eg, J Bacchus, *Trade Links: New Rules for a New World* (CUP 2022); M Jakob, 'How Trade Policy Can Support the Climate Agenda' (2022) 376 *Science* 1401.

<sup>5</sup> For the relevant definition of regimes, see M Young, 'Introduction: The Productive Friction between Regimes' in M Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 11 (as 'sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumptions and biases').

<sup>6</sup> MA Mehling et al, 'Beat Protectionism and Emissions at a Stroke' (2018) 559 *Nature* 321. See also, Committee on Climate Change, 'Net Zero: The UK's Contribution to Stopping Global Warming' (May 2019) 250 <<https://www.theccc.org.uk/publication/net-zero-the-uks-contribution-to-stopping-global-warming/>>; J Odell, 'Our Alarming Climate Crisis Demands Border Adjustments Now' in M Elsig, M Hahn and G Spilker (eds), *The Shifting Landscape of Global Trade Governance: World Trade Forum* (CUP 2019).

<sup>7</sup> V Rive, *Fossil Fuel Subsidy Reform: An International Law Response* (Edward Elgar 2019); H van Asselt, T Moerenhout and C Verkuil, 'Using the Trade Regime to Phase out Fossil Fuel Subsidies' in M Jakob (ed), *Handbook on Trade Policy and Climate Change* (Edward Elgar 2022).

tariffs for environmental goods and services.<sup>8</sup> Amidst these international and domestic efforts, there are suggestions of an ‘untapped potential’:<sup>9</sup> namely, climate governance in preferential or free trade agreements (FTAs).

Improving the global response to climate change is an urgent task. Scientists provide an ever-worsening outlook for the health of the planet.<sup>10</sup> The changing climate is becoming a massive and regular burden in the daily lives of many: the 2022 floods along the east coast of Australia, for example, demonstrated the vulnerability of food and agriculture systems,<sup>11</sup> and followed the megafires of 2019–20, which destroyed vast swathes of habitat for Australia’s biodiversity.<sup>12</sup> In the UK, heatwaves in June, July and August 2022 led to unprecedented high temperatures, damaging crops and fuelling wildfires.<sup>13</sup> While the impact of these disasters on the economy and production are yet to be assessed fully, it is clear that trade itself is highly vulnerable to the effects of climate change. Even a 1.5°C or 2°C warmer world will significantly disrupt trade.<sup>14</sup> Yet efforts to address the problem are constrained. An ongoing malaise of multilateralism<sup>15</sup> has been stifled further by the pandemic, the war in Ukraine and rising energy prices. Rather than a site of multilateral problem-solving and decision-making on trade and climate integration, the World Trade Organization (WTO) has seen multiple disputes about discrimination in low-carbon energy-generation projects.<sup>16</sup>

<sup>8</sup> M Wu, ‘The WTO Environmental Goods Agreement: from Multilateralism to Plurilateralism’ in P Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar 2016).

<sup>9</sup> J Morin and S Jinnah, ‘The Untapped Potential of Preferential Trade Agreements for Climate Governance’ (2018) 27 *EnvtlPol* 541; N Laurens, C Brandt and J Morin, ‘Climate and Trade Policies: From Silos to Integration’ (2022) 22 *ClimPol* 248; J Munro, ‘Climate Change in the TPP and the TTIP’ in P Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar 2016) 396.

<sup>10</sup> Intergovernmental Panel on Climate Change (IPCC), ‘The Summary for Policymakers of the Special Report on Global Warming of 1.5°C’ (SR15, October 2018) <<https://www.ipcc.ch/sr15/chapter/spm/>>. See also IPCC, ‘Climate Change 2022: Mitigation of Climate Change: Summary for Policymakers’ (Working Group III Contribution to the Sixth Assessment Report of the IPCC) <[https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC\\_AR6\\_WGIII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf)>.

<sup>11</sup> Climate Council of Australia, *The Great Deluge: Australia’s New Era of Unnatural Disasters* (Climate Council of Australia Ltd 2022) <[www.climatecouncil.org.au/wp-content/uploads/2022/11/CC\\_MVSA0330-CC-Report-The-Great-Deluge\\_V7-FA-Screen-Single.pdf](http://www.climatecouncil.org.au/wp-content/uploads/2022/11/CC_MVSA0330-CC-Report-The-Great-Deluge_V7-FA-Screen-Single.pdf)>.

<sup>12</sup> See Australian Institute for Disaster Resilience, ‘Bushfires – Black Summer’ (<<https://knowledge.aidr.org.au/resources/black-summer-bushfires-nsw-2019-20/>>).

<sup>13</sup> See A Rhoden-Paul, ‘Heatwave: England Has Had Joint Hottest Summer on Record, Met Office Says’ (*BBC*, 1 September 2022) <<https://www.bbc.com/news/uk-62758367>>.

<sup>14</sup> See, eg, C Izaguirre et al, ‘Climate Change Risk to Global Port Operations’ (2021) 11 *NatClimChange* 14; K Li et al, ‘The Impact of 1.5 °C and 2.0 °C Global Warming on Global Maize Production and Trade’ (2022) 12 *SciRep* 17268 <<https://doi.org/10.1038/s41598-022-22228-7>>.

<sup>15</sup> See J Crawford, ‘The Current Political Discourse Concerning International Law’ (2018) 81 *MLR* 1.

<sup>16</sup> For the most recent, see *United Kingdom – Measures Relating to the Allocation of Contracts for Difference in Low Carbon Energy Generation: Request for Consultation by the European Union*, WT/DS612/1/G/L/1248, 30 March 2022.

The United Kingdom and Australia provide a useful model to test the role of FTAs in climate governance. Both countries have formally committed to the goals of the climate and trade regimes, having ratified the United Nations Framework Convention on Climate Change (UNFCCC),<sup>17</sup> the Paris Agreement<sup>18</sup> and the WTO covered agreements.<sup>19</sup> They are also trading partners with relatively high territorial emissions,<sup>20</sup> significant carbon footprints<sup>21</sup> and robust capacities to mitigate climate change as compared to developing countries.<sup>22</sup> They are participant countries of the ‘Coalition of Trade Ministers on Climate’.<sup>23</sup> The United Kingdom is notable, of course, due to its departure from the European Union (EU) and its quest to update its terms of trade through newly negotiated FTAs.

When Australia and the UK launched negotiations for an FTA in June 2020, only the UK had committed to net zero domestic emissions targets. The UK was providing leadership within the climate regime, preparing to host the Glasgow Conference of the Parties (COP) to the UNFCCC in 2021. Australia, in contrast, was viewed by many within the COP as a ‘climate laggard’<sup>24</sup> and one of the

<sup>17</sup> United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

<sup>18</sup> Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) [2016] ATS 24.

<sup>19</sup> Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3.

<sup>20</sup> According to the OECD, in 2020 Australia and the UK’s GHG emissions were 18.97 and 6.11 metric tonnes per capita, respectively: ‘Greenhouse Gas Emissions’ (*OECD.Stat*) <[https://stats.oecd.org/Index.aspx?DataSetCode=AIR\\_GHG](https://stats.oecd.org/Index.aspx?DataSetCode=AIR_GHG)>.

<sup>21</sup> The United Kingdom refers to its ‘carbon footprint’ as ‘emissions that are associated with the consumption spending of UK/England residents on goods and services, wherever in the world these emissions arise along the supply chain, and those which are directly generated by UK/English households through private motoring and burning fuel to heat homes’. See Department for Environment, Food & Rural Affairs, ‘Official Statistics: Carbon Footprint for the UK and England to 2019’ (3 November 2022) <<https://www.gov.uk/government/statistics/uks-carbon-footprint/carbon-footprint-for-the-uk-and-england-to-2019>>. Australia’s ‘consumption-based national greenhouse gas inventory’ records ‘emissions generated, either domestically or overseas, in support of production of goods and services that are finally produced in Australia’. See Department of Climate Change, Energy, the Environment and Water, *Quarterly Update of Australia’s National Greenhouse Gas Inventory: March 2022* (Commonwealth of Australia 2022) 23 <<https://www.dcceew.gov.au/sites/default/files/documents/nggi-quarterly-update-march-2022.pdf>>.

<sup>22</sup> The climate regime acknowledges the principle of ‘common but differentiated responsibilities and respective capabilities’ (CBDR–RC): Paris Agreement (n 18) arts 2(2), 4(19); see also preamble. For the origin of the CBDR–RC principle, see UNFCCC (n 17) art 3(1).

<sup>23</sup> Coalition of Trade Ministers on Climate, ‘Members of the Coalition of Trade Ministers on Climate’ <[www.tradeministersonclimate.org/members](http://www.tradeministersonclimate.org/members)>. Note also that the Group of Seven (G7), which includes the UK but not Australia, has committed ‘to urgent, ambitious, and inclusive climate action in this decade to limit global warming to 1.5°C above pre-industrial levels [and reaffirmed] commitment to reach net-zero emissions no later than 2050’: Council of the EU, ‘G7 Leaders’ Statement’ (12 December 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/g7-leaders-statement/>>.

<sup>24</sup> Australia has been a recipient of various ‘awards’ devised by environmental non-governmental organisations, including the ‘colossal fossil’ at COP26: see Climate Action

weakest in committing to mitigating climate change.<sup>25</sup> With the then Prime Ministers Scott Morrison and Boris Johnson seeking an FTA that included *inter alia* provisions relating to climate change, the prospect of leveraging bilateral relations provided optimism. The UK–Australia FTA<sup>26</sup> was signed in December 2021 and ratified by the Australian Parliament in November 2022. It is currently undergoing domestic ratification procedures in the United Kingdom, and it is expected that the agreement will enter into force in 2023.<sup>27</sup>

Emitting GHGs that tally to ‘net zero’ has become a target domestically and globally. The goals of the Paris Agreement include holding the increase in global average temperatures to well below 2°C above pre-industrial levels, and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.<sup>28</sup> In order to achieve this temperature goal, the Parties ‘aim to reach global peaking of greenhouse gas emissions as soon as possible ... so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century’.<sup>29</sup> This aspiration for net zero global emissions in the second half of the century is emphasised for developed country Parties, but only in the sense that the Paris Agreement recognises ‘that peaking will take longer for developing country Parties’, and that equity and efforts to eradicate poverty are relevant. All Parties pursue domestic mitigation measures to achieve their ‘nationally determined contributions’ (NDCs) to the global response to climate change, which they are obligated to prepare, communicate and maintain.<sup>30</sup>

The UK introduced its domestic net zero target in a 2019 amendment to its Climate Change Act 2008.<sup>31</sup> This Act sets out a duty ‘to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline’.<sup>32</sup> This is a net figure rather than an absolute reduction: UK territorial emissions are adjusted to take into account removals of emissions from the atmosphere. This can occur through the use of sinks (such as

Network International, ‘Colossal Fossil of the Day 12 November 2021’ (12 November 2021) <<https://climatenetwork.org/resource/colossal-fossil-of-the-day-12-november-2021-australia/>>.

<sup>25</sup> For example, the 2023 Climate Change Performance Index ranked Australia 55th out of 59 countries and the EU: see Climate Change Performance Index, ‘Australia’ (14 November 2022) <<https://ccpi.org/country/aus/>>.

<sup>26</sup> Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland (signed 17 December 2021) [2022] ATNIF 3 (UK–Australia FTA).

<sup>27</sup> D Giannini, ‘Australia–UK FTA to be Legislated’ (*The Canberra Times*, 7 June 2022) <<https://www.canberratimes.com.au/story/7770978/australia-uk-fta-due-to-be-legislated/>>.

<sup>28</sup> Paris Agreement (n 18) art 2(1)(a). <sup>29</sup> *ibid*, art 4(1). <sup>30</sup> *ibid*, art 4(2), art 2. The UK’s NDC was submitted on 12 December 2020. An update was submitted to the UNFCCC NDC Registry on 22 September 2022.

<sup>31</sup> Climate Change Act 2008 (2050 Target Amendment) Order 2019 (S.I. 2019/1056) sections 1, 2. The net UK carbon account is, according to the explanatory note of the Order, ‘the amount of net UK emissions of targeted greenhouse gases for a period adjusted by the amount of carbon units credited or debited to the account’. This order changed the previous target of 80 per cent of the 1990 baseline of GHG emissions. See also NDC submitted on 12 December 2020, *ibid*.

<sup>32</sup> Climate Change Act 2008, *ibid*, section 1(1).

planting forests, which sequesters carbon) or the purchase of carbon credits.<sup>33</sup> Establishing appropriate carbon budgets for the UK's Net Zero Strategy entails significant duties for the Secretary of State, including in the analysis of proposals and policies.<sup>34</sup>

In October 2021, Australia committed to a domestic target of net zero emissions by 2050.<sup>35</sup> After a general election in Australia in May 2022 and a change of government, Australia updated its NDC in July 2022 to include a more ambitious target of reductions to achieve by 2030 and confirm the target of net zero emissions by 2050.<sup>36</sup> The new Climate Change Act 2022 (Commonwealth of Australia), passed in September 2022, legislated these targets and included as its objects the temperature goals of the Paris Agreement.<sup>37</sup> Scholars of law, political science, economics and other disciplines may wonder whether Australia's commitment to net zero emissions was due to the influence exerted by the UK in the negotiation of the FTA.

The research question that thus motivates this article is: does the UK–Australia FTA contribute to net zero emissions goals? This question has significance for the two countries, and for the climate, but it also has implications for other FTAs and for the broader interaction between the climate and trade regimes. It requires understanding about the making of the FTA, the content of the FTA, and the implementation and enforcement of the FTA.<sup>38</sup> The evaluation also benefits from a comparison with existing and recently negotiated FTAs, including those that aspire to lead the field. Included therefore are text and context of a wide variety of FTAs including the UK–New Zealand FTA (UK–NZ FTA),<sup>39</sup> which was negotiated soon after the UK–Australia FTA. The analysis incorporates selected

<sup>33</sup> See, further, C Hilson, 'Hitting the Target? Analysing the Use of Targets in Climate Law' (2020) 32 JEL 195, 207–8. Aside from the net zero commitments of states that are the focus of this article, the authors note that pledges by non-state entities give rise to separate legal issues: see, eg, the Report from the United Nations' High-Level Group on the Net Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions* (2022) <[https://www.un.org/sites/un2.un.org/files/high-level\\_expert\\_group\\_n7b.pdf](https://www.un.org/sites/un2.un.org/files/high-level_expert_group_n7b.pdf)>.

<sup>34</sup> Climate Change Act 2008 (n 31) sections 13, 14; see further, *R (Friends of the Earth Ltd and ors) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin).

<sup>35</sup> See Media Release by the Hon Angus Taylor MP, 'Australia committed to successful COP26 summit in Glasgow' (28 October 2021) (noting Australia's updated Nationally Determined Contribution registered with the UNFCCC) <[www.minister.industry.gov.au/ministers/taylor/media-releases/australia-committed-successful-cop26-summit-glasgow](http://www.minister.industry.gov.au/ministers/taylor/media-releases/australia-committed-successful-cop26-summit-glasgow)>.

<sup>36</sup> Australia's updated NDC included confirmation of Australia's commitment to achieve net zero emissions by 2050, and a new, increased, 2030 target of 43 per cent below 2005 levels by 2030: Australian Government, *Australia's Nationally Determined Contribution: Communication 2022* (Commonwealth of Australia 2022) <<https://unfccc.int/sites/default/files/NDC/2022-06/Australias%20NDC%20June%202022%20Update%20%283%29.pdf>>.

<sup>37</sup> Climate Change Act 2022 (Commonwealth of Australia) section 3(a); section 10(b).

<sup>38</sup> See, in the context of trade-related aspects of fisheries, M Young, 'Regime Interaction in Creating, Implementing and Enforcing International Law' in M Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012).

<sup>39</sup> UK–New Zealand Free Trade Agreement (signed 28 February 2022, not yet in force) <[https://www.gov.uk/government/collections/uk-new-zealand-free-trade-agreement](http://www.gov.uk/government/collections/uk-new-zealand-free-trade-agreement)> (UK–NZ FTA).

provisions from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),<sup>40</sup> the EU–Canada Comprehensive Economic and Trade Agreement (CETA),<sup>41</sup> the EU–Japan Economic Partnership Agreement,<sup>42</sup> the EU–UK Trade and Cooperation Agreement (TCA)<sup>43</sup> and others. Agreements that sit alongside FTAs are also discussed, including the Singapore–Australia Green Economy Agreement (GEA), signed in October 2022,<sup>44</sup> and the proposed plurilateral ‘Agreement on Climate Change, Trade and Sustainability’, led by NZ. In this way, the article can serve in part as a summary of the state of play in the development of FTAs with climate aspirations.

Methodologically, this is a textual and comparative legal analysis. The article assesses the text of the agreement as it relates to action on climate change, focusing on the Environment chapter and other clauses, and referencing relevant examples from other FTAs. It also incorporates the results of publicly available impact assessments, noting that the UK and Australia do not adopt sustainability impact assessments that are used in other countries.<sup>45</sup> It reviews assessments from the UK Department for International Trade (DIT) and the UK Trade and Agriculture Commission, as well as various parliamentary committees. Statements by civil society (including a recently filed complaint about lack of adequate stakeholder engagement in the FTA negotiation) are also included, although quantitative assessment of impacted sectors or qualitative analysis of stakeholder interests and participation are not undertaken. Though interviews or other empirical assessment were not conducted for this article, the methodology adopted permits offering possible reasons for the relatively weak outcome of the UK–Australia FTA for tackling climate change. The conclusions are necessarily constrained by the text-based methodology. Yet the analysis suggests that the potential of FTAs to address climate change was not met in the context of the UK–Australia FTA.

The article is structured in three main sections. Following this Introduction, Section II provides necessary background to the relationship between trade liberalisation and GHG emissions, pointing to earlier analyses of the impact on

<sup>40</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) [2018] ATS 23 (CPTPP).

<sup>41</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23 (signed 30 October 2016).

<sup>42</sup> Agreement between the European Union and Japan for an Economic Partnership [2018] OJ L330/3 (signed 17 July 2018, entered into force 1 February 2019) (EU–Japan EPA).

<sup>43</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10 (signed 30 December 2020, entered into force 1 May 2021) (EU–UK TCA).

<sup>44</sup> Australian Government, Department of Foreign Affairs and Trade (DFAT), ‘Singapore–Australia Green Economy Agreement’ <<https://www.dfat.gov.au/geo/singapore/singapore-australia-green-economy-agreement>>.

<sup>45</sup> See further, G Riddell and S Lowe, ‘UK Trade Policy Observatory: Special Report – Towards a Comprehensive UK Green Trade Strategy’ (12 October 2021) 3 <<https://blogs.sussex.ac.uk/uktpo/files/2021/10/SR-UK-Green-Trade-Strategy.pdf>>.

the environment due to the scale and composition of particular trade flows, and drawing on literature surrounding ‘issue-linkage’ in international relations. It notes the importance of impact assessments of trade agreements by countries. This material enables the development of a framework of evaluation of the text of the UK–Australia FTA in Section III. This points to provisions to strengthen climate commitments, including net zero targets, provisions to facilitate trade and investment in climate-related areas, and provisions relating to enforcement and cooperation. Using evidence from the text and context of other FTAs, positive features and weaknesses of the UK–Australia FTA in addressing climate change are demonstrated. Section IV seeks to understand opportunities for participation and engagement across trade and climate regimes, which have been identified as necessary for regime interaction in other contexts. It describes the negotiating process and the announcement of the trade deal, which was accompanied by an image of Boris Johnson and Scott Morrison exchanging packets of chocolate biscuits.<sup>46</sup> A more jarring juxtaposition with the stirring images of extreme weather events in both countries less than a year later, amongst significant political and economic upheaval, is perhaps difficult to imagine.

## II. TRADE LIBERALISATION AND CLIMATE CHANGE

Efforts within the international community to address climate change are primarily concentrated on the Paris Agreement and the UNFCCC, which target GHGs generated or sequestered within countries. Inventories of GHG emissions are directed to territorial emissions within national jurisdictions. Countries seek to reduce their emissions through NDCs by focusing on emissions within their territory.<sup>47</sup> By contrast, trade and trade policy can affect GHG production and consumption behaviour in other countries.<sup>48</sup> This is significant for a country like the UK whose consumption-based emissions are considerably higher than its territorial-based emissions.<sup>49</sup> While this article does not empirically assess the carbon footprint of the goods traded between the United Kingdom and Australia,<sup>50</sup> it is important to track in general terms how the enhanced production and economic activity resulting

<sup>46</sup> See J Elsom, ‘Koal-ty Street: Boris Johnson Hails “New Dawn” with Post-Brexit Australia Trade Deal That Could Make Steaks and Wine Cheaper’ (*The Sun*, 15 June 2021) <<https://www.thesun.co.uk/news/politics/15278020/boris-johnson-signs-trade-deal-with-australia-for-cheap/>>.

<sup>47</sup> Paris Agreement (n 18) art 4(2). Some countries, including Scotland, have incorporated aviation and shipping, which are trade-related emissions, into their climate targets: see E Lydgate and C Anthony, ‘Can the UK Government be “World-Leading” in Both Trade and Climate Policy? Briefing Paper 47’ (*UK Trade Policy Observatory*, September 2020) <<https://blogs.sussex.ac.uk/uktpo/publications/can-the-uk-government-be-world-leading-in-both-trade-and-climate-policy/>>.

<sup>48</sup> See M Young, ‘Trade Measures to Address Climate Change: Territory and Extraterritoriality’ in P Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar 2016).

<sup>49</sup> Department for Business, Energy & Industrial Strategy, ‘2020 UK Greenhouse Gas Emissions, Final Figures’ (1 February 2022) 3 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1051408/2020-final-greenhouse-gas-emissions-statistical-release.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051408/2020-final-greenhouse-gas-emissions-statistical-release.pdf)>.

<sup>50</sup> Cf. impact assessments noted below (n 260 and n 268).

from trade, and the transportation of goods, results in increases in GHG emissions.<sup>51</sup> This section introduces the economic assessments of the impact of trade liberalisation on the environment, before discussing the political benefits in linking trade and climate governance and the role of impact assessments.

### A. Scale, Type, Technique and Other Trade Factors

Economists have analysed the environmental impacts of trade liberalisation in the context of early FTAs such as the North American FTA<sup>52</sup> by looking at three factors in particular (which are often synthesised as two factors: scale and composition).<sup>53</sup> The first factor is the scale of additional economic activity created by the liberalisation—a point easily comprehended by recognising the decrease in GHG emissions after the economic slow-down from the COVID-19 pandemic.<sup>54</sup> The second factor is the type of economic activity that the trade liberalisation supports, and whether such activity occurs within emissions-intensive sectors. Research suggests that middle- and low-income countries are especially vulnerable to an increase in activity in emissions-intensive sectors as a result of trade liberalisation.<sup>55</sup> However, it is important to note the pressures that beset even high-income countries. Australia's most recent State of the Environment report, whose release had been delayed by the Morrison government, was published in July 2022.<sup>56</sup> It revealed alarming and increasing pressures on Australia's natural environment by high rates of land clearing, deforestation and climate change,<sup>57</sup> a point that is particularly relevant to liberalisation of trade in the agricultural sector. Literature from animal studies emphasising the link between factory farming and climate

<sup>51</sup> L Tamiotti et al, *Trade and Climate Change: WTO-UNEP Report* (WTO and UN Environment Programme (UNEP) 2009) <[https://www.wto.org/english/res\\_e/booksp\\_e/trade\\_climate\\_change\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf)>; WTO, 'Carbon Content of International Trade, Information Brief No 4' (9 November 2021) <[https://www.wto.org/english/news\\_e/news21\\_e/clim\\_03nov21-4\\_e.pdf](https://www.wto.org/english/news_e/news21_e/clim_03nov21-4_e.pdf)>.

<sup>52</sup> North American Free Trade Agreement (Canada–Mexico–United States of America) (signed 17 December 1992, entered into force 1 January 1994) [1994] CTS 2 (NAFTA), since replaced with a new version by the parties (signed 13 November 2018, entered into force 1 July 2020) (United States–Mexico–Canada Agreement; USMCA).

<sup>53</sup> See GM Grossman and AB Krueger, 'Environmental Impacts of a North American Free Trade Agreement, Working Paper No 3914' (National Bureau of Economic Research, November 1991) <<https://www.nber.org/papers/w3914>>. See also, Tamiotti et al (n 51).

<sup>54</sup> C Le Quére et al, 'Temporary Reduction in Daily Global CO<sub>2</sub> Emissions During the COVID-19 Forced Confinement' (2020) 10 *NatClimChange* 647.

<sup>55</sup> E Meidinger, 'TPP and Environmental Regulation' in B Kingsbury et al (eds), *Megaregulation Contested: Global Economic Ordering After TPP* (OUP 2019) 177.

<sup>56</sup> Australia's 'State of the Environment' report is published every five years, and was finalised and due for release in 2021. The Coalition government had not released the report by the time of the May 2022 election. The new Department of Climate Change, Energy, the Environment and Water released the report on 19 July 2022 <<https://soe.dccceew.gov.au/>>.

<sup>57</sup> See H Murphy and S van Leeuwen, 'Biodiversity' in Australian Government, *Australia State of the Environment 2021* (Commonwealth of Australia 2021) <<https://soe.dccceew.gov.au/biodiversity/introduction>>.

change (and pandemics) is also pertinent,<sup>58</sup> and trade policy is one of several areas that can shape and alter support for industries across sectors.

There are divergences in views and methods identifying the type of economic activity (the second factor identified above) in different contexts. For example, the EU's analysis of the latest version of its EU–Mercosur Association Agreement predicts that the liberalisation will have no impact on global GHG emissions.<sup>59</sup> This is in contrast to non-governmental organisation (NGO)-led advocacy that emphasised that enhanced market access for GHG-intensive beef products and automobiles would make the deal 'the worst ever'.<sup>60</sup> The failure of the EU to apply its own emissions standards to the cars it intends to export is argued to be one of the lost opportunities of the agreement.<sup>61</sup>

The third factor affecting the environmental impact of trade liberalisation is the technique of production of the goods in question, and specifically whether those techniques may become more accessible through trade liberalisation. For example, renewable energy may become cheaper and more accessible. This third factor has become particularly significant given a focus on liberalisation in the trade of climate-friendly goods and services, such as the elimination of tariffs on wind turbines and solar panels.<sup>62</sup> Some studies have found that the dissemination of climate-friendly products under certain FTAs will result in a reduction of GHG emissions that is likely to counteract any increase caused by enhanced economic activity.<sup>63</sup>

A final point might be made about the effects of trade liberalisation. In addition to increasing GHG emissions, especially with respect to scale effects, trade liberalisation may also create a risk that citizens of advanced industrial nations will be sheltered from the realities of consuming fossil fuels and natural resources at unsustainable levels. Cheaper and more accessible goods can allow

<sup>58</sup> Sebo argues that climate change mitigation and adaptation require the phasing down of industries like factory-farming, forestry and wildlife trade, and the phasing up of humane, healthful and sustainable alternatives: J Sebo, *Saving Animals, Saving Ourselves: Why Animals Matter for Pandemics, Climate Change, and other Catastrophes* (OUP 2022) 95–100.

<sup>59</sup> M Mendez-Parra et al, *Sustainability Impact Assessment in Support of the Association Agreement Negotiations Between the European Union and Mercosur* (London School of Economics and Political Science, December 2020) 86 <<https://www.lse.ac.uk/business/consulting/reports/sia-in-support-of-the-association-agreement-negotiations-between-the-eu-and-mercotur>>.

<sup>60</sup> Climate Tracker, 'Cars for Cows: "The EU's Worst Trade Agreement for the Climate"' (8 July 2019) <<http://climatetracker.org/cars-for-cows-why-the-eu-brazil-deal-is-the-eus-worst-trade-agreement-for-the-climate/>>.

<sup>61</sup> L Krämer, 'A Lost Opportunity? The Environment and the EU–Mercosur Trade Agreement' (2021) 18 JEEPL 143. See also J Harrison and S Paulini, 'The Trade and Sustainable Development Chapter in the EU–Mercosur Association Agreement: Is It Fit for Purpose?' (*Client Earth*, July 2020) <<https://www.clientearth.org/media/rs5enobx/the-trade-and-sustainable-development-chapter-in-the-eu-mercotur-association-agreement-ext-en.pdf>>.

<sup>62</sup> See, generally, C Dent, 'Trade, Climate and Energy: A New Study on Climate Action through Free Trade Agreements' (2021) 14 *Energies* 4363.

<sup>63</sup> E Moisé and S Rubinová, 'Sustainability Impact Assessments of Free Trade Agreements: A Critical Review, OECD Trade Policy Paper No 255' (November 2021) 11 <<https://www.oecd.org/publications/sustainability-impact-assessments-of-free-trade-agreements-65b1a07e-en.htm>>.

consumers to maintain high levels of consumption which are incompatible with efforts to change patterns of growth. These effects of globalisation are difficult to assess. Yet they highlight the need to ensure that carbon-intensive production processes are priced appropriately (and environmental impacts internalised), including through appropriate domestic regulation, so that long-term decarbonisation becomes competitive and achievable for all countries. State structures are essential for these market conditions. Even beyond market conditions, however, the ethical issues relating to climate change have prompted a more overt change to patterns of globalised consumption, such as a suggestion to differentiate luxury emissions from subsistence emissions.<sup>64</sup> That these issues remain debated and important supports the general call to ensure those whose lives are affected by trade liberalisation are included in FTA decision-making. This call has been made in the context of EU trade agreements agreed when the UK was still part of the EU,<sup>65</sup> and informs the discussion in Section IV. Moreover, it shows that the FTAs at the very least should include provisions that strengthen climate commitments and facilitate trade and investment in climate-related areas, as discussed in Section III, and potentially could do much more.

### *B. Issue-Linkage and the Broader Political and Regulatory Context*

Linking issues across international regimes has long been recognised for useful tactical and substantive goals.<sup>66</sup> The power and interests of the negotiating countries provide an opportunity to exert significant pressure to advance climate objectives if one of them supports that goal. The EU, for example, has stated that it will not enter into FTA negotiations with any country that is not a party to the Paris Agreement.<sup>67</sup>

While issue-linkages are usually discussed in multilateral settings, they are pertinent for bilateral FTAs. They are also possibly less complicated. Studies of the fragmentation of international law have highlighted the difficulties that arise when the membership of relevant linked regimes are not identical, and when consent to interaction is not apparent.<sup>68</sup> FTA negotiations, unlike

<sup>64</sup> H Shue, 'Subsistence Emissions and Luxury Emissions' in SM Gardiner et al (eds), *Climate Ethics: Essential Readings* (OUP 2010). Such issues are ripe for more attention within trade circles.

<sup>65</sup> See S Puntischer Riekmann, 'The Struggle for and Against Globalization: International Trade Agreements and the Democratic Question' in S Griller, W Obwexer and E Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (OUP 2017).

<sup>66</sup> EB Haas, 'Why Collaborate? Issue-Linkage and International Regimes' (1980) 32(3) *WldPol* 357.

<sup>67</sup> K Mathiesen, 'EU Says No New Trade Deals with Countries Not in Paris Agreement' (*Climate Home News*, 2 February 2018) <<https://www.climatechangenews.com/2018/02/02/eu-difficult-imagine-trade-deals-countries-not-paris-agreement/>>. Of course, the practical consequences of this may now be limited, given that, by January 2023, only a handful of countries had not signed the Paris Agreement.

<sup>68</sup> MA Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (CUP 2012) 268–71.

multilateral treaties, involve a limited number of parties, are based on direct reciprocity usually underpinned by some sort of sanctions or dispute settlement regime, and, particularly given the rate at which new FTAs are being negotiated and concluded, can provide an opportunity for experimentation with innovative provisions.<sup>69</sup> Bilateral, plurilateral or regional trade negotiations may provide more flexible and effective ways of developing trade provisions tailored to climate change than the multilateralism of the WTO, particularly given the current negotiating stalemate in the latter.<sup>70</sup> Moreover, while the more limited membership of FTAs affects their ability to address climate change effectively, which necessarily requires global action, the norms and approaches adopted may be ‘multilateralised’ over time as they are adopted more broadly.<sup>71</sup> This may be said to have occurred with the CPTPP’s advances in fisheries subsidies reform, which preceded and influenced the new WTO agreement.<sup>72</sup>

On this basis, FTAs should include provisions to strengthen climate commitments. The UK–Australia FTA text is investigated in Section III below, but it is immediately apparent that the UK, as a country strategising to effect better climate action globally through leadership of the Glasgow COP, would seek to link climate and trade, thus using its influence to change the behaviour of Australia. Moreover, given that the UK had been involved in earlier EU negotiations of ‘mega-regional’ FTAs, which sought the integration of environmental and social concerns,<sup>73</sup> it might have been expected that the UK would link trade liberalisation commitments to other goals. The UK–Australia FTA is therefore a good example of the potential for strategic issue-linkage to be used in FTAs for climate goals.

### *C. Sustainability Impact Assessments of FTAs*

When it was part of the EU, the UK participated in the regularised assessment of the impact of trade liberalisation on the environment in the negotiation of FTAs.<sup>74</sup>

<sup>69</sup> R Leal-Arcas et al, ‘The Contribution of Free Trade Agreements and Bilateral Investment Treaties to a Sustainable Future’ (2020) 23 ZEuS 3, 13–14. See also, Morin and Jinnah (n 9).

<sup>70</sup> R Leal-Arcas et al, ‘Green Bills for Green Earth: How the International Trade and Climate Regimes Work Together to Save the Planet’ (2022) 31 EEELR 19, 39–40; R Leal-Arcas et al, ‘Of International Trade, Climate Change, Investment and a Prosperous Future’ (2020) 12 TLaw&Dev 405, 429.

<sup>71</sup> Munro (n 9) 397.  
<sup>72</sup> Ministerial Conference, *Agreement on Fisheries Subsidies: Ministerial Decision of 17 June 2022*, WT/MIN(22)/33WT/L/1144, 22 June 2022. See further, MA Young, ‘Fisheries’ in D Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (2nd edn, OUP 2022) 821–6.

<sup>73</sup> See, eg, L Bartels, ‘Human Rights, Labour Standards, and Environmental Standards in CETA’ in S Griller, W Obwexer and E Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (OUP 2017); L Lechner, ‘The Domestic Battle over the Design of Non-Trade Issues in Preferential Trade Agreements’ (2016) 23(5) RevIntlPolEcon 840.

<sup>74</sup> European Commission, *Handbook for Trade Sustainability Impact Assessment* (2nd edn, April 2016) 5 <<https://op.europa.eu/en/publication-detail/-/publication/8b3a2b37-1028-11e6-ba9a-01aa75ed71a1>>.

Indeed, sustainability impact assessments—also called ‘environmental assessments’ in Canada, ‘environmental reviews’ in the United States’ and ‘impact studies’ in Latin America—have now become a common feature of FTA negotiations with major economies. The United Nations Environment Programme (UNEP) and the International Institute for Sustainable Development (IISD) have published ‘A Sustainability Toolkit for Trade Negotiators’, which includes advice on the conduct of environmental impact assessments in trade negotiations.<sup>75</sup> The toolkit provides guidance for negotiators on the timing of the assessment, its geographic scope and the type of impacts that it might cover. As the links between climate change and a range of practices become clearer, there is a need to expand the types of impacts included in the toolkit. For example, there is scope to make more express an assessment of the standards of treatment of animals in food production and other contexts.<sup>76</sup>

Impact assessments are often dealt with explicitly in the domestic context. For example, the United States, Canada and the EU all mandate that an assessment be conducted before the FTA is entered into.<sup>77</sup> On the other hand, while the EU and Canada require the assessment to address the impacts of the FTA both domestically and in the partner country(s),<sup>78</sup> environmental reviews in the United States focus primarily on domestic effects, only considering transboundary and international environmental concerns in some circumstances.<sup>79</sup> Further, the EU requires assessments to provide the European Commission with an analysis of potential economic, social, human rights and environmental impacts.<sup>80</sup> Commentators have called for the inclusion of the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) in such assessments.<sup>81</sup> After the UK’s exit from the EU, there were calls for the UK to develop its own sustainability impact assessment process, particularly as part of current and forthcoming Brexit trade deals.<sup>82</sup> Australia does not undertake sustainability

<sup>75</sup> UNEP and IISD, ‘A Sustainability Toolkit for Trade Negotiators’ (2016) <<https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/about-us/>>.

<sup>76</sup> On the inclusion of animals in health and environmental impact assessments, see Sebo (n 58) 100–3.

<sup>77</sup> European Commission (n 74); Government of Canada, ‘Environmental Assessments of Trade Agreements: Process and Revised Framework’ (21 January 2021) <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/enviro-assessments-evaluations-environnementale.aspx?lang=eng>>; United States Trade Representative and Council on Environmental Quality, *Guidelines for Implementation of Executive Order 13141: Environmental Review of Trade Agreements* (December 2000) 3 <<https://ustr.gov/issue-areas/environment/environmental-reviews>>.

<sup>78</sup> European Commission (n 74) 5; Government of Canada, *ibid*.

<sup>79</sup> United States Trade Representative and Council on Environmental Quality (n 77) 8.

<sup>80</sup> European Commission (n 74) 18–23.

<sup>81</sup> J Scott, ‘Reducing the EU’s Global Environmental Footprint’ (2020) 21 *GermLJ* 10, 15.

<sup>82</sup> E Lydgate, ‘Assessing the Sustainability Impacts of Trade Agreements’ (Policy Brief, Sussex Sustainability Research Programme, December 2020) <<https://www.sussex.ac.uk/webteam/gateway/file.php?name=policy-brief---assessing-sustainability-impacts-of-trade-agreements---emily-lydgate.pdf&site=492>>.

impact assessments of FTAs, instead relying on economic impact assessments and a framework of public submissions, as described further in Section IV.

Impact assessments generally seek to include public participation, and to consult with climate and sustainability-related stakeholders. For example, civil society representatives are invited to comment upon drafts, which can give greater legitimacy to final negotiating positions. The European Commission's handbook on the conduct of 'sustainability impact assessments' requires a highly-participatory consultation process that involves identification of relevant stakeholders, including groups that may otherwise be excluded.<sup>83</sup> Analysis of trade agreements by the EU has argued that existing approaches to 'sustainability impact assessments' do not allow non-trade issues, such as environmental concerns, to be properly identified and taken into account in the consultation process.<sup>84</sup> Consultations with the general public are also part of the conduct of Canadian 'environmental assessments',<sup>85</sup> and in the United States the guidelines require sufficient information about the trade negotiations to be provided to the public to facilitate their involvement in the 'environmental review' process.<sup>86</sup> Before turning to the sustainability impact assessment of the UK–Australia FTA, this section concludes with a typology of potential climate-related provisions in FTAs.

#### *D. Climate-Related Provisions in FTAs*

In offering a typology of relevant provisions, the implications of the scale, type, technique and other factors in FTAs are drawn on, as well as the textual provisions that have begun to emerge. An increasing number of FTAs address climate change issues to some extent. They may address climate change issues in the body of the agreement itself, but more commonly include provisions in a separate 'Environment' chapter. As analysed by political scientists Morin and Jinnah, a dataset of 668 FTAs signed between 1947 and 2016 shows that climate change is addressed in almost 100 of those FTAs.<sup>87</sup> The FTAs contain both 'defensive' and 'offensive' clauses:<sup>88</sup> defensive provisions protect governments' policy space for adopting environmental

<sup>83</sup> See European Commission (n 74) 25; I von Homeyer, M Collins and W Ingwersen, 'Improving Public Participation in Sustainability Impact Assessments of Trade Agreements' in P Elkins and T Voituriez (eds), *Trade, Globalization and Sustainability Impact Assessment: A Critical Look at Methods and Outcomes* (Taylor & Francis 2009) 194.

<sup>84</sup> See B Hoekman and H Rojas-Romagosa, 'EU Trade Sustainability Impact Assessments: Revisiting the Consultation Process' (2022) 25 *JIEL* 45. This study includes consideration of the pre-Brexit period, and therefore the period during which the United Kingdom was involved in the FTA negotiation process.

<sup>85</sup> Government of Canada (n 77) 11.

<sup>86</sup> United States Trade Representative and Council on Environmental Quality (n 77) 11.

<sup>87</sup> Morin and Jinnah (n 9) 555 (Figure 2).

<sup>88</sup> On the distinction, see D Blümer et al, 'Environmental Provisions in Trade Agreements: Defending Regulatory Space or Pursuing Offensive Interests?' (2020) 29 *EnvtlPol* 866.

regulation, while offensive provisions prescribe environmental policies, including those to address trade competitiveness.

Based on the type and trade factors identified above, the FTAs most likely to advance climate action will be those tailored to the content of expected trade flows with negotiating partners, in order to incentivise climate-friendly goods and services and restrict the flow of emissions-intensive goods and services. Understanding the effect of relevant provisions requires a whole-of-economy assessment of the climate-friendly production of electricity, agriculture, transportation and buildings. For example, plant-based, organic agriculture might be rewarded with lower tariffs for all countries, provided an assessment is undertaken on the relative carbon intensity of its production. The phasing out of petrol and diesel cars could be assisted by increased trade flows of alternative transportation vehicles. FTAs concluded by the EU regularly provide for specific vehicle emissions standards,<sup>89</sup> while the UK–NZ FTA and GEA include bicycle parts in their annex of environmental goods. FTAs that are most likely to address climate change effectively might also include offensive provisions to ensure negotiating partners use best efforts to transition to a low-carbon economy. For example, an FTA might prohibit fossil fuel subsidies, or require restrictions on fossil fuel production and processing. For a country with significant emissions from land use, an FTA could contain legally enforceable requirements to adopt better management and conservation of carbon sinks, thus requiring effective environmental regulation. There is also a place to recognise the phasing out of harmful animal practices as a climate (and pandemic) mitigation goal, including factory farming, deforestation and the wildlife trade.<sup>90</sup> As noted in the description of methodology, empirical analysis of UK–Australia trade flows is not undertaken. Instead, a typology of textual provisions is pointed to that might allow trading partners to support these kinds of activities. Some of these are from existing FTAs, while others would be the first of their kind. The typology that is offered in the next section thus provides an analytical framework to assess the FTA's contributions to climate change goals.

### III. THE UK–AUSTRALIA FTA: TEXTUAL AND COMPARATIVE ANALYSIS

Contrary to the comments of Australia's Prime Minister, which opened this article,<sup>91</sup> the UK–Australia FTA recognises a link between trade and climate change. It emphasises 'the need to enhance the mutual supportiveness between trade and environmental law and policies',<sup>92</sup> and acknowledges the role of global trade and investment in efforts to address climate change.<sup>93</sup>

<sup>89</sup> See, eg, Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6 (signed 6 October 2010, entered into force 13 December 2015). However, see Krämer (n 61).

<sup>90</sup> See further, Sebo (n 58).

<sup>91</sup> Coates (n 1).

<sup>92</sup> UK–Australia FTA (n 26) art 22.4(2).

<sup>93</sup> *ibid*, art 22.5(2).

This section provides an overview and analysis of the relevant textual provisions of the UK–Australia FTA. These are mostly found in Chapter 22 of the FTA, the ‘Environment’ chapter, which takes up much of the focus.<sup>94</sup> The objectives of the chapter are to:<sup>95</sup>

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

The Environment chapter includes a range of environmental topics.<sup>96</sup> There is a separate clause headed ‘climate change’, which includes the following express recognition of the need for global trade and investment to address climate change:<sup>97</sup>

The Parties emphasise that efforts to address climate change require collective and urgent action, and acknowledge the role of global trade and investment in these efforts.

Our textual and comparative analysis of the UK–Australia FTA is grouped according to the following categories: first, the provisions that aim to strengthen environmental commitments, including net zero; secondly, the provisions that seek to facilitate trade and investment in climate-related areas; and thirdly, the provisions that provide institutional dispute resolution and cooperative frameworks.

### *A. Provisions to Strengthen Climate Commitments, Including Net Zero Goals*

#### *1. Affirming the Paris Agreement*

In the UK–Australia FTA, each Party affirms its commitments to ‘implement the multilateral environment agreements to which it is a party’<sup>98</sup> and to ‘address climate change, including under the UNFCCC and the Paris Agreement ... and recognises the importance of achieving their goals’.<sup>99</sup> These provisions generally reaffirm commitments to environmental and climate change agreements and do not refer to the specific temperature goals of the Paris Agreement. The failure to incorporate specific references to the temperature

<sup>94</sup> Provisions relating to technical barriers to trade (UK–Australia FTA (n 26) chapter 7), sanitary and phytosanitary measures (UK–Australia FTA (n 26) chapter 6), and animal welfare and antimicrobial resistance (UK–Australia FTA (n 26) chapter 25) are outside of the scope, although relevant measures can be highly significant for climate goals, including in ecolabelling.

<sup>95</sup> UK–Australia FTA (n 26) art 22.2.

<sup>96</sup> These include marine pollution and circular economy issues that have been addressed only relatively recently by FTAs: *ibid.*, arts 22.10, 22.11. See further, MA Young, ‘Protection of the Marine Environment: Rights and Obligations in Trade Agreements’ (2021) 9 *KoreanJIntlCompL* 196.

<sup>97</sup> UK–Australia FTA (n 26) art 22.5 (contra public comments by the Australian Prime Minister; see Coates (n 1)).  
<sup>98</sup> *ibid.*, art 22.4(1).  
<sup>99</sup> *ibid.*, art 22.5(1).

goals was identified as a particular concern in the work of several UK parliamentary committees.<sup>100</sup>

This contrasts with other FTAs of higher ambition. In its action plan on the CETA, France committed to including as part of its individual country obligations, in all future trade agreements concluded by the EU, ‘compliance with the Paris Agreement among the key provisions of cooperation and political dialogue agreements that are concluded in parallel to the trade agreements, which could be withdrawn from or suspended in case of proof that these key provisions have been violated, as per customary international law’.<sup>101</sup> This is far-reaching, but not as arresting as it might initially appear, because of the voluntary mode in which countries determine their own NDCs. Yet the reporting requirements of the Paris Agreement are mandatory, and this provision could yield fruitful interaction between the relevant cooperative bodies established within France or under the CETA and the Compliance Committee established under the Paris Agreement.<sup>102</sup>

Other FTAs reach out more expressly to the Paris Agreement, but without a suspensive clause. In its Environment chapter, the UK–NZ FTA replicates the UK–Australia FTA objectives but includes an additional objective to ‘encourage the Parties to address the urgent threat of climate change’.<sup>103</sup> In the provision relating to ‘context and objectives’, the UK and NZ recognise ‘the urgent need to address climate change, as outlined in the *Intergovernmental Panel on Climate Change Special Report on Global Warming of 1.5°C*’.<sup>104</sup> This Special Report gave an example, amongst other things, of the phase out of coal in the energy sector as a needed transformation to ensure warming does not exceed 1.5°C,<sup>105</sup> which may have been a reason why Australia, as a major coal exporter, was not as welcoming of it as other countries when it was presented to the COP.<sup>106</sup> The UK–NZ FTA has a stand-alone provision headed ‘climate change’, in which the Parties inter alia ‘affirm their commitment to implement the Paris Agreement and to take action to reduce greenhouse gas emissions ... and their ambition of achieving their respective domestic net zero targets by 2050’.<sup>107</sup> This language is similar to the EU–Japan Economic Partnership Agreement, which provides that ‘the Parties recognise the importance of achieving the ultimate objective of the

<sup>100</sup> Report from the International Agreements Committee, ‘Scrutiny of International Agreements: UK–Australia Free Trade Agreements’ HL (2022–23) 26.

<sup>101</sup> Government of France, *Implementation of CETA: Government Action Plan* (25 October 2017) 16 <<https://www.tresor.economie.gouv.fr/Articles/8930b45f-ccfd-499f-a7bb-d1f2c516ad91/files/a712fd2c-0f4d-40b0-a16d-d0958be5e135>>.

<sup>102</sup> Paris Agreement (n 18) art 15.

<sup>103</sup> UK–NZ FTA (n 39) art 22.3(2).

<sup>104</sup> *ibid.*, art 22.3(3)(c).

<sup>105</sup> IPCC, ‘Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty. Summary for Policy Makers’ (2018) 17 <[https://www.ipcc.ch/site/assets/uploads/2018/10/SR15\\_SPM\\_version\\_stand\\_alone\\_LR.pdf](https://www.ipcc.ch/site/assets/uploads/2018/10/SR15_SPM_version_stand_alone_LR.pdf)>.

<sup>106</sup> E Jukić and MA Young, ‘Australia’ (2018) 29 *YIntlEnvL* 363, 364.

<sup>107</sup> UK–NZ FTA (n 39) art 22.6(3).

United Nations Framework on Climate Change ... the Parties reaffirm their commitments to effectively implement the UNFCCC and the Paris Agreement'.<sup>108</sup>

Beyond affirming the Paris Agreement in broad terms, there is scope for FTAs to cleave more closely to the institutional structure, professional networks and implementation pathways supported by the NDCs. A report examining existing EU–Latin American Trade Relations by the Centre for International Sustainable Development Law (CISDL) found that FTAs could include commitments to progressively adopting more ambitious NDCs.<sup>109</sup> Particular strengths of NDC pathways could be exposed and supported by trade. The UK–Australia FTA obligations relating to progression will be looked at, but before doing so consideration will be given to provisions recognising the adoption of trade measures that address climate change.

## 2. Recognising the adoption of trade measures that address climate change

Accepting the use of unilateral trade measures that address climate change, such as 'border carbon adjustments', could strengthen climate commitments between FTA parties. This could take the form of a clause modelled on Article XX of the General Agreement on Tariffs and Trade (GATT) 1994. Even further than this would be express waiver of rules, akin to the 'climate waiver' advocated by James Bacchus.<sup>110</sup> Bacchus has called for a waiver from the application of WTO rules for trade-restrictive measures that discriminate 'based on the amount of carbon and other greenhouse gases consumed or emitted in making a product', though the GATT Article XX chapeau provisions relating to arbitrary or unjustifiable discrimination or disguised restriction would still apply.<sup>111</sup> In requiring the measures to fit the definition of a climate response measure as defined by the climate COP,<sup>112</sup> Bacchus implicitly recognises the importance of regime interaction in institutional terms.

In the UK–Australia FTA, the 'Provisions and Exceptions' chapter provides that 'Article XX of GATT 1994 is incorporated into and made part of this Agreement, *mutatis mutandis*'.<sup>113</sup> It further specifies that the Parties understand that 'the measures referred to in paragraph (b) of Article XX of GATT 1994 include *environmental measures* necessary to protect human, animal or plant life or health', and that 'paragraph (g) of Article XX of GATT 1994 applies to measures relating to the conservation of *living and non-living* exhaustible natural resources'.<sup>114</sup> These modifications represent a statement of WTO law that incorporates important jurisprudence relating to

<sup>108</sup> EU–Japan EPA (n 42) art 16.4(4).

<sup>109</sup> M Gehring and C Delevy, *European Union Trade Agreement Negotiations with Latin American States: Next Steps in the Climate, Sustainable Development and Trade Agenda* (CISDL 2022) <<https://www.cisd.org/wp-content/uploads/2022/11/EU-Latin-America-FTAs-Progress-Nov-2022.pdf>>.

<sup>110</sup> Bacchus (n 4) 187–97.

<sup>111</sup> *ibid* 195.

<sup>112</sup> *ibid*.

<sup>113</sup> UK–Australia FTA (n 26) art 31.1(1).

<sup>114</sup> *ibid*, art 31.1(2) (emphasis added).

trade and the environment, including the *US–Shrimp* dispute.<sup>115</sup> According to the UK Trade and Agriculture Commission, these exceptions are ‘at least as extensive as under WTO law, and in some cases even more extensive than under WTO law’.<sup>116</sup> The UK–Australia FTA also contains a separate chapter on Animal Welfare and Antimicrobial Resistance.<sup>117</sup> However, the FTA does not contain provisions that might provide more definitive protection for climate change policy measures such as border carbon adjustments.

At the present time, there are no FTAs that go as far as Bacchus’s proposed waiver, although some are close. The UK–NZ FTA provides that ‘the Parties recognise that nothing in this Agreement prevents a Party from taking measures to fulfil its commitments under the UNFCCC and the Paris Agreement provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination against the other Party or a disguised restriction on trade’.<sup>118</sup> The European Commission’s position paper for its proposed ‘Transatlantic Trade and Investment Partnership’ with the United States contained a provision that ‘nothing in the agreement should prevent either party from adopting or maintaining measures to implement the multilateral environmental agreements to which it is a party, provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the parties or a disguised restriction on trade’.<sup>119</sup> The CPTPP expressly incorporates Article XX of the GATT and its interpretive notes.<sup>120</sup>

Of course, the relevance of GATT Article XX in the climate context is not limited to border carbon adjustments. For example, the CETA provides that the parties will strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection, including by encouraging the development of climate-friendly labelling and certification requirements or standards.<sup>121</sup> In another example, the UK–Australia FTA’s provisions on ‘sustainable forest management and trade’ recognise the importance of forest management including in relation to addressing climate change.<sup>122</sup> In a further practical example of operationalising GATT Article XX, Parties recognise the importance of ‘taking measures that contribute to combatting illegal logging and related

<sup>115</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998. See further, MA Young, ‘Principle 12’ in JE Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015) 337.

<sup>116</sup> Trade and Agriculture Commission, ‘Advice to the Secretary of State for International Trade on the UK–Australia Free Trade Agreement’ (April 2022) 27 <<https://www.gov.uk/government/publications/uk-australia-fta-advice-from-trade-and-agriculture-commission>>.

<sup>117</sup> UK–Australia FTA (n 26) chapter 25.

<sup>118</sup> UK–NZ FTA (n 39) art 22.6(1).

<sup>119</sup> EU, ‘Position Paper on Sustainable Development in TTIP’ (7 January 2015) 6 <<http://tracker.borderlex.eu/doc/647/European%20Commission%20Initial%20Position%20Paper%20on%20Trade%20and%20Sustainable%20Development.pdf>>.

<sup>120</sup> CPTPP (n 40) art 29.1.

<sup>121</sup> CETA (n 41) art 22.3.2.

<sup>122</sup> UK–Australia FTA (n 26) art 22.13(1).

trade and to promoting trade in legally harvested forest products'.<sup>123</sup> As for the link between animal use and climate change,<sup>124</sup> there is scope for FTAs to address more fully the use of trade measures relating to animal welfare and the protection of animal life and health.

### 3. *Non-derogation, non-regression or progression of environmental laws*

The potential for trade liberalisation to place downward pressure on countries' environmental laws, if the 'type' of goods traded are more competitive because of a lack of domestic environmental regulation, has already been discussed.<sup>125</sup> A 'race to the bottom' in climate terms might be especially likely for middle- and low-income countries, if their comparative advantage is in carbon-intensive sectors. To address these and other risks, FTAs can include a 'non-regression' clause, by which the parties agree on an environmental or climate standard from which they cannot regress or derogate.<sup>126</sup> For example, the CPTPP provides that '[n]o Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties'.<sup>127</sup>

There is room to go further, to allow for 'progression' of environmental laws. For example, the UK–NZ FTA provides that '[e]ach Party shall endeavour to ensure that its environmental and other relevant law and policies provide for, and encourage, high level of environmental protection, and to continue to improve its respective level of environmental protection'.<sup>128</sup> The EU–Mercosur proposed FTA similarly provides that '[e]ach Party shall strive to improve its relevant laws and policies so as to ensure high and effective levels of environmental and labour protection'.<sup>129</sup>

The progression could extend further, to climate laws. A commitment to improvement of climate ambition is supported by the Paris Agreement, which provides that '[e]ach Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting

<sup>123</sup> *ibid.*, art 22.13(2)(d). On the relevance to Australia of the Glasgow Leaders' Declaration on Forest and Land Use, see M Young and CE Gascoigne, 'Weakening Australia's Illegal Logging Laws Would Undermine the Global Push to Halt Forest Loss' (*The Conversation*, 15 December 2021) <<https://theconversation.com/weakening-australias-illegal-logging-laws-would-undermine-the-global-push-to-halt-forest-loss-172770>>. <sup>124</sup> See Sebo (n 58).

<sup>125</sup> See Meidinger (n 55) and surrounding text.

<sup>126</sup> See, for examples in both trade and investment agreements, AD Mitchell and J Munro, 'An International Law Principle of Non-Regression from Environmental Protections' (2023) 72 ICLQ 35.

<sup>127</sup> CPTPP (n 40) art 20.3.4. Note that 'shall' has a stronger meaning than other precedents, which have used 'should' or 'strive': Munro (n 9) 402–3.

<sup>128</sup> UK–NZ FTA (n 39) art 22.4(2) (emphasis added).

<sup>129</sup> Draft text on Chapter on Trade and Sustainable Development, Trade part of the EU–Mercosur Association Agreement (28 June 2019) art 2 (emphasis added) <[https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercotur/eu-mercotur-agreement/text-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercotur/eu-mercotur-agreement/text-agreement_en)>.

their [CBDR-RC]'.<sup>130</sup> In the EU–UK TCA, parties ‘shall continue to strive to increase their respective environmental levels of protection or their respective climate level of protection referred to in this Chapter’.<sup>131</sup> Strengthening the link between FTAs and NDCs has been one of the recommendations of a recent report on the EU–Americas trade relations.<sup>132</sup>

The UK–Australia FTA provides that ‘each Party shall strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection and to continue to improve its respective levels of environmental protection’,<sup>133</sup> and that ‘neither Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties’.<sup>134</sup> Environmental laws are defined to include a law ‘the primary purpose of which is the protection of the environment through prevention or control of the release, discharge or emission of pollutants or environmental contaminants including greenhouse gases’.<sup>135</sup> The chapter further provides that:

the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.<sup>136</sup>

The ‘soft’ obligation in Article 22.2(3) requiring parties to ‘strive’ to ensure that laws provide for high levels of environmental protection is replicated in the Animal Welfare chapter, which provides that parties ‘shall endeavour to continue to improve their respective levels of animal welfare protection’.<sup>137</sup> These provisions could be made stronger if the non-regression obligation was tied to, for example, the ‘nationally determined contributions’ of each party under the Paris Agreement.<sup>138</sup> Nonetheless, these provisions effectively mean that neither party can resile from their current domestic environmental protections. While Australia accepted such a clause in the CPTPP, its position was not a given in the negotiations, and it does not appear in the Australia–Peru FTA.<sup>139</sup>

Despite the promise of high levels of environmental protection, ‘environmental laws’ are defined, with respect to Australia, to refer only to laws of the Commonwealth Parliament. This means that the non-derogation obligation does not apply to state and territory laws, under which the

<sup>130</sup> Paris Agreement (n 18) art 4.3.

<sup>132</sup> Gehring and Devel (n 109).

<sup>134</sup> *ibid*, art 22.3(4). <sup>135</sup> *ibid*, art 22.1.

<sup>138</sup> GC Leonelli, ‘Submission to International Agreements Committee: Inquiry into UK-

Australia Trade Negotiations’ (No AUT0044, 2022) <<https://committees.parliament.uk/writtenevidence/43680/pdf/>> 6.

<sup>139</sup> Peru–Australia Free Trade Agreement (signed 12 February 2018, entered into force 11 February 2020) [2020] ATS 6.

<sup>131</sup> EU–UK TCA (n 43) art 391.

<sup>133</sup> UK–Australia FTA (n 26) art 22.2(3).

<sup>136</sup> *ibid*, art 22.3(6). <sup>137</sup> *ibid*, art 25.1(4).

majority of environmental regulation occurs in Australia. This constraint has been identified as a particular issue by the International Trade Committee.<sup>140</sup> Its observation is particularly pertinent given that a recent statutory review of Australia's main federal environmental statute has recommended that national environmental standards be established, and that the Commonwealth require Australia's state governments to ensure that regional forestry activities are consistent with these standards.<sup>141</sup> Recent Australian litigation has also established that state-based forestry activities are conducted well below national environmental standards.<sup>142</sup> Future trade negotiators should be more aware of the complexities of the constitutional allocation of powers to the environment in federal systems, and be careful not to limit non-derogation to just the federal level.

#### 4. Recognising the right to regulate

The non-derogation of environmental laws is linked to the 'right to regulate'. FTAs can restrict a nation's policy space to make future decisions on climate mitigation, particularly where investment chapters are included, such as prohibiting the imposition of local content requirements to stimulate domestic renewable energy industries.<sup>143</sup> The inclusion of investor-State dispute settlement (ISDS) provisions in FTAs might create additional issues. There may be a risk that a country faces compensation claims from foreign investors as a result of increased climate regulation that has trade or investment effects.<sup>144</sup> At the same time, however, ISDS provisions can allow investors in green sectors to contest changes that weaken a country's climate change commitments.<sup>145</sup> For example, Spain was subject to dozens of ISDS

<sup>140</sup> International Trade Committee, 'UK Trade Negotiations: Agreement with Australia' HC (2022–23) 117, 90.

<sup>141</sup> G Samuel, 'The Independent Review of the Environment Protection and Biodiversity Conservation Act 1999' (Department of Agriculture, Water and the Environment, October 2020) Recommendation 15 <<https://epbcactreview.environment.gov.au/>>.

<sup>142</sup> *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704; *VicForests v Friends of Leadbeater's Possum Inc* [2021] FCAFC 66. See further, MA Young and E Vines, 'Biodiversity Litigation in Australia' in G Futhazar, S Maljean-Dubois and J Razzaque (eds), *Biodiversity Litigation* (OUP 2023).

<sup>143</sup> Economist Intelligence Unit, 'Climate Change and Trade Agreements: Friends or Foes?' (Report, 2019) 12 <<https://pages.eiu.com/rs/753-RIQ-438/images/TradeandClimateChange2019.pdf>>. See also G Valles, 'Local Content Requirements and the Green Economy' (UN Conference on Trade and Development Report, 16 December 2014) <<https://unctad.org/webflyer/local-content-requirements-and-green-economy>>.

<sup>144</sup> See K Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 TEL 229.

<sup>145</sup> A Dimopoulos, 'Climate Change and Investor-State Dispute Settlement: Identifying the Linkages' in P Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar 2016) 416. See also, C Higham and J Setzer, "'Investor-State Dispute Settlement" as a New Avenue for Climate Change Litigation' (*Grantham Research Institute on Climate Change and the Environment*, 2 June 2021) <<https://www.lse.ac.uk/granthaminstitute/news/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation/>>.

proceedings following the withdrawal of regulatory measures designed to incentivise investment in renewable energy.<sup>146</sup> In this sense, ISDS could disincentivise governments from unwinding their climate regulations.

As an example of an FTA protecting the right to regulate, the proposed EU–Mercosur chapter on Sustainable Development includes a provision on ‘right to regulate and levels of protection’, which contains a mix of ‘shall’ (hard) clauses and ‘should’ (aspirational) clauses, and recognises the ‘right of each Party to ... establish the levels of domestic environmental and labour protection [as] consistent with each Party’s commitment to the international agreements and labour standards referred to in Articles 4 and 5’.<sup>147</sup> (Articles 4 and 5 of the chapter set out a number of labour and multilateral environment agreements and envisage information exchange and other efforts at regime interaction.)

The EU–Singapore FTA provides that ‘the Parties recognise the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify its relevant laws and policies accordingly, consistent with the principles of the internationally recognised standards or agreements to which it is party’.<sup>148</sup> The CETA states that ‘[f]or the purposes of this [Investment] Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity’.<sup>149</sup>

Under the UK–Australia FTA, ‘the Parties recognise the sovereign right of each Party to establish its own levels of domestic environmental protection and its own priorities relating to the environment, including climate change, and to establish, adopt or modify its environmental laws and policies accordingly’.<sup>150</sup> This provision does not mention the Paris Agreement or net zero, but does refer to ‘climate change’ expressly. According to the Trade and Agriculture Commission, the FTA does not limit the right to regulate as compared to the situation under WTO law, and may also increase it in some respects. As noted above, the chapter provides that ‘the Parties further recognise that it is inappropriate to establish or use their environmental laws or other environmental measures in a manner which would constitute a disguised restriction on trade or investment between the Parties’.<sup>151</sup> While this operates as a limitation on each party’s right to regulate, it does not incorporate the requirement in the chapeau to Article XX of the GATT that

<sup>146</sup> I Reynoso, ‘Spain’s Renewable Energy Saga: Lessons for International Investment Law and Sustainable Development’ (International Institute for Sustainable Development, 27 June 2019) <<https://www.iisd.org/itn/en/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/>>.

<sup>147</sup> Draft text on Chapter on Trade and Sustainable Development (n 129) art 2(1).

<sup>148</sup> Free trade Agreement between the European Union and the Republic of Singapore [2019] OJ L294/3 (signed 19 October 2018, entered into force 21 November 2019) (EU–Singapore FTA).

<sup>149</sup> CETA (n 41) art 8.9.1. On the distinction between ‘recognising’ and ‘reaffirming’ the right to regulate, see Bartels (n 73) 214.

<sup>150</sup> UK–Australia FTA (n 26) art 22.3(2).

<sup>151</sup> *ibid.*, art 22.2(3).

the measures at issue be ‘no more discriminatory than necessary to achieve their objectives’.<sup>152</sup>

The Investment chapter (Chapter 13) also specifies that ‘nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives’.<sup>153</sup> This reproduces the equivalent provision in the CPTPP. It only applies to measures that are ‘otherwise consistent’ with the chapter. The omission of this qualifying statement, an approach taken in a number of recently concluded investment treaties, would potentially increase each party’s own regulatory space.<sup>154</sup>

The UK–Australia FTA does not provide for ISDS. For those concerned with a chilling effect of ISDS for climate regulation,<sup>155</sup> this is a good outcome, and it is consistent with some Australian FTAs which carve out specific public interest measures from ISDS provisions.<sup>156</sup> For instance, the Indonesia–Australia Comprehensive Economic Partnership Agreement excludes from the scope of ISDS proceedings any claim ‘in relation to a measure that is designed and implemented to protect or promote public health’.<sup>157</sup> The China–Australia FTA excludes from the provisions of the Investment chapter entirely ‘measures of a party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order’.<sup>158</sup>

## *B. Provisions to Facilitate Trade and Investment in Climate-Related Areas*

### *1. Liberalising green sectors*

Provisions prioritising the liberalisation of green service sectors and goods can have positive impacts on climate change mitigation and adaptation. Of course, these provisions must work in tandem with other policies, including in domestic infrastructure, planning and education: for example, it is unlikely that the cost of imported bicycle parts is the main disincentive to zero emissions transportation

<sup>152</sup> Trade and Agriculture Commission (n 116) 27.

<sup>153</sup> UK–Australia FTA (n 26) art 13.17.

<sup>154</sup> See J Paine, ‘Submission No AUS0014 to International Trade Committee, Inquiry into UK–Australia FTA’ (15 January 2022) para 13 <<https://committees.parliament.uk/writtenevidence/42559/pdf/>>.

<sup>155</sup> See further, Tienhaara (n 144) and surrounding text.  
<sup>156</sup> See J Paine, ‘Submission to Australian Government Department of Foreign Affairs and Trade: Review of Australia’s Bilateral Investment Treaties’ (Department of Foreign Affairs and Trade, undated) 15–6 <<https://www.dfat.gov.au/sites/default/files/bit-review-submission-dr-joshua-paine.pdf>>.

<sup>157</sup> Indonesia–Australia Comprehensive Economic Partnership Agreement (signed 4 March 2019, entered into force 5 July 2020) [2020] ATS 9, art 14.21.

<sup>158</sup> China–Australia Free Trade Agreement (signed 17 June 2015, entered into force 20 December 2015) [2015] ATS 15, art 9.8.

options. Yet reducing tariffs in environmental goods and services is an important part of the transition to the low-carbon economy. The UK–Australia FTA chapter provides that ‘each Party shall facilitate and promote, as appropriate, trade and investment in environmental goods and services, including environmental and low emissions technologies, clean and renewable energy and enabling infrastructure, and energy efficient goods and services’<sup>159</sup> and that ‘the Parties shall endeavour to address any potential barrier to trade in environmental goods and services that may be identified by a Party’.<sup>160</sup>

These provisions require parties to take steps to liberalise trade and investment in environmental goods and services. They are similar to the UK–NZ FTA, but the latter agreement goes further in requiring Parties to eliminate customs duties on goods containing environmental goods listed in an annex.<sup>161</sup> Products include bicycle parts (because bicycles and their parts provide an environmentally friendly, low-carbon mode of transportation) and live plants and mushroom spawn (to promote regrowth and biodiversity of plant life for local agriculture) in addition to materials used for photovoltaic panels and sustainably sourced construction materials.<sup>162</sup> The GEA between Singapore and Australia, which establishes a framework for ‘green economy cooperation’, also contains a list of ‘Environmental Goods’ and ‘Environmental Services’, and establishes a mechanism to identify non-tariff barriers to trade in environmental goods and services.<sup>163</sup> The GEA is meant to complement, rather than supersede or modify, other trade agreements (both WTO agreements and FTAs) by which the parties are already bound. It accepts the premise that ‘sustainability and economic growth can go hand in hand’,<sup>164</sup> and does not contain many of the requirements relating to standards of environmental regulation that would be included in more substantial trade agreements. Nonetheless, it reaffirms the commitments of both parties to ‘upholding our obligations under the UNFCCC and the Paris Agreement’,<sup>165</sup> including ‘[keeping] the Paris Agreement temperature goals within reach’.<sup>166</sup> Moreover, it is designed in part as a model for broader regional or global cooperation on the ‘green economy’, including collaboration that might be pursued in international fora.<sup>167</sup>

The UK–NZ FTA and the GEA are more ambitious than a ‘best efforts’ clause found in earlier FTAs. For example, the EU–Singapore FTA provides that parties ‘shall pay special attention to facilitating the removal of obstacles to trade or investment concerning climate-friendly goods and services’.<sup>168</sup> The

<sup>159</sup> UK–Australia FTA (n 26) art 22.6(2).

<sup>160</sup> *ibid.*, art 22.6(3).

<sup>161</sup> UK–NZ FTA (n 39) art 22.7.

<sup>162</sup> *ibid.*, annex 22A.

<sup>163</sup> Australian Government, DFAT, ‘Singapore–Australia Green Economy Agreement Official Text’, para 9(a) <<https://www.dfat.gov.au/geo/singapore/singapore-australia-green-economy-agreement/singapore-australia-green-economy-agreement-text>>.

<sup>164</sup> *ibid.*, para 5.

<sup>165</sup> *ibid.*, para 7(a).

<sup>166</sup> *ibid.*, para 4.

<sup>167</sup> *ibid.*, paras 6(h), 6(i), 7(k).

<sup>168</sup> EU–Singapore FTA (n 148) art 12.11.2.

CETA requires that parties make efforts to facilitate and promote trade and investment in environmental goods and services, including through addressing the reduction of non-tariff barriers related to these goods and services, and paying special attention to facilitating the removal of obstacles to trade or investment in goods and services of particular relevance for climate change mitigation.<sup>169</sup>

These FTA developments outpace the multilateral and regional efforts to liberalise trade and investment in climate-friendly goods and services. At the WTO, negotiations for an ‘Environmental Goods Agreement’ are being conducted—slowly—by a group of 18 participants (representing 46 WTO members) to promote trade liberalisation for key environmental products.<sup>170</sup> The negotiations have proved difficult, due to differences in views about a reliable definition of an ‘environmental good’.<sup>171</sup> In 2012, 21 members of the Asia-Pacific Economic Cooperation (APEC) finalised a list of 54 goods in respect of which they committed to lowering applied tariffs to 5 per cent or less by 2015.<sup>172</sup> This list includes several renewable energy and clean technology parts, such as solar panels and wind turbines. In 2016, each of the 21 APEC countries put forward an implementation plan detailing their progress.<sup>173</sup>

There are signs that countries wish to enhance their commitments, both at the WTO and within regional and bilateral agreements. The Coalition of Trade Ministers on Climate have announced their intention to focus attention ‘across sectors on the nexus between climate and trade’ and to ‘promote trade and investment that foster the diffusion, development, accessibility and uptake of goods, services and technologies that support climate mitigation and adaptation’.<sup>174</sup> The advances in the FTAs on environmental goods and services, including the express annex of the UK–NZ FTA and the GEA, may assist trade ministers to meet this priority. There is scope to go further than even the leading FTAs. Efforts to expand the list of environmental goods and services could encompass a range of sectors beyond the current focus on energy, transportation and building sectors. For example, as the link between the human treatment of animals and climate change gains greater

<sup>169</sup> CETA (n 41) art 24.9. <sup>170</sup> WTO, ‘Environmental Goods Agreement (EGA)’ <[https://www.wto.org/english/tratop\\_e/envir\\_e/ega\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/ega_e.htm)>. <sup>171</sup> See Wu (n 8) 285.

<sup>172</sup> APEC Policy Support Unit, ‘The APEC List of Environmental Goods’ (Policy Brief No 5, 28 November 2012) <[https://www.apec.org/docs/default-source/publications/2012/11/the-apec-list-of-environmental-goods/2012\\_psu\\_apec-list-environ-gds-policy5.pdf?sfvrsn=82d414e2\\_1](https://www.apec.org/docs/default-source/publications/2012/11/the-apec-list-of-environmental-goods/2012_psu_apec-list-environ-gds-policy5.pdf?sfvrsn=82d414e2_1)>.

<sup>173</sup> APEC Committee on Trade and Investment, ‘APEC Cuts Environmental Goods Tariffs’ (News Release, 28 January 2016) <[https://www.apec.org/press/news-releases/2016/0128\\_eg](https://www.apec.org/press/news-releases/2016/0128_eg)>. See also, APEC, ‘APEC Economies’ Implementation Plans for Tariff Reductions on Environmental Goods’ (September 2021) <<https://www.apec.org/Groups/Committee-on-Trade-and-Investment/APEC-Economies-Implementation-Plans>>. This progress can be contrasted with anti-dumping and countervailing duties safeguard measures still applied to environmental goods: see, eg, China’s unsuccessful complaint in Panel Report, *United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products*, WT/DSS62/R, circulated 2 September 2021.

<sup>174</sup> Coalition of Trade Ministers on Climate (n 3).

visibility,<sup>175</sup> goods and services related to plant-based food production might be included. These efforts may revitalise the WTO negotiating efforts; as already noted, FTAs can serve as important laboratories for later multilateral action.<sup>176</sup>

## 2. Promoting low-carbon investments and green finance

Promoting low-carbon investments and discouraging high-carbon investments facilitate trade and investment in climate-related areas. In the face of successful challenges to domestic renewable energy support programmes at the WTO,<sup>177</sup> FTAs could ensure that such programmes are identified as consistent with trade commitments.<sup>178</sup> In addition to recognising the need for low-carbon investments, FTAs could identify and discourage high-carbon investments that might be promoted by other agreements in need of modernization.<sup>179</sup>

Proposals for reform have focused on the energy sector. There is scope to broaden proposals to address investment and trade in agriculture, transportation, building and other sectors. This is the flip side of the recognition in trade agreements of the legitimate use of unilateral measures necessary for the protection of animal, plant and human life and health, as discussed above.

The ‘Investment’ chapter in the UK–Australia FTA provides that the ‘Parties recall the provisions of this Agreement that are applicable to promoting mutually supportive investment and environmental outcomes and that are consistent with the sovereign right of each Party to set its levels of environmental protection’, including those applicable to ‘supporting the transition to low carbon and climate resilient economies’ and ‘encouraging investment in environmental goods and services’.<sup>180</sup> This provision indirectly provides support for low-carbon investments, rather than committing to protecting low-carbon investments and discouraging high-carbon investments. It is similar to the EU–Singapore FTA, which provides that parties will ‘actively promote the development of a sustainable and safe low-carbon economy, such as investment in renewable energies and energy efficient solutions’.<sup>181</sup>

<sup>175</sup> On the responsibility to reduce the use of animals as part of climate change and pandemic mitigation efforts, see Sebo (n 58).  
<sup>176</sup> See n 72 and surrounding text.

<sup>177</sup> Appellate Body Report, *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R, adopted 24 May 2013; Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R, adopted 14 October 2016.

<sup>178</sup> See also the discussion of climate response measures in Bacchus (n 112 and surrounding text).

<sup>179</sup> For example, FTAs could promote a commitment by relevant Parties to reform of the Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95. For a discussion of proposals for reform, see J Tropper and K Wagner, ‘The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?’ (2022) 23 *JWidInv&Trade* 813.  
<sup>180</sup> UK–Australia FTA (n 26) art 13.18.

<sup>181</sup> EU–Singapore FTA (n 148) art 12.11.3.

Green financing is mentioned in the Financial Services chapter of the UK–Australia FTA. There is general recognition of the need for international cooperation to ‘facilitate the inclusion of environmental, social and governance considerations in investment decision-making’, which involves, ‘inter alia, the assessment and pricing of climate-related risks and opportunities, and the exploration of environmental and sustainable projects and infrastructure’.<sup>182</sup> Article 9.19(4) provides that parties ‘shall cooperate in relevant international fora and ... in the development and adoption of internationally recognised standards for the inclusion of environmental, social and governance considerations in investment decision-making and other business activities’.

There is scope for FTAs to consider more broadly how cooperation on trade can link to climate finance initiatives. For example, the UK’s Ayrton Fund was announced at the United Nations Climate Action Summit in New York in September 2019 and pledged £1 billion of aid funding to create new technology to help developing countries reduce their emissions.<sup>183</sup> Such cooperation might be especially important in climate finance to assist in adaptation, due to the current bias towards mitigation rather than adaptation.<sup>184</sup> The EU–Colombia–Peru Trade Agreement recognises the effect of climate change on current and future development, and highlights the importance of ‘increasing and supporting adaptation efforts, especially in those Parties which are developing countries’.<sup>185</sup>

### *3. Eliminating harmful fossil fuel subsidies and production*

Fossil fuel subsidies can ‘distort trade and investment, disadvantage renewable and clean energy, encourage wasteful consumption, and contribute significantly to global greenhouse gas emissions’.<sup>186</sup> Fossil fuel subsidies for the production of fossil fuels—estimated at US\$444 billion a year for the Group of 20 (G20) countries alone<sup>187</sup>—promote the exploration and exploitation of oil, gas and coal reserves. Levelling the playing field for renewable sources of energy can facilitate trade and investment in climate-related areas. Yet WTO members have

<sup>182</sup> UK–Australia FTA (n 26) art 9.19.

<sup>183</sup> UK Government, ‘UK to Double Efforts to Tackle Climate Change’ (Press Release, 23 September 2019) <<https://www.gov.uk/government/news/uk-aid-to-double-efforts-to-tackle-climate-change>>.

<sup>184</sup> LM Abadie, I Galarraga and D Rübhelke, ‘An Analysis of the Causes of the Mitigation Bias in International Climate Finance’ (2013) 18 *MitigAdaptStrategGlobChange* 943.

<sup>185</sup> Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part [2012] OJ L354/3, art 275.3 (signed 26 June 2012).

<sup>186</sup> UK–NZ FTA (n 39) art 22.9(1).

<sup>187</sup> E Bast et al, ‘Empty Promises: G20 Subsidies to Oil, Gas, and Coal Production’ (Oil Change International and Overseas Development Institute 2015) <[https://cdn.odi.org/media/documents/Full\\_report.pdf](https://cdn.odi.org/media/documents/Full_report.pdf)>.

not challenged fossil fuel subsidies,<sup>188</sup> and efforts at fossil fuel subsidy reform have not succeeded within the WTO, the UNFCCC or other regimes.<sup>189</sup>

The UK–NZ FTA recognises that fossil fuel subsidies can be trade-distortive and contribute significantly to GHG emissions.<sup>190</sup> Each Party shall ‘take steps to eliminate harmful fossil fuel subsidies where they exist, with limited exceptions in support of legitimate public policy objectives’ and ‘end new direct financial support, such as officially supported export credits, for fossil fuel energy in non-parties, except in limited circumstances’.<sup>191</sup> As fellow members of the ‘Powering Past Coal Alliance’, both Parties also shall ‘end unabated coal-fired electricity generation in their territories’.<sup>192</sup> Separately, NZ is leading an initiative with Fiji, Costa Rica, Iceland, Norway and Switzerland to negotiate an ‘Agreement on Climate Change, Trade and Sustainability’. That agreement is intended *inter alia* to establish concrete commitments to eliminate fossil fuel subsidies.<sup>193</sup> Launching the negotiations, the NZ Prime Minister noted that ‘[d]espite commitments from the G20 and APEC to remove fossil fuel subsidies, we are seeing dangerously little action occurring. Legally enforceable trade rules would change that.’<sup>194</sup>

Other bilateral and regional agreements have signalled action. While the EU–Singapore FTA does not prohibit subsidies to the coal industry, it states that parties ‘share the goal of progressively reducing subsidies for fossil fuels’.<sup>195</sup> The elimination of fossil fuel subsidies is also contemplated in a number of proposed agreements. The draft text of the ‘Global Pact for the Environment’, which was endorsed by the United Nations in 2019,<sup>196</sup> provides that parties ‘shall ensure the promotion of public support policies, patterns of production and consumption both sustainable and respectful of the environment’.<sup>197</sup>

The UK–Australia FTA does not refer to the elimination or restriction of fossil fuel subsidies. However, it does contain enforceable provisions on fisheries subsidies,<sup>198</sup> replicating many of the advances already assumed by

<sup>188</sup> T Meyer, ‘Explaining Energy Disputes at the World Trade Organization’ (2017) 17 *IntlEnvtlAgreem* 391.

<sup>189</sup> Rive (n 7); see also H van Asselt and K Kulovesi, ‘Seizing the Opportunity: Tackling Fossil Fuel Subsidies under the UNFCCC’ (2017) 17 *IntlEnvtlAgreem* 357.

<sup>190</sup> UK–NZ FTA (n 39) art 22.8(1). <sup>191</sup> *ibid.*, art 22.8(2). <sup>192</sup> *ibid.*, art 22.8(2)(b).

<sup>193</sup> Prime Minister of New Zealand, ‘New Zealand Leading Trade Agreement Driving Action on Climate Change and the Environment’ (Release, New Zealand Government, 26 September 2019) <<https://www.beehive.govt.nz/release/new-zealand-leading-trade-agreement-driving-action-climate-change-and-environment>>. <sup>194</sup> *ibid.* <sup>195</sup> EU–Singapore FTA (n 148) art 12.11.3.

<sup>196</sup> UNGA Res 72/277 (14 May 2018) UN Doc A/RES/72/277.

<sup>197</sup> Global Pact for the Environment, ‘Text of the Draft Global Pact for the Environment by the IGEP’ (September 2017) art 3 <<https://globalpactenvironment.org/en/documents-en/the-pact-text/>>.

<sup>198</sup> UK–Australia FTA (n 26) art 22.12(5). The UK–NZ FTA also contains provisions for the reduction and elimination of fisheries subsidies: UK–NZ FTA (n 39) art 22.9.

Australia under the CPTPP.<sup>199</sup> Such a provision could have indirect benefits for climate mitigation, given that fuel subsidies (including fuel-specific tax exemptions) are the largest subsidy types in the fisheries sector.<sup>200</sup>

The comparison between fossil fuels and marine capture fisheries is relevant beyond subsidies.<sup>201</sup> It has been relatively uncommon in climate policy to think about restricting the production of fossil fuels, with the emphasis instead on the restriction of emissions upon consumption.<sup>202</sup> Yet in fisheries, countries have long-believed in the utility—indeed, necessity—of restricting supply.<sup>203</sup> Agreement between States has moved from regional fisheries management organisations into trade agreements: the CPTPP, for example, entrenches binding obligations on parties to operate a fisheries management system designed to prevent overfishing and overcapacity.<sup>204</sup> These obligations are replicated in the UK–Australia FTA<sup>205</sup> and extended by the UK–NZ FTA.<sup>206</sup> This may signal a move, which has been advanced in non-trade arenas,<sup>207</sup> towards an agreement between parties to restrict the extraction, production or export of fossil fuels.

### *C. Dispute Resolution and Cooperation*

#### *1. Enforcement*

The enforcement provisions of an FTA can also influence the extent to which that FTA is able to address climate change effectively. Compulsory dispute settlement is increasingly popular in FTAs, including for trade and environment chapters. For example, the CPTPP allows for environmental consultations, followed by the establishment of a panel under the agreement's general trade dispute provisions.<sup>208</sup> Similarly, the CETA provides for the establishment of a panel of experts for disputes arising from the trade and environment chapter of that agreement.<sup>209</sup> The United States has filed its first complaint against the government of Mexico under the United States–Mexico–Canada Agreement utilising its Environmental chapter.<sup>210</sup>

Studies assessing climate-related provisions in existing FTAs show that these provisions are weaker than other environment-related provisions such as

<sup>199</sup> CPTPP (n 40) art 20.16.5. These advances are discussed in MA Young, 'Energy Transitions and Trade Law: Lessons from the Reform of Fisheries Subsidies' (2017) 17 *Int'l Envtl Agreem* 371.

<sup>200</sup> But see UK–Australia FTA (n 26) art 22.12(9). <sup>201</sup> See further, Young (n 72).

<sup>202</sup> F Green and R Denniss, 'Cutting with Both Arms of the Scissors: The Economic and Political Case for Restrictive Supply-Side Climate Policies' (2018) 150 *ClimChange* 73.

<sup>203</sup> For further discussion, see Young (n 199). <sup>204</sup> CPTPP (n 40) art 20.16.3.

<sup>205</sup> UK–Australia FTA (n 26) art 22.12(2). <sup>206</sup> UK–NZ FTA (n 39) art 22.9.

<sup>207</sup> H van Asselt and P Newell, 'Pathways to an International Agreement to Leave Fossil Fuels in the Ground' (2022) 22(4) *Global Envtl Pol* 28. See also, The Fossil Fuel Non-Proliferation Treaty <<https://fossilfuel treaty.org/>>.

<sup>208</sup> CPTPP (n 40) arts 20.20–20.23.

<sup>209</sup> CETA (n 41) art 24.15.

<sup>210</sup> Y Wang, 'Free Trade Agreements and Marine Species Sustainability: United States Files Environmental Complaint against Mexico to Protect Vanishing Vaquita' (2022) 7 *APJOLP* 156.

biodiversity, but this may change in the future. In one study, 70 per cent of assessed FTAs with climate-related provisions did not contain third-party dispute settlement procedures for those provisions.<sup>211</sup> Compulsory dispute settlement procedures for FTAs often sit alongside other processes. For example, the Joint Committee on Trade and Sustainable Development established under the CETA operates as a forum for parties to share views and updates on environmental issues.<sup>212</sup>

While the ability to enforce an FTA is a key consideration for negotiators, there may be a balance to be struck between enforceability and ambition. It is possible that the prospect of hard enforcement lowers ambition in the content of the FTA provisions themselves. Different countries take different approaches to this issue.<sup>213</sup> The United States and Canada typically include a narrower set of commitments in their chapters, but these are covered by the FTA's dispute settlement mechanisms.<sup>214</sup> If a panel finds that a failure to meet environmental commitments has had an effect on trade flows, trade concessions may be withdrawn. There is even scope in many Canadian FTAs for fines to be levied by a panel for violation of trade-related labour provisions.<sup>215</sup> By contrast, the EU commonly agrees upon side chapters for sustainable development that are not subject to enforceable dispute settlement procedures, and that do not have penalties for non-compliance.<sup>216</sup>

There are exceptions to this approach. France and the Netherlands signed a 2020 'non-paper' on trade and sustainable development proposing a staged implementation of tariff reductions linked to the effective implementation of the relevant FTA.<sup>217</sup> The EU–UK TCA allows for retaliatory measures in the case of non-compliance with arbitral rulings, including the suspension of parts of the agreement.<sup>218</sup> The TCA also allows each party to take 'rebalancing' measures in the event that the other party fails to ensure a 'level playing field for open and fair competition', including with respect to

<sup>211</sup> Morin and Jinnah (n 9) 55.

<sup>212</sup> See European Commission, 'Meeting of the Committee on Trade and Sustainable Development, Brussels, 13 September 2018' <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/45c4d7b6-119a-46e5-a5b1-7994a12a49fb/details>>.

<sup>213</sup> See Leal-Arcas et al (n 69) 17–18.

<sup>214</sup> See, eg, Protocol replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America and the Mexican States (signed 30 November 2018, entered into force 1 July 2020) CTS 2020/5, art 24.32(1).

<sup>215</sup> See, eg, Canada–Israel Free Trade Agreement (signed 31 July 1996, entered into force 1 January 1997) CTS 1997/49, annex 12.14 (Monetary Assessments).

<sup>216</sup> See, eg, EU–Singapore FTA (n 148) art 12.16(1). See also, M Bronckers and G Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24 JIEL 25.

<sup>217</sup> Kingdom of the Netherlands, 'Non-Paper from the Netherlands and France on Trade, Social Economic Effects and Sustainable Development' (8 May 2020) 1 <<https://www.permanentrepresentations.nl/documents/publications/2020/05/08/non-paper-from-nl-and-fr-on-trade-social-economic-effects-and-sustainable-development>>.

<sup>218</sup> S Fella et al, 'The UK–EU Trade and Cooperation Agreement: Summary and Implementation' (House of Commons Briefing Paper No 09106, 30 December 2020) 32–3 <<https://researchbriefings.files.parliament.uk/documents/CBP-9106/CBP-9106.pdf>>.

environmental standards.<sup>219</sup> Ex post impact assessments of FTAs can provide knowledge and experience of the best approaches in this respect.

The UK–Australia FTA Environment chapter sets out a specific process for the resolution of disputes arising under that chapter. In the first instance, it allows a party to request consultations with the other party.<sup>220</sup> If consultations fail to resolve the matter, either party may request that the Joint Committee, a committee constituted under the FTA by senior government representatives of the parties to supervise its implementation and operation, convenes to consider the matter.<sup>221</sup> If that process fails, either party may refer the matter to the relevant Ministers of the Parties,<sup>222</sup> and, failing that, may have recourse to the general dispute resolution provisions in Article 30 of the FTA, which might include the establishment of a panel.<sup>223</sup> If a dispute is referred to a panel, the FTA provides that panellists other than the chair shall have ‘sufficient expertise or experience in environmental law or practice’.<sup>224</sup> If the final report of a panel is not complied with, temporary remedies, including the payment of compensation or the suspension of concessions under the FTA, are available to the complaining party.<sup>225</sup> Therefore, any failure to comply with provisions of the Environment chapter might eventually result in the suspension of FTA concessions with respect to the party at fault.

The UK–Australia FTA’s enforcement provisions are somewhat attenuated in the climate context. While some provisions, such as the requirement of non-derogation from environmental laws, could lead to a panel proceeding (ie a failure to enforce environmental laws effectively, or a derogation from those laws, might result in a panel proceeding, and if a panel award is not complied with, it could result in one party imposing sanctions on the other), other provisions are less likely to be enforced in this way. This is because the Environment chapter provisions that are specific to climate change are expressed in aspirational terms: for example, each Party ‘affirms its commitment to address climate change’ and ‘the Parties emphasise that efforts to address climate change require collective and urgent action, and acknowledge the role of global trade and investment in these efforts’.<sup>226</sup> While these provisions are subject to the same dispute-resolution provisions as the rest of the chapter, given the aspirational terms in which they are expressed it is unlikely they would underpin a legal claim.<sup>227</sup>

Further examples highlight this contrast. For ozone-depleting substances, Parties are required to ‘take measures to control the production and consumption of, and trade in, substances controlled by the Montreal Protocol’.<sup>228</sup> In similarly enforceable terms, the CPTPP requires parties to take measures to control the production and consumption of, and trade in,

<sup>219</sup> EU–UK TCA (n 43) arts 355(1), 411(2). See also, *ibid* 23–4.

<sup>220</sup> UK–Australia FTA (n 26) art 22.23(2).

<sup>221</sup> *ibid*, art 22.24(1).

<sup>222</sup> *ibid*, art 22.25.

<sup>223</sup> *ibid*, art 22.26(1).

<sup>224</sup> *ibid*, art 22.26(2).

<sup>225</sup> *ibid*, art 30.16.

<sup>226</sup> *ibid*, art 22.5.

<sup>227</sup> Webb (n 138) 45.

<sup>228</sup> UK–Australia FTA (n 26) art 22.8(1).

substances which can deplete or modify the ozone layer.<sup>229</sup> An example from the CPTPP that is less likely to be enforceable is the CPTPP provision on the transition to a low-emissions economy, which makes clear that such transition should reflect each party's domestic circumstances and capabilities, and requires only that the parties cooperate and engage in capacity-building activities in pursuit of that transition.<sup>230</sup>

## 2. Cooperation

The 'enhanced cooperation to protect and conserve the environment'<sup>231</sup> is an overarching objective of the UK–Australia FTA Environment chapter. The Parties recognise the important role that cooperation can play in addressing climate change, and 'shall cooperate to address matters of mutual interest' which may include, *inter alia*, emission reduction opportunities, the development of zero emissions technologies, climate change adaptation and capacity building and development assistance for climate vulnerable countries.<sup>232</sup> Article 22.20 contains a general recognition of the importance of cooperation as a mechanism to implement the chapter, 'subject to the availability of funds and of human and other resources, and to the applicable laws and regulations of the Parties'.<sup>233</sup> The Parties establish an Environment Working Group which will meet within a year of the date of entry into force of the FTA,<sup>234</sup> and there is scope for public participation and public submissions regarding the chapter's implementation.<sup>235</sup>

Commentators have observed that enhanced cooperation and not liberalisation has been the main operational framework in which climate action measures are incorporated into FTAs.<sup>236</sup> This is apparent, for example in the facilitation of the exchange of information or research collaboration in the development of green technologies.<sup>237</sup> The effectiveness of such collaboration depends, in part, on relationships and practices set up during the negotiating process, to which the article now turns.

#### IV. THE UK–AUSTRALIA FTA: THE NEGOTIATING PROCESS AND ITS AFTERMATH

Attention now turns to issues of process in the UK–Australia FTA, guided by the understanding that transparency, consultation and public participation are important for coordinating efforts between disparate treaties and fields of professional specialisation.<sup>238</sup> Studies of regime interaction in climate change governance emphasise the indispensability of States and non-State

<sup>229</sup> CPTPP (n 40) art 20.5(1).

<sup>231</sup> UK–Australia FTA (n 26) art 22.2.

<sup>234</sup> *ibid*, art 22.21(2).

<sup>236</sup> See on this point, Dent (n 62) 25: '... co-operation and not liberalisation has been the main operational framework in which climate action measures are incorporated into FTAs'.

<sup>237</sup> See also Leal-Arcas et al (n 69) 15–16.

<sup>230</sup> *ibid*, art 20.15(2).

<sup>232</sup> *ibid*, art 22.5(3).

<sup>233</sup> *ibid*, art 22.20(6).

<sup>235</sup> *ibid*, arts 22.18, 22.19, 22.20(5).

<sup>238</sup> See Young (n 68) 280–4.

actors,<sup>239</sup> and these are just as applicable in the bilateral context of an FTA negotiation. This section thus describes the negotiating rounds, impact assessments, views of parliamentary committees and alleged lack of effective public participation that has accompanied the UK–Australia FTA.

### *A. Negotiating Rounds*

The negotiations for the UK–Australia FTA formally commenced on 17 June 2020. This was after a series of public consultations in the UK which were conducted by the DIT between 20 July and 26 October 2018,<sup>240</sup> a response to which was published by the DIT on July 2019.<sup>241</sup> Based on these consultations, the negotiating objectives of the UK included the achievement of:

[s]ecure provisions that support and help further the Government’s ambition on climate change and achieving Net Zero carbon emissions by 2050, including promoting clean growth, trade in low carbon goods and services, supporting research and development collaboration, maintaining both parties’ right to regulate in pursuit of decarbonisation and reaffirming our respective commitments to the United Nations Framework Convention on Climate Change and the Paris Agreement.<sup>242</sup>

Within Australia, stakeholders were ‘engaged’ over four years of preparatory discussions within a bilateral Trade Working Group established in September 2016, with further consultation with industry and other stakeholders once negotiations commenced.<sup>243</sup> Submissions are listed on the Department of Foreign Affairs and Trade (DFAT) website and mostly come from industry bodies (in agriculture, digital services), with a small number of NGOs such as World Animal Protection and the Royal Society for the Prevention of Cruelty to Animals.<sup>244</sup>

There were four negotiating rounds between the UK and Australia.<sup>245</sup> According to the Australian DFAT, the environment was a subject of discussion in each of the negotiating rounds, including, during the second negotiating round from 21 September to 2 October 2020, specific discussion of Australia’s domestic approach to meeting its climate change

<sup>239</sup> MA Young, ‘Climate Change Law and Regime Interaction’ (2011) 2 CCLR 147.

<sup>240</sup> Ipsos MORI, ‘Consultation Methodology: DIT Consultations on Trade Negotiations with the US, Australia and New Zealand, and on the UK Potentially Seeking Accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)’ (18 July 2019) <[www.gov.uk/government/consultations/trade-with-australia](http://www.gov.uk/government/consultations/trade-with-australia)>.

<sup>241</sup> Department for International Trade, ‘UK–Australia Free Trade Agreement: The UK’s Strategic Approach’ (17 July 2020) <[www.gov.uk/government/publications/uks-approach-to-negotiating-a-free-trade-agreement-with-australia](http://www.gov.uk/government/publications/uks-approach-to-negotiating-a-free-trade-agreement-with-australia)>. <sup>242</sup> *ibid.* 12.

<sup>243</sup> See DFAT, ‘National Interest Analysis: Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland’ [2022] ATNIA 3 (25 November 2021) Attachment I (‘Consultation’) 15. <sup>244</sup> *ibid.* 19–20.

<sup>245</sup> See DFAT, ‘Overview of Australia–United Kingdom Free Trade Agreement Negotiations’ <<https://www.dfat.gov.au/trade/agreements/negotiations/aukfta/overview-negotiations>>.

targets.<sup>246</sup> The Australian government's negotiating aims and objectives of June 2020 stated that its approach with respect to environmental protection was to 'include FTA commitments that are consistent with internationally agreed principles, standards and rules that have a clear link to trade'.<sup>247</sup> In the UK, new appointments to the Board of Trade on 4 September 2020 included the former Australian Prime Minister, Tony Abbott, who when in office in Australia dismantled Australia's climate legislation.<sup>248</sup>

An Agreement in Principle on the UK–Australia FTA was reached in June 2021.<sup>249</sup> The UK's press release highlighted that British cars, Scotch whisky and confectionery would be cheaper to sell in Australia, boosting UK industries.<sup>250</sup> The overview of the Environment chapter included some references to climate change. It stated that 'both countries commit to undertaking cooperative activities, including those targeted at key technologies in the transition to a low carbon and climate resilient economy'.<sup>251</sup> It also stated that commitments in the chapter would include provisions affirming commitments under multilateral environmental agreements, a provision affirming commitments by each country to tackle climate change, and a provision recognising the right of each country to establish its own levels of domestic environmental protection and adopt laws and policies accordingly.<sup>252</sup>

Before and after the Agreement in Principle, the UK consulted with interested groups. In 2021, DIT officials participated in six meetings of the Strategic Trade Advisory Group (STAG).<sup>253</sup> Attendees include representatives from a range of groups including industry, farming, trade unions and environmental advocacy bodies. The only meeting recorded as mentioning the UK–Australia FTA was

<sup>246</sup> See DFAT, 'Overview of the Second Negotiating Round' <<https://www.dfat.gov.au/trade/agreements/negotiations/aukfta/overview-second-negotiating-round>>.

<sup>247</sup> See DFAT, 'Australia–United Kingdom Free Trade Agreement: Summary of Negotiating Aims and Approach' (15 June 2020) 4 <<https://www.dfat.gov.au/sites/default/files/australia-uk-fta-negotiating-aims-and-approach.pdf>>.

<sup>248</sup> See UK Government, 'Government Announces New Board of Trade' (Press Release, 4 September 2020) <[www.gov.uk/government/news/government-announces-new-board-of-trade](http://www.gov.uk/government/news/government-announces-new-board-of-trade)>. For details of the Clean Energy Legislation (Carbon Tax Repeal) Act 2014, and other activities of the Tony Abbott's government, see E Jukić and MA Young, 'Australia' (2013) 24 *YIntlEnvL* 512, 512–14; E Jukić and MA Young, 'Australia' (2014) 25 *YIntlEnvL* 471, 472–4.

<sup>249</sup> See 'Australia–United Kingdom Free Trade Agreement: Agreement in Principle' (DFAT, 17 June 2021) <<https://www.dfat.gov.au/sites/default/files/aukfta-negotiations-agreement-in-principle-17-june-2021.pdf>>.

<sup>250</sup> UK Government, 'UK Agrees Historic Trade Deal with Australia' (Press Release, 15 June 2021) <<https://www.gov.uk/government/news/uk-agrees-historic-trade-deal-with-australia>>.

<sup>251</sup> 'Australia–United Kingdom Free Trade Agreement: Agreement in Principle' (n 249) 14.

<sup>252</sup> *ibid.*

<sup>253</sup> See UK Government, 'Strategic Trade Advisory Group (STAG): Summary of Discussions' (last updated 30 June 2022), which lists meetings on 22 February, 26 April, 28 June, 6 September, 25 October and 13 December 2021. <[www.gov.uk/government/publications/strategic-trade-advisory-group-stag-summary-of-discussions](http://www.gov.uk/government/publications/strategic-trade-advisory-group-stag-summary-of-discussions)>.

on 25 October 2021, when members held discussions about the government's approach to the Mobility chapter.<sup>254</sup>

In September 2021, some articles appeared in the UK press based on an apparently leaked email from the government that suggested that the UK had agreed to drop some specific references to climate change from the text of the FTA to appease the Australian government.<sup>255</sup> The email referred to two 'climate asks' that International Trade Secretary Liz Truss and Business Secretary Kwasi Kwarteng thought could be dropped from the text of the agreement, one being a reference to the temperature goals of the Paris Agreement.<sup>256</sup> Following the publication of the articles, the UK government confirmed that the text of the agreement would contain a 'substantive article on climate change' referring to the Paris Agreement, but not to the specific temperature goals.<sup>257</sup> Following domestic criticism, including from the chair of the independent Climate Change Committee, the UK government denied that it had given in to Australian pressure to remove the references.<sup>258</sup> It reiterated that the agreement would uphold the commitments of the Paris Agreement, including, implicitly, its temperature goals. Australia's Trade Minister Dan Tehan confirmed that the agreement would contain references to the Paris Agreement, but also said that matters relating to climate change were not relevant to trade agreements.<sup>259</sup> The FTA was signed virtually on 16 December 2021 (London, UK) and 17 December 2021 (Adelaide, Australia).

### *B. Impact Assessments*

The UK DIT's impact assessment of the FTA, published on 16 December 2021, found that overall GHG emissions associated with UK-based production would be largely unchanged by the FTA, but that there would be some increase in emissions associated with goods produced in Australia and imported to the UK.<sup>260</sup> There would also be some increase in transport-related emissions associated with increased trade flows.<sup>261</sup>

<sup>254</sup> UK Government, 'Summary of Discussions: Strategic Trade Advisory Group 25 October 2021' <<https://www.gov.uk/government/publications/strategic-trade-advisory-group-stag-summary-of-discussions/summary-of-discussions-strategic-trade-advisory-group-25-october-2021>>. See further below, WWF UK et al (n 298) and surrounding text. <sup>255</sup> Coates (n 1).

<sup>256</sup> *ibid.*

<sup>257</sup> S Cannane, 'UK Government Accused of Dropping FTA Climate Commitments Due to Australian Pressure' (*ABC News*, 9 September 2021) <<https://www.abc.net.au/news/2021-09-09/uk-government-accused-of-dropping-fta-climate-commitments/100445668>>. <sup>258</sup> *ibid.*

<sup>259</sup> D Jervis-Brady, 'Climate Targets Dropped from Australia–UK Trade Deal: Reports' (*The Canberra Times*, 9 September 2021) <<https://www.canberratimes.com.au/story/7422843/climate-goals-part-of-uk-australia-trade-deal-despite-leaked-email/>>.

<sup>260</sup> Department for International Trade, 'Impact Assessment of the Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia' (16 December 2021) 45–6 <<https://www.gov.uk/government/publications/uk-australia-fta-impact-assessment>>.

<sup>261</sup> *ibid.* 46–7.

The DIT's impact assessment acknowledged that increased market access might facilitate higher levels of trade in sectors where climate policies differ between the two countries, potentially leading to a shift in production from the UK to Australia.<sup>262</sup> The likelihood of this 'carbon leakage' will depend to an extent on the development of climate policies in the two countries.<sup>263</sup> The impact assessment also identified a number of other possible environmental impacts of the FTA, including an increase in trade of agricultural, wood, paper and rubber products leading to increased deforestation in Australia;<sup>264</sup> stress on habitats and biodiversity in both countries as a result of changes to agricultural production;<sup>265</sup> and strain on water resources and quality particularly in Australia in areas where meat and livestock sectors are concentrated.<sup>266</sup>

A coalition of civil society groups responded that the DIT's impact assessment, while recognising Australia's low rating on agricultural standards, had understated the extent of climate change impacts by failing to include impacts of agricultural liberalisation relating to land use change and deforestation and water.<sup>267</sup> The European Commission's Sustainability Impact Assessment of the proposed EU–Australia FTA similarly found that an FTA could lead to an increase in global GHG emissions as a result of increased production, particularly meat production, in Australia.<sup>268</sup>

On 17 December 2021, the UK's Secretary of State for International Trade requested the Trade and Agriculture Commission to advise her on a number of features of the UK–Australia FTA, including deforestation and climate change. The UK Trade and Agriculture Commission is an independent expert committee established to provide advice under the UK's Agricultural Act 2020. In April 2022, it presented its report, noting that it has not been provided with any evidence that Australian agricultural products likely to be imported at increased rates under the FTA are any more emissions-intensive than comparable products produced in the UK, but finding evidence that transport-related emissions increases were likely to be negligible.<sup>269</sup> The Commission accepted that deforested land in Australia is in some cases used to produce agricultural products which will be imported to the UK in greater quantities. In pointing to the limit in legal options for the UK, the Commission stated '[a]s under WTO law, the FTA does not give the UK a right to protect Australian resources, including its

<sup>262</sup> *ibid* 47.      <sup>263</sup> *ibid* 48.      <sup>264</sup> *ibid* 51.      <sup>265</sup> *ibid*.      <sup>266</sup> *ibid* 49.

<sup>267</sup> Compassion in World Farming et al, 'Safeguarding the UK's Food and Farming Standards in Trade: Lessons from the Australia–UK Free Trade Agreement' (undated) <[https://www.ciwf.org.uk/media/7450288/168678\\_lessons-learned-from-australia-trade-deal-core-standards-ciwf-wwf-and-others-march-2022.pdf](https://www.ciwf.org.uk/media/7450288/168678_lessons-learned-from-australia-trade-deal-core-standards-ciwf-wwf-and-others-march-2022.pdf)>. Also see further below, Annex 13 to the Communication to the Aarhus Convention Compliance Committee (n 293).

<sup>268</sup> European Commission, *Trade Sustainability Impact Assessment in Support of FTA Negotiations between the European Union and Australia* (March 2020) 89 <<https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a7e767cd-6a75-4c1c-8ec3-dbf991e34cfd/details?download=true>>.

<sup>269</sup> Trade and Agriculture Commission (n 116) 39.

forests',<sup>270</sup> in a response that seems at odds, at least in sentiment, to the strategic issue-linkage sought by the UK. The Commission further noted, correctly in the present authors' view, that it was likely that the UK would be entitled under WTO law and the FTA to restrict trade in the event of any net deforestation that contributed to climate change.<sup>271</sup>

Australia's 'National Interest Assessment' (NIA) was published with the text of the FTA and dated 17 December 2021. The NIA did not mention net zero goals or temperature targets. It stated:

The Chapter on Environment (Chapter 22) affirms the Parties' commitments under multilateral environmental agreements, including the Paris Agreement ... Most provisions substantively replicate those in the Environment Chapter of the CPTPP and require no changes to Australian law or practice.

The accompanying final assessment of Australia's 'regulation impact statement', dated 25 November 2021, does not discuss any anticipated environmental impacts of the agreement.<sup>272</sup>

### *C. Parliamentary Committees and Leadership Changes*

The UK–Australia FTA was tabled in the Australian Parliament on 8 February 2022. As is standard for international agreements, this triggered a review by the Joint Standing Committee on Treaties (JSCOT). In the meantime, a general election in Australia on 21 May 2022 saw the Liberal–National Coalition government led by Scott Morrison replaced by a Labor Party government led by Anthony Albanese.<sup>273</sup> (As noted above, on 16 June 2022, Australia communicated its updated 'nationally determined contribution' under Article 4 of the Paris Agreement to the United Nations.<sup>274</sup>) The JSCOT progress entailed public submissions and two public hearings.<sup>275</sup> The JSCOT

<sup>270</sup> *ibid.*

<sup>271</sup> *ibid.*

<sup>272</sup> See DFAT (n 243) Attachment II ('Regulation Impact Statement').

<sup>273</sup> The election was a resounding defeat of Scott Morrison's government, leading to a significant loss of parliamentary seats: see further, N Bryant, 'Australia Election: A Great Shock to the System' (*BBC Online*, 22 May 2022) <[www.bbc.com/news/world-australia-61503380](http://www.bbc.com/news/world-australia-61503380)>. After the election, Scott Morrison was found to have secretly appointed himself to multiple ministries while in office, which was determined to be 'corrosive of [the public's] trust, and thus confidence, in government': The Hon V Bell AC, 'Report of the Inquiry into the Appointment of Former Prime Minister to Administer Multiple Departments' (25 November 2022) 95 <[www.ministriesinquiry.gov.au/system/files/2022-11/ministries-inquiry-report.pdf](http://www.ministriesinquiry.gov.au/system/files/2022-11/ministries-inquiry-report.pdf)>.

<sup>274</sup> Australia's updated NDC included confirmation of Australia's commitment to achieve net zero emissions by 2050, and a new, increased, 2030 target of 43 per cent below 2005 levels by 2030: Australian Government (n 36).

<sup>275</sup> Joint Standing Committee on Treaties, 'Report 201: Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland' (Parliament of Australia, November 2022) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/AUKFTA/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/AUKFTA/Report)>. Submissions included the Australia Fair Trade & Investment Network (AFTINET), which recommended the enforceability of the climate provisions of the Environment chapter, and noted the haste in which the negotiations had been conducted. See AFTINET, 'AFTINET Submission to the Joint Standing Committee on Treaties Inquiry into the Free Trade Agreement

recommended ratification of the UK–Australia FTA in November 2022.<sup>276</sup> The new Parliament passed legislation giving effect to the FTA on 22 November 2022.<sup>277</sup>

The UK–Australia FTA was laid in the UK Parliament on 16 June 2022, triggering a 21-day scrutiny period. Chairs of several parliamentary committees, which had been conducting inquiries into the FTA, were critical of the Government’s decision to bring the agreement to Parliament before they had published their final reports, which was contrary to prior assurances from the Government. The Chair of the International Trade Committee was particularly critical of the decision, which he said set ‘an outrageous precedent for future scrutiny of trade deals with other countries’, and of the Secretary of State for International Trade’s failure to give evidence to the committee.<sup>278</sup>

Several of the UK parliamentary committees expressed their general disappointment with the obligations contained in the Environment chapter. This relates in particular to the UK’s inability under the FTA to ensure that Australia will implement or comply with higher environmental standards, including with respect to climate change. The International Agreements Committee wrote that ‘considering that the UK granted Australia generous agricultural market access, it is regrettable that the Government did not press Australia for more ambitious commitments on climate change and that the temperature goals of the Paris Agreement were not explicitly referenced in the FTA’.<sup>279</sup>

Some committees also addressed the concerns of civil society groups that the impact assessment of the FTA had failed to take into account the effect that increased agricultural production in Australia might have on deforestation, and the consequences of transport-related emissions.<sup>280</sup> The International Agreements Committee noted the clear difference in levels of ambition between the UK–Australia FTA and the UK–NZ FTA.<sup>281</sup> As noted above, the UK–NZ FTA contains an express affirmation of the parties’ commitment to achieve the temperature goals of the Paris Agreement, and their own domestic net zero targets by 2050,<sup>282</sup> while also providing for the elimination of fossil fuel subsidies and an end to coal-fired electricity generation.<sup>283</sup>

between Australia and the United Kingdom of Great Britain and Northern Ireland’ (Submission No 6, March 2022) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/FreeTradeAgreement-UK/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/FreeTradeAgreement-UK/Submissions)>.<sup>276</sup> *ibid.*

<sup>277</sup> Customs Amendment (Australia–United Kingdom Free Trade Agreement Implementation) Act 2022 (Commonwealth of Australia).

<sup>278</sup> ‘Anne-Marie Trevelyan Accused of Disrespecting Parliament on UK–Australia Trade Deal’ (House of Commons, International Trade Committee, 16 June 2022) <<https://committees.parliament.uk/committee/367/international-trade-committee/news/171490/annemarie-trevelyan-accused-of-disrespecting-parliament-on-ukaustralia-trade-deal/>>.

<sup>279</sup> International Agreements Committee (n 100) 26.

<sup>280</sup> *ibid* 25; International Trade Committee (n 140) 91–2.

<sup>281</sup> International Agreements Committee (n 100) 25.

<sup>282</sup> UK–NZ FTA (n 39) art 22.6(2).

<sup>283</sup> *ibid.*, art 22.8.

It includes an illustrative list of environmental goods on which tariffs are set at zero. The International Agreements Committee also expressed its hope that some terms of the UK–Australia FTA might be reviewed, following the change of government in Australia, by the Joint Committee established under the FTA to monitor its implementation.<sup>284</sup> These include issues relating to animal welfare standards. Although the link between animal welfare and climate change was not made,<sup>285</sup> the International Agreements Committee noted its concern that UK consumers could not be confident that animal products, such as beef produced in feedlots, followed adequate welfare standards.<sup>286</sup>

On 6 September 2022, Boris Johnson stepped down as UK Prime Minister after significant internal controversies.<sup>287</sup> The Environment, Food and Rural Affairs Committee wrote to the new Secretaries of State noting its disappointment at the response to its central recommendation that the Government commit to core standards for goods entering the UK,<sup>288</sup> and on 12 October 2022 asked the new government to expand the government’s agri-food Trade Advisory Group to provide it with more expertise on animal welfare, health and the environment.<sup>289</sup>

In September 2022, the new government under Prime Minister Liz Truss commissioned a review of the UK’s approach to reaching its net zero target. The review was to consider whether the government’s approach was ‘the most economically efficient path to meeting its climate change commitments’: in particular, whether it would deliver maximum economic growth and drive opportunities for private investment, support energy security and affordability, and minimise costs borne by businesses and consumers.<sup>290</sup> Published on 13 January 2023, the review by Member of Parliament Chris Skidmore

<sup>284</sup> International Agreements Committee (n 100) 26.

<sup>285</sup> Cf. arguments for more express recognition of the link between animal welfare and climate change, Sebo (n 58).

<sup>286</sup> International Agreements Committee (n 100) 17. See also, ‘Concerns over Animal Welfare Standards in UK Free Trade Deal’ (radio interview with Dianne Hayter, Baroness of Kentish Town and chair of the House of Lords International Agreements Committee) (27 January 2023) <[www.abc.net.au/radionational/programs/breakfast/concerns-over-animal-welfare-standards-in-uk-free-trade-deal/101898304](http://www.abc.net.au/radionational/programs/breakfast/concerns-over-animal-welfare-standards-in-uk-free-trade-deal/101898304)>.

<sup>287</sup> UK Government, ‘Boris Johnson’s Final Speech as Prime Minister: 6 September 2022’ (6 September 2022) <<https://www.gov.uk/government/speeches/boris-johnsons-final-speech-as-prime-minister-6-september-2022>>.

<sup>288</sup> Letter from the Chair of the Environment, Food and Rural Affairs Committee to Secretaries of State (22 September 2022) <<https://committees.parliament.uk/publications/30184/documents/174884/default/>>. The Committee’s original report, ‘Australia FTA: Food and Agriculture’, was published on 17 June 2022 <<https://committees.parliament.uk/publications/22677/documents/166636/default/>>.

<sup>289</sup> Environment, Food and Rural Affairs Committee, ‘Government Asked to Reconsider on Trade Agreements’ (12 October 2022) <<https://committees.parliament.uk/committee/52/environment-food-and-rural-affairs-committee/news/173516/government-asked-to-reconsider-on-trade-agreements/>>.

<sup>290</sup> UK Government, ‘Independent Report: Net Zero Review: Terms of Reference’ (13 January 2023) <[www.gov.uk/government/publications/review-of-net-zero/net-zero-review-terms-of-reference](http://www.gov.uk/government/publications/review-of-net-zero/net-zero-review-terms-of-reference)>.

recommended *inter alia* that the government should establish a minimum threshold for environmental provisions in all new FTAs, in order to ‘make a positive difference for the net zero transition’ and remove the barriers to trade in climate change products and services.<sup>291</sup> By this time, the UK had yet another new Prime Minister, Rishi Sunak, who did not provide an official response to the review.

#### *D. Lack of Effective Public Participation*

The UK is a party to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (‘Aarhus Convention’).<sup>292</sup> On 10 August 2022, a coalition of NGOs including World Wildlife Fund-UK submitted a communication to the Aarhus Convention Compliance Committee. It alleges that the UK has not complied with Article 8 of the Aarhus Convention when negotiating FTAs.<sup>293</sup> Article 8 provides, *inter alia*:

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

The complaint relates to the UK–Australia FTA and a range of other FTAs that have been signed or are being negotiated since the UK left the EU. The UK challenged the admissibility of the complaint, asserting that Article 8 does not apply to treaty negotiations.<sup>294</sup> The Compliance Committee determined the complaint to be admissible in December 2022. It has invited the UK to submit written explanations or statements clarifying the matter and describing any response by May 2023.<sup>295</sup>

The complaint addresses alleged failures in public participation within stakeholder engagement groups including the Strategic Trade Advisory Group (STAG) and a lack of consultation on impact assessments.<sup>296</sup>

<sup>291</sup> Rt Hon Chris Skidmore, ‘Mission Zero: Independent Review of Net Zero’ (13 January 2023) 283 <[www.gov.uk/government/publications/review-of-net-zero](http://www.gov.uk/government/publications/review-of-net-zero)>.

<sup>292</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 2008, entered into force 30 October 2001) 2161 UNTS 447. The Convention is open to States members of the Economic Commission for Europe and associated states and regional economic integration organisations; Australia is not a party.

<sup>293</sup> WWF UK et al, ‘Communication to the Aarhus Convention Compliance Committee: The UK’s Non-Compliance with Article 8 of the Convention when Negotiating International Free Trade Agreements’ (ACCC/C/2022/194, 10 August 2022) <[https://unece.org/env/pp/cc/acc.c.2022.194\\_uk](https://unece.org/env/pp/cc/acc.c.2022.194_uk)>.

<sup>294</sup> United Kingdom, ‘Communication to the Aarhus Convention Compliance Committee: Note of the Oral Presentation on Admissibility’ (9 September 2022) UN Doc ACCC/C/2022/194 <[https://unece.org/env/pp/cc/acc.c.2022.194\\_uk](https://unece.org/env/pp/cc/acc.c.2022.194_uk)>.

<sup>295</sup> See Letter to the Party concerned enclosing Committee’s determination of preliminary admissibility (12 December 2022) <[https://unece.org/env/pp/cc/acc.c.2022.194\\_uk](https://unece.org/env/pp/cc/acc.c.2022.194_uk)>.

<sup>296</sup> WWF UK et al (n 293).

Concerns about stakeholder inclusion and a democratic deficit during FTA negotiations have been raised in the context of other FTAs.<sup>297</sup> For the UK–Australia FTA, the Aarhus Convention complaint claims that the STAG discussed the agreement ‘only a few times before it was signed, and there was no scope for detailed discussion of the text after it was finalised’.<sup>298</sup> The complaint also refers to the need for members of the STAG and other groups to sign confidentiality agreements, thus preventing them from sharing information.<sup>299</sup>

Australia is not a party to the Aarhus Convention and if there are complaints about public participation in the UK–Australia FTA, they have remained informal. It is notable, however, that the JSCOT report included greater consultation and transparency as one of its recommendations.<sup>300</sup> It stated:

The substance and quality of the consultation process around trade agreements has been a consistent theme of the Committee’s work over many years. Consultation should be timely, meaningful, and responsive. There is evidence that this has not been the case in Australian trade agreement making, especially when compared to the approach in other national jurisdictions.<sup>301</sup>

This suggests that, for both parties, improving consultation and participation in the negotiating process is required to ensure that their FTAs can properly address climate change. While reforms may be too late for the making of the UK–Australia FTA, there remains scope for improvements in these efforts in ongoing bilateral relations; the interaction between regimes is not of interest only in negotiations.<sup>302</sup> As discussed above, the UK–Australia FTA provides opportunities for public participation and public submissions in the implementation of the Environment chapter and in future frameworks for cooperation.<sup>303</sup> The Environment Working Group,<sup>304</sup> whose function is to review and monitor the implementation and operation of the Environment chapter, is an obvious place for the issues raised by this article to be addressed.

#### V. CONCLUSION

This article has investigated the UK–Australia FTA in the light of its stated ambitions to address climate change. The investigation was ripe, particularly given broader literature that suggests that FTAs represent untapped potential for climate governance. This claim seems likely because trade and climate are inextricably linked, and studies have shown that an increase in GHG emissions from trade liberalisation is dependent on the scale, type and technique of trade. The article gave context to FTA negotiations by

<sup>297</sup> Puntser Riekman (n 65).

<sup>298</sup> WWF UK et al (n 293) 2.

<sup>299</sup> *ibid.*

<sup>300</sup> JSCOT (n 275) xvii (recommendation 1).

<sup>301</sup> *ibid.* 220, para 8.37.

<sup>302</sup> Young, ‘Regime Interaction in Creating, Implementing and Enforcing International Law’ (n 38).

<sup>303</sup> UK–Australia FTA, arts 22.18, 22.19, 22.20(5) (n 235 and surrounding text).

<sup>304</sup> *ibid.*, art 22.21 (n 234 and surrounding text).

explaining the relevance of sustainability impact assessments and pointing to provisions addressing climate change and the environment from FTAs in different regions, including the CPTPP, CETA and the UK–NZ FTA.

It has been shown that the UK–Australia FTA falls short of its ambitions and is likely to have mixed impacts on climate change mitigation. The article highlights examples where the agreement could strengthen efforts to tackle climate change. The Parties expressly recognise that ‘efforts to address climate change require collective and urgent action, and acknowledge the role of global trade and investment in these efforts’,<sup>305</sup> in contrast to the views of politicians, including the former Australian Prime Minister. The article also shows that the Environment chapter advances efforts to link trade liberalisation and environment protection by, for example, commitments that each country shall not weaken its current environmental protections, in a non-derogation clause similar to that found in the CPTPP. However, it is noted that Australia’s federal system weakens this protection, especially when state and territory laws have been shown to be operating below international standards. The article also points to concerns about animal welfare standards, and the link between agricultural expansion and climate change. Although there were gains in the UK–Australia FTA in liberalising trade and investment in environmental goods and services, including clean and renewable energy, these did not extend to an express list, which could encompass goods and services within the energy, transportation and other sectors. Unlike the UK–NZ FTA, the UK–Australia FTA does not contain a clause restricting fossil fuel subsidies.

While the negotiation of the new UK–Australia FTA seemed to provide an opportunity for major diplomatic and trade advances, especially with Australia lagging behind the UK in pursuing ‘net zero’ policies, it fell flat. Many of the anticipated improvements on climate and trade policy integration did not eventuate in an agreement that was publicly celebrated for decreasing costs of cars, whisky and confectionery. In addition, the apparently aborted effort on the part of the UK to entrench the Paris Agreement’s temperature targets in the FTA was upstaged when the new Australian government passed a bill legislating the targets in 2022. The Australian public had voted for a different political party that promised to address climate change through national and international law.

The article does not provide definitive answers as to why the UK–Australia FTA’s potential for improving climate governance was not met. The methodology employed was restricted to a legal analysis of the FTA and related agreements and a review of political and other processes. However, the stark events in both countries suggest possible contributing factors. Complaints about a lack of transparency, limited opportunities for participation and a hurried negotiating agenda suggest failures in even basic

<sup>305</sup> As discussed above (n 97 and n 226).

requirements for the interaction between different legal regimes. The negotiating governments were demonstrably dysfunctional, while also struggling through admittedly complex pandemic conditions. The actions and commitments of both countries at the Glasgow UNFCCC COP were shown to be wanting. The necessary political will to act on climate change can be said to have been missing within each country's actions in both trade *and* climate regimes. On a more hopeful note, the new Australian government, elected in 2022 on a platform of enhanced action on climate change, may use the cooperation frameworks established in the FTA to pursue further action, and the article pointed to the participatory potential of country representatives and the broader public.

In the context of ever-worsening climate and economic conditions, and a still-to-be-ratified FTA, the experience of the UK–Australia FTA negotiations shows the impediments to more effective integration of climate and trade policy. Whether the lessons of the making of the UK–Australia FTA can be limited to just these two countries is of course a critical question. Although the government leadership in the UK and Australia has been erratic in recent times, domestic instability and discord are not exclusive to these countries, and public participation in international law is rarely embraced. There is an ongoing disconnect between the need to address climate change and domestic and international legal developments in trade and other areas. If there is untapped potential of FTAs to advance the objectives of the climate regime, the political will of participating States, in whichever international forum it is expressed, remains the biggest constraint.