



**TRADE JUSTICE
MOVEMENT**

MAKE WORLD TRADE
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Alternative trade for the planet: aligning trade policy with climate and environmental goals

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Executive summary*

Tackling the climate and environmental crises is more urgent than ever and global momentum to do so is building rapidly. Yet international trade law lags behind and threatens to choke off serious action. The UK has now taken back competence for its trade policy for the first time in nearly fifty years. The time is right for a serious discussion about what we want international trade rules to achieve and how we design them to get there. This paper aims to make a contribution to that debate: it sets out some of the key ways in which trade and investment agreements threaten progress on climate and environmental goals and proposes ways in which we could rethink them so that they not only do no harm but also make a positive contribution to progress in these areas.

The UK has a unique opportunity to shape its trade policy so that it is in line with its climate and environmental commitments. Provisions in areas as diverse as intellectual property, investment protection and agriculture need fresh thinking to ensure they support the transition to low carbon industry, agriculture and transport, and support regulatory innovation and the sharing of green technology. The UK should use its independent membership of the World Trade Organisation (WTO) to support and increase ambition for reform, and develop a new approach to bilateral trade relations, learning from others but also innovating.

The UK began official negotiations towards new trade and investment agreements from the beginning of February 2020 with partners including the US, Japan, Australia and New Zealand. There is an urgent need to design UK trade policy so that it is guided by and makes a positive contribution to climate and environmental justice, both domestically and internationally. Climate and environmental justice, alongside social justice, must be the key determinants of the UK's future international relations.

Transparency and scrutiny of trade agreements are critical to achieving this aim: it will be essential to ensure effective and meaningful public engagement

and full scrutiny and oversight of parliament of the negotiation and agreement of trade agreements.

One of the major obstacles to ensuring trade supports the achievement of other goals is that it tends to be viewed as an end in its own right, rather than a means to an end. This report suggests instead that the aims of international trade law should be to:

- **Reinforce existing international environmental commitments** including multilateral environmental agreements, such as the 2015 Paris Climate Agreement, and the UN Sustainable Development Goals
- **Provide strong, enforceable guarantees that parties will have the freedom to develop and implement domestic law and policy which enhance environmental protection**, even if they have the effect of restricting international trade
- **Include a core list of environmental principles to prohibit any weakening of environmental laws**, including meaningful and enforceable commitments to non-regression in trade agreements
- **Support and strengthen environmental governance.**
- **Allow production subsidies for specific green products and technologies.**

The report recommends that the UK develop an overarching strategy to set out how it can implement those aims. It recommends that the UK:

- **Create the right enabling environment for trade negotiations.** This should include a formal commitment to aligning UK trade policy with its other international commitments, particularly those on climate, the environment and international development. Free trade agreements should only be pursued when the conditions for doing so, including commitments and action on the part of both parties to implement climate and environmental action, are in place.

- **Get the right balance between trade agreements and environmental goals.** The interpretation of trade agreements must be made explicitly subordinate to environmental commitments.
- **Rethink trade rules.** Trade agreements must be guided by environmental and climate aims. This means reducing the scope of trade agreements and rethinking specific provisions so that they are in line with climate and environmental goals.
- **Ensure democratic structures are in place.** Achieving trade policy that works in the interest of environmental and social goals requires the full participation of civil society, including affected communities, trade unions and other organisations, in the process of laying the groundwork for and negotiating and agreeing trade deals.
- **Ensure environmental commitments are binding.** Trade agreements should include enforceable trade and sustainable development provisions, including a requirement for parties to implement the Paris Agreement and binding non-regression clauses.
- **Include regular review of trade agreements.** Trade agreements must as a matter of course include mechanisms for regular review, by a broad range of stakeholders, to assess, amongst other things, environmental impact.
- **Promote responsible business conduct.** Provisions on due diligence obligations should be included in FTAs to ensure that businesses have to assess, address and report the environmental and climate impacts of their operations.

* Full references available later in the document.

Abbreviations and acronyms

ACCTS	Agreement on Climate Change, Trade and Sustainability
AoA	Agreement on Agriculture
ASCM	Agreement on Subsidies and Countervailing Measures
BIT	Bilateral Investment Treaty
CAFTA	Central American Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement (EU-Canada agreement)
COP	Conference of the Parties
CPTPP	Comprehensive and Progressive Transpacific Partnership
EBA	Everything But Arms
EEA	European Economic Area
EGA	Environmental Goods Agreement
FCDO	Foreign, Commonwealth and Development Office
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GHG	Greenhouse Gas
GMO	Genetically Modified Organism
GSP	Generalised System of Preferences
IEA	International Energy Agency
IPR	Intellectual Property Rights
ISDS	Investor-to-State Dispute Settlement
MEA	Multilateral Environmental Agreement
NAFTA	North American Free Trade Agreement
ODA	Overseas Development Aid
SDGs	Sustainable Development Goals
SIA	Sustainability Impact Assessment
SPS	Agreement on the Application of Sanitary and Phytosanitary Standards
TBT	Agreement on Technical Barriers to Trade
TRIMS	Agreement on Trade Related Investment Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
TSD	Trade and Sustainable Development
UNFCCC	United Nations Framework Convention on Climate Change
WTO	World Trade Organisation

Introduction

In February 2020 the UK regained full competence for its trade and investment policy, including the ability to negotiate new agreements. Before that, the Government had already been engaged in pre-negotiation discussions with fourteen different countries regarding future trade agreements, including with the US, New Zealand, Australia and members of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP). A Free Trade Agreement (FTA) with Japan (based in large part on the existing EU-Japan FTA) was agreed in September 2020 and a Trade and Cooperation Agreement with the EU in December 2020. Full negotiations are ongoing with key partner countries, with the aim of completing agreements with the US before summer 2021 and with Australia and New Zealand as soon as possible.

At the same time, the UK has declared a climate emergency, has committed to achieving net zero carbon emissions by 2050 and is a signatory to a number of important Multilateral Environmental Agreements (MEAs). It will host the next UN Conference of the Parties (COP26) in November 2021: an event that will aim to make significant progress against commitments made at the 2015 Paris COP. The UK is also due to host the 2021 G7 summit: the G7 countries represent nearly two-thirds of total global net wealth and account for almost one quarter of total global greenhouse gas emissions, leadership by this group of countries is therefore essential.¹ There are furthermore a number of crucial global summits due on important issues such as conservation, water biodiversity and the Sustainable Development Goals (SDGs).

Trade agreements have huge implications for our ability to achieve climate and environmental commitments and there has long been recognition that these two areas are fundamentally linked. In the founding agreement of the World Trade Organisation (WTO), signatories recognise in the very first paragraph that trade rules should allow for “the optimal use of the world’s resources in accordance with the objective of sustainable development,

seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.”² Many countries now routinely include environmental chapters in their trade agreements.³

However these efforts have so far done little to change the overall trajectory of trade policy. The WTO rulebook contains very little that refers to the environment beyond the exceptions clauses such as General Agreement on Tariffs and Trade (GATT) Article XX.⁴ Environmental chapters in trade agreements have so far had little impact in preventing challenges to environmental legislation and the main provisions of trade agreements all too often hinder climate action. Nevertheless, given the significant momentum behind climate and environmental action, it is disappointing to find that, despite a manifesto commitment to no compromise on high environmental protection, animal welfare and food standards, the UK Government has done little to ensure its commitments on climate and the environment are supported by its trade policy: there has been no legislation and no white paper has been introduced.

For the UK and beyond, the time is right for a serious discussion about the relationship between commitments on climate and the environment and international trade rules. This paper aims to make a contribution to that debate: it sets out some of the key ways in which trade and investment agreements threaten progress on climate and environmental goals and proposes ways in which trade could be redesigned so that it not only does no harm but also makes a positive contribution to progress in these areas. The briefing focuses specifically on the interactions between trade and the environment. However, trade also interacts with issues of social justice, equity and human rights, all of which are inextricable from issues of climate justice and sustainability and should be taken into consideration as the UK formulates its future trade policy.

Section 1:

How international trade and investment impact on climate change and the environment

Overview:

- Provisions on regulations can stymie domestic climate and environmental measures
- Investment protection provisions can hinder the transition away from fossil fuels
- Bans on subsidies and stringent intellectual property rules hamper the development of green technologies
- Trade rules can hinder efforts to move to a sustainable model of agriculture
- Existing mechanisms that aim to reduce the impact of trade on the environment have proven ineffective
- Beyond trade rules, other related areas of UK foreign and industrial policy promote or support unsustainable economic activity

Introduction

Trade is a normal and often useful part of interactions between people and countries. It allows us to access things that are not available in the UK, including food, medicines and raw materials and it forms an important part of most countries' industrial strategies. However, as currently configured, trade rules pose a significant barrier to achieving climate and environmental goals. At the most basic level, trade rules operate as a blunt instrument: they seek to indiscriminately liberalise and increase trade. This inevitably leads to increases in greenhouse gas emissions, for example where greenhouse gas-intensive industries, or industries that contribute to deforestation, expand their market share

as a result of increased trade. Of equal concern is the impact that trade and investment agreements have on the ability of governments to introduce policies to tackle climate change and environmental destruction. Trade policies have already hindered the phase out of fossil fuels, the expansion of renewables sectors and the transition to a sustainable model of agriculture. Whilst there have been some efforts to include language on climate and the environment in trade agreements, the core provisions of trade agreements have remained unchanged and tend to be negotiated with little meaningful reference to commitments under MEAs.

Provisions on regulations can stymie domestic climate and environmental measures.

WTO agreements contain a number of provisions that can hamper domestic climate and environmental measures. One of the most problematic aspects has been the 'necessity tests' included in agreements such as the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the Technical Barriers to Trade (TBT) Agreement and the Agreement on the Application of Sanitary and Phytosanitary Standards (SPS). The clearest example of this is within the TBT, which covers mandatory labelling schemes and minimum standards that relate to the end-use performance of a product. It contains two basic obligations for WTO Member States: first, a provision prohibiting discrimination against and between foreign products; and second, a provision which requires that technical regulations and standards must not "create unnecessary obstacles to international trade", and prevents WTO members from adopting standards that are "more trade-restrictive than necessary" for achieving "legitimate policy objectives."⁵

The TBT agreement has been used to challenge a number of environmental measures taken by different countries. For example, Mexico used it to challenge US dolphin-safe labelling that prohibited certain kinds of practices in tuna fishing. The US eventually won the case against it, however it was required to make a number of changes to its regulations and the case dragged on for several decades.⁶ Many countries may not have the resources to defend such lengthy cases which could severely delay important environmental regulation.

At the heart of the WTO disputes are differing views about approaches to regulation and the interpretation of the provisions in trade rules. In the EU hormone-treated beef case, the source of the dispute was in essence the EU's use of the 'precautionary principle' versus the US insistence on 'science-based' regulation. The EU reserves the right to regulate where it believes there is a risk of harm, whereas the US requires scientific proof of harm. Under WTO rules the use of precaution is allowed where there is a lack of scientific evidence but this tends to be time-limited and the onus is on member states (in this case the EU) to provide evidence for the continued use of a more cautious approach.⁷ In the hormone-treated beef case, the US has accused the EU of using the precautionary principle as a cover for protectionist measures. At the same time there has been significant criticism of the science-based approach, for example, when research is undertaken and its release controlled by the companies that stand to benefit from particular decisions on regulation.⁸ Although the UK has included the precautionary principle in both the EU Withdrawal Act and the Environment Bill (which at the time of writing has not been passed) it is yet to be fully defined or implemented, leaving significant room for change.⁹ This is of concern given that trade negotiations are already ongoing.

FTAs build on WTO rules and are increasing the extent to which trade agreements impact on domestic regulation by including so-called 'regulatory cooperation' chapters.¹⁰ Because a significant proportion of tariffs are already low between a number of key trading partners, the focus is now increasingly on so-called 'behind the border barriers to trade'.¹¹ To date the chapters are relatively new introductions to trade agreements and tend towards the establishment of forums for dialogue and information sharing.

One example of these chapters can be found in the EU-Canada agreement (CETA). It set up a Regulatory Cooperation Forum which met for the first time in December 2018. Its priority list of areas for cooperation were: cyber-security and the 'internet of things', animal welfare, 'cosmetic like' drug products, pharmaceutical inspections and information exchange between respective product alert systems. Thirteen committees and six specialised dialogues were established to address these issues.¹² To illustrate the scale of this: in its first year of operation, the CETA agreement established an infrastructure that already bore comparison with the UK's dedicated infrastructure dealing with all regulation across the UK: the UK has around seventeen dedicated regulatory bodies with further resources allocated from Whitehall departments.¹³ The scope of these provisions can be significant: in the Transatlantic Trade and Investment Partnership (TTIP) draft agreement between the EU and US, identified 'trade barriers' included: green or sustainable public procurement policies, energy efficiency labels, fuel efficiency standards for cars, regulation of unconventional fossil fuel extraction including shale gas and tar sands, sustainability standards for bioenergy and the banning of gases in appliances such as refrigerators and freezers.¹⁴

Whilst it is too early to fully assess the impact of such provisions, assessments are already revealing some trends. Economically 'weaker' countries are likely to align their standards with those of stronger partners: the EU and US appear as 'global standard-setters' in this context. Across the board, FTAs provide an impetus for countries to amend their regulations and standards. Finally, the direction of travel is towards countries agreeing to consult with trade partners on any proposed new regulation, for example in respect of food or environmental standards.¹⁵ This is likely to diminish the influence of citizens and parliamentarians, increase that of international business and third countries and subject regulations and standards to a number of trade tests that are likely to be extraneous to the original aims of the measures. This could lead to the weakening or even reversal of legislation. Regulatory cooperation chapters have yet to be tested however the potential for blocking environmental regulation is clear.

Investment protection provisions facilitate corporate challenge to climate and environmental action

Investment chapters in FTAs and Bilateral Investment Treaties (BITs) together with the WTO's Trade Related Investment Measures (TRIMs) agreement, offer significant protections to international investors. There is mounting evidence that these provisions are in direct contradiction with efforts to phase out fossil fuels and improve environmental standards.¹⁶

Investment protection provisions in FTAs can apply across a range of possible investments, including portfolio investments, and offer investors a number of far-reaching privileges including 'fair and equitable treatment' and against 'indirect expropriation'. They also include an investor-to-state dispute settlement (ISDS) mechanism through which investors can sue governments. These provisions have been interpreted very broadly, including for example the finding that undermining companies' 'legitimate expectations' of a stable business environment can constitute a breach of treaty.¹⁷ This has allowed companies to challenge a broad range of environmental measures. For example, Germany lowered environmental standards in the Elbe river in response to a challenge from Swedish company Vattenfall, who claimed that higher standards of water quality would have impacted on the profitability of their coal-fired power station; Lone Pine are suing Canada for a moratorium on fracking under the St Lawrence river; oil and gas company Rockhopper are suing Italy for a ban on oil and gas exploitation within 12 nautical miles of its coastline, coal company Westmoreland is suing Canada for plans to phase out coal-fired power stations and energy company Uniper are threatening a case against the Netherlands for similar phase-out plans.¹⁸

TRIMs agreement is more limited in its scope because it applies only to investment measures that affect trade in goods however it covers more countries because it is one of the founding agreements of the WTO. Its main aim is to prevent governments from requiring international companies to use local inputs. It therefore establishes bans on local content requirements and limitations to access to foreign exchange based on levels of local inputs. These stipulations are blind to the political reality facing governments who want to respond rapidly to climate change. Many of the policy measures that will be needed to tackle climate change will require

governments to demonstrate that they are of benefit to local communities.

TRIMs has already been proven to be a barrier to doing so. For example, in 2011, Canada was challenged at the WTO for the introduction of a feed-in tariff that included local content requirements aimed at ensuring that local businesses and populations saw direct benefits from the programme. Ontario offered a preferential 20-year purchase price for wind and solar generated electricity but, in order to qualify for the preferential price, producers had to guarantee that 50% of wind and 60% of solar costs originated from Ontario. A two-year review of the project found that it had brought in CDN\$27 billion in private sector investment and created more than 20,000 jobs.¹⁹ However, in 2012 a WTO panel found that the scheme was in violation of TRIMs. As a result, the feed-in tariff project was effectively brought to an end and many investors in the renewable sector pulled out.²⁰ This experience suggests that TRIMs flies in the face of measures aimed at supporting a globally just transition in which nations are able to decarbonise in ways which benefit their citizens.

Bans on subsidies and stringent intellectual property rules hamper the development of green technologies

Widespread access to green technologies is crucial to meet the Paris Agreement goal of limiting the increase in global temperatures to well below 2 degrees Celsius. This will require considerable technology transfer from North to South because 90 per cent of the increase in global carbon emissions until 2050 is expected to occur in the developing world, while the vast majority of low-carbon technologies are still invented in developed countries. Japan, the US, Germany, South Korea, and France together account for 75 per cent of the low-carbon inventions patented globally from 2005 to 2015.²¹

International trade rules contain a number of provisions ostensibly aimed at preventing 'protectionist' or mercantilist behaviour. However, in recent years, it has become apparent that in practice they are often at odds with the measures needed to promote and disseminate green technologies.

One of the most contentious provisions is on subsidies. Any form of export subsidy, including those for clean energy or green technologies is prohibited under Part II of the WTO Agreement on Subsidies and Countervailing Measures (ASCM). Whilst domestic subsidies for specific industries for the development and production of green products are not prohibited, they are also actionable by partner countries if the latter believe that their domestic production or exports are adversely affected; countries can choose to apply tariffs or raise disputes at the WTO in retaliation. Until 2000, some environmental subsidies were deemed non-actionable but that exemption has not been renewed.²²

These provisions are increasingly being used to challenge countries' environmental measures. In late 2012, the US imposed anti-subsidy duties of around 15 percent in response to Chinese state support for solar panels. This was closely followed by a similar case launched by the EU against China. As recently as the end of June 2019, India won a case against the US arguing that renewable energy subsidies in eight American states were in contravention of WTO provisions on subsidies (the panel also found the US in breach of the TRIMS agreement for using similar local content requirements to those used by Canada). But India's case against the US was in itself a retaliatory measure taken in response to a previous US case against India for local content requirements in its own solar energy programme.²³ This tit-for-tat use of the WTO to challenge measures that a number of countries clearly wish to use to support their renewable energy sectors suggests that a different approach is urgently needed at the WTO.

“China and other countries are today being straitjacketed by the subsidies-are-bad ideology. The global battle against climate change is thus being fought with a depleted arsenal.”²⁴

It is of note that subsidies to fossil fuel industries have not been challenged in the same way. One of the reasons for this is the potential consequence of such a challenge: few countries could afford restrictions on their fossil fuel trade, whether for

import or export. A further reason is that there is little agreement on the definition of a subsidy. For example, the European Commission recently found that the UK offered the largest subsidies to fossil fuel industries of all EU countries but a UK spokesperson was able to counter “we do not subsidise fossil fuels.”²⁵ This was possible because the International Energy Agency (IEA) definition of a subsidy excludes tax reductions which form a significant proportion of UK support for energy firms. In this respect the WTO approach, which is used by the EU, is helpful because it includes in its definition a broader range of measures, including tax reductions. However, the WTO system works against challenges in this area because the definition of a notifiable subsidy is unclear and member state reporting on subsidies has been patchy.²⁶

During the 2017 WTO Ministerial Conference, 12 countries tried to put fossil fuel subsidies on the WTO agenda and issued a Ministerial statement calling for action on fossil fuel subsidies.²⁷ The introductory language of the statement is ambitious, for example paragraph four acknowledges that “a phase-out of fossil-fuel subsidies would generate an estimated 12 percent of the total abatement needed by 2020 from energy sector emissions.” However the aims of the statement are much less ambitious. For example, the first point of the ‘shared understanding’ limits action to ‘inefficient’ subsidies, it states “We seek the rationalisation and phase out of inefficient fossil fuel subsidies that encourage wasteful consumption, and encourage the international community to join us in those efforts.” Following the statement it appears that no action has been taken within the WTO: the members of the separate ‘Friends of Fossil Fuel Subsidy Reform’ group have given regular updates at the committee on trade and the environment but there continues to be disagreement about whether the WTO is the correct forum to address the issue.²⁸

In order to meet its own net-zero commitments, the UK has already committed to a number of measures, including the phase-out of petrol and diesel vehicles by 2030, increased investment in wind power and infrastructure for electric vehicles, the incentivisation and installation of low-carbon heating, and the decarbonisation of industry. Implementation of these measures is likely to require subsidies. This would have to be notified at the WTO and could be subject to challenge. To ensure measures are effective,

flanking trade measures such as restricting higher-emissions imports or the imposition of energy-efficiency requirements will also be necessary.²⁹

It is clear that the WTO system currently facilitates challenge to subsidies aimed at achieving environmental and climate goals whilst failing to address those that support damaging industries. It is tempting to conclude that the solution is to ensure that, at minimum, fossil fuel subsidies are addressed in an equivalent way to renewables subsidies. However this is clearly challenging as it would require countries to provide a level of transparency that they have been thus far unwilling to provide and to use WTO mechanisms to challenge provisions in a way that could risk their own energy security. It would finally require the WTO to reform and reinvigorate the ASCM to address the issues around the definition of subsidies; however, given the current deadlock in respect of the dispute settlement mechanism, this seems a distant possibility.

A more realistic goal in the immediate future might therefore be to rebalance treatment of renewables supports towards those of fossil fuels and suspend the ability of countries to challenge renewable energy subsidies. The six-country proposed 'Agreement on Climate Change, Trade and Sustainability' (ACCTS – see below for further details), which specifically aims to agree disciplines on fossil fuel subsidies, might offer greater potential in the medium term.

Intellectual property rules play a similar role in preventing the dissemination of green technologies. The WTO's Agreement on Trade Related Aspects of Intellectual Property (TRIPs) and intellectual property chapters of FTAs provide for the expansion of intellectual property rights. This is often through extensions on intellectual property protections, in the case of TRIPs enforcing a minimum 20-year duration for patents and ten years for industrial designs.³⁰ This can prevent countries from developing their own versions of green technologies, adapting them to their own circumstances (for example by making them more resilient to particular climates) or innovating to improve efficiency. Whilst the most significant debates in this area have been about pharmaceuticals and the ability of countries like India to produce cheap generic versions, there have been a number of challenges to countries, in particular China, who require technology sharing as a condition of trade or investment.³¹

Trade rules can hinder efforts to move to a sustainable model of agriculture

Agricultural production, climate change and environmental degradation are fundamentally interconnected policy areas. Agricultural production will be significantly impacted by climate change, with predicted declines in fertility and productivity in some regions, in particular sub-Saharan Africa, flooding and loss of land, particularly in low-lying small island states, whilst other more northern, temperate regions experience increases in fertility and productivity. Agriculture also contributes significantly to greenhouse gas emissions through direct emissions of methane, nitrous oxide and carbon dioxide, and its impact on soil, deforestation and other land uses.³² Trade rules, including some of those highlighted earlier in this report, have implications for policies which seek to address these issues.

Many in the trade policy world argue that the international trade system is well placed to help address both changes in agricultural production as a result of climate change as well as the associated emissions and environmental impact. In the case of climate-related shifts in food production, it is argued that trade can help to distribute food to areas most in need as countries' agricultural comparative advantage shifts.³³ However this ignores important issues which may prevent distribution from happening in practice. In many of the world's poorest countries, agriculture is a significant source of employment; if this is lost, given that many of those countries lack the means to offer alternative sources of employment, it is not obvious that they would have the purchasing power to substitute imports for lost domestic production. It is also apparent that climate and other crises are increasingly global, and that major food exporting countries often respond by restricting their food exports. For example, during the 2008 food price crisis, which was driven by a number of factors relevant to climate and environmental protection including decreasing yields and increasing oil prices, major producers including Kazakhstan, Russia, Ukraine, India and Vietnam all placed restrictions, in some cases bans, on exports of wheat and rice for periods of between a few months and one and a half years.³⁴

In theory, trade rules include provisions that could allow countries to differentiate between more or less greenhouse gas intensive agricultural products

as they cross their borders. For example, under the GATT Article XX general exceptions countries may adopt measures intended to “protect human, animal or plant life or health” and those “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”³⁵ Measures must in addition not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

However the application of these exceptions to agricultural products where the only difference is in their carbon footprint has not yet been tested at the WTO: it is therefore not clear, for example, whether domestic industries experiencing price increases caused by measures to reduce emissions could be shielded from lower-cost but higher Greenhouse Gas (GHG) emitting industries through the use of import restrictions.³⁶ This is further complicated by the fact that countries cannot exceed their bound tariff schedules without offering compensation and that all non-tariff measures such as quantitative import restrictions, outright import bans or variable import duties are prohibited except in very limited circumstances (Article 4 of the Agreement on Agriculture, Article XI of GATT.)³⁷

Beyond the technical hurdles that would need to be overcome at the WTO, there are a number of other thorny issues that are yet to be resolved. Calculating the carbon footprint of any given product has already proven to be extremely complicated and there is no international agreement about how to do so.³⁸ Should this be overcome it would then be necessary to set a tax rate that was sufficient to deter imports of products with higher GHG emissions. This could be challenging given the power of some market actors, for example in industries such as palm oil or soy where trade is controlled by a small number of large companies, and the potential consequence is that the less powerful in the supply chain, such as workers or consumers, bear the brunt of the taxes with little impact on overall business practices. Finally, discrimination at the border would need to offer flexibility to developing countries given their much more limited capacity to be able to quickly reduce the GHG emissions of their agricultural industries.

There is clearly merit in considering the implementation of border measures to support the transition away from GHG intensive production and towards more sustainable approaches. This is

particularly the case where it can be demonstrated to prevent or reduce the ‘offshoring’ of GHG emissions or to ensure a domestic carbon tax is not undermined. However a carbon border tax adjustment would require careful design to avoid unintended consequences.³⁹

Regulatory cooperation chapters, outlined above, also have the potential to hinder efforts to reduce emissions in the agriculture sector. If countries agree to recognise different production methods as equivalent, this stands to benefit the country with the cheapest production costs and raises questions about what happens if one country raises its standards above the level in place at the time of signing the agreement: would products being imported from the partner country still be recognised as equivalent even if standards in the importing country had risen?

This has been of particular concern for farmers and civil society organisations in the UK in respect of an agreement with the US: US agricultural production standards are on the whole lower than those in the UK, including widespread use of chemical washes in poultry production, significantly higher use of antibiotics and hormone treatments and greater incorporation of Genetically Modified Organisms (GMOs) in the food system. When combined with US lobbying to prevent ‘excessive’ labelling, this has led to fears that consumers will be exposed to lower quality goods. However a greater concern is that as farmers are unable to compete with the lower cost of US goods, there will be pressure to lower standards in the UK.⁴⁰

Finally, WTO case law appears to point to discrimination being permitted where there is clear scientific evidence of a risk or for a limited time under the precautionary approach, however it is not straightforward to produce such evidence, particularly in the absence of robust GHG emission analysis.

Current discourse around trade and food tends to be framed in terms of ‘agricultural commodities’ and the need to ‘drive down prices for consumers’.⁴¹ This reflects an industrial model of agriculture and excludes important considerations such as the environmental impacts of food production or the kinds of farming that might be most socially useful. As a result of this framing, current trade rules tend to benefit large-scale industrial agriculture and can drive deforestation, both of which contribute

significantly to climate change. For example, the WTO's Agreement On Agriculture (AoA) places significant restrictions on domestic support to farmers whilst also committing countries to liberalise their agricultural sectors through lower tariffs.⁴² Small scale farmers using less carbon intensive production methods can lose vital domestic support which is not compensated for by tariff reductions because they don't operate on international markets, often driving them out of business.⁴³

As noted above, trade liberalisation can increase trade in more carbon-intensive products, in terms of agriculture this could include increased trade in products such as beef, soy and palm oil which are driving deforestation.

Existing mechanisms that aim to reduce the impact of trade on the environment have proven ineffective

In recent years countries have begun to systematically undertake Sustainability Impact Assessments (SIAs) that include an assessment of the environmental impacts, before or during trade negotiations. Environmental language has also increasingly been introduced into trade agreements. Such language can be found in the preamble, in trade and sustainable development chapters or trade and environment chapters, or in a combination of these sections. Various chapters in the agreements will often also reaffirm the Parties' right to use the general exceptions clause (established under WTO agreements and replicated in FTAs) which in theory allows them to "adopt measures to protect the environment and human health" including those taken pursuant to multilateral environmental agreements to which they are party.⁴⁴ However an analysis of these measures demonstrates that they have little bearing on the final content of the agreement and often lack enforceability.

Impact assessments don't influence the shape of the trade agreement

Environmental Impact Assessments were first introduced in the early 1990s as negotiations towards the North American Free Trade Agreement (NAFTA) were launched. The EU now routinely uses Sustainability Impact Assessments which cover both environmental and other social impacts.

The increasing use of impact assessments in trade agreements aims to foreground possible environmental harm with a view to potentially mitigating it. However, there are a number of problems with the current approach to impact assessments that severely undermine their usefulness.

Potential environmental harm is often given less weight than forecast economic benefits. Action to mitigate any dangers is piecemeal, unenforceable and usually relies on the willingness of both parties to take proactive measures in the future, rather than changing the nature of the deal itself. Insufficient time is built into assessment processes to amend deals in response to findings.

Impact assessments generally deal with issues in silos so that, for example, environmental and gender equality issues are considered separately rather than considering the disproportionate impact that lack of environmental protection has on women's rights. One of the reasons for this is that it is very difficult to draw very specific conclusions about impacts, particularly in a context where the details of negotiating positions cannot be revealed or are not yet known (in the case of the other party's priorities). The EU has, for example, committed to take action on any 'red light' findings, however the uncertainty surrounding the assessment means that such findings are extremely rare.⁴⁵

For example, the EU position paper on the CETA impact assessment cites concerns raised by the authors of the impact assessment. It states: "an EU-Canada Agreement could have an impact on the environment, particularly in certain sectors. Increased agricultural production could lead to a higher degree of intensification and use of chemical inputs, while increased beef production could lead to greater herd size and production of methane [...]. The environmental impact associated with energy and extractive industries is likely to be limited, though it could be exacerbated if the agreement leads to significant increases in foreign direct investment (FDI) in Canada's oil sands and mining industries since these sectors are environmentally intensive. Growth of trade would likely increase the greenhouse gas (GHG) emissions associated with transport."

The report goes on to highlight a number of recommendations which might mitigate these impacts, and the European Commission indicates that it has 'taken these assessments into consideration

when formulating its negotiating positions'. Yet there is no indication of specific provisions within the agreement aiming to target any of the issues raised.

Finally, impact assessments often occur whilst negotiations are ongoing, rather than in advance of negotiations. This severely limits their ability to influence the content of agreements.

In their current form impact assessments unfortunately have little influence over trade agreements. However, comprehensive and independent impact assessment will be essential for delivering climate-friendly trade, and the EU's model offers a good starting place for the UK model, which currently fails to comprehensively address climate issues at all. Further discussion of how to do impact assessments well is included in the 'policy proposals' section.

Non binding commitments

Environmental commitments in trade agreements are not binding in the same way as other clauses, relating for example to investor protection (see box) or trade rules. For example, in the CETA agreement, Parties agree to: 'promote', 'enhance coordination on', engage in 'dialogue and cooperation on' environmental commitments and to 'recognise' each others' right to set environmental priorities. There are several problems with this language that makes it ineffective if the aim is to ensure that trade agreements genuinely support environmental commitments: the text offers no concrete commitments, no monitoring system through which non-compliance might be identified, no timeframes and no sanctions for not meeting commitments. These sections of the trade agreement are also not subject to the same enforceable dispute resolution process as the rest of the text: instead a panel is mandated to produce a report which 'stakeholders' are encouraged to 'take forward'. This is in stark contrast with provisions in other chapters of the agreements where commitments are specific and enforceable with all the necessary provisions to do so. Indeed when India tried to invoke its National Action Plan on Climate Change to defend its programme of subsidies for solar panels, this did not prevent the WTO from finding against them.⁴⁷

What does binding language look like in a trade agreement? Investor protection provisions in CETA vs environmental protection in EU-Mercosur

As with all of the key trade-related provisions, the investment protection provisions within CETA contain broadly-worded protections for investors, which leave significant discretion for the arbitral tribunal when it comes to interpretation, with very specific, binding wording and provision for a specific mechanism in respect of enforcement. Whilst most trade-related sections of the agreement come under the state-to-state dispute settlement provision, the investment chapter contains its own ISDS mechanism. This is made directly binding in four important ways:

- **A comprehensive outline of what needs 'protecting':** There is a lengthy definition of what constitutes a protected 'investment', which is to include:

"every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stocks and other forms of equity participation in an enterprise; (c) bonds, debentures and other debt instruments of an enterprise; (d) a loan to an enterprise; (e) any other kind of interest in an enterprise;"⁴⁸

- **Clear sanctions for non-compliance:**

It states clearly that a party shall offer compensation to an investor who suffers losses if the articles of the investment provision are breached, with only a limited set of restrictions;

continued

■ **Broad definition of possible infractions:**

It gives a long list of broadly defined protections against which investors could bring a claim;

■ **Process for determining and sanctioning non-compliance:**

It sets out the details for the ways in which a claim can be brought, how a tribunal will be constituted and the steps that each party will need to take

The investment chapter alone runs to 36 pages, the environment chapter is just eight pages long.

Environmental protection in EU-Mercosur

The recent EU-Mercosur agreement is a prime example of how disconnected FTA negotiations can be from the actions of partner countries in respect of climate or the environment. In this case, non-binding environmental language was included in negotiations that took part at the same time as Brazil introduced a number of measures that promised to undermine global environmental, climate and human rights goals.

Public documents published by the EU in relation to the Mercosur agreement suggest that it was developed under the guiding principle that “trade should not happen at the expense of the environment or labour conditions; [and] on the contrary[...] should promote sustainable development”.⁴⁹ The FTA contains environmental commitments such as to ‘promote and effectively implement’ multilateral environmental agreements (Art 5), not to weaken domestic environmental protections to encourage trade or investment (Art 2) and to uphold free, prior and informed consent⁵⁰ (Art 8) as per commitments under the auspices of the UN.

However, such statements provide little detail in terms of scope and definition, do not guarantee protection and support for domestic policies that protect the environment, nor do they have the

legal force that would allow them to shape the trading relationship to support such outcomes. For example, articles 14-17 provide oversight of the trade and sustainable development (TSD) chapter, but constitute a far from satisfactory enforcement mechanism: Article 14 sets out that ‘The functions of the TSD Sub-Committee are to: (a) facilitate and monitor the effective implementation of this Chapter... [and to] make recommendations to the Trade Committee’. Article 15 suggests that disputes will be resolved only through ‘dialogue, consultation, exchange of information and cooperation to address any disagreement’. If this fails, Article 17 allows for a ‘panel of experts’ to be brought together, to issue a report on the situation. However, the conclusions or recommendations of such a report are not given binding force. In comparison to the investment protection provisions in CETA, these clauses do not offer guidance on the form infractions may take, nor a detailed process for determining and sanctioning non-compliance.

During the period in which Mercosur was negotiated, Brazil in fact weakened its protections for the country’s most important and sensitive ecological regions, experienced a spike in human rights violations, and the president threatened to withdraw Brazil from the Paris Climate Agreement.⁵¹ There was also a policy shift which directly contradicts commitments made in the FTA to prevent illegal logging: president Bolsonaro threatened to make many forms of deforestation legal. The EU nevertheless concluded the agreement in July 2019.

This clearly illustrates that, even in the face of policy change that clearly has a detrimental impact on the environment and climate, trade goals are given priority. Because there is no strong enabling environment for environmental action, the EU was able to continue negotiating the trade agreement. Whether or not member states will choose to ratify and whether any action is taken as a result of the environment chapter is yet to be seen.

General exceptions clauses

As referred to earlier in this report, both WTO agreements and FTAs contain 'general exceptions clauses' which are intended to preclude action against parties for good faith measures taken to pursue public welfare objectives. Examples include Article XX of GATT and Article XIV of GATS.

The general exceptions clauses are qualified so that an exception can only be made if it can be demonstrated that it is not being "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".⁵² In addition, regulations can fall foul of the WTO provision that measures "shall not be more trade-restrictive than necessary to fulfil a legitimate objective".⁴⁰ This so-called 'chapeau' has been used to challenge a range of measures.⁵⁴

Weak positive reinforcements

Some agreements introduce what is sometimes referred to as a 'non-regression clause', for example Article XXIII:iv of CETA states that:

- "1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.
2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.
3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental law to encourage trade or investment."⁵⁵

Key to understanding these provisions are the qualifying phrases in the text. Measures are only in contravention of them if they can be demonstrated to be *encouraging trade or investment*. Recent case law suggests that this is a very high burden of proof. There are no examples of cases being brought in response to violations of environment provisions, however environment and labour provisions are often grouped together and there is one example of a case brought under the latter. The US launched a case against Guatemala for alleged violations of the

labour provisions in the Central American Free Trade Agreement (CAFTA). In this case, the panel found that whilst there were labour violations, they were not trade distorting and therefore did not warrant any trade action.⁵⁶

Agreements including the CETA and EU-South Korea FTAs also commit the Parties to establish a Committee on Trade and Sustainable Development to oversee the implementation of the trade and labour and trade and environment chapters of the agreements. There is a commitment to convene this committee within the first year of the entry into force of the agreement but further meetings are to be held "as the Parties consider necessary", and given that they are reviewing provisions that have no enforceability it is difficult to see how they will be effective.⁵⁷

Whilst some agreements make provision for dispute resolution under environmental chapters, they are separate and distinct from the general dispute resolution procedures, lack enforceability mechanisms, are limited to actions such as consultation, the establishment of a panel of experts or reviews through committee and do not offer sanctions, for example in the form of increased tariffs or other penalties.

Whilst many of these mechanisms are relatively new, it seems unlikely that such non-binding 'add-ons' to existing trade law will be effective in achieving the aim of a trade regime that is fully aligned with environmental goals. Later sections of this briefing will suggest ways in which trade agreements could be redesigned in order to achieve this aim.

Other UK trade-related measures must also be addressed.

The global impacts of UK economic activity are not limited to trade conducted under FTAs, or indeed other forms of trade and investment treaty. Rather, these impacts are part of a landscape which includes international trade and investment which is often carried out outside of formal trade agreements.

For example, UK Export Finance, which supports UK companies to create markets abroad, directed 99.4% of its available energy sector financing towards fossil fuel related projects between 2013/14 and 2017/18 – equating to £2.5 billion worth of support in comparison to just £104 million for renewables.⁵⁸ Similarly, departments including the Foreign,

Commonwealth and Development Office (FCDO) provide overseas 'aid' funding through a variety of different streams, none of which explicitly exclude projects causing environmental harm.⁵⁹ Between 2010 and 2018, 19% of Overseas Development Assistance (ODA) energy support went to fossil fuel development, with funds used on projects including promotion of shale gas drilling in China, and supporting the expansion of oil and gas industries in Brazil, Mexico, India, and Myanmar.⁶⁰

The above actions are in direct conflict with the UK's aim to achieve net zero climate emissions by 2050. They support industries that are driving increased emissions and poor environmental outcomes and fail to use key levers to support the development of climate or environmentally responsive infrastructure.

The UK announced at the end of 2020 that it will end direct government support for the fossil fuel energy sector overseas.⁶¹ The pledge includes ending support from UK Export Finance, aid funding and trade promotion. This is a welcome move, although it is of concern that the 'consultation period', due to end in early February 2021, allows for the possibility of further projects being initiated. Climate activists are looking carefully at the fine detail to ensure that there are no loopholes that might for example allow for further investment in fossil fuels or that finance might shift from fossil fuels to biofuels, which are problematic both from the point of view of emissions and human rights.⁶² Meaningful change will only be achieved if the UK ensures its industrial strategy, including its approach to inward investment, does not undermine its international development commitments, as well as its trade and international environmental commitments.

Section 2:

Alternative approaches

The challenges outlined above will require significant innovation and leadership. However there are a few emerging examples of countries developing new approaches to trade agreements. These are outlined in this section.

The Agreement on Climate Change, Trade and Sustainability

Costa Rica, Fiji, Iceland, New Zealand and Norway launched the Agreement on Climate Change, Trade and Sustainability (ACCTS) in 2019 and were joined by Switzerland shortly after that. The countries involved propose to reduce barriers to trade in environmental goods and services, phase out their fossil fuel subsidies and encourage the promotion and application of voluntary eco-labelling programs and mechanisms. ACCTS is envisaged as a “living agreement” that can be updated and take on additional issues, and once the initial negotiations are concluded, it will also be open to further members.⁶³

This is a welcome initiative to the extent that it makes a clear statement of intent to stop dealing with climate change, trade and sustainability in silos and recognises that trade rules have an important role to play in achieving progress in the other two areas. Given that global fossil fuel subsidies amount to more than US\$500 billion per year, and that trade rules are already used to reduce other kinds of subsidies (in agriculture and manufacturing), it is encouraging to see countries proposing concrete multilateral measures aimed at phasing them out.⁶⁴ Measures to liberalise trade in environmental goods and services are also welcome but only to the extent that increased international trade produces meaningful reductions in emissions: negotiations towards the Environmental Goods Agreement (EGA) stalled because of a lack of agreement regarding the definition of an

‘environmental good’ with the risk that the definition was expanded to the point of being meaningless.⁶⁵ It is unclear how much impact the third strand of the negotiations will have, as it envisages “guidelines to inform the development and implementation of voluntary eco-labelling programmes and associated mechanisms to encourage their promotion and application.”⁶⁶ Such a cautious approach seems unlikely to lead to the kind of significant change that is needed if we are to prevent runaway climate change in the next ten years.

Negotiations are clearly in the very early stages, however the UK should follow them closely and consider joining at a future date. As a participant in the negotiations it would be a significant player and would therefore have the potential to increase ambition, for example by deepening discussion of the relationship between MEAs and trade agreements, or seeking to include negotiations on specific provisions such as phasing out investment protection provisions, or rethinking public procurement or intellectual property provisions. ACCTS also offers a framework that could form the basis of future UK trade agreements.

Using trade agreements to increase climate ambition

In a similar move, France and the Netherlands are calling for the EU to “increase its ambition regarding the nexus between trade and sustainable development in all its dimensions, consistent with the implementation of the European Green New Deal.”⁶⁷ They envisage five separate areas for action. Most significantly, in a so-called ‘non-paper’, they argue that the Paris climate agreement should be an essential element of EU agreements and that the EU should condition the start of trade

negotiations upon the other party being a member of and implementing the agreement. In this sense the Paris agreement would be treated in the same way as provisions on the proliferation of weapons of mass destruction and respect for human rights. The non-paper recommends strengthening sustainability chapters by making them more ambitious and ensuring effective implementation. It notes that the European Green Deal includes provision for a 'Chief Trade Policy Enforcer', one of whose roles will be to ensure effective implementation of trade agreements and urges the EU to go further by offering positive incentives to governments that are implementing their sustainable development commitments. This could include staged implementation of tariff reductions and their potential withdrawal in the event of a breach of sustainable development provisions. They call for improved impact assessments, for example to include regional impacts, more detailed sector-specific analysis and better analysis of labour impacts and for the development of an EU framework on responsible business conduct as a flanking measure to trade agreements. Finally, the paper supports the proposed WTO declaration on trade and the environment at the next ministerial conference, which both the EU and UK now support. These proposals appear promising and the UK should consider them carefully, particularly given its historically strong trade links and cooperation with the Netherlands.

EU level playing field proposals to the UK

As outlined above, governments often agree as part of trade agreements not to lower standards, but this is generally qualified such that it only takes effect if standards are lowered in a way that would give one party a trade or investment advantage. The EU's initial proposals to the UK in respect of the future relationship diverged from this significantly: they proposed that the UK should not be able to diverge from the EU *irrespective* of the impact on trade or investment. This would mean that any regulatory action in the UK could be scrutinised and actioned by the EU if they considered that it undermined the 'level playing field' between the two countries, whether or not they could demonstrate a direct impact on EU business. It also provided a near-exhaustive list of issues that would be in scope (excluded areas were primarily those having strictly local impacts) and covered both regulation and its implementation. The proposal also committed

the UK to provide for effective remedies including effective sanctions and enabling judicial proceedings by public authorities and members of the public. The EU argued that this was necessary because of the geographic proximity and economic interdependence between the UK and the EU.

The proposal stopped short of provisions in the European Economic Area (EEA) and EU Association Agreements because in those agreements the EU requires both an absolute commitment to non-regression and a much greater degree of alignment with a view to harmonisation with EU regulations. The EU's proposal for the UK envisaged broadly achieving the same level of protection, rather than seeking full alignment.⁶⁸

The EU deal was published as this report was being finalised.⁶⁹ It broke new ground by referring to climate change as an "essential element" of the deal and there are specific provisions to ensure a 'level playing field' between the parties, which cover environmental standards, including a commitment to non-regression on existing levels of protection.⁷⁰ In addition, the deal includes statements that appear as standard in other EU trade deals, for example that both parties will 'strive' to increase their levels of environmental and climate protections.⁷¹

Whilst the climate reference and level playing field provisions are welcome, in practice they are likely to be unenforceable. The commitments on climate change require a disputing Party to prove that an act or omission "materially defeats the object and purpose of the Paris Agreement", a high bar that is likely to prevent either Party to the deal taking action.⁷² Action can only be taken on level playing field commitments if they can be shown to have an impact on trade or investment; this is again, extremely difficult to prove and, as outlined above, such provisions have never been used. Furthermore, level playing field commitments lack enforceability. The exceptions to this are non-regression commitments, where, if a breach is identified, parties can have recourse to 'temporary remedies' such as an increase in tariffs or the suspension of duty-free access in particular areas.⁷³

The UK clearly missed an opportunity to seek much higher levels of ambition with our closest trading partner, with whom we have shared climate ambition. This is extremely disappointing however it seems likely that the deal will continue to be refined in the months and years to come, potentially providing an opportunity for progress.

Section 3:

Alternative trade for the planet – policy proposals

Summary:

In order to achieve a trade system that works for climate and the environment the UK should:

- Create the right enabling environment for trade negotiations
- Get the right balance between trade agreements and environmental goals
- Ensure trade agreements are guided by environmental aims
- Rethink trade rules
- Ensure democratic structures are in place
- Ensure environmental commitments are binding
- Include regular review of trade agreements
- Promote responsible business conduct

For the UK to move towards a model that ensures its trade and climate goals are aligned, it will first need an overarching strategy that sets out how it can do this. The following makes recommendations for the key components of such a strategy.

The right enabling environment

It is widely recognised that achieving climate and environmental goals will require significant policy change and it is critical that trade is high on the list of policies to change. Our existing priorities therefore need rethinking: international trade must be viewed as a means to an end, rather than an end in itself. This requires a fundamental shift of approach: from one which sees the goal of trade policy as simply to

increase trade, to one in which trade policy is clearly conceptualised as just one element in a broader context and is guided by environmental and social concerns. It requires a recognition that international trade fits within a broader set of policies including the implementation of other international treaties, international development commitments, industrial strategy, and the promotion and operation of UK businesses abroad. There needs to be consistency across these areas and a holistic approach to ensuring they do not hinder action to protect and enhance our environment and that, where possible, policies actively support improved outcomes.

Trade must be shaped by the urgent need to address the climate emergency and reduce GHG emissions to zero. This means that trade rules will need to go beyond voluntary commitments to uphold various climate, environment and sustainable development agreements. They must be formally assessed against, amongst other things, their contribution to phasing out fossil fuels, ensuring resource consumption remains within planetary boundaries and helping to reverse ecological damage.

For the above reasons, and in line with the direction of travel set out in the ‘non-paper’ issued by France and the Netherlands, there must be no assumption that an FTA is desirable. Negotiations towards an FTA should only go ahead when the conditions for doing so (elaborated below) are in place. Trade agreements must only be struck where there is a strong case that doing so will have a positive impact. For example, it would not be appropriate for the UK to conclude a trade agreement with a country which either doesn’t have or doesn’t enforce legal safeguards to protect the environment or tackle climate change. It must also be possible to suspend agreements if political changes mean that a country is no longer enforcing its commitments.

At the same time, it is clear that it would not be appropriate to try to make trade agreements a primary means of delivering environmental policy. The central aim of trade agreements is to set in place the rules that partner countries will follow when trading with one another. Environmental aims should shape the process of determining trade partners, the remit of negotiations, and the core elements of the final agreement. The scope of FTAs must be limited and aligned with environmental policy. Domestic environmental regulation should be excluded from the scope of FTAs and international cooperation around climate and the environment should continue to happen in other forums.

UK relations with other nations must be shaped by the pursuit of high environmental outcomes over and above the pursuit of an FTA for its own sake. In practical terms, this could mean negotiating binding environmental agreements prior to instigating discussions about trade – preventing environmental provisions from being rendered ineffective through lack of enforcement or subordination to trade aims. In the same way that the WTO requires countries to go beyond WTO rules in their bilateral agreements, countries could view multilateral UNFCCC commitments as the baseline that they must build on and make more binding before moving on to trade negotiations.

It also means a strong commitment to democracy, with meaningful opportunities for public scrutiny and debate to guide the mandate and opportunities for parliament to discuss and vote upon agreements. This should include scrutiny by the International Trade Committee (as is current practice) but also the House of Commons Environment, Food and Rural Affairs, Environmental Audit, International Development and other committees as appropriate. The resultant agreements are likely to be more limited in scope, focused on areas that would genuinely benefit from being dealt with under trade law and are genuinely aligned with environment and climate goals.

Getting the right balance between trade agreements and environmental goals

As outlined in previous sections of this paper, there is currently an imbalance in policy such that trade policy tends to take precedence over climate and environmental policy. In order to redress this

imbalance and ensure that trade agreements support environmental policy, their interpretation must be made explicitly subordinate to environmental commitments and allow national and international communities to shape these commitments and their implementation without impediment. Some of these commitments are recognised in international agreements, such as the need to fight climate change, while others will be defined by national contexts or between negotiating partners.⁷⁴ As a first step, the UK should not proceed with trade agreements with partners who are not able to demonstrate that they have signed and are implementing key environmental agreements, including the Paris Climate agreement to limit warming to 1.5 degrees. Negotiators and trade lawyers must be directed, for example via negotiating mandates or guidelines for dispute resolution, to give precedence to MEAs, and assessments of the compatibility of particular measures should be made by panels composed of representatives with a cross-section of expertise, including environmental specialists.

Such a provision would sometimes mean that the UK and partner countries would spend a period of time working to increase or improve environmental commitments on one or both sides before trade negotiations could commence: negotiations on environmental goals should be given precedence over trade deals. Where appropriate, preparations for trade negotiations should include support for countries to ratify and implement key environmental agreements and for domestic capacity to be built in areas such as the production of green technologies. In some circumstances, for example where there are significant disparities in wealth, countries should be offered access to UK markets without negotiating a trade agreement so that there is no requirement for reciprocity.⁷⁵ This is in line with existing EU agreements, including Everything But Arms (EBA) and the Generalised System of Preferences (GSP) which the UK has committed to replicating.

The UK should seek to move away from trade in goods or services that threaten the climate or environment; the Government is already committed to ensuring it does not engage in trade in certain products, such as illegally logged timber, it should seek to expand on this position to include trade in goods and services that are driving deforestation, land grabbing or severe water pollution. Trade agreements should incorporate the precautionary principle, such

that goods that have not been proven to do no harm should not be traded. Where an immediate change towards a more sustainable form of trade could have significant negative consequences, (such as creating unemployment in fossil-fuel dependent industries) with no transition strategy in place, and where halting trade in these areas is considered less urgent, such environmentally damaging trade should be phased out with a timeline that allows for mitigation and 'just transition' strategies to be put in place.⁷⁶

Environmental impact assessments are a key tool for understanding whether the right enabling environment is in place. Assessments should be carried out early in the negotiating process so that the outcomes can be taken into account in negotiations. There must also be ongoing monitoring and evaluation, including a formal process of regular review and mechanisms to secure the suspension or cancellation of agreements where there is evidence of harm. The process needs to be transparent so that citizens and parliamentarians can scrutinise and respond to them. Terms of reference and details about the organisations who are carrying them out must also be made publicly available. Organisations undertaking assessments should be independent from government and should have demonstrable environmental expertise. Evidence of negative impacts, whether for the UK, a potential trading partner or a third country, must result in negotiations being halted or negotiating positions being significantly altered to avoid (not just mitigate or compensate for) the identified harm.

The UK should establish a set of benchmarks for assessing whether the right conditions are in place to proceed with a trade agreement, with or without further joint action to increase standards amongst parties.

What does this mean for Trade Agreements?

Trade agreements have expanded in scope to cover too broad a range of policy areas. To ensure countries are able to properly respond to the climate and environmental crises, the scope of agreements needs to be scaled back so that they apply to aspects of trade that cannot be dealt with elsewhere. What follows outlines some of the policy areas where cooperation in non-trade forums might be more appropriate:

- **Regulation:** Decisions over regulations and standards should continue to be taken by elected

representatives and citizens should retain their right to debate and influence them. This means that regulatory cooperation chapters should be excluded from trade agreements. To facilitate international cooperation towards higher standards, countries could consider separate agreements on regulation that do not focus on the impact that regulations have on trade flows.

- **Food and agriculture:** Trade policy should respect food sovereignty and the close links between the food system and policy areas such as tackling climate change, livelihoods and health. There must not be an assumption that food and agriculture can always be opened up to liberalisation and the elements of production that will be included in trade deals should be decided carefully on a case-by-case basis.
- **Rules on intellectual property:** Intellectual property rules (IPRs) cover everything from medicines to seeds and offer huge dividends to companies for knowledge that was often already available to local communities, or that should be treated as part of the commons due to its significant social benefits, for example vaccines.⁷⁷ As with food and agriculture, there must be no assumption that IPRs should be dealt with under a trade agreement and where they are, careful attention should be paid to their interaction with broader environmental, as well as human rights commitments. Trade deals should use as a starting point the assumption of maximum sharing of research and technological innovations with partner countries as part of the global commons.
- **ISDS mechanisms** and similar investor protection provisions must be excluded from trade agreements.

Trade agreements should include enforceable trade and sustainable development provisions, including a requirement for parties to implement the Paris Agreement and binding non-regression clauses.

Addressing fossil fuel subsidies

The UK should carefully consider moves by countries involved in the ACCTS negotiations and the Friends of Fossil Fuel Subsidy Reform to reduce fossil fuel subsidies through the trade system, in line with trade measures aimed at reducing subsidies for agricultural and industrial goods.

Democratic structures

To ensure the trade system adequately reflects the rights and wishes of the majority, better decision-making structures must be created. Achieving trade policy that works in the interest of environmental and social goals requires the full participation of civil society, including affected communities, trade unions and other organisations, in the process of laying the groundwork for and negotiating and agreeing trade deals. This could happen through citizens' assemblies and scrutiny committees, who track the development of deals and assess their impact once they are in force. The provision of accessible information about trade policy and negotiations, including impact assessments and negotiating documents, is essential to facilitating this. Parliament and local decision-making structures must also be given a much stronger role in the scrutiny and approval of trade deals.

A democratic, accountable and transparent trade system should include:

- A public right to be engaged in the process of developing the parameters of a trade agreement (the mandate) and to scrutinise texts as the negotiations progress.
- Gender-responsive sustainability impact assessments.
- The right of Parliament to set a thorough mandate to govern each trade negotiation, with a remit for the devolved administrations.
- A presumption of full transparency in negotiations.
- The right of Parliament to amend and reject trade deals, with full debates and scrutiny guaranteed and a remit for the devolved administrations.
- The right of Parliament to review trade deals and withdraw from them in a timely manner after the signature of the deals.

The UK should also work with partner countries to encourage similar levels of public and parliamentary engagement. This is desirable in its own right, however being able to demonstrate public support for a particular approach can also provide some leverage to governments during negotiations and legitimacy for deals once they are agreed.

Regular Review

Trade agreements must as a matter of course include mechanisms for regular review to assess, amongst other things, environmental impact. Assessments should be undertaken independently and Parliament should be given full access to and the ability to take action in response to their findings, including a debate and vote to stop the implementation of the deal.

Promoting Responsible Business Conduct

Trade rules are currently unbalanced because they offer companies rights and benefits without requiring them to meet even the most basic standards of best practice. Businesses are the primary operators within the international trade system and as such their behaviours have significant implications for ensuring trade supports climate and environmental goals. For these reasons trade negotiations must establish mechanisms early in the development of any trade agreement to ensure that this happens. Provisions on due diligence obligations should be included in FTAs to ensure that businesses have to assess, address and report the environmental and climate impacts of their operations. The government should establish an independent monitoring and adjudication body with a meaningful public complaints mechanism through which citizens can raise complaints if they believe the practices of businesses are in breach of environmental agreements. This body should have the power to impose fines, trade sanctions or the suspension of trade agreements where a breach is identified. The UK must also introduce a Due Diligence Act, covering the above and join a future UN Binding Treaty on Business and Human Rights.

Positive incentives must also be included in trade deals. Trade rules can and should be used to support sustainable business practices. A 'business passport' should be introduced which allows businesses to access a wider range of trade benefits (such as lower tariffs or the ability to bid for government procurement contracts) the more they are able to demonstrate positive environmental and social impacts: in effect, the 'trusted trader' scheme will be improved to become an 'ethical trader' scheme. Trade access credits would be earned for example for: the use of renewable energy throughout the supply chain, minimising or eliminating waste or ensuring products are designed to last for as long as possible.

Priority actions for the UK government

The following outline immediate actions that the UK government should take in order to begin the process of aligning its trade policy with its climate and environmental commitments.

- **Ensure coherence across departments.** All UK economic and diplomatic activity must be coherent with the UK's climate change and development goals in order to create an enabling context for tangible improvements, and prevent unintended consequences or inconsistencies.
- **Set out a new trade policy in legislation.** This should involve a rethink of the current approach, including full engagement with civil society, so that achieving environmental and social goals becomes the cornerstone of all future trade agreements. The policy must as a minimum include:
 - A commitment to undertake full negotiations only with countries ratifying and effectively implementing international treaties on human rights and the environment.
 - A new and transparent process for the setting of mandates and scrutiny of trade negotiations and deals.
 - A guarantee of adequate and enforceable environmental safeguards in all future deals and a commitment to ensure all trade agreements feature best practice enforcement mechanisms.
 - A commitment to carry out independent, robust and transparent impact assessments prior to entry into all future FTAs and to regularly assess the environmental impacts of all agreements rolled over from the EU.
 - An outline of new, robust procedures for monitoring the implementation and enforcement of all parties' domestic environmental law and compliance with FTA terms in all future agreements. These procedures should be applied across all existing FTAs.
 - A requirement to report on how future trade will support strengthened environmental governance and reinforce existing MEAs and the SDGs.

■ Get the UK's house in order:

- An immediate commitment in legislation to environmental non regression and to introduce measures to phase out environmentally damaging imports post-Brexit, with specific support for developing countries to ensure they are not disadvantaged.
- An extension of the current net zero commitment to cover global footprint, including shipping, aviation and the impacts of the global production of goods and services consumed by the United Kingdom and to include the development and implementation of a UK green new deal.
- Introducing a domestic UK Due Diligence Act
- Identify and implement mechanisms to lower the climate and environmental impact of UK goods trade, this might include carbon labelling or border measures.
- **A close and cooperative future relationship between the UK and the EU.** Building on the agreement signed at the end of December 2020, this must support high environmental and social outcomes and includes a bilateral commitment to non-regression.
- **A full and transparent review of all rolled over trade agreements.** The aim of this must be to ensure alignment with environmental goals and an overarching vision of equity and sustainability. This should include:
 - Removing ISDS clauses
 - Negotiating improved enforcement mechanisms for environmental provisions
 - Set out a process for monitoring mechanisms relating to the environment
- **A UK strategy for influencing at the WTO.** This should be consistent with the aims outlined above.

Conclusion

The UK government has a long way to go before it can claim that its new trade policy is in line with its climate and environmental commitments. There is currently no published strategy for UK trade (the 2017 White Paper was withdrawn following the 2019 General Election) and no legislation pertaining to the negotiation of new FTAs. The Trade Bill (2019-2021) contains no reference to incorporating or reflecting environmental or climate commitments nor does a command paper issued in 2019 which sets out the processes the UK will follow for negotiating new trade deals. Rollover agreements have not been amended to ensure full coherence nor have they been updated to reflect the EU's current approach.⁷⁸ Rather, the approach to trade agreements has been to rush through as many as possible, partly to ensure continuity for businesses following the transition period but also to demonstrate that the Government is 'getting Brexit done'. The mandates for negotiations with the EU, US, New Zealand,

Australia and the CPTPP all reference the UK's net zero target, however each approach is "calibrated to the partner's commitment to climate change mitigation... and some of the objectives outlined very much lack in ambition."⁷⁹

It is clear that the UK urgently needs an overarching strategy to ensure coherence between its climate, environmental and trade strategies. This needs to include a review of agreements rolled over from the EU but should also inform new deals, particularly those with the EU and US who together account for around 70% of total UK trade.

This document has outlined ways in which the current approach to trade is creating a serious roadblock to climate and environmental action. It has also set out priority actions for the UK to take if we are to prevent this from happening: it is clear that a new approach to trade is urgently needed if the UK is serious about tackling climate change.

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