

No More Business-as-Usual: Where to Now for International Trade?

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About this report

This report is part of an ongoing series on urgent contemporary policy issues in Aotearoa New Zealand. This series is action-oriented and solutions-focused, with an objective of bringing academic research to bear on the economic, social and environmental challenges facing us today. The views, opinions and positions expressed by the authors are theirs alone, and do not necessarily reflect the views, opinions or positions of The Policy Observatory or Auckland University of Technology.

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Foreword

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When the Trans-Pacific Partnership (TPP) was signed in Auckland in February 2016, its advancement seemed inevitable. About as inevitable as a Trump Presidency did not. This is why, when Donald J. Trump became President of the United States of America, it felt like the international community had turned a corner. Ordinary expectations had been inverted. No more business-as-usual.

But strains within the global system have persisted longer than this. The Global Financial Crisis, the Tea Party movement, Occupy Wall Street, the Eurozone crisis, the British vote to leave the European Union – all these events (and more) rearranged the political furniture. In New Zealand, the TPP showed a remarkable inability to win majority public support, especially given the country's economic reliance on export markets. Collectively, these were signs that trade's architects had taken too much for granted. As a result, the TPP – like the Transatlantic Trade and Investment Partnership (TTIP) – is on ice, perhaps to be thawed in a warmer season, perhaps to remain frozen where it last lay down.

The Italian theorist Antonio Gramsci (1891–1937) found a new lease of life last year, for his apt and poetic description of times of crisis: 'the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.' Trump is the most morbid of symptom yet, but it's still hard to say conclusively whether he signals a false start, or the beginnings of the next great transformation. To paraphrase Gramsci again, present history might feel like a series of violent tugs, but is the definitive tug on the horizon? And if so, who will deliver it? The revolutionaries? The bullies? The masses? The Silicon Valley entrepreneurs? The global climate? Or can this definitive tug be avoided? Is it possible – with a few tweaks and compromises – to re-establish business-as-usual and to carry on as before? Another unlikely president, Emmanuel Macron, marched into the Élysée in 2017 on promises like this. The New Zealand Government, in a less flashy way, toes a similar line with its conspicuously unadventurous 'refresh' of trade policy, Trade Agenda 2030.

Still, there is no better time to ask fundamental questions. What does New Zealand want from international trade – and what don't we want? What should we not be willing to compromise? Do the rewards of our trade arrangements justify the trade-offs? And is the distribution of impacts fair, equitable and both environmentally and politically sustainable? Only by addressing questions like these can international trade refrain from sowing the seeds of its own undoing. Only by striving for real improvements can New Zealand trade policy overcome public ambivalence and regain the support of constituencies who responded to the TPP with a withering 'yeah, nah'.

The contributors to this volume don't agree on the answers – far from it. Some are relatively supportive, even protective, of the way that international trade has heretofore been organised. Others are more critical, committed to the view that the wrong sacrifices have been made – to equality, to democracy, to public goods, to added value, to environmental integrity. But it warrants emphasising – given the polarisation of past debates – that none of the contributors to this volume are *against* trade. No one comes remotely close to proposing that New Zealand *cease* all exports and imports. Nor are any contributors wholly complacent toward business-as-usual. What this discussion paper offers is a range of suggestions about how trade might be improved. Some recommendations are highly demanding, others are more incrementalist, seeing the shortcomings of our trade regime with Beckettian stoicism: 'Ever tried. Ever failed. No matter. Try Again. Fail again. Fail better.'

That pragmatic spirit animates Stephen Hoadley's essay which draws on his newly published book, *New Zealand Trade Negotiations*, a survey of trade deals over the last half century. He derives lessons for the future from the past, highlighting New Zealand's record of success as a trading nation. Our failures, he argues, are only really failures when held up to impossible standards, such as the avoidance of all compromise.

Hosuk Lee-Makiyama and Hanna Deringer, respectively Director and Policy Analyst for the European Centre for International Political Economy (ECIPE), offer an external perspective. Writing from the heart of the European Union in Brussels, they reinforce the view of a global trade system that is uniquely vulnerable today. In this context, they argue, New Zealand could play a critical role in holding together what remains of the rule-based global system – which includes pursuing a TPP-11 without the United States.

Other contributors propose a more thoroughgoing reckoning of global trade institutions. Toby Moore takes an institutional perspective, focusing on the road not taken after the dissolution of the post-War Bretton Woods regime. Public disenchantment, in his view, won't be easily undone, because the threats that people perceive from trade are as much political as economic. But this observation also recommends a remedy: the importance of preserving a nation's 'policy space'.

On a similar tack, Robert Wade makes a case for managed trade by way of unpicking the economic rationale for free trade. He argues that the formal justifications for free trade, derived from classical economic theory, are unrealistic and overwrought. In the face of this, he endorses a more strategic approach that leaves space for domestic policy and more widely for international cooperation on pressing global problems.

Bill Rosenberg examines free trade in its political context, using Dani Rodrik's trilemma between hyper-globalisation, national sovereignty, and democratic politics. These factors cannot grow together equally; one must always be subordinated. Until recently, the sovereignty of nation-state was weakened, which sowed the seeds for today's nationalist upheavals, but these in turn undermine democracy. So why not restrain globalisation instead, asks Rosenberg, to ensure that international trade occurs in a world of stable democratic states?

Amy Baker Benjamin's contribution expands upon a theme that is touched upon lightly elsewhere: regulatory harmonisation. Contemporary trade deals go beyond the ambitions of traditional 'free trade' to remove tariff barriers and seek to reform domestic policy. This involves a level of executive discretion that cuts against the democratic grain.

For the remainder of this discussion paper, the essays shift from broad brush-strokes to a finer grain, to particular problems and solutions within the wider sphere of international trade.

Rahul Sen comes from within the economic discipline and, from this perspective, he affirms the global and national benefits of trade. Yet he also recognises that this isn't the entire story, that the gains of trade are not distributed evenly within nations, and nor are the risks. There is a need, he argues, for policy makers to anticipate and alleviate these consequences.

Facing trade's problem of legitimacy, Jordan Carter explores whether certain strategies from the world of internet governance could be applied. The alternative he proposes is 'multistakeholderism' which could be adapted to overcome the criticism that trade negotiations are covert, elitist and undemocratic.

Dan Bidois addresses the question of New Zealand's place within global trade, arguing that New Zealand should pivot from the Trans-Pacific to the Asia-Pacific, from the TPP to RCEP, a less comprehensive agreement that involves non-TPP members like China and India.

Carol Neill examines bilateral trade between China and New Zealand, operated through a free trade agreement that is currently under review. Despite its dominance – China has been our largest export market since 2013 – Neill identifies a significant opportunity cost given the lack of added value in our export goods.

Lida Ayoubi explores the issue of copyright and traditional cultural expressions, an issue of longstanding concern for Māori who have seen their cultural resources used inappropriately for commercial gain. Ayoubi argues that the balance is not yet right; indeed that the status quo is at risk of contravening indigenous rights.

Pheh Hoon Lim surveys the state of intellectual property law, particularly for pharmaceuticals. This was one of the more controversial aspects of the proposed TPP, which gave substantial ground to United States' interests in extended copyrights. Lim highlights the capacity of developing countries to advance their views through the existing trade framework.

Finally, Adrian Macey, a former trade negotiator for New Zealand, provides a note on how the global trade system could be reconciled to the Paris Climate Agreement, another complex feat of international negotiation.

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Glossary

ASEAN: Association of Southeast Asian Nations

BTAs: Border tax adjustments

CEPs: Comprehensive economic partnership agreements

EEC: European Economic Community

EEZ: Exclusive Economic Zone

EU: European Union

FTA: Free trade agreement

GCC: Gulf Cooperation Council

ISDS: Investor-state dispute settlement

IP: Intellectual property

Mercosur: Southern Common Market. Full members are Argentina, Brazil and Paraguay and Venezuela (currently suspended). Associate countries are Bolivia, Chile, Colombia, Ecuador, Peru and Suriname. Observer countries are Mexico and New Zealand.

MFAT: Ministry of Foreign Affairs and Trade

NAFTA: North America Free Trade Agreement

RCEP: Regional Comprehensive Economic Partnership

ROO: Rules of origin

SBTC: Skill-biased technical change

SMEs: Small and medium enterprises

TPP or TPPA: the Trans-Pacific Partnership; sometimes also referred to as the Trans-Pacific Partnership Agreement

TTIP: Transatlantic Trade and Investment Partnership

WTO: World Trade Organisation

1: On New Zealand's Trade History: Walking Confidently into the Future

Stephen Hoadley, Associate Professor of Politics and International Relations, University of Auckland.

New Zealand is a smart international trader

The record of the last three decades shows that New Zealand negotiators have done better at securing access to reluctant partner governments' markets than could be expected given the diminutive size of the New Zealand economy.¹ As one analyst summed it up, 'by force of personality, by mastery of the subject matter and by the use of various methods, New Zealand manages to be a prominent player despite the size of its economy.'²

Similarly, former Senior Trade Commissioner Ted Woodfield noted that, 'the persistence of New Zealand ministers; the strength of the case; and the reasoned way it was presented and pursued [by officials as well as ministers], appeared to strike the right chords at the right times.'³ The ability in 1971 to negotiate transitional access arrangements into the European Economic Community (EEC) market denied to other Commonwealth countries is a notable example of Woodfield's point.

The achievement of Closer Economic Relations with Australia in 1983 remains a pioneering milestone in the history of progressive free trade agreements (FTAs). Subsequently, New Zealand from 2001 concluded a series of ten free trade agreements with Asian partners, notably with the three governments of Greater China, and across the Pacific with Chile. Each of these resulted in increased exports of goods and services and inbound investments and in setting ever-higher standards of trade facilitation. New Zealand was at the centre of the Trans-Pacific Partnership (TPP) negotiations from beginning to end and played a constructive role throughout, not least by performing the role of secretariat and repository of documents. New Zealand was also successful in appeals against the United States for relief from duties on kiwifruit (through the United States Department of Commerce) and sheepmeat (through the WTO), and against Australia for banning apples and Canada for subsidising dairy products.⁴

¹ This conclusion is based on the case studies reviewed in my book: Hoadley, S. (2017). *New Zealand Trade Negotiations*. Wellington, New Zealand: NZ Institute of International Affairs.

² McMillan, S. (2001). *State business is a cruel trade*. New Zealand Trade Consortium working paper 13, p. 10. Wellington, New Zealand: NZ Institute of Economic Research & the New Zealand Trade Consortium.

³ Woodfield, T. (2008). *Against the odds: Negotiating for New Zealand's future* (p. 81). Wellington, New Zealand: Dunmore Publishing. Also see Woodfield, T. (2009). *Agents abroad: The story of the New Zealand trade commissioner service*. Auckland, New Zealand: Penguin Books.

⁴ Dairy Companies Association of New Zealand and counterparts in Australia, Europe, Mexico and the United States recently urged the WTO to take up a complaint against Canada for subsidising and dumping dairy products. Gray, J. (2016, September 18). NZ dairy companies urge WTO action against Canada. *NZ Herald*. Retrieved from http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11711422

Figure 1: Map of New Zealand's free trade agreements

Source: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/>
 Reproduced with MFAT permission.

Trade with each and every partner has increased as a result of a trade negotiation. In the wake of the United States withdrawal from the TPP New Zealand has joined with Japan to advocate persisting with the TPP text, and a number of other members, notably Mexico, have sought out New Zealand for possible bilateral or plurilateral talks should the TPP talks be abandoned. In anticipation of the British exit from the European Union leaders from both the United Kingdom and the European Union have agreed in principle to initiate free trade agreement talks with New Zealand.

By other measures, too, New Zealand was acknowledged as a leader in trade liberalisation. Successive chairs of the Agricultural Committee of the WTO have been New Zealanders, notably Tim Groser, Crawford Falconer, and David Walker. Former Prime Minister Mike Moore was elected Director-General of the WTO in 1999. When the WTO parties set up disputes resolution panels requiring able and unbiased mediators they often chose New Zealanders such as Tim Groser, Adrian Macey, Wade Armstrong, and Hugh McPhail, all of whom reportedly served with skill, professionalism, and good judgement. New Zealanders have been chosen as WTO disputes panellists more often than any other member's citizens save those of the host country, Switzerland.⁵

⁵ McMillan, cited above, p. 11.

A few negotiating failures?

To be fair, one should acknowledge a few failures over the decades. These include the following:

- the inability to persuade Japan to liberalise its beef market in exchange for permission to fish in New Zealand's Exclusive Economic Zone;
- continued denial of free entry into the European market;
- the persistence of agricultural subsidies and barriers imposed by New Zealand's most important partners such as the US and Japan;
- the stalling of the free trade agreement with the Gulf Cooperation Council despite a 'facilitation payment' and sheep farm aid package;
- and the failure to achieve a free trade agreement with the United States or to persuade that government to remain in the TPP negotiations.

But these are failures only as measured against immediate, unfettered, and full-spectrum trade access, which is an unreal standard in a world characterised by growing economic nationalism, and covert and overt protectionism. By relaxed criteria New Zealand did not fail absolutely, but only failed to reach its more ambitious goals. In every case trade continued to grow despite the alleged failures because the trade partners discreetly made adjustments to their import policies that worked to New Zealand's advantage. And New Zealand maintained harmonious diplomatic, security, and cultural relations with each of the trade partners concerned, keeping the door open to further trade liberalising adjustments while also serving New Zealand's wider foreign policy interests.

A sound basis for negotiating success

The factors underpinning the success of New Zealand's negotiators are at least four in number.⁶

First, New Zealand negotiators have developed skill and subtlety by necessity, having to offset New Zealand's relative lack of weight in asymmetric bilateral and multilateral fora by personal intelligence and tactical nimbleness. Furthermore, it is widely believed that New Zealanders value egalitarianism and thus do not defer to rank, privilege or power, but rather can meet and talk with leaders of larger powers with confidence, which engenders respect amongst those leaders greater than the diminutive power and wealth of New Zealand would normally deserve.

⁶ This inventory of factors was inspired by McMillan, cited above, pp.13-15 but is my own adaptation and phrasing taking into account changes since McMillan wrote in 2001.

Second, New Zealand officials have enjoyed the backing of their ministers, and their ministers have enjoyed the backing of their Cabinet and party, and these leaders have legitimacy among the wider public, so New Zealand can present a stable and united political, diplomatic, and bureaucratic front to the world.

Third, successive ministers of trade have retained their portfolios long enough to develop depth in their leadership performance, and to earn legitimacy for their initiatives among other ministers and the general public. Likewise, officials in the Trade Negotiation Division tend to remain in trade negotiation roles for long periods of time, or to continue to engage in trade roles when posted elsewhere, thus capitalising on their experience and acquired skills.

Fourth, government and commercial sector leaders are relatively few in number and many have similar backgrounds in farming or study at private schools or leading universities. Networks of Wellington and Auckland official and commercial elite are small and their members have numerous opportunities to exchange their views. Accordingly, entrenched positions dividing one government agency from another, or dividing the government from the leaders of the agricultural, manufacturing, or service sectors, are rare; and consensus is easily achieved, especially on the promotion of agricultural exports. Government consultation and cooperation with commercial sector leaders is especially close and contributes to New Zealand's credibility abroad as a unified, focussed, and effective negotiating partner.

Countervailing weaknesses

However, these factors may be weakening as a result of constitutional and political changes. Prior to 1996 a single party, either National or Labour, dominated the Government, further enhancing intra-governmental consensus. And National worked intimately with the agricultural sector, not least because many National ministers had prior farming or agriculture-related careers. But the adoption in 1996 of the mixed member proportional (MMP) system of voting has allowed multiple political parties to win one or more seats in Parliament and obliged the leading parties to link with minor parties to achieve stable majorities.⁷ Trade policy is no longer non-partisan, and despite vigorous efforts by successive governments to legitimate trade agreements, controversy and criticism have grown. The rise of anti-globalisation movements ideologically opposed to free trade agreements, and the availability of social media to disseminate anti-FTA arguments, have given anti-FTA political parties such as the New Zealand Green Party new constituencies. A notable example was the divisive debate in Parliament over the free trade agreement with Singapore, and another was visible recently in the polarising public and parliamentary debate over the TPP, reflecting the fact that a majority of polled New Zealanders did not support the government's initiatives in negotiating the agreement.

⁷ Electoral Commission. (2014). *MMP voting system*. Retrieved from <http://www.elections.org.nz/voting-system/mmp-voting-system>

Table 1

Support of the TPP by party preference, November 2016

	Total	Labour	National	NZ First	Green Party	ACT	Maori Party
Support	34.0%	17.9%	59.5%	5.0%	7.4%	75.0%	8.3%
Don't support	52.1%	73.3%	23.2%	86.9%	84.1%	12.8%	84.3%
Don't Know	14.0%	8.8%	17.3%	8.0%	8.5%	12.2%	7.4%

Source: Reid Research Poll for TV3, November 2015, data courtesy of Ngaire Reid, 21 April 2017.

My prediction

I do not believe that these trends will reverse the commitment of the New Zealand Government led by either major party to seek wider and deeper free trade agreements. The aggregate benefits of these policies are empirically demonstrable despite the pockets of job losses and hardship that they often induce.⁸

To sustain their economic liberalisation policies, New Zealand's authorities are advised to provide assistance to those losing out as a result of trade liberalisation, and to redouble efforts to legitimate trade policies with transparency, reliable information and frank assessments. As long as freer trade produces benefits that can be shown to be greater than the injuries it allegedly inflicts, and governments are willing to acknowledge and mitigate those injuries by appropriate domestic policies, then it is in the national interest for the New Zealand Government to persist in its present trade policy trajectory, albeit with adjustments to address social needs. The alternatives of economic nationalism and protectionism, and the beguiling but illusory chimera of economic independence and self-sufficiency, advocated by political parties and ideologues of the far left and far right, are not sustainable in a competitive and globalised world, and would lower New Zealanders' standard of living.

⁸ Causes of job losses and hardship are multiple, and freer trade is only one of them.

Conclusion

As fresh negotiations begin with the European Union, the United Kingdom, and Donald Trump's America, or negotiations resume to conclude free trade agreements such as that with the Gulf Cooperation Council, or to improve existing FTAs such as that with China, New Zealand's ministers and officials will be strengthened by the high reputation their predecessors have bequeathed them and the lessons they have learned from them. I have little doubt that New Zealand's negotiators have learned well the lessons of history and experience, and are putting them into practice daily.

I hope this short piece, based on my book *New Zealand Trade Negotiations* (New Zealand Institute of International Affairs, 2017) will be of value to the next generation, now studying at university, to sensitise them to the rigours, and the rewards, of negotiators' aims, strategies, tactics and skills. I hope also to alert the general reader to the complexities of trade negotiations so as to engender realistic expectations of what they can achieve. I recommend public respect for those negotiators who have achieved past trade advantages, whether large in free trade agreements or small in incremental adjustments, despite long odds, public and political criticism. They have advanced New Zealand's national economic interests and contributed to maintaining New Zealanders' high standard of living in a competitive world.

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2: On Rule-based Trading in Uncertain Times

Hosuk Lee-Makiyama (Director) and Hanna Deringer (Policy Analyst), the European Centre for International Political Economy (ECIPE)

A post-American trading system

To say that the international trading system is going through a rough time is probably an understatement. We may be used to lack of progress in the World Trade Organisation (WTO), but now its substitutes – the regional agreements like the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) – are also buried in oblivion. And there is nobody left to pick up the pieces: Following President Trump's 'America first' policy doctrine, which mistakes protectionism for nationalism, the United States (US) very intentionally abdicated from managing the rule-based trading system, even threatening to withdraw from the WTO.

As we stand today, no other global player is ready to fill the power vacuum left by the US. China does not yet enjoy the trust and agenda setting power to lead the global trading system. It is still undergoing a transformation towards becoming an open economy itself and the latter is even debatable as the number of restrictions in its economy is actually increasing rather than decreasing. Similarly, the European Union (EU) is not up for the challenge as it has been considerably weakened as a normative trading power due to meagre growth prospects and internal politics. Its credibility as a leader on global trade has not only been undermined by the recent public opposition to free trade, but also by legal challenges to the EU exclusive competence for trade agreements. And not least, Brexit led the European Union into its biggest political crisis.

The lack of leadership bears the risk that without a driving force the trade agenda will be left in the air and countries will resort to protectionism. This in turn leaves an important role for the world's middle powers and advocates for open trading systems like New Zealand to guide the European Union, China and the United States to stay within a free trade, rule-based system. Interestingly, New Zealand is part of all main trade initiatives that could determine the coming era of trade: A post-American TPP-11 consisting of the remaining eleven TPP members under Japan's stewardship, and the China-led Regional Comprehensive Economic Partnership (RCEP), which aims to merge all free trade agreements concluded by the Association of Southeast Asian Nations (ASEAN) with China, India, Japan, Korea, and Australia. Last but not least, New Zealand will begin negotiations with the European Union this autumn (2017). Short of resources and policy space, New Zealand will need to prioritise and sequence these negotiations effectively.

TPP: Still the centrepiece of the new order

The cornerstone of the great trade unravelling of 2016 was certainly the United States' withdrawal from TPP. Comprising some of the main economies in the Asia-Pacific, the rules set out in the TPP are of the highest standard and the most comprehensive in scope, including new trade issues like the digital economy. Such issues are likely to be omitted in TTIP and RCEP. Therefore, despite the United States' withdrawal, TPP provisions still serve as reference points and benchmarks for Europe's free trade agreements, RCEP, and potentially President Trump's renegotiation of the North American Free Trade Agreement (NAFTA). Other agreements, such as TTIP (if it should ever be concluded), were too far away from completion, and dealt with uniquely transatlantic problems with little universal relevance.

Without a TPP agreement in place, the future baseline for openness risks being much less ambitious, although ambition is not the only factor that should push New Zealand to make TPP its highest priority. Even without US participation, a TPP-11 serves New Zealand's self-interests by consolidating its economic ties with the fast-growing Asian-Pacific markets, while trade and GDP growth in most Western economies have stagnated over the past decade. In addition to New Zealand's existing trade agreements, TPP will add market access to the Pacific Alliance (of Chile, Colombia, Mexico and Peru), Canada and Japan, Asia's largest consumer market.

However, going from the original TPP-12 to TPP-11 will not be a frictionless affair. The conclusion of TPP-11 hinges on a renegotiation of the original agricultural package, which was overly focused on the United States' offensive interests while New Zealand's core interests in dairy were not sufficiently addressed. As Japan is currently reforming its arcane market support system for dairy, a conclusion of TPP-11 could prove to be a unique opportunity for new market access on New Zealand's key exports.

The second order of RCEP

Although RCEP involves five countries of the G20, a quarter of the global GDP and nearly half of the world population, it takes second order to TPP in terms of sequencing. To begin, the level of ambition of RCEP is determined mainly by TPP as the benchmark and hence the ability of New Zealand and its TPP partners to uphold agreed standards in an agreement without the US. Moreover, the market access provided by RCEP is not as attractive for New Zealand's exporters as that offered by TPP, for which there are two reasons: Firstly, RCEP includes economic and geopolitical rivals like China, India, Japan and Korea, which considerably lowers the level of

market openings being on offer in the agreement. Secondly, RCEP offers little new substantive market access for New Zealand's exporters because it basically binds together existing free trade agreements and because New Zealand already has FTAs with all parties involved (provided that TPP-11 comes into force and that the pending free trade agreement with India is concluded).

The strategic relevance of European Union free trade agreements

European Union free trade agreements in the Asian region will advance with the soon expected conclusion of the EU-Japan agreement, to be followed by the upcoming negotiations with Australia and New Zealand. Not only is the European Union one of the top five trade partners for New Zealand, but these EU free trade agreements with Asian economies could eventually merge into a major trade area, especially if the European Union manages to re-open and conclude its negotiations with ASEAN, which is currently being considered. An EU-centric 'hub-and-spoke' liberalisation of Asia could integrate regional supply chains across the Asia-Pacific region given sufficient flexibility of rules of origin to qualify for preferences.

This long-term potential needs to be kept in mind to avoid the EU-New Zealand agreement becoming another free trade agreement that merely addresses some market access issues and irritants which are unique to the EU-New Zealand relationship. In addition, following the demise of TTIP Europe is falling short of candidates with whom it can develop its new template for a next generation of free trade agreements, especially in areas like regulatory cooperation. The European Union cooperates in more areas with New Zealand than any other previous free trade agreement partner and their FTA is likely to raise the standard of European Union free trade agreements in areas of common interest, including technical barriers to trade, food safety standards and services.

Furthermore, New Zealand ought to consider in what ways the European Union free trade agreements also serve New Zealand's interests. Even a considerably weakened Europe still has negotiation leverage against third countries like the United States (in case TTIP makes a return), ASEAN or even China, if negotiations are attempted in the next decade. New Zealand could therefore exert an influence and open up remaining pockets of protectionism in third countries through the backdoor by shaping a new free trade agreement template with the European Union.

Although European Union free trade agreements cannot be compared to the long-term strategic function of TPP, they do play some role in consolidating global rule

of law, albeit slowly. In this context, New Zealand has made the right priorities in the wake of Brexit to prioritise a free trade agreement with the European Union over restoring its imperial preferences with the United Kingdom (UK). Britain's post-Brexit free trade agreements may take a very long time to emerge – if ever – and the UK is unlikely to be unscathed from leaving the European Union. The more competences the United Kingdom withdraws from the Single Market to pursue its own free trade agreements, the more economically weakened – and thereby less attractive – the United Kingdom becomes as a trading partner.

New Zealand's role in the new trade architecture

Although New Zealand is only a medium-sized economy, it has shown on several occasions – from the agricultural negotiations at the WTO, to the conception of the TPP – that it can provide thought leadership and make a decisive contribution to move discussions in international trade forward. As it is now involved in all main ongoing negotiations, it can pull the strings and play a role in determining how these agreements are designed and how these trade initiatives relate to each other.

Of particular importance is the relationship between the Asian initiatives: TPP, RCEP and New Zealand's bilateral upgrades of its free trade agreements with China and selected ASEAN partners. There is a political imperative in negotiating TPP-11 first to adjust and align it even closer to New Zealand's interests before the United States may re-enter into the agreement. Failure of TPP-11 will also strongly influence RCEP and the European Union negatively – leaving the agenda-setting power to New Zealand's stand-alone bilateral free trade agreements which can only exercise limited impact on global governance.

However, in all scenarios New Zealand's preferential access to United States markets is left outstanding. While Australia concluded its controversial free trade agreement with the United States in 2004, negotiations with New Zealand are not yet in the works. Given the uncertainties surrounding the policy priorities of the current United States administration, it is impossible to foresee whether such a free trade agreement is a likely prospect, or what the landing zone of such endeavour would be. In fact, considering the renegotiation of NAFTA and the United States' priority put to negotiating a bilateral FTA with Japan (which the administration wants to put in place instead of the original TPP), and US trade negotiators' aversion to undertake parallel negotiations, the prospects for a US-New Zealand free trade agreement seem rather dim under the current political cycle. Also, the question is whether it would be in New Zealand's interest to negotiate its outstanding issues on agriculture with a hard

mercantilist White House which values its partners strictly on the basis of how much United States goods it imports.

This leaves the question of Europe's role. Brussels is highly prone to parallel negotiations based on its own template and will negotiate free trade agreements with Australia and New Zealand simultaneously. Most likely, the European Union will progress more rapidly with New Zealand than with Australia given the many more sticking points in the negotiations with the latter. Brussels is also inclined to opening negotiations with the smaller – and thereby less threatening or more flexible – counterparts first. Despite the prospects of a rapid conclusion with the world's largest economy, it would, however, be a mistake to choose speed over substance in a New Zealand-EU free trade agreement. It is more important to work towards the long-term goal of grounding the European Union in the free trade camp and pursue common interests towards third countries.

Given the complementarity and the pre-existing regulatory cooperation, New Zealand-EU negotiations might offer a realistic chance to upgrade European Union free trade agreements into advanced instruments for global governance of similar grade as the TPP. Most of Europe's free trade agreement partners prior to New Zealand are countries which generally did not bring forth ambitious disciplines or innovative new concepts in their FTAs. Meanwhile, the negotiations who follow New Zealand in the European Union's negotiation queue are highly complex with high risks of failure; for example, region-to-region negotiations with ASEAN and with Mercosur. However, the EU-New Zealand relationship is not void of issues: Agriculture is a sensitivity for Europe in any trade negotiation, especially under the current market conditions where European Union subsidies to the dairy sector are being scaled down while market prices are still depreciated.

In conclusion, a very small group of countries - which includes New Zealand - are part of TPP and RCEP, while also negotiating a European Union free trade agreement. These countries are like an adhesive which can tie several imperfect or incomplete initiatives together by keeping the key disciplines consistent across regions, independently of whether trade liberalisation occurs on a regional basis or through 'hub-and-spoke' bilateralism. For the time being, this adhesive may be the substitute of global economic governance in a post-WTO and post-American trading system.

3: On Trade in the Shadow of History

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In the wake of the United States withdrawal from the Trans-Pacific Partnership (TPP), many are now asking 'What now for international trade?', or even more pointedly, 'What now for globalisation?' Under different circumstances, the international economic order of recent decades might have been primarily associated with the remarkable achievements in poverty reduction across the developing world. Instead, the cause of global economic integration is increasingly seen as an elite project, disconnected and dismissive of popular concerns. Each month seems to bring a fresh challenge to the causes of openness, liberalism and multilateralism.

That said, the extent of the opposition to globalisation in general is often overstated. The TPP has plenty of opponents from various perspectives, but few of them support President Trump's apparent inclination to wind back the global trading system further. Furthermore, it is simplistic to treat Trump and Brexit as the transatlantic branches of a unified backlash against globalisation. The leaders of the latter have made it quite clear that they will pursue as close a trading relationship with the Continent as their opposition to open migration will allow. Concerns about the long-term implications of Trump's TPP opposition often implicitly invoke the so-called 'bicycle theory of trade' – the idea that failure to continue to liberalise trading relations risks an inevitable backslide toward protectionism. However, this theory has little basis in reality. 2016 was a tumultuous year, but it does not seem to signal a lasting coalition in favour of protectionism.

Nonetheless, we find ourselves at an interesting juncture. The task of liberalising traditional trade barriers, in the form of tariffs and import quotas, was largely achieved some time ago. As Subramanian and Kessler note, 'The US International Trade Commission ... estimates that the welfare gains in the United States from eliminating all remaining tariffs are close to zero.'¹⁰ Where barriers do remain, in the developing world, in the services industry and in agriculture (to New Zealand's continued frustration), proponents of greater openness are likely to face continued opposition.

As a small nation, New Zealand has a natural interest in a rules-based system of trade, and any threats to our existing access to international markets – for instance, through the World Trade Organisation (WTO) – would be a concern. Yet there is reason to be sceptical of the relentless pursuit of ever-deeper integration. Any potential gains through the harmonisation of different rules between countries (which made up the bulk of the TPP's fairly modest projected benefits) run the risk of colliding with

⁹ The author would like to thank Robert Wade, Brian Easton, Lovisa Möller, Julianne Molineaux and David Hall for helpful comments on this essay.

¹⁰ Subramanian, A., & Kessler, M. (2013). *The hyperglobalization of trade and its future*. Peterson Institute for International Economics Working paper 13-6, p.10.

legitimate national differences in values that lie behind them. Such efforts might further stoke the antipathy of sections of the public that are already uneasy with the degree to which control over their lives has been ceded to out-of-reach global forces.

If one accepts that further trade liberalisation largely promises marginal gains and greater difficulty, but that the process of globalisation that has brought us this far would be painful to wind back (and disastrous for the developing world focused on export-led growth), then globalisation itself is clearly not a yes/no question. Rather, we need to consider how we can better manage the inevitable fact that the citizens of the world now live in one another's pockets to a much greater degree than in the past. Almost inevitably, this involves considering how we can lessen the asymmetry between the global reach of markets and the national scope of governments.

The past as a vague guide

To some, discussions of how well the global *system* of trade works might seem strange to those who think of trade in terms of a competition between countries. Yet the global economic system has, by design or evolution, taken a number of distinct forms over the past several centuries; some of which have worked better than others in terms of balancing global integration with human wellbeing at the national level. This is true in terms of the effective operation of the system without intermittent crisis, but also in terms of the degree of domestic interventionism involved, which has acted to cushion the blunter edges of global capitalism.

Although these stages have differed in the constraints placed on the flows of goods, services and capital across borders, all have met Krasner's definition of an international regime, being a set of, 'implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge'.¹¹

It is telling to recall that as the roots of the post-WWII economic order were being put down during the 1944 Bretton Woods conference, trade was by far the weakest of the three institutional pillars that were established. A planned International Trade Organisation, which would have sat alongside the International Monetary Fund (IMF) and World Bank, never came into being. Instead, it took until the establishment of the WTO in 1995 until global trade had an organisational form that matched the ambition of globalisation's cheerleaders. This lag of more than 50 years was not due to anyone forgetting about the potential benefits of trade; rather, the memory of how sharply global economic turmoil can tear at the social fabric of domestic polities meant that restoring the pre-1914 liberal order was a secondary priority.

¹¹ Krasner, S. D. (1982). Structural causes and regime consequences: Regimes as intervening variables. *International Organization*, 36(2). doi: <https://doi.org/10.1017/S0020818300018920>. President Trump's reference to the 'fairness' of other countries' trade practices suggests an expectation of reciprocal obligations (though his specific targets may be somewhat misguided).

The Bretton Woods regime only lasted until 1973, before its internal contradictions began to outweigh the willingness of its participants to prop it up.¹² But it is the common purpose underpinning that system, rather than its specific structures, that ought to serve as a guide to a more effective global system. Ruggie termed this post-war regime, 'embedded liberalism', drawing on Polanyi's original account of the pre-1914 liberalism being 'disembedded' in the sense that integrated global markets were pursued at the expense of national societal concerns. In contrast, the Bretton Woods regime would be a multilateral economic system 'predicated upon domestic interventionism', with institutional buffers and safeguards to provide states with the space to pursue national social and economic objectives (including full employment).¹³

An international order without order

We now have more than enough evidence that the current regime of deep global integration without corresponding governance at the global level has been a recipe for instability and recurrent crises.¹⁴ The issues outlined here are, admittedly, not necessarily those most likely to be on the placards of anti-globalisation protesters. They are, however, a significant source of the economic and social dislocation underpinning globalisation's current unpopularity.

In terms of the effectiveness of the current global system, a number of key issues stand out. The system lacks an effective mechanism to deal with persistent current account imbalances – countries persistently exporting more than they import, and (as a necessary corollary) other countries importing more than they export.

As John Maynard Keynes had identified after the global trading system broke down during the 1930s, there is a crucial asymmetry between the two situations. Countries running a current account deficit are reliant on international creditors continuing to lend to them. The risk of a sudden change in investor sentiment that would lead to borrowing becoming more expensive (or not possible at all) means that these countries have a strong incentive to move back toward balance by spending less. Conversely, surplus countries face no corresponding pressure to make this process easier by spending more.

The result of this asymmetry is that the global economy overall suffers a deflationary bias, and higher unemployment. At the time of writing, this issue is felt most acutely in Europe, where Germany's current account surplus (estimated at 8.5 per cent of GDP for 2016) makes it much more difficult for debtor Eurozone countries in southern Europe to regain competitiveness.¹⁵

¹² For a detailed discussion of these efforts – particularly the 'gold pool' system, see Eichengreen, B. (2008). *Globalizing capital: A history of the international monetary order*. Princeton, NJ: Princeton University Press.

¹³ Ruggie, J. G. (1982). International regimes, transactions, and change: Embedded liberalism in the postwar economic order. *International Organization*, 36 (2), 393. doi: <https://doi.org/10.1017/S0020818300018993>

¹⁴ For instance, Laeven and Valencia identify 147 banking crises, 218 currency crises and 66 sovereign crises over the period of 1970–2011. Laeven, L., & Valencia, F. (2012). *Systemic banking crises database: An update*. IMF working paper 12/163. Retrieved from <https://www.imf.org/external/pubs/ft/wp/2012/wp12163.pdf>

¹⁵ International Monetary Fund. (2017). *World economic outlook, April 2017: Gaining momentum?* Retrieved June 6, 2017, from <http://www.imf.org/en/Publications/WEO/Issues/2017/04/04/world-economic-outlook-april-2017>

A related issue is that of the accumulation of foreign currency reserves by developing countries. In the lead up to the global financial crisis, Ben Bernanke pointed to a 'global savings glut' as a significant factor behind falling interest rates and the United States' own sizable current account deficit. Although oil exporters and a few aging advanced countries (Germany and Japan) also contributed to these global imbalances on the surplus side, much attention focused on the shift within East Asian developing countries, which, despite having much better investment opportunities, became net exporters of capital from the early 2000s onwards. This somewhat perverse state of affairs, with capital flowing from poor countries to rich, was a key macroeconomic enabler of the expansion of credit within the household sector of advanced countries prior to the global financial crisis.¹⁶

There are two key reasons for the accumulation of these surpluses by emerging economies – both of which are evidence that the current global trading system does not promote stable growth. For many of these countries, this is a strategy of self-insurance against a repeat of the sudden stop of capital inflows experienced during the Asian Financial Crisis of the late-1990s. The demands placed on the affected countries by the IMF, in return for emergency financing during the crisis, further strengthens their determination that such an episode never be repeated.¹⁷

The second reason is a broadly mercantilist development strategy – favouring export-led growth through undervalued currencies, and intervening in foreign exchange markets in order to keep their currencies from appreciating.¹⁸ China, whose account surplus reached US\$232 billion in 2006, was the most notable adherent of this approach.¹⁹ Dani Rodrik notes that this was effectively an implicit industrial policy, adopted after China's ascension to the WTO in 2001 required it to abandon its explicit industrial policy.²⁰

Today, the situation is much different. China's current account surplus has fallen below 2 per cent in 2016, and the country is now intervening to support, rather than devalue, the renminbi (which is also an issue of capital flight to countries with safer institutions).²¹ Still, as Barry Eichengreen and Peter Temin have noted, 'an exchange rate system is a system, in which countries on both sides of the exchange rate relationship have a responsibility for contributing to its stability and smooth

¹⁶ This point should not be overstated, however. Gross capital flows between high-income countries (and more specifically, their finance sectors) were much greater than net flows from poor to rich countries. Wolf, M. (2014). *The shifts and the shocks: What we have learned - and have still to learn - from the financial crisis*, pp. 159-170. New York, NY: Penguin Press.

¹⁷ Stiglitz, J. (2002). *Globalization and its discontents*. New York, NY: W.W. Norton & Company.

¹⁸ Subramanian and Kessler, 12.

¹⁹ Wolf, 160.

²⁰ Rodrik, D. (2011). *The globalization paradox: Democracy and the future of the world economy* (p. 155). New York, NY: W.W. Norton & Company.

²¹ Frankel, J. (2017, March 22). Mnuchin's Mission. *Project Syndicate*. Retrieved June 7, 2017, from <https://www.project-syndicate.org/commentary/mnuchin-trump-china-currency-manipulation-by-jeffrey-frankel-2017-03>

operation.²² There is little in the operation of the global economic system to suggest that states have solved the problem of balancing domestic obligations with international entanglements.

Toward a better globalisation

For many years, economic integration served the worthy goal of promoting multilateralism, and providing a degree of interdependence that made dealing with global issues easier. Now, as global trade negotiations are pursued with little regard for social legitimacy, the concern must be that deeper economic integration crowds out greater global governance around pressing challenges. In terms of global causalities of the Trump administration's isolationist tendencies, the withdrawal from the TPP is a trivial matter compared to the Paris Climate Change Agreement. It is telling that the European Union, where the theory of economic integration preceding political integration was the most explicit, now finds itself in a near-impossible bind of trying to salvage a workable path forward on political integration from the wreckage caused by its common currency.²³

As already noted, the specific structures of the Bretton Woods regime did not survive the twentieth century, and are likely to be even more difficult to revive today. More important are the values underpinning the system, which prioritised social and economic stability within countries over furthering the global reach of markets.

It is tempting for social democrats to focus solely on the domestic side of this embedded liberal equation. However, if greater social protection was all that was needed to allay contemporary unease around globalisation, the near-success of right-wing populists in France and Austria during 2016 and 2017 remains unexplained. A more convincing account is that the sort of insecurity felt by these voters cannot be repaired by a social safety net alone. Instead, this unrest goes to a perceived loss of control of one's own life to impersonal forces such as technology, global markets and the influence of multinational corporations. In this context, there is much greater value to be realised through improving the working of the existing global trade regime, rather than committing to deeper integration in pursuit of diminishing aggregate gains.

There are a number of areas where more effective governance of the global economic system would improve its functioning. Despite the long overdue United States acceptance of changes to the distribution of voting power within the IMF in 2016, the global lender of last resort has a long way to go before it truly reflects the shift of global economic

²² Eichengreen, B., & Temin, P. (2010). Fetters of gold and paper. *Oxford Review of Economic Policy*, 26(3), 383.

²³ Rodrik, D. (2017, March 14). How much Europe can Europe tolerate? *Project Syndicate*. Retrieved June 7, 2017, from <https://www.project-syndicate.org/commentary/juncker-white-paper-wrong-question-by-dani-rodrik-2017-03>

power toward developing countries.²⁴ Mohamed El-Erian has recently written about reinvigorating the IMF's Special Drawing Rights, a reserve asset that consists of a basket of major global currencies (including the renminbi, as of 2015). This measure could help satisfy developing countries' needs for reserves, and the global system's need for liquidity, with fewer of the difficulties seen in recent years.²⁵

Global economic governance alone is unlikely to be sufficient. A more effective globalisation must also entail greater diversity between nations, and a renewed commitment by policymakers to respond to the concerns of citizens. Rodrik advocates an explicit focus on 'policy space'. This applies not only to rich countries looking to buffer domestic industries and help workers transition between sectors, but also to a greater leeway provided to developing countries to promote industrialisation without running afoul of restrictive global rules.²⁶ To insist instead that national regulations must be 'harmonised' regardless of differences in norms and social priorities from country to country, or that international investors should be treated as a privileged class above domestic companies, risks a deeper and more destructive backlash against globalisation than we have seen to date.

Admittedly, the approach outlined here is ambitious, and certainly beyond the power of one small country (though the same could be said for any multilateral effort, the TPP included). Opportunities to reshape the international economic system, à la 1944, do not come along very often, but it is important that countries have a clear idea of where the global system is in need of reform, and where our resources should be best directed. To quote Larry Summers, himself a long-standing free trade advocate and an influential figure in the advances of the 1990s, 'there needs to be a balancing of the political costs of legislating trade agreements against those of other forms of internationalism. If a small fraction of the U.S. political capital that has been devoted to the Trans-Pacific Partnership had instead gone to support reform of the International Monetary Fund and adequate funding for international financial institutions and the United Nations, these objectives could have been attained – and with greater benefits than the TPP will deliver'.²⁷

²⁴ Vestergaard, J., & Wade, R. H. (2015). Still in the woods: Gridlock in the IMF, and the World Bank puts multilateralism at risk. *Global Policy*, 6(1), 1-12.

²⁵ El-Erian, M. (2017, April 24). New life for the SDR? *Project Syndicate*. Retrieved from <https://www.project-syndicate.org/commentary/reinvigorating-special-drawing-rights-by-mohamed-a--el-erian-2017-04>

²⁶ Rodrik, D. (2016, September 17). Put globalization to work for democracies. *New York Times*. Retrieved June 10, 2017, from <https://www.nytimes.com/2016/09/18/opinion/sunday/put-globalization-to-work-for-democracies.html>

²⁷ Summers, L. (2015, June 14). Rescuing free-trade deals. *Washington Post*. Retrieved June 10, 2017, from https://www.washingtonpost.com/opinions/rescuing-the-free-trade-deals/2015/06/14/f10d82c2-1119-11e5-9726-49d6fa26a8c6_story.html?utm_term=.0715ef17416d

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Summers, L. (2015, June 14). Rescuing free-trade deals. *Washington Post*. Retrieved June 10, 2017, from https://www.washingtonpost.com/opinions/rescuing-the-free-trade-deals/2015/06/14/f10d82c2-1119-11e5-9726-49d6fa26a8c6_story.html?utm_term=.0715ef17416d

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Wolf, M. (2014). *The shifts and the shocks: What we have learned - and have still to learn - from the financial crisis*. New York, NY: Penguin Press.

4: On Rethinking the Pros and Cons of Free Trade Agreements

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'The first thing you need to know is that almost everyone exaggerates the importance of trade policy' (Paul Krugman, 2015).

'Free trade assumes that if you throw men out of work in one direction you re-employ them in another. *As soon as that link is broken the whole of the free-trade argument breaks down*' (John Maynard Keynes, 1930. Emphasis added.)

'Businesses, especially international ones, have ever greater resources, and in Europe they have acquired the ability to compete with states ... Politicians' real impact on the economic life of a country is more and more limited. *Fortunately.*' (Bernard Arnault, CEO of French luxury group LVMH, ranked 10th richest person on earth in 2000, when he spoke. Emphasis added.)

'People have to choose between heating their homes, buying food or buying health care and you want them to worry about the survival of the planet or transgender stuff? I respect business and I distrust government. That's the American way. I don't want illegal immigrants taking our jobs....White lives matter, too, you know. That woman forgot that - and lost. We lost our discipline and our moral code in this country. *So we need honest Trump to shake things up.*' (Trump supporter cited in Roger Cohen, 2017, 'Americans, let's talk', *New York Times International*, May 31. Emphasis added.)

Since the 1990s major states have attempted to negotiate four mega trade agreements - 'mega' because they cover a significant proportion of world trade, and because they require member states to make changes *deep within* national society. The member states have to 'harmonise' with each other just about all national laws or institutions which even indirectly affect trade and foreign investment. First came the North American Free Trade Agreement (NAFTA), between the United States, Canada and Mexico, which came into force in 1994 and which governs trade between the three countries to this day. Next came the fully multilateral Doha Development Round under the auspices of the World Trade Organisation, involving over 150 countries, starting in 2001. It has been on life support for many years, with no final agreement. The global financial crisis of 2008 and the ensuing recession rendered it comatose.

²⁸ Thanks to John Ravenhill for comments on an earlier draft. I dedicate this paper to the memory of Sir Frank Holmes, professor of Economics at Victoria University, and to the very present Helen Sutch, economist, old friend and former Chancellor of Victoria University.

The mega-regionals, TPP and TTIP

The two major trading blocs – the United States and the European Union – then turned to smaller and hopefully easier bilateral or regional agreements, notably the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP).²⁹

Inspired by NAFTA and especially by their respective bilateral agreements with South Korea, the United States and European Union negotiators calculated that the TPP and TTIP would allow them to secure rules – on trade, investment, capital flows, intellectual property protection, state-owned enterprises, public procurement, and more – which set conditions of access to their markets (the biggest and most sophisticated in the world) not just for the other signatory states but for the rest of the world. *The TPP and TTIP would in effect set the framework for later global rules.* China and India, in particular, would have no option – in order to maintain their global trade – but to sign on to rules set mostly by the United States and the European Union. The frameworks would help the US and EU protect their established industries (providing them with larger markets abroad, legal protection of their foreign investment, legal protection of their intellectual property, good access to foreign public procurement, and more) while making it more difficult for new entrants to compete against them in their home markets. In particular, the objective was to help western multinational companies manage their cross-border regional value chains more efficiently, with minimal changes having to be made on account of different rules and institutions in different countries. This objective was described in the negotiations as ‘trade facilitation’ and ‘investment facilitation’, the word ‘facilitation’ implying a level playing field for all companies.

The TPP, which excluded China and India, also aimed to bind its East Asian, Pacific and Latin American member states more closely into the United States military and economic power structure, bolstering US leadership vis a vis China. Once the TPP was in place, both the United States and the European Union would be in a stronger position to negotiate trade agreements with rising China and India and get more favourable terms of access to their markets than without it (for example, making China to agree to cut privileges to its state-owned enterprises). The official literature glossed this as, ‘[the TPP is] a next-generation transformation agreement’ that includes ‘new cross-cutting issues.’

As this suggests, trade agreements are normally about inter-state and inter-corporate power structures as much as about efficient use of resources. The unspoken deep purpose of the TPP and TTIP was to reinforce the core western economies’ position in the existing core-periphery structure of the world economy, with the public justification that, ‘free trade brings mutual benefit, not conflicting interest’.

²⁹ This paper draws on Wade, R. H. (2017). Is Trump wrong on trade? A partial defence based on production and employment. *Real-World Economics Review*, 79. See also Wade, R. H. (2014). Current thinking about global trade policy. *Economic and Political Weekly*, XLIX(6), 18-21; and Wade, R. H. (2014) Market versus state or market with state: How to impart directional thrust. *Development & Change*, 45(4). Retrieved from <http://onlinelibrary.wiley.com/doi/10.1111/dech.12099/pdf>

However, the fate of these two mega regional agreements is uncertain as of 2017. During the Obama administration Republicans blocked ratification of TPP because it did not give enough on what they wanted, especially intellectual property protection for pharmaceuticals; and the incoming Trump administration withdrew from it altogether in January 2017. Business interests have been split on whether and what to support, split as between: (1) exporting and non-exporting companies, (2) big pharma and producers of generics, (3) producers of digital materials and open source producers, (4) owners of intellectual property and consumer groups in health systems, universities, and more. Civil society groups mobilised against the TPP and the TTIP, though their governments mostly ignored the protests.³⁰

The TPP parties minus the United States are continuing to negotiate an agreement, in the hope of countering the new China-led Regional Comprehensive Economic Partnership (RCEP), whose negotiation started in late 2012. The latter includes many of the parties to the TPP and also India, while it excludes the Americas. By late 2016 it had arranged some 15 rounds of negotiations. China sees it as one component of its massive 'One Belt, One Road' initiative to construct infrastructure and create 'infrastructure alliances' (in lieu of military alliances) across 60 countries – to accelerate its rise up the global economic and political hierarchy.

The economic rationale of free trade agreements

On the face of it, the lack of enthusiastic consensus for the Doha Development Round and the later mega-regionals is surprising. Trade obviously brings benefits, and more trade should bring more benefits. The key point is that people in one country want to consume a wider mix of goods and services – including more varieties of the same product (for example, cars) – than can be produced at home more cheaply than imports. Countries therefore tend to export goods whose production makes intensive use of resources (including land, labour, skilled labour, capital) which are abundant at home, and import goods whose production requires resources which are relatively scarce at home. A country with trade barriers blocks this efficiency-raising mechanism and imposes higher costs on its population ('puts rocks in its own harbour'). A country which lowers its trade barriers tends to raise its specialisation of production, exports and employment in the resource-abundant products, so the returns to the abundant resources tend to rise relative to the returns to the scarcer resources. Therefore, free trade is best for each country and the world, because it enables maximum consumption from a given stock of resources.

If only it were so simple. The underlying argument to justify a policy of free trade rests on a raft of assumptions so unreal as to make it a poor guide to public policy. Here are four of the assumptions.

³⁰ Ravenhill, J. (2016). The political economy of the Trans-Pacific Partnership: A '21st century' trade agreement? *New Political Economy*, 1-22. doi: <http://dx.doi.org/10.1080/13563467.2017.1270925>

Flaws in the rationale: The assumption of full employment

The above argument (known as the theory of comparative, or relative, advantage) assumes that when two or more countries lower their tariffs to each other (and move towards harmonising their laws and regulations, including on foreign investment) they all maintain full employment. This assumption rules out 'transitional costs' of increased exposure to trade, and there by *avoids a trade-off between the welfare gains from trade and the welfare losses from unemployment or precarious employment*. John Maynard Keynes made the point in a memo to the Macmillan Committee on Finance and Industry in 1930: 'Free trade assumes that if you throw men out of work in one direction you re-employ them in another. *As soon as that link is broken the whole of the free-trade argument breaks down*' (emphasis added).

The assumption that full employment is maintained means that the argument implicitly sides with *consumers, not with employees* or others whose income would be threatened by unrestrained imports. It is as though the 'Walmart effect' of cheap imported consumer goods eclipses the employment losses associated with rising imports of manufactured goods (now amplified by post-2008 fiscal austerity).

The unreality of the constant full employment assumption is brought out in recent research by David Autor, David Dorn and Gordon Hanson. They study the effects of 'the China shock' that began in the early 1990s in the form of a surge of manufactured exports to the United States. They find that,

'Alongside the heralded consumer benefits of expanded trade are substantial adjustment costs and distribution consequences... Adjustment in local labor markets is remarkably slow, with wages and labor-force participation rates remaining depressed and unemployment rates remaining elevated for at least a full decade after the China shock commences... At the national level, employment has fallen in U.S. industries more exposed to import competition, as expected, but offsetting employment gains in other industries have yet to materialise.'³¹

They calculate that about 55 per cent of job losses in United States manufacturing between 2000 and 2007 was caused by 'rising exposure to Chinese import competition' (as distinct from 'technological change'), and 33 per cent in the earlier period between 1990 and 2000.³²

More evidence on the slowness of labour market adjustment comes from OECD figures on unemployment since the global financial crisis in 2007-2008. As of 2015 some 44 million people were unemployed and wanting work in the OECD, 37 per cent higher than the rate before 2007.

³¹ Autor, D., Dorn, D., & Hanson, G. (2016). *The China shock: Learning from labor market adjustment to large changes in trade*. National Bureau of Economic Research working paper no.21906. Retrieved from www.nber.org/papers/w21906. Emphasis added.

³² Autor, D., Dorn, D. & Hanson, G. (2013). The China syndrome: Local labor market effects of import competition in the United States. *American Economic Review*, 103(6), 2121-68, at 2139.

The mainstream response prescribes fiscal austerity and job retraining, as though the cause of high unemployment is labour market rigidity plus overgenerous welfare benefits. This is like saying that when 100 dogs are let into a room where 95 bones have been hidden, the five dogs who emerge without a bone have insufficient bone-finding skills and insufficient motivation, they need more training and less initiative-sapping welfare benefits. Alarming, the European Union takes these primitive economic ideas as its bible, and the new Macron-Merkel axis is turbo-charging them across the continent, as though we are still living in the era before 1936 when Keynes published *The General Theory of Employment, Interest and Money*.

Flaws in the economic rationale: The assumption that free trade does not raise income inequality

A second assumption of the free trade argument is that the move to free trade does not cause higher income inequality. The theory accounts only for *aggregate* income or consumption gains from trade. To see the significance of its neglect of effects on income distribution, consider an example from Ian Fletcher.³³ A country lowers trade barriers, then exports more aircraft and imports more clothes, in line with its comparative advantage. Its Gross Domestic Product (GDP) goes up, and economists, politicians and business leaders declare import liberalisation a success. But for each million dollars of production, clothing requires one white collar worker and nine blue collar workers, while aircraft require three white collar workers and seven blue collar workers. So demand for white collar workers goes up, demand for blue collar workers goes down; and their wages move in the same direction. Since most workers are blue collar, most workers face a fall in their employment conditions, even as GDP goes up, thanks to free trade moving the economy's production structure closer in line with its comparative advantage.

Of course, the economist's standard response is that (1) the aggregate gains in income will be sufficient for the losers (the blue collars) to be fully compensated; and (2) the economics profession's endorsement of free trade ends with the gain in *overall* income, and it is up to politicians to decide the distribution of the gains. According to this response, economists have no scientific basis on which to make an equity judgement, while they do have a scientific basis to prescribe ways to improve efficiency. We know how this story about compensating losers ends in practice.

³³ Fletcher, I. F. (2010). Free trade doesn't work: *What should replace it and why* (p. 109). Washington, D.C: United States Business and Industry Council.

Flaws in the economic rationale: The assumption that gains in efficiency will yield increases in long-term growth

A third assumption is that a country's short-term gain in the efficiency with which its resources are used (due to trade liberalisation) will translate into higher long-term growth. But this is unwarranted, because *the theory deals only with the effect of moving to free trade on a country's use of existing resources. It is silent on the effects of the reallocation of existing resources on future resources and future growth.* If the reallocation results in the country moving out of activities rich in employment or high technology spillovers into other activities, it can harm growth.

NAFTA, which came into force in 1994, is a case in point. Proponents of the agreement promised big benefits and small costs. United States workers undertook mass protests against it, accurately forecasting large-scale job losses at home, to no avail. Barack Obama, before being elected US president in 2008, declared, 'entire cities have been devastated by trade pacts. I don't think NAFTA has been good for America, and I never have.'³⁴

NAFTA has brought large income and wealth gains to shareholders and top executives of United States and Canadian multinational corporations and their dependent Mexican counterparts. It has also stimulated foreign direct investment into Mexico, and manufactured exports from Mexico. But Mexico's growth has been sluggish since the 1990s, behind most other countries in Latin America. Net employment actually fell (due especially to imports of *subsidised* United States agricultural produce knocking out employment in agriculture). Average real wages have fallen to the point where the average real wage in Mexico City is below Shanghai, and the wage gap between US and Mexican wages has risen, incentivising large-scale migration to North America. In a recent poll in Mexico, only 20 per cent of respondents believed that NAFTA had been good for Mexican consumers and businesses. The Mexican economist Gerardo Esquivel noted, 'as a development strategy, it should have led to higher sustained growth, generated well-paid salaries and reduced the gap between Mexico and the United States. It has remained well below what was hoped for.'³⁵

Of course, the fault is not all NAFTA's. The government and the domestic private sector failed to increase investment in R&D, regulations remain burdensome, and banks have lent less than their Latin American counterparts, leaving small and medium enterprises scrambling for credit.

Like NAFTA, the Doha Development Round, which commenced in November 2001, was initially justified by calculations showing very large increases in global GDP. But as the negotiations wore on, analyses of the likely effects produced smaller and smaller gains for the world economy as a whole – divided between big gains for China and

³⁴ Quoted in Thornton, S. (2008, March 31). Trade pact smoulders in fiery campaign. *Australian Financial Review*. Retrieved from www.afr.com

³⁵ Ahmed, A. & Malkin, E. (2017, January 6). Mexico doesn't feel like winner in trade deal. *New York Times (International)*, p. 1.

for the most developed countries, and *net costs for many developing countries* (for example, loss of unskilled jobs in manufacturing).³⁶ As this likely outcome became clear, developing country governments and civil society organisations in developing and developed countries started to dig in their heels.

Beyond the experience of NAFTA and the modelling of the Doha round, Paul Krugman concludes on the basis of many empirical studies: '*The first thing you need to know is that almost everyone exaggerates the importance of trade policy*' (emphasis added).³⁷ This is a surprise coming from an economist who won the Nobel Prize in Economics for his work on trade theory.³⁸

Dani Rodrik affirms that, 'Countries that have done well in the post-war period are those that have been able to formulate a *domestic investment strategy to kick-start growth* and those that have had the appropriate institutions to handle external shocks, not those that have relied on reduced barriers to trade and capital flows.'³⁹

Francisco Rodriguez summarises literature on the link between openness and growth, and finds that six major measures of openness are only weakly if at all correlated with growth (and the causality could go both ways). Also, most growth accelerations are not correlated with trade openings.⁴⁰

Flaws in the economic rationale: The assumption that trade remains balanced

We have now seen that three key assumptions underlying the policy of free trade are empirically not well supported. We can also note in passing a fourth dubious assumption, that trade between liberalising trade partners remains balanced throughout thanks to exchange rate adjustments. Countries running current account deficits will experience exchange rate depreciation, which will boost exports, reduce imports, and curb the current account deficit. Countries running current account surpluses will experience the opposite. But New Zealand and the world have much experience of foreign exchange markets driving exchange rates in the *wrong* direction to produce current account balances, and of governments manipulating exchange rates and suppressing wages to secure competitive advantage, forcing other economies to run deficits.

³⁶ Polaski, S. (2006). *Winners and losers: Impact of the Doha Round on developing countries*. Washington, D.C.: Carnegie Endowment for International Peace.

³⁷ Krugman, P. (2015, March 11). TPP at the NABE. *New York Times*.

³⁸ It should be known as the 'so-called Nobel Prize in Economics'. See Mirowski, P. (2015). The neoliberal ersatz Nobel Prize. Unpublished paper for presentation to conference on The Road from Mont Pelerin II.

³⁹ Rodrik, D. (1999). *The new global economy and developing countries: Making openness work*. Overseas Development Council policy paper 24, p. 93. Washington, D.C.: Overseas Development Council. <https://drodrik.scholar.harvard.edu/publications/making-openness-work-new-global-economy-and-developing-countries> Emphasis added.

⁴⁰ Rodriguez, F. (2007). *Openness and growth: What have we learned?* United Nations Department of Economics and Social Affairs DESA working paper 51. <https://shop.un.org/books/desa-working-paper-no51-61937>

Conclusion

We have to conclude, in light of all these unrealistic assumptions, that the theory justifying free trade policy does not survive much scrutiny. But my argument should not be construed as 'anti-trade'. Free trade, in the sense of low tariff and non-tariff protection, is the sensible rule of thumb in most sectors most of the time. It is sensible because the efficiency gains are often real, even though the theory of comparative advantage over-generalises them; and because it is a simpler rule for any state and for inter-state agreements than rules for managed trade.

But trade agreements have to recognise the legitimacy of some of the opposition coming from farmers, workers, small businesspeople, consumers, environmentalists and human rights activists; and from the populations living in regions of countries which are backwashed by fast trade liberalisation while other regions benefit (think of the English Midlands compared to London and the southeast). This may sound obvious, but the fact is that trade agreements so far have neglected the vertical and regional distribution of income and consumption gains, on the optimistic assumption that 'in the end' all will be better off – that 'a rising tide lifts all boats', rather than 'a rising tide lifts yachts but not rowboats'.

All inter-state agreements imply some sacrifice of national autonomy. Agreements on health, environment, human rights, refugees, development, tax evasion, minimum top marginal tax thresholds and the like, have a high potential for mutual gains between the signatory states; they should be encouraged in the spirit of 'cooperative internationalism'.

However, liberalisation agreements on trade, investment, capital mobility and other domains of economics and finance typically have far-reaching, more ambivalent effects on the structures of production, employment and income distribution in which national populations live. They express the spirit of 'deep integration' or 'integrative globalization', *as though the aim is to make the whole world into one economic country, in which each state has no more control over flows of goods, services and people across its borders, or the stocks of foreign investment claims on its assets, than US states have over theirs.*⁴¹ The assumption is that 'everyone will eventually win', that 'mutual benefit' will far exceed 'conflicting interests', if governments limit themselves to improve the conditions for *exchange* in national and international markets, and let the *production* and *employment* structures develop as they will (*laissez-faire*) on the basis of uncoordinated investment decisions by private profit-seeking firms competing in fully open markets. See Bernard Arnault's remark in the third epigraph.

⁴¹ I take 'cooperative internationalism' and 'integrative globalization' from Dunkley, G. (2016). *One world mania: A critical guide to free trade, financialization and global integration*. London, England: Zed Books.

United States rhetoric about its own 'free market' policies reflects the same assumption. But as I show in 'The American paradox: ideology of free markets and hidden practice of directional thrust' (2017), the US state has for decades implemented a relatively decentralised and quite effective investment and innovation 'network-building' policy (industrial policy by another name), below the radar of political and academic attention.⁴² On the other hand, the state has also for decades let whole sectors, whole regions, to 'the market', with results expressed in the fourth epigraph.

When assessing effects of 'trade agreements' it is important to remember that these days they are not mainly about stimulating trade. They are more about facilitation of foreign investment, which for the most part means facilitation of investment by western multinational corporations in other countries. The accumulation of so-called free trade agreements, with their investment clauses, is building up a body of international investment law favourable to *western* firms, especially through clauses on 'investor versus state dispute settlement' (ISDS) and through case-by-case judgements about investor-state disputes, such as those before arbitration panels under the World Bank's International Centre for Settlement of Investment Disputes (ICSID).

Good trade and investment agreements have to be structured so as to allow more 'policy space' for participating governments than hitherto; which means less of a drive for harmonising laws and regulations (for example, more scope for state subsidies to help restructure industries on the verge of being knocked out by imports, and more scope for governments to deploy capital controls to restrain hot money inflows and outflows). Trade agreements should be regarded not as the core of – let alone a substitute for – national development strategy, as they often are, but as one part of a larger strategy in which the state imparts some directional thrust to the economy and takes care to keep income and employment inequalities within check. Inter-state agreements, including WTO rules, should be revised to aim at 'shallower' rather than 'deeper' integration, and permit more government 'leadership' and 'followership' of the market – sometimes by leading the production structure into activities the private sector would not undertake on its own (leadership), sometimes by making bets on initiatives already underway in the private sector to assist those initiatives to scale up (followership).^{43, 44}

But the first step is to dispense with the saturated scorn with which managed trade and investment is dismissed – by mainstream economists, conservative politicians, some business leaders, and *The Economist* and *The Financial Times* – as 'protectionism'.

⁴² Wade, R. H. (2017). The American paradox: Ideology of free markets and the hidden practice of directional thrust. *Cambridge Journal of Economics*, 41(3), <https://doi.org/10.1093/cje/bew064>.

⁴³ Wade, R. H. (1990). Industrial policy in East Asia: Does it lead or follow the market? Chapter 9 in Gereffi, G. and Wyman, G. (Eds.), *Manufacturing miracles: Paths of industrialization in Latin America and East Asia*. Princeton, NJ: Princeton University Press.

⁴⁴ Wade, R. H. (2003). What development strategies are viable for developing countries? The World Trade Organization and the shrinking of 'development space'. *Review of International Political Economy*, 10(4), 621-44.

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5: On a People-Friendly Globalisation

Bill Rosenberg, economist, New Zealand Council of Trade Unions⁴⁵

With the backers of the Trans-Pacific Partnership Agreement (TPPA) struggling to keep it alive, it is time to think about what a good alternative – and what people-friendly globalisation – would look like. This will require much more than simply taking the same model and adding on a few weak labour and environment chapters as the TPPA did. The whole framework needs to be changed.

The TPPA failed not just because Trump withdrew. There was a huge international movement against it. Per capita, few countries had stronger opposition than New Zealand with tens of thousands of people in public protests; a 2015 3 News poll showed 54 per cent of voters disagreeing with the TPPA. All credible candidates for the United States presidency opposed it. The European Union-US equivalent, the Trans-Atlantic Trade and Investment Partnership (TTIP), is in a similar state due to widespread popular opposition, particularly in Europe. These facts will not change even if some of the remaining 11 parties to the TPPA negotiations manage to resurrect it in some more limited form.

Clearly we have reached a watershed in the development of such agreements. Despite this, there are many governments still in denial. The New Zealand government as much as any has its head in the sand. The Minister of Trade is using the weakest of political excuses: that the New Zealand public just didn't understand. All that was needed was more pro-TPPA roadshows and more business support. It is in various stages of negotiation for a raft of new agreements in the same model: the Trade in Services Agreement (TiSA), Regional Closer Economic Partnership (RCEP), India, PACER Plus, the European Union, and Sri Lanka (the latest suggestion). It has asked to join the Pacific Alliance, an agreement between Mexico, Colombia, Peru and Chile. There are likely to be proposals for bilateral agreements with the United States and Mexico.

Wouldn't it be more sensible to press the pause button and ask why there is growing opposition internationally, and how the nature of these agreements should be changed to address these concerns? Here, I offer some ideas as to what a more progressive path would look like.

⁴⁵ An earlier version of this essay was published in the *CTU Monthly Bulletin*, no. 186 (February 2017).

What is the problem?

At the heart of public concerns – whether it is about the impact of these agreements on medicine prices, public health, labour rights, the environment, privacy, the power of overseas investors, migration (less so in New Zealand), food standards, or inequality – is the same debate we constantly have at a national level over the tensions between different objectives and priorities.

We want more and better jobs and incomes – but that can conflict with environmental protection and the limits to resources. Capitalism can help by being dynamic and (sometimes) innovative – but it can also suppress people's needs such as their rights at work, good jobs and a healthy and safe environment. Rapid growth in firms may be easier in the short run when they don't have to take account of the impacts of their decisions – whether internally such as the fair treatment and safety of their employees, or externally such as the impact of their activities on people's health and the resources they consume – but we value those outcomes just as we value the goods and services produced by firms. The rules made to ensure good outcomes in the face of these conflicts frequently come up against the economic interests of those who think they can make more money with fewer rules, which leads to conflicts between democratic rights and commercial power. We have institutions that are set up to debate and decide (not always effectively) among these conflicting priorities: elections, parliament, local government, government agencies, the court system, media, unions.

There are very different frameworks for weighing these conflicts and tensions. To oversimplify two of them: neoliberalism is the idea that, left to itself with just enough intervention to make sure it works efficiently, the 'market' will resolve such conflicts in everyone's best interests as long as government keeps out of the way. It has little way to handle matters such as fairness, income inequality or 'immeasurables' such as a pleasant environment to live in. Social democracy accepts capitalism as the basis for the economy but sees a strong role for government as necessary to ensure fair and sustainable economic, social and environmental outcomes.

It is now widely accepted that neoliberalism, which became the dominant framework in New Zealand with the 1984 Labour Government, has failed economically, socially and environmentally. The Global Financial Crisis (GFC) starting in 2008 was a body blow to many of its assumptions, and politically the huge growth in inequality internationally, particularly in the United States, has highlighted its social failings. It is unable to provide a solution to global threats such as climate change. It is not clear what will replace it as the dominant ideology or framework.

Yet the international agreements are products of the neoliberal framework. Early agreements such as the General Agreement on Tariffs and Trade (GATT) dealt only with international goods trade and were much more limited in their impact on domestic laws and regulations. While imperfect, they accepted a compromise between freeing up international commerce and protecting the interests of individual nations. However, with its expansion in 1995 into the World Trade Organisation and its raft of new treaties, trade agreements became increasingly intrusive, dealing with services, 'technical' food and safety standards, qualifications, foreign investment, movement of people for work, intellectual property, and expanding into regulatory standards and state-owned enterprises. These agreements developed new judicial systems with their own tribunals to decide disputes, outside the jurisdiction of individual nations.

Initially there was a rational economic basis for these agreements. Increased trade is in general a good thing. It allows countries to expand in the areas in which they are most efficient (comparative advantage) and, for small countries like New Zealand, allows firms to grow far beyond what the domestic market would allow and obtain efficiencies of scale. There needs to be provisions for growing new industries outside the heat of international competition, and protection from the introduction of pests and diseases – but in general the argument for international trade is sound.

A similar rationale is used for 'trade' in services – but given they include essentials like health and education on which societies base their long-term economic, social and cultural development, and sensitive cultural areas like the arts, videos, music, news media and broadcasting, and that much of this 'trade' is really investment or movement of people across borders, it is a gross oversimplification. Services also include finance whose deregulation creates enormous risks, which played out in the Global Financial Crisis. It gets even more difficult when investment and movement of people are concerned. Huge issues of power, social sensitivities, and selection of investment and migrants come into play.

Both services and specific investment provisions limit countries' abilities to regulate incoming investment and bring further demands. The private international tribunals being set up to protect investors' interests against national governments (Investor-State Dispute Settlement or ISDS) privilege investors with little evidence of public benefit and grave risks to the public interest.

Even some neoliberals would agree that an economic argument for extending intellectual property rights in the way that the TPPA proposed does not exist. The 'rationale' is win-lose: the big media and pharmaceutical companies of the United States want commercial advantage at the expense of the rest.

The objectives of these agreements have changed from an arguable basis of maximising economic welfare to one of maximising the most powerful player's commercial advantage.

There are other problems. The central principles of these agreements seek to minimise regulation in favour of increased economic activity in the form of international trade and investment. This mistakes a means (economic activity) for wellbeing and better outcomes. Those outcomes are familiar in day to day political debate as described above: improving material living standards, better health, education, safety; a clean environment and conservation of scarce resources; respect for different cultures and strengthening of local culture and the arts; and fairness in how these outcomes are shared. In these agreements, rather than wellbeing being primary, aspects of wellbeing (and only some) are framed as 'exceptions' to the rules that aim to increase economic activity.

The normal political debate over priorities is turned on its head in a way that serves corporate interests rather than social, environmental and broader economic interests.

These upside-down priorities are aggravated by the authoritarian process of negotiation of the agreements. With few exceptions, draft texts of agreements are secret to all but negotiators and privileged corporate representatives until signed and too late to change. If domestic legislation was enacted like this there would be an outcry.

How has all this come about?

Globalisation

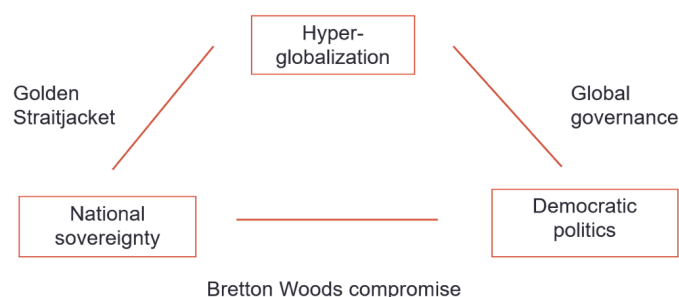
Those who criticise these agreements are frequently labelled 'anti-globalisation'. In these days of Trump and Brexit, where people are turning against these trends, there is an attempt to tar all with the same far-right brush. Those with a 'liberal' outlook are said to favour 'globalisation'.

But there are many possible models of globalisation. Harvard University Professor of International Political Economy Dani Rodrik who has written extensively on these subjects describes the current model as 'hyperglobalisation' – globalisation taken to an extreme depth.⁴⁶ He has proposed what he calls 'the Political Trilemma of the World Economy': 'It says that democracy, national sovereignty and global economic integration are mutually incompatible: we can combine any two of the three, but never have all three simultaneously and in full.'⁴⁷ This is represented by Figure 2 below.⁴⁸

⁴⁶ Rodrik, D. (2011). *The globalization paradox: Democracy and the future of the world economy*. New York, NY: W.W. Norton & Co.

⁴⁷ Rodrik, D. (2007, June 27). *The inescapable trilemma of the world economy*. Retrieved October 23, 2014, from http://rodrik.typepad.com/dani_rodriks_weblog/2007/06/the-inescapable.html

⁴⁸ Rodrik, D. (2016, June 13). *Brexit and the globalization trilemma*. Retrieved February 28, 2017, from <http://rodrik.typepad.com/.a/6a00d8341c891753ef01b8d1f6d855970c-pi>

Figure 2: Brexit and the globalization trilemma

Pick two, any two

Why? We have seen that deep economic integration through the current type of agreements increasingly means weakening domestic laws and regulation. It greatly reduces the space available for the nation-state to regulate in its people's own interests. Rodrik says we have three choices:

1. *Weaken or dispense with the nation-state:* If we want to maintain the current model of globalisation and deepen it further through agreements like the TPPA, the nation-state must make its priority the enforcement of international integration. Meaningful democracy must therefore be at the global level. Given the difficulty that large federal states like the United States, let alone looser confederations like the European Union, have in conducting a working democracy, this is a dangerous pipe dream. Even little New Zealand often finds it difficult.
2. *Weaken or dispense with democracy:* If we want to maintain the nation-state with its power to regulate and also have hyperglobalisation, we must weaken or dispense with democracy because the state will frequently not have freedom to do what the electorate wants. It will tend towards authoritarian rule. As we see in recent developments, this tendency is the status quo.
3. *Weaken globalisation:* If we want to maintain the power of the nation state to regulate in the interests of its citizens and also have democratic politics, globalisation must be more limited. Rodrik gives as an example the Bretton Woods regime from the time of World War II to the early 1970s.

I unashamedly choose a working democracy. Because for most purposes a working democracy can only occur in a nation state, option 3 is the only acceptable choice. The point of this is certainly not to advocate for closing up the borders. That would be daft. The point is that the current intense model of globalisation – hyperglobalisation – must be reformed to make it friendly to democracy within nation-states.

A framework for international agreements

In this, I take a social democratic perspective. Those who take a neoliberal perspective have little problem with the current framework. I suggest that what we should seek as far as possible is consistency between our aims at home and our international aims. Why should international agreements be an exception to our aims for social justice and environmental sustainability? Yet hyperglobalisation makes it very difficult for social democracy to flourish.

Some impacts of globalisation are not due to international agreements; for example the falling costs of international transport and telecommunications make it harder for a nation-state to regulate its own territory. But that should not be exaggerated. Some of these results, such as tax dodging, can be addressed with international cooperation, which is increasingly occurring though too slowly.

A framework for international agreements that allows democracy to flourish and preserve sufficient room for governments to make meaningful decisions within the nation state could look like this:

- Recognise the right of each nation to legislate, regulate and administer in its citizens' interests in areas fundamental to their wellbeing including health, education, safety, environment, conservation, culture, human rights, labour rights, and any other actions considered necessary to address disadvantage among social groups, inequalities of income and wealth, and inequalities of outcomes. A foundation could be provided by the international treaties and conventions which set accepted standards in human rights, labour rights, conservation and the environment. .
- Recognise the right of each nation to regulate the movement of people and capital according to its own needs and to adjudicate disputes, as long as actions do not breach human rights.
- Recognise the right of each nation to determine which services should be provided as public services, by whom and under what conditions.

- Recognise that each nation has economic development needs. These may require time-limited exceptions to open borders in order to build industries that provide better jobs and address economic imbalances. The time required for developing countries will be considerably longer than for advanced economies, and the exceptions broader, but even advanced economies will need exceptions to restructure. Also recognise the need for protection from commercial, social and environmental dumping of goods and services below cost (including externalised costs).
- Recognise the need of each nation to take actions for economic, social and physical security, including the ability to take action to prevent financial and balance-of-payments crises, to address their effects if they occur, to maintain currency stability, and to conduct an effective monetary policy.
- Recognise the sovereignty of each nation in its taxation policies. Negotiate agreements committing to cooperation to prevent tax avoidance and to desist from competitive use of taxation to attract investment.
- Subject to these constraints, which are primary, negotiate progressive reductions in intentional barriers to trade.
- The process of developing agreements should be as similar as possible to developing domestic legislation with widespread consultation while changes can still be made and, whenever possible, publicly available draft texts. The latter could be addressed in a number of ways including making available drafts after they have been tabled in negotiations unless there is a specific justifiable reason for withholding them (as the European Ombudsman recommended), and having pauses in negotiations at regular intervals (such as annually) when the text to date is made available for public debate. Final decisions on ratification of agreements should be by Parliament after an independent evaluation of the economic, social and environment impact.

In fact at this stage of hyperglobalisation, the economic returns from trade and investment agreements are tiny and uncertain. Even the economic evaluation of the TPPA commissioned by the Ministry of Foreign Affairs and Trade (MFAT) found only a 0.9 per cent increase in GDP in 15 years' time, and all but 0.2 percentage points of that is a contentious estimate of the gains from deregulation of services.⁴⁹ This risks counting as gains the removal of some of the protections which we have for public purposes such as health, safety, financial stability, and service quality, on the basis that it creates more commercial opportunities. This type of economic evaluation uses modelling (a Dynamic Computable General Equilibrium or DCGE model)

⁴⁹ Strutt, A., Minor, P., & Rae, A. (2015). *A dynamic computable general equilibrium (CGE) analysis of the Trans-Pacific Partnership Agreement: Potential impacts on the New Zealand economy*. Wellington, New Zealand: Ministry of Foreign Affairs and Trade. Retrieved from <http://tpp.mfat.govt.nz/assets/docs/TPP%20-%20DCGE%20Analysis%20of%20Impact%20on%20New%20Zealand,%20report.pdf>

which assumes away some of the most important questions: it assumes no change in employment, no change in inequality, no change in the balance of trade, and no adjustment costs. An alternative model which does not make these assumptions finds increases in inequality and falling employment.⁵⁰ Important impacts are not included in these models including economic and social costs of higher-priced medicines, books and music due to more restrictive intellectual property rights; the higher risk of financial crises which could more than reverse any economic gains; the cost of corporations suing the government through ISDS – both legal costs and the impact on our future choices; the cost of remaining in a low value economy; and the increased difficulties in putting public health measures into place to combat excess alcohol use and obesity.⁵¹

There may therefore be substantially greater returns (some economic, some social or environmental) to change focus to negotiating international taxation agreements to prevent the robbery of government revenue, cooperation in managing international financial movements, strengthening cooperation in areas such as climate change and research, and strengthening international human rights and environmental regimes.

Speaking from a European perspective, Austrian development economist Werner Raza has suggested (as has Rodrik) that: 'In certain areas, a partial de-globalization and re-regionalisation of economic activities, respectively, for instance in the financial sector, in agriculture or with respect to public services seems warranted.'⁵² In finance, aspects of de-globalisation are urgently required to prevent the rapid spread of crises and to help stabilise exchange rates at more realistic values.

Agriculture has always been a difficult area given New Zealand's interests in agriculture exports and the desire of other countries to protect food security and agriculture-based social and environmental values. That does not mean that New Zealand exporters need to give up ambition to extend markets (within environmental limits): growing incomes will increase demand. But this emphasises what we saw in the TPPA: that even small openings in new agricultural and other markets now come at an increasing cost to the rest of New Zealand in national sovereignty and democracy.

⁵⁰ Capaldo, J., & Izurieta, A. (2016). *Trading down: Unemployment, inequality and other risks of the Trans-Pacific Partnership Agreement*. GDAE working paper 16-01. Global Development and Environment Institute at Tufts University. Retrieved from http://www.ase.tufts.edu/gdae/policy_research/TPP_simulations.html

⁵¹ For a fuller critique of the MFAT-commissioned model, see Coates, B., Oram, R., Bertram, G., & Hazledine, T. (2016). *The economics of the TPPA*. New Zealand law Foundation expert papers no. 5. Retrieved from <https://tpplegal.wordpress.com/nzlf-expert-paper-series/>

⁵² Raza, W. (2017, February 21). Global inequality, populism and the future of democracy. Social Europe. Retrieved February 28, 2017, from <https://www.socialeurope.eu/2017/02/global-inequality-populism-future-democracy/>

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6: On Regulatory Harmonisation: Executive Prometheus Unbound

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In the name of nationalism, President Trump has attacked the substance of multilateral trade treaties such as NAFTA, the TPPA, and TTIP. These agreements, he claims, have contributed to the de-industrialisation of the United States and cost Americans millions of middle-class jobs. While I am certainly sympathetic to this claim, I am equally concerned about an aspect of these agreements that President Trump has so far not taken issue with: namely, the acute danger they pose to our democratic tradition.

It is by now hardly a secret that today's 'trade treaties' are not so much about free trade as they are about regulatory harmonisation – the project of ensuring that the rules and standards governing a host of important policy areas are uniform across the economies of signatory states. As Yale Professor David Grewal explains:

[T]oday's trade agreements aren't really about free trade, at least not as traditionally understood. They are efforts to achieve regulatory harmonization across borders, initiatives in what is now called 'global governance.' They don't keep the state out of the marketplace so much as bring it in, on selective terms, to favor powerful corporate interests at the expense of national sovereignty...

The old trade agenda – the plan to bring down tariffs in the postwar era – was largely successful. Tariffs are now lower than they have ever been and, in many sectors, almost gone altogether. But instead of declaring victory, the trade agenda morphed into something else: a subtle and ongoing push to integrate regulatory regimes across borders. Obama's trade agreements represent a vigorous new effort to construct new global rules that go beyond simply freeing up trade to bind individual nations to new international regulations.⁵³

Or, as one American public-interest advocate acerbically put it a few years ago:

It takes quite a 'trade' agreement to undermine financial regulation, increase drug prices, flood us with unsafe imported food and products, ban Buy America policies aimed at recovery and redevelopment, and empower corporations to attack our environmental and health safeguards before tribunals of corporate lawyers. Trade, in fact, is the least of the Trans-Pacific Partnership (TPP).⁵⁴

The attempt to fashion a body of transnational law horizontally via multinational treaty-making – instead of vertically via the edicts of politically-insulated officials nested in opaque supranational institutions like the European Union – might seem like a

⁵³ Grewal, D. (2015, June 11). Why fast track isn't free trade. *American Conservative*. <http://www.theamericanconservative.com/articles/why-fast-track-isnt-free-trade>.

⁵⁴ Wallach, L. (2012, March 13). A Stealth Attack on Democratic Governance. *American Prospect*. Retrieved from <http://prospect.org/article/stealth-attack-democratic-governance>.

victory for democracy. After all, a national government that is invited to join a trade-treaty regime will presumably accept that invitation only if a majority of its electorate support the rules and regulations contained in the treaty. But this is a misimpression. In practice, owing to the way we have allowed our leaders to structure the treaty ratification process, international-legislating-via-treaty is almost as undemocratic as its authoritarian counterpart (i.e. top-down European Union edicts).

To understand why, consider a legislative proposal concerning levels of pesticide residue on food. If this proposal originates as an ordinary bill within the confines of New Zealand domestic politics (as 'The Food Safety Act,' say), it receives full legislative consideration, in the form of a potentially six-month-long select committee examination, public submissions, proposed amendments, debate, and ultimately, if merited, an up-or-down vote by the full House. If, on the other hand, this same proposal originates as a rule contained in a chapter of a proposed regulatory-harmonisation 'trade' treaty, it may receive next to no Parliamentary scrutiny at all. The Executive can negotiate the text of the rule in virtual secrecy and then sign and ratify the treaty containing it after giving Parliament only fifteen sitting days in which to consider the treaty and make a non-binding recommendation respecting it.⁵⁵

It is true that only Parliament can enact treaty-implementing legislation and that, per convention, the Executive will normally wait for it to do so before proceeding to ratification. But these truisms provide scant comfort. Implementation need not be in statutory form; in some cases it may be achieved unilaterally by the Executive via changes to the regulatory framework. Even in cases where legislation is needed, does anyone seriously believe that the likes of a John Key or a Tim Groser will be deterred by the niceties of convention from ratifying without first securing it? The question practically answers itself.

Nor should we expect the Executive to hesitate to take unpopular treaty action out of fear of having to deal with negative political repercussions. This is where the secrecy surrounding the negotiating phase comes in. By keeping the treaty text largely under wraps from both MPs and the public prior to its being tabled in Parliament, the Executive virtually guarantees that questions of confidence will not be able to be formulated, much less successfully raised, prior to the running of the fifteen-day clock – by which time, ratification presumably having occurred, the bringing down of the Government would be as fully satisfying for treaty opponents as closing the barn door after the horse has run. New Zealand would still wake up the next morning and find herself bound, and the Prime Minister would likely face a 'punishment' of highly lucrative post-political employment with the very corporate interests he had so dutifully served. The same could also be said regarding defeat of the ruling party in the next election. The bottom line: Some political challenges require *ex ante* de jure political solutions, not *ex post* de facto ones. This plainly is one of them.

⁵⁵ Department of the Prime Minister and Cabinet. (2014). *New Zealand Cabinet Manual 2014*, paragraph 7.129. For a summary of New Zealand's treaty-making processes, see generally Kelsey, J. (2015). *The TPPA: Treaty making, parliamentary democracy, regulatory sovereignty & the rule of law*. Retrieved from <https://tpplegal.files.wordpress.com/2015/12/tpp-treaty-process.pdf>.

In the United States we find a similar, if less drastic, lobotomisation of standard legislative procedure when it comes to consideration of legislation-via-treaty. Owing to the purer separation of powers that characterises the American system, Congress does get a binding up-or-down vote on trade deals. But it has been persuaded on more than one occasion to streamline its consideration of them by adopting a process that limits floor debate to a mere twenty hours per chamber and restricts the entirety of legislative scrutiny (including preliminary review in committee) to a mere sixty legislative days.⁵⁶ If a complicated and multifaceted bill of domestic origin were processed in this cursory manner, the cue to outrage would be obvious. Yet when the same massive bill comes wrapped in treaty paper, misgivings are quietly hushed amid reassurances from respectable people that the neutered procedure, while otherwise intolerable, is sufficiently democratic for the 'trade' context.

But is it sufficiently democratic, and if not then why have so many of us been persuaded otherwise? Here we enter the fascinating realm of political psychology and myth. We are enthralled to the notion – very much a pre-modern one – that 'politics stops at the water's edge,' that when our Executive sallies forth to represent us to the world he deserves a more or less solid and unquestioning phalanx of support behind him. This notion is at work whenever we hear the Executive chide those on the domestic front who dare to demand the same access to draft treaty texts as is granted corporate 'advisors' to the government.⁵⁷ *Pipe down!* we are told. National interests – perhaps even full-blown national security – are jeopardised by such second-guessing of the Executive, who is only trying to get for us the best deal he can.

However, this tactical chiding should be seen for what it is – illegitimate and unwarranted. The second-generation treaties described by Professor Grewal et al. are most definitely *not* the trade equivalent of international war, or even of foreign affairs as traditionally understood. As noted, these treaties go far beyond the classic Enlightenment project of reducing the walls (tariffs) that keep foreigners from competing within our domain, or of ending practices (export subsidies) that impede the price-discovery mechanism that is essential to giving effect to each country's comparative advantage. Instead, these treaties aim to advance the revolutionary goal of remaking all domains in the same image and reducing a wide variety of advantages to the basest ones.

The reality, therefore, is that when our Prime Ministers and Presidents sit down with the representatives of other nations to write 'trade' rules, they are negotiating not so much against foreign others on our collective behalf as against our own good selves. And when these same Executive officials and their domestic political allies use the cloak of foreign affairs to achieve internationally what they could never achieve domestically, we do well to realise that we are in the process of being had.⁵⁸

⁵⁶ Fergusson, I. F. (2015). Trade promotion authority and the role of congress in trade policy. Retrieved from Congressional Research Service website: <https://fas.org/sgp/crs/misc/RL33743.pdf>.

⁵⁷ For an example of such a demand, see Flynn, S. (2012). *Law professors call for Trans-Pacific Partnership (TPP) transparency*. Retrieved from <http://infojustice.org/archives/21137>.

⁵⁸ For an example of this tactic in the battle over regulation of the financial industry, see Wallach, L. (2012, May 20). Trade deals: Backdoor financial deregulation. *Huffington Post*. Retrieved from http://www.huffingtonpost.com/lori-wallach/free-trade-agreements_b_1367031.html.

Precisely because the trade agenda has moved on from what it once was and become (to paraphrase von Clausewitz) domestic politics by other means, we stand to lose a great deal unless we recognise the need for our treaty-ratification procedures to move on along with it. Options for reform are relatively straightforward. If the Executive insists on maintaining a wall of secrecy around the negotiation of trade-treaty text, so be it; at the end of the day democratic accountability can probably tolerate a closed and secretive drafting process. But once a proposed multilateral treaty (or significant bilateral treaty) has been finalised and per Cabinet's authorisation signed, it should become Parliament's creature and Parliament's creature alone and receive the same procedure as any other bill.⁵⁹ Allowing Parliament, as guided by extensive public input, six to twelve months to study and vote on the Executive's handiwork is hardly a Big Ask considering that most trade harmonisation treaties will have been years in the making. If other signatory states were to complain about the time expended in completing our domestic review, the short and devastating response surely would be: 'And why is your society not also engaged in a full democratic consideration of the treaty?'

I shall be the first to admit that my proposal to democratise the treaty-ratification process is not original. It very much echoes a proposal made years ago by Green MP Keith Locke, which unfortunately went nowhere.⁶⁰ I shall also freely admit that I have an ulterior motive in making the proposal. It is my hope that once Parliament asserts its sovereignty on the matter of treaty-ratification, it will be in a better position to recognise the threat posed to its supremacy by such grotesquely corrupt features of trade harmonisation treaties as the Investor-State Dispute Settlement mechanism.⁶¹ Finally, I am more than happy to portray my proposal as an olive branch offered to my globalist friends rather than as a threat. One reason why the project of globalisation has stumbled lately (think Brexit) is that its architects have shown little interest in finding ways to democratise the process of enacting supranational rules and regulations. While there is no clear way to democratise supranational political institutions short of developing a global demos supported and structured by global political parties (which are unlikely to materialise), the process of global-legislation-via-treaty can be democratised quite easily.

Dare I predict that any resistance to such democratisation efforts will tell us much about the true nature of the globalist agenda?

⁵⁹ This procedure could even include the ability of MPs to offer amendments provided these are conceptualised and packaged as valid reservations and/or interpretive declarations under the international law of treaties.

⁶⁰ Locke, K. (2013, December 16). Parliament and people shut out of treaty ratification process. *The Daily Blog*. Retrieved from <http://thedailyblog.co.nz/2013/12/16/parliament-and-people-shut-out-of-treaty-ratification-process/>

⁶¹ For an appreciation of the dangers posed to national sovereignty by the ISDS, see Public Citizen. (2016). *220+ law and economics professors urge congress to reject the TPP and other prospective deals that include Investor-State Dispute Settlement (ISDS)*. Retrieved from <https://www.citizen.org/sites/default/files/isds-law-economics-professors-letter-sept-2016.pdf>

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7: On the Economics of Trade Agreements: Who Gains and Who Loses?

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Bilateral and regional free trade agreements have proliferated around the world in recent decades, with New Zealand jumping onto the FTA bandwagon as early as 1983 with the establishment of the Closer Economic Relations (CER) agreement with Australia. According to the Ministry of Foreign Affairs and Trade, New Zealand has successfully enforced nine trade agreements with sixteen WTO members, with more under negotiations.⁶²

It is a well-known fact from the economics literature that trade liberalisation generates efficiency and higher overall welfare for any country, big or small, developed or developing.⁶³ Some of the most common arguments in favour of trade liberalisation is that it creates opportunities for specialisation in production of an entire good or service or a part of it, thereby improving economic efficiency, and creates opportunities for competition, product diversification and innovation. However, it is also a fact that such agreements, whether negotiated on a bilateral or regional basis does not benefit every individual in the society, especially those in their capacity as import-competing producers.⁶⁴

Traditional classical and neoclassical country-based trade theories have produced important findings for adverse impacts of trade liberalisation on income distribution. However, recent firm-based trade theories incorporating intra-industry trade and firm heterogeneity also confirm that trade results in adjustments within sectors so that only large and more productive firms within a sector become successful in exporting at the expense of smaller, less productive firms.⁶⁵ This reallocation of economic activity across firms within industries raises aggregate productivity and total exports, and has a positive impact on increasing real wages for exporting and more productive firms, with increased labour demand in that sector. However, post-trade liberalisation, intra-industry resource re-allocation can lead to exit of those firms whose productivity is lower than the others.

⁶² See Ministry of Foreign Affairs and Trade. (n.d.). *Free trade agreements in force*. Retrieved from <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/>

⁶³ See Krugman, P. R., Obstfeld, M., & Melitz, M. J. (2015). *International economics: Theory & policy* (10th ed.). Essex, England: Pearson.

⁶⁴ From the New Zealand perspective, import competing producers would be a group of producers in the country that are producing goods or services in the domestic market, that compete directly with imports from Australia, China or other trading partners of New Zealand.

⁶⁵ Krugman, P. R. (1979). Increasing returns, monopolistic competition, and international trade. *Journal of International Economics*, 9(4), 469-479. Melitz, M. J. (2003). The impact of trade on intra-industry reallocations and aggregate industry productivity. *Econometrica*, 71(6), 1695-1725.

According to firm-based trade theories, three groups of firms are likely to exist post the trade liberalisation process through free trade agreements. The first group would consist of low productivity import-competing firms, some of whom would exit the industry due to increased competition as a result of free trade agreements, and thereby cease to operate. The second set of firms with intermediate level of productivity serves both domestic and export markets, and are more likely to generate favourable labour market outcomes in terms of increased real wages and employment. The third group of most productive firms, in addition to exporting and serving domestic market through local sales, would access foreign markets through foreign direct investment (FDI), and are more likely to be larger relative to domestic, non-exporting firms.⁶⁶

Theoretical evidence broadly suggests gains for the exporting industry due to greater international market access, although possible adverse impacts are observed on wages and employment in the import competing industry due to increased competition. However, empirical findings are often based on micro-level evidence of firm data. There is an interplay of factors that defines the complex relationship between trade liberalisation and labour market impacts, which includes the depth and scope of trade agreements negotiated, relative price effects, market structure, efficiency of capital markets, global engagement in the value chain at a firm-level, informality in the labour force, and the quality of laws and regulations governing them.

A straightforward answer to who gains and who loses from trade liberalisation through trade agreements in a country therefore remains elusive. The picture is made more complex with countries entering into multiple trade agreements, often at times with the same nations, that are dissimilar in terms of membership, coverage, rules and commitments.

This article therefore revisits the important question of who gains and who loses in trade liberalisation through trade agreements - from a New Zealand perspective. The rest of the article is organised as follows. I first analyse the welfare effects of trade agreements, and attempt to revisit the vital yet controversial question of who gains and who loses in their presence. I then analyse the policy implications and offers some concluding remarks.

⁶⁶ See Helpman, E., Melitz, M. J., & Yeaple, S. R. (2004). Export versus FDI with heterogeneous firms. *The American Economic Review*, 94(1), 300-316. Retrieved from <http://www.jstor.org/stable/3592780>

Who gains and who loses from trade agreements?

The need to balance the globalisation challenges and the domestic interests in the post-cold war era fostered a trend for greater economic cooperation through free trade agreements, also known as Regional Trading Agreements (RTA). This resonated as a wave of 'new regionalism' among the Asia-Pacific economies over the last two decades.⁶⁷ With the breakdown of multilateral trade talks through the World Trade Organisation, all of its 151 member countries are now members to at least one such FTA/RTA.

Free trade agreements are legal agreements wherein members agree to promote and facilitate trade and economic cooperation among themselves. There is no legal requirement to cover all goods traded between the member countries in a free trade agreement to begin with, and member countries are free to discriminate against non-members with respect to trade policy. This would imply that since New Zealand and China have a working bilateral free trade agreement, both countries are free to implement separate trade policies for non-members which do not have an FTA with either of them, such as India.

In New Zealand, MFAT defines trade agreements as a 'set of rules for how countries treat each other when it comes to doing business together—importing and exporting goods or services and investing.'⁶⁸

The primary aim of free trade agreements was once to eliminate or reduce tariff barriers on goods imported and exported, but recent FTAs address a range of issues on other aspects of international trade restrictions that go beyond trade barriers at the border. These include simplification of customs procedures, removal or reduction of restrictions related on trade in commercial services and investment, as well as regulatory measures pertaining to changes in labour laws, environmental regulations, intellectual property, competition policy and government procurement. As these so-called comprehensive economic partnership agreements (CEPs) are not negotiated under a common framework, they vary from each other in terms of their issues covered, depth of the agreements, implementation deadlines and forms of negotiation. Differences in levels of development dictate trade policy priorities for members.

⁶⁷ As of 31 January 2014, 377 of some 583 notified RTAs received by the GATT/WTO (counting goods, services and accessions separately) were in force. 315 RTAs were in force till date, with 144 of these proliferating just over the past decade of 2007-2017.

⁶⁸ New Zealand's oldest free trade agreement has been the Australia-New Zealand Closer Economic Relations (ANZCERTA), effective since 1983. However, post-2001, with the failure of the multilateral trade talks at the WTO, New Zealand has enforced nine trade agreements, seven of which have been bilateral in nature involving Singapore, Thailand, China, Malaysia, Hong Kong, Chinese Taipei and Korea respectively. The two regional agreements involving multiple membership are the ASEAN-Australia-NZ FTA (AANZFTA) comprising of 12 members and the P-4 agreement. New Zealand's most recently signed regional trade agreement is the PACER Plus agreement which was signed in Nuku'alofa in Tonga on 14 June 2017 by Australia, New Zealand and eight Pacific island countries – Cook Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tonga and Tuvalu. See Ministry of Foreign Affairs and Trade. (n.d.). *PACER plus full text*. Retrieved from <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/pacer/pacer-plus-full-text/>

The implications of trade policy interventions in a country differ on whether the country is 'small' or 'large' in the international market.

A 'small' country, by definition is the one where changes in its domestic market do not alter the international price of the commodity. This implies that the country acts as a 'price-taker' in the international market. In the free trade agreement context, if there is an existing tariff, then the small country bears the entire incidence of the tariff, with net welfare losses that equal the inefficiencies from overproduction and under-consumption caused by the price distortions resulting from the tariff.

In contrast, if the country is large in the world market – for example, the United States – then it is able to generate a terms of trade gain through protectionist tariffs by changing prices for goods in the world market that override these efficiency losses. This implies that, theoretically, there is an optimum tariff for a large country that justifies protectionism and the continuation of beggar-thy-neighbour policies, as long as it does not invite retaliation.

Since New Zealand is a small open economy that cannot influence its terms of trade, and that acts as a price-taker in the international market, the cost of protectionism is high for New Zealand. Theoretically, its optimum tariff is zero.

When New Zealand enters into a free trade agreement, reduction of tariffs and non-tariff barriers among member countries are likely to have price effects in its goods market, which in turn have an impact on output, employment and wages in the affected industries. From the exporters' perspective, as market access improves, output and employment in exporting industries should expand due to free trade agreements, thereby increasing wages. However, from the perspective of domestic producers in New Zealand who face cheaper import competition, lower tariffs or non-tariff barriers increase the prospect of downsizing, restructuring or exit, which leads to unemployment and/or reductions in wages, especially if these companies are not involved in exporting or importing intermediate inputs. It is therefore clear that trade agreements will generate winners and losers. What might then be the overall welfare effect of these trade agreements for New Zealand?

The notion of *trade creation* and *trade diversion*, terms coined by Viner, summarise these effects.⁶⁹ Trade creation through an FTA occurs when consumption shifts from a high-cost producer to a low-cost producer because of the agreement. As an example, if we assume that China is the most efficient producer of garments, then, after arranging a free trade agreement, it is possible to import garments from China into New Zealand without paying the tariff. This will lead to an efficiency gain for New Zealand consumers, and translate into positive welfare gains.

⁶⁹ Viner J. (1950). *The customs union issue*. New York, NY: Carnegie Endowment for International Peace.

On the contrary, trade diversion is more likely to occur when a hitherto efficient non-member producer of goods or services loses out to inefficient member producers due to creation of a free trade agreement. As an example, let's assume that China is the most efficient producer of garments, but there is no FTA between New Zealand and China. Instead, a new free trade agreement comes into force between New Zealand and Vietnam, a more high cost garment producer compared to China. In this situation, some garment imports into New Zealand could be diverted toward Vietnam from China as a result of tariff elimination in this free trade agreement. In that sense, it could be a potential net welfare loss for New Zealand, especially if the revenue loss from eliminating tariffs with Vietnam for garments is greater than the efficiency gains from the now diverted cheaper imports that were coming in from China.

Given that New Zealand now has nine working free trade agreements, it is evident that these FTAs may have some import markets in which trade creation would occur and other markets in which trade diversion would occur. An economist would say that the net effects of all New Zealand's free trade agreements would be welfare improving if, summing up the effects across markets and across countries, they were to lead to more trade creation than trade diversion. There is however, no recent research to confirm that all of these free trade agreements have been net trade creating.

Even if there is a net trade creation, it is important to emphasise here that all market access under FTAs are subject to compliance of the rules of origin (ROOs).⁷⁰ These determine which goods will enjoy preferential tariffs among free trade agreement members. Indeed, restrictive and multiple ROOs across different trade agreements can have the equivalent effect of a tariff on imported intermediate inputs and potentially adverse effects on trade flows. The result is a disguised protectionism tool (Krishna, 2005, Auger et.al, 2005), particularly in the manufacturing sector which involves global value chains. Further, multiple and restrictive ROOs increase transactions costs of trade by imposing additional administrative costs on exporters that offset the bilateral trade creation, and also increase trade diversion with non-members by inducing firms to switch suppliers in order to meet the rules of origin. Free trade agreements change the relative price of imports from member countries vis-a-vis non-members due to preferential tariff reductions or eliminations. This provides incentives for firms to reduce their purchases of inputs from non-FTA member countries and switch their imported input suppliers in favour of member nation firms. They are also therefore more likely to affect small countries such as New Zealand since they are more dependent on imported intermediate goods. Estevadeordal and Suominen argue that restrictive and selective ROOs in final goods increase trade among intermediates in the short-run.⁷¹ Over the long-term, although

⁷⁰ For manufactured goods, ROOs comprise three types: (i) a change in tariff classification rule defined at a detailed harmonised system level; (ii) a local (or regional) value content rule, which requires a product to satisfy a minimum local (or regional) value in the country (or region) of a free trade agreement; and (iii) a specific process rule, which requires a specific production process for an item (See Estevadeordal and Suominen, 2006).

⁷¹ Estevadeordal, A., & K. Suominen. (2006). Mapping and measuring rules of origin around the world. In O. Cadot, A. Estevadeordal, A. Suwa-Eisenmann, & T. Verdier (Eds.), *The origin of goods: Rules of origin in regional trade agreements* (pp. 69-113). Oxford, England: Oxford University Press.

exporters may learn to apply ROOs over time, these regimes can also incentivise firms to circumvent the ROOs and go for foreign investment in the partner country without utilising free trade agreement provisions at all. Kawai and Wiganaraja, drawing from a survey of ROO perceptions among firms across Asia, argue that larger firms tend to have more negative perceptions of multiple ROOs than small and medium enterprises (SMEs).⁷²

Nevertheless, as trade agreements reduce bilateral import tariffs or taxes, and reduce both cross-border and behind-the border price distortions caused by interventions, consumers, would be able to buy a greater variety of cheaper imported goods and services. Further, if trade agreements guarantee improved health and safety standards by requiring its importing country free trade agreement partners to adhere to a common regulatory framework for trade of goods and services, it would also indirectly benefit New Zealand consumers, as long as they do not substantially increase transaction costs of trade in the specific industries.

The effects of trade agreements on the labour market, and on producers, is however, more complex and existing research is yet inconclusive, as argued earlier. From the exporters' perspectives, free trade agreements certainly generate gains in terms of opportunities to expand output, increase employment and wages, and become more productive and efficient. However, the picture is clearly gloomy for low productivity firms, especially if they are import competing and not involved in exporting products and/or using imported intermediate inputs in production. As an example, Amiti and Davis's firm-level study on Indonesia estimates that a 10 per cent decline in output tariffs decreases wages by 3 per cent in firms oriented exclusively toward the domestic economy, but increases wages by up to 3 per cent in exporting firms.⁷³

Empirical evidence also points to increases in the skill premium on wage inequality with increasing trade liberalisation, owing more to skill-biased technical change (SBTC) due to rapid globalisation.⁷⁴ Indeed, there is a valid argument that rapid technological changes in the labour market due to globalisation has a stronger adverse impact on the labour market than trade if skill formation does not catch up with the pace of new technology.⁷⁵ This implies that while trade may be one of the causal factors that creates job losses and income inequality in the short-run, SBTC and labour market rigidities play an important role in worsening it over the long-run.

⁷² Kawai, M., & Wignaraja, G. (Eds.). (2011). *Asia's free trade agreements: How is business responding?* Edward Elgar Publishing. doi: <http://dx.doi.org/10.4337/9780857930415>

⁷³ Amiti, M., & Davis, D. R. (2012). Trade, firms, and wages: Theory and evidence. *The Review of economic studies*, 79(1), 1-36.

⁷⁴ See Goldberg, P. K., & Pavcnik, N. (2007). *Distributional effects of globalization in developing countries*. NBER Working paper 12885. Cambridge, MA: National Bureau of Economic Research. doi: 10.3386/w12885

⁷⁵ For the United States context, see Garrett, G. (2017, February 1). Do trade agreements lead to income inequality? *Wharton - University of Pennsylvania*. Retrieved from <http://knowledge.wharton.upenn.edu/article/do-trade-agreements-lead-to-income-inequality/>

Policy implications and concluding remarks

As New Zealand is a small open economy, with more than half of its national income generated from international trade, it is inevitable that bilateral and regional trade agreements will continue to form an integral part of New Zealand's trade policy in the near future. Not surprisingly, the recently released Trade Agenda 2030 has set a target of 90 per cent of New Zealand's goods exports to be covered by free trade agreements by 2030.⁷⁶

This has two implications. First, everyone in New Zealand in their capacity as consumers, as well as producers in the export market, stand to benefit from the market access offered to them in these trade deals. However, this would require that New Zealand's trading partners implement these agreements in their entirety and that businesses utilise them for exports of goods and services and investments abroad. Second, these trade agreements will also require New Zealand to likewise provide preferential market access to its partners, which will put pressure on import-competing producers of goods and services, as well as domestic investors in the country to be more competitive, potentially resulting in job losses.⁷⁷ To summarise, New Zealand's trade agreements are more likely to generate winners who will be dispersed (consumers), while the losses are more likely to be concentrated (employers who lose jobs due to import competition). Therefore, political pressure for protection is inevitable with more and more FTAs coming on board.

As economists would argue, since New Zealand stands to gain overall from trade liberalisation, a policy tool that enables the government to redistribute the gains from trade more evenly across society would be essential to ensure that trade policy works for the benefit of everyone, and mitigates any adverse effects on income inequality.

What would such a policy tool comprise of? Urata and Narjoko offer some interesting insights, confirming that firm-level and country-specific evidence of the impacts of trade liberalisation on income inequality is mixed.⁷⁸ Their studies consider two policy tools. First, providing social safety nets for workers adversely affected by trade liberalisation through Free trade agreements could be a short-term option.⁷⁹ Second, labour market regulations that limit the mobility of labour increases income inequality with trade liberalisation. It is important to ensure that displaced workers with improved skills can find appropriate jobs in a post-FTA scenario.

⁷⁶ For details on the future direction of New Zealand's trade policy see Ministry of Foreign Affairs and Trade. (n.d.). *Trade agenda 2030*. Retrieved from <https://www.mfat.govt.nz/en/trade/nz-trade-policy/trade-agenda-2030>.

⁷⁷ Recent free trade agreements that include beyond-the-border barriers and regulatory measures related to intellectual property, competition policy, dispute settlement etc. aim to create a level playing field for both New Zealand businesses that venture overseas as well as for overseas businesses who sell their goods, services, or invest in New Zealand.

⁷⁸ Urata, S., & Narjoko, D. A. (2017). *International trade and inequality*. ADBI working paper no. 675. Tokyo: Asian Development Bank Institute. Retrieved June 12, 2017, from <https://www.adb.org/sites/default/files/publication/230591/adbi-wp675.pdf>

⁷⁹ A good example would be that of the Trade Adjustment Assistance (TAA) program in the United States. See United States Department of Labor. (2012). *What is trade adjustment assistance?* Retrieved from <https://www.doleta.gov/tradeact/factsheet.cfm>

In the New Zealand context, these policy tools could include provision of education and training for workers displaced by import-competing imports. This makes sense because there is evidence that trade agreements allow technology transfer and increase the demand for skilled workers, due to the SBTC effect. The OECD's Economic Survey of New Zealand 2017 has noted with concern that while the economy has high levels of skills in literacy and information technology, there exists high levels of mismatch between qualifications, skills and jobs.⁸⁰ This has the potential to exacerbate income inequality, amid increasing demand for high skilled workers and concomitant trade liberalisation through free trade agreements. A notable point of significance in this OECD report is the need to enhance educational advancement in mathematics for new entrants to the future labour force in New Zealand, as increasing automation and high skilled jobs in engineering and computing make these skills essential for improving labour productivity, with a direct bearing on growth.

Clearly, improving the quality of education and upgrading skills in the labour force through human resource development, in a more flexible labour market is a key to reducing income inequality, whether associated directly or indirectly with trade liberalisation, and to provide a net positive welfare impact. The role of the government to ensure that trade agreements benefit the entire economy, working for everyone who contributes to its growth, is crucial. This suggests that an improvement on the status quo concerning trade and labour market policies are required. While the Trade Agenda 2030 is a step in that direction, appropriate labour market policies will have to be devised to ensure the two are in tandem.

⁸⁰ See Organisation for Economic Co-operation and Development. (2017). *Economic survey of New Zealand 2017*. Retrieved from <http://www.oecd.org/newzealand/economic-survey-new-zealand.htm>

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8: On Opening the Doors on Trade Negotiations

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‘Trade’ is an increasingly inappropriate term for many of the agreements that we traditionally think of as such. From the Trans-Pacific Partnership Agreement to RCEP, something else is going on. Beyond liberalising trade in goods or services, there is an increasing focus on harmonising regulatory frameworks of all sorts across sectors.

This essay makes the case that the increasingly broad subject matter covered by such agreements requires – for practical as well as principled reasons – a different approach to their creation. I will introduce an approach used in Internet governance processes known as ‘multistakeholderism’ as a way of making international economic policy that could improve the quality and legitimacy of agreements compared with traditional approaches.

The changing face of trade

Since the inception of the Bretton Woods institutions in the aftermath of the Second World War, and the 1947 General Agreement on Tariffs and Trade in particular, there has been a huge rise in the complexity of the global trading system. From early agreements to lower tariffs on industrial goods, the scope of matters covered by various international agreements on economic matters has spread. From goods to services to the flow of capital, the movement of people, the mutual recognition of product standards, educational qualifications, jurisdiction of courts, professional accreditations, the protection of intellectual property – things have changed. Underpinning this has been a digital revolution, with the rise of the microprocessor and Internet being two innovations with enormous and continuing effects.

The deals we still call ‘trade agreements’ thus can be characterised as affecting far more stakeholders within a given economic setting than traditional agreements. They are also affecting those stakeholders in different ways. It is not only the cost of a pair of shoes, or the tariff on an appliance: it may be the recognition of my degree, the fitness of my doctor to practice, or the privacy protections in the Internet cloud applications I use to store my photo collection.

When such matters were the province of national law and national politics, citizens in countries with liberal democratic institutions had some methods to influence these matters, and to resolve disagreements about how to proceed. The whole repertoire of democratic politics lay at their disposal, and collective decisions were made in

processes that often (but not always) accepted that citizens should have a say, and a right to be involved, in regulatory proceedings or the passage of legislation.

The process of negotiating trade agreements was different. Conceived by specialists, conducted by diplomats and officials from ministries and departments, the watchword was often secrecy. In part, this secrecy gave negotiating parties the space to make trade-offs that might otherwise have been hard to make in the gaze of the public and those who would be harmed.

However suitable that elite-level confidential process may have been for negotiating agreements for goods and services, there are significant problems that have come from its application to the very wide scope of agreements under discussion here.

A first challenge is legitimacy. Transferring the very wide array of issues that modern trade agreements incorporate – such as the behind-the-border or mutual recognition questions noted above – from the public realm of traditional policy and politics into the secret environment of traditional trade diplomacy leads people to criticise the process. Even when such agreements reach the public legislative stage, they are already ‘pre-cooked’ because the negotiation is finished and legislatures, generally, cannot re-litigate the deal.

A second challenge is practical. With the vastly expanded scope of such negotiations and the consequent breadth of groups and individuals directly affected by them, it becomes less credible that the officials of a trade negotiating team could fully understand the relevant interests and dynamics in a way that could adequately see these represented and taken into account in the negotiating process. Since states seem unlikely to wish to move away from the more expansive scope of such agreements, this complexity is unlikely to diminish. Further, the secrecy inherent in such agreement processes means that errors, which are more likely than when agreements were narrower and simpler, can often only be identified once agreements are already final and difficult to change.

The Internet community around the world has deployed a form of governance that might help to resolve these challenges. The next section briefly defines and summarises this approach.

Multistakeholderism

A clumsy word, the essential points to grasp about 'multistakeholderism' in the context of this discussion are these:

First, the relevant stakeholders tend to be in the room – physically or virtually. Participation tends to be on an opt-in basis, and where decisional structures are developed they tend to provide balanced representation of the stakeholder set. An example from the Internet world: recent efforts to reform the accountability framework applying to the Internet Corporation for Assigned Names and Numbers (ICANN), a global organisation that coordinates the worldwide system of unique identifiers on the Internet, involved technical people, policy people, commercial interests, civil society activists, governments and more – including simply interested citizens.

Second, the processes tend to be open, at least in a formal sense. Anyone can join the mailing lists; anyone can attend the meetings; working papers and discussion facilities are public to all. Methodological approaches tend, given the sector, to follow generally logical development techniques – engineering is often an inspiration. Work tends to be organised around solving particular problems, be they the origination of policy, coordination between actors, or approaches to allocation of resources. Arguments tend to stand or fall based on their merits in defining, analysing and solving the problems involved, rather than simply based on who has made them. A degree of language and technical understanding is required to meaningfully participate, but that is common to all areas of policy to some extent.

Third, decisions tend to be arrived at by consensus. This means that power dynamics play out differently to some other modes of governance. Rewards come from a patient and coherent assembly of agreements to problems and solutions. Unilateral action or influence by single actors rarely wins out. The process can be long and painful but tends to produce durable outcomes, in combination with the first two characteristics noted above. There are varieties or flavours of consensus – in many parts of the Internet system the consensus can be 'rough' rather than complete; for instance, to avoid random participants being able to prevent decisions being arrived at.

Fourthly, and perhaps controversially, there are rarely 'alternative processes' – such as national legislation or government decisions – that can sidestep these processes in the Internet world. In the Internet governance context, this is because no single party controls the resources involved in the system. As I overheard at an event this year, 'Each of the stakeholders has some steak.' The fact that alternative processes can't replace the multistakeholder approach in Internet governance means that actors do not have incentives to hold out and avoid coming to a consensus in the hope

that some external actor or process can ride to their rescue. Whether this could be replicated in the international system of states is an open question.

In essence, the multistakeholder governance approach is inclusive, open, consensus-driven and usually not subject to being overtaken or replaced by other governance approaches. This is a very different approach to the traditional take on negotiating trade agreements.

A better approach?

The argument is at heart a simple one. Pulling all those affected into a process, not just some; having it in the open rather than behind closed doors; applying a consensus rule and not allowing those with most power to dominate; embedding the process as 'the only way to solve' – these represent a different approach to traditional trade negotiations. Does it resolve the principled and practical challenges to the traditional approaches to trade negotiation I noted above?

On the principled question, the answer appears to be yes. Adopting a multistakeholder approach to negotiating comprehensive economic agreements would seem to address the legitimacy concern. It makes things public. It allows for scrutiny and debate, both within the process and by media and other actors who choose not to participate. The usual participants in democratic politics – or anyone at all – can choose their level of involvement and can respond as things happen. The legitimacy concerns of closed doors and smoke-filled rooms fade away.

On the practical question, provided that the relevant stakeholders can be brought together with adequate resources (time, intellectual capacity), it seems likely that forcing a consensus informed by all the relevant information and perspectives leaves less room for error on technical questions than a closed-door, traditional approach. It would also seem less likely to overlook or deny interests that a more closed process may simply not be aware of. Officials would no longer have to understand and represent an endless array of perspectives and interests: they could be included in the discussion directly.

States may well not wish to step down from the pedestal of Westphalian state autonomy and sovereignty to share decisions on these types of agreements with a wider set of stakeholders or individuals, nor to weather the inevitable political challenges of open tradeoffs that will inevitably arise. Governments are not all that familiar with being out-argued and having to make concessions, especially in public. The traditional perspective that sees states as the only legitimate representatives of a

polity, and uniquely legitimate in conducting negotiations, is a powerful one – and that perspective appears from time to time in the Internet processes conducted through multistakeholder frameworks, as a critique of their legitimacy.

In designing processes to build legitimacy and workability of these agreements, the shades of grey matter. For instance, traditional trade negotiation does involve sector and industry consultation; for instance, the efforts of New Zealand's Ministry of Foreign Affairs and Trade to broaden their sector and stakeholder involvement in New Zealand is something the author has witnessed first-hand. Consensus is at least required before agreements are finalised – if only between the states negotiating them.

In this offering, my aim is not to resolve these arguments. It is instead to encourage the reader to think about the founding assumptions of a different approach and to consider whether that might be better suited to the reality of reaching agreement across borders on the very wide and deep array of matters bundled up in today's 'trade' agreements. This quick sketch of multistakeholderism is deliberately stark, designed to get readers thinking about the differences – differences that are fundamental.

In my experience the strengths of the multistakeholder approach, both in principle and based on its very tangible success in keeping the global Internet working, are considerable. The fact it represents a very different approach to today's trade practice makes it challenging – a challenge I hope those well-versed in trade will accept with relish.

9: On New Zealand's Future in the Asia-Pacific Region

Dan Bidois, independent strategy advisor and economist

While in Australia in 2012, then Secretary of State Hillary Clinton hailed the Trans-Pacific Partnership (TPP) as 'the gold standard in trade agreements.' Unlike no agreement before it, the TPP was to offer a level playing field for free, transparent and fair trade between countries, along with a governance structure fit for the 21st century to monitor, regulate and settle trade disputes.

With twelve member countries representing nearly 30 per cent of global GDP and 20 per cent of global trade, the TPP would have been the largest and most comprehensive trade agreement in modern history.

For the United States, TPP was the cornerstone of President Obama's 'pivot' to Asia, a strategic geopolitical move to counter the growing influence of China in the region.

For us in New Zealand, TPP represented over a decade's worth of painstaking effort to build ever closer relationships with our major trading partners in the Asia-Pacific. It also represented a chance for us to finally obtain an elusive free trade agreement with the United States, which alone accounts for nearly 60 per cent of the trade bloc's combined GDP.

With President Trump pulling the US out of the TPP at the eleventh hour, it is worth taking a step back to assess what New Zealand's next strategic move should be to strengthen trade links with the Asia-Pacific.

Risks ahead

Our current approach involves taking a lead role to conclude an agreement with the remaining eleven TPP members. At a meeting in Vietnam early this year, a joint statement released by all remaining members agreed on the value of TPP and to assess options to bring the TPP into force expeditiously. They have until their next meeting in November to find a way forward for the trade agreement.

At first glance, New Zealand's decision to press on with TPP without the United States seems pragmatic. Better to try and salvage something after all those years we invested in leading those negotiations, after all. TPP would help us to establish a new trade relationship with Japan, a country where we have no free trade agreement, and strengthen our existing trade links with the rest of the region.

But to rely so heavily on a salvaged TPP with the remaining eleven members is a risky strategy for New Zealand, and one with significantly less upsides than before. Without the United States, TPP is set to deliver much smaller benefits to New Zealand than originally intended.

What's more, the political incentives of member countries to move forward with the TPP have become more fractured than before, as each significantly lowers their expectations from joining the agreement. Only New Zealand and Japan have ratified the agreement so far. Others such as Malaysia and Vietnam are hesitating. Each with their own domestic politics on the trade agreement, without the United States binding member countries together with a common incentive, some might bail on the agreement altogether, further limiting the potential economic benefits to New Zealand.

Meanwhile, those countries that choose to stay in the agreement might find themselves wanting to renegotiate the conditions of TPP further, since many gave heavy concessions to their own markets (for example, Japan's agriculture sector or Malaysia's state-dominated industries) in exchange for greater access to the United States market. Malaysia, for instance, has already proposed that the TPP be renegotiated, which might take longer than November and would further delay the implementation and benefits of TPP.

Given the emerging risks and significantly lower economic benefits associated with the TPP, should New Zealand, as the smallest country in the trade bloc, be investing so much time, resources and political capital in resurrecting the agreement? Is there another way for us to strengthen trade relations with the region further?

A more prudent approach would be to instead redirect our efforts to focus on the following three key areas:

1: Concluding the Regional Comprehensive Economic Partnership (RCEP) Agreement

Initiated by Japan and launched in 2012, RCEP involves sixteen Asia-Pacific countries representing nearly 40 per cent of the world's GDP. It includes seven TPP members (Australia, Brunei, Japan, New Zealand, Singapore, Malaysia and Vietnam), as well as India and China, but not the United States.

RCEP is focused mainly on tariff reductions and covers goods and services, intellectual property and dispute mechanisms, although in its present form it is a less comprehensive agreement than TPP.

After eighteen rounds of negotiations, China and Singapore have recently expressed a desire to expedite all remaining RCEP negotiations before the end of the year. Several challenges to concluding the agreement remain – for example, India is digging in its heels over tariff reduction – but members remain confident the agreement is on track and have expressed a willingness to be flexible to help achieve a consensus.

RCEP offers another strong pathway to a free trade area in the Asia-Pacific region. It includes alluring countries like Japan and expands the opportunity for New Zealand to India and other ASEAN countries not originally included in the TPP.

New Zealand's priority should shift from TPP to RCEP. Specifically, the RCEP agreement needs to be raised further to the standard of TPP and it needs to be seen through to a successful conclusion.

2: Signing an FTA with Japan

Of the remaining TPP members, the big prize for New Zealand is Japan, who we have no official free trade agreement with. The fifth largest economy in the world accounts for nearly 40 per cent of the combined GDP of all remaining TPP members. It is also a member of RCEP.

Previous government efforts to establish a free trade agreement with Japan seem to stall. This is either because of a reluctance of the Japanese to liberalise their agricultural markets or because of the ongoing development of regional economic agreements such as TPP or RCEP.

New Zealand should put an FTA clearly back on the table with Japan. Japan wants greater access to our manufacturing sector and we want greater access to Japan's dairy and agricultural sectors.

3: Strengthening our existing FTAs in the region

New Zealand already has free trade agreements with virtually all countries in the Asia-Pacific region, and all with varying degrees of success.

While we've made great progress on tariff reductions with most of our trading partners, more needs to be done to ensure we maximise the value of our current trade relationships. Significant non-tariff barriers still exist, especially around product standards and regulatory requirements for entering and competing in foreign markets

that tilt the playing field in favour of domestic competitors. New Zealand's Trade Agenda 2030 makes non-tariff barriers a key government priority.

We also need to focus on translating greater market access from our free trade agreements into tangible expanded demand wins for Kiwi businesses. This requires disseminating knowledge more broadly about the existing FTAs New Zealand has and how Kiwi businesses can take advantage. Most Kiwi businesses probably don't even know that we have free trade agreements with Malaysia, Thailand or Korea, so finding ways to raise awareness of existing FTAs should be a key priority.

It is a worthy objective to try and resurrect the TPP despite the United States withdrawing from the pact. But to pin the hopes of a nation wishing to strengthen economic relations with the Asia-Pacific on TPP is a risky strategy with significantly less upsides than before.

A better approach would be to shift our focus onto other trade frameworks in the region, such as RCEP, to sign a free trade agreement with Japan, and to strengthen existing FTAs in the region.

10: On the Promise and Reality of New Zealand-China Trade

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Over the past half century New Zealand's trade policy has focused on evolving away from a traditional reliance on Britain and Europe as the main markets for its primary export activities. The goal has been to secure more wealthy markets to sell high value goods to, and establish a competitive place in the global market. In recent decades the focus to that end has particularly been on the fast developing Asian markets, so the establishment of the New Zealand-China Free Trade Agreement in 2008 was seen as an important step in achieving diversification and development goals. It must be asked, however, how much this relationship has contributed to trading progress and real economic development spinoffs for New Zealand, and the current review of the free trade agreement has raised important questions in that respect. This paper presents an overview of key elements of New Zealand's export trade to China since 2008 as a context for the review of this trade agreement.

New Zealand exports to China

Statistics show that the New Zealand-China FTA provided the catalyst for substantial growth in bilateral trade between those two countries since 2008. China has certainly become an increasingly important market for New Zealand products, growing from being New Zealand's fourth largest export market in 2007 to its largest by 2013. In 2016, exports to China were worth \$9.4 billion, comprising 19 per cent of New Zealand's total outgoing commodity trade. The increase in value of exports to China from 2008 to 2016 of \$7 billion was more than the total growth of New Zealand's exports worldwide, of \$5 billion.⁸¹

The substantial growth in export trade to China has clearly been driven by primary industry. In 2016, 70 per cent of New Zealand's export products to China were from the top five commodity areas of dairy, forestry, meat, fish and wool. The increase in value of these export areas and their importance to New Zealand's overall exports to China is illustrated in the table below.

⁸¹ Unless otherwise stated, statistics are sourced and calculated from Statistics New Zealand (n.d.). *Infoshare*. Retrieved from <http://www.stats.govt.nz/infoshare/TradeVariables.aspx?DataType=TEX>

Table 2: New Zealand exports to China (2007-2016)

Total all exports		Main exports to China by value (NZD\$) 2007-2016					Total 5 main areas
		Wool	Fish & seafood	Meat	Wood & wood products	Dairy	
2007	1,934,301,424	174,038,971	92,612,750	70,390,511	234,635,603	390,962,964	962,640,799
2008	2,516,154,892	190,117,187	127,392,398	95,996,170	347,010,689	521,298,473	1,281,814,917
2009	3,613,047,492	239,619,350	136,393,949	140,522,200	703,059,602	977,760,678	2,197,355,779
2010	4,809,399,673	292,256,090	160,251,508	135,567,575	991,697,311	1,825,969,087	3,405,741,571
2011	5,863,790,222	396,268,660	279,710,636	215,264,235	1,178,940,111	2,172,186,149	4,242,369,791
2012	6,840,528,216	388,354,066	335,227,952	411,719,261	1,240,107,927	2,567,565,707	4,942,974,913
2013	9,943,827,105	395,142,481	394,035,962	880,939,042	1,898,909,440	4,590,792,367	8,159,819,292
2014	9,934,550,729	412,239,572	423,489,062	1,057,920,368	1,729,710,220	4,325,575,950	7,948,935,172
2015	8,572,576,323	459,252,629	484,928,269	1,210,992,095	1,550,521,068	2,466,613,283	6,172,307,344
2016	9,407,147,443	316,861,628	560,146,814	1,011,401,793	1,969,262,411	2,733,096,313	6,590,768,959

Source: Compiled from Statistics New Zealand, Infoshare: <http://www.stats.govt.nz/infoshare/>

These five main commodity areas contributed approximately \$5.6 billion, or 75 per cent, of overall growth in exports to China from 2007 to 2016. Dairy experienced the greatest increase and is the obvious mainstay of the trade relationship. Dairy comprises a substantial proportion of exports to China (29% in 2016), followed by forestry products (20.93%), meat exports (10.75%), fish and seafood exports (5.95%) and wool products (3.37%).

Of even more significance is the reliance of these main commodity exports on China. In dairy, for example, China has clearly become more important as a market for New Zealand's exports since 2008, and accounts for almost all of the \$2.2 billion of New Zealand's total dairy export growth in that period. Exports of dairy products to China grew swiftly from 2008, peaking at \$4.6 billion in 2013 when they comprised one third of total dairy exports. Since then despite some decline in both total export values and the proportion going to China, that market remains very important, buying 24 per cent of New Zealand's total dairy product exports in 2016. China is also by far the largest single market for dairy, in 2016 taking more than four times the value of the next largest market Algeria, and more than five times that of the next two largest markets USA and Australia.⁸²

New Zealand dairy export activity has accordingly become intrinsically linked with China. Overall increases and declines in New Zealand's dairy exporting from year to year have tended to reflect what has happened with the Chinese market. A similar story can be told of wood products, of which the growth to China contributed 83 per cent of total increases in those exports from 2008 to 2016. Growth in exports to China,

⁸² International Trade Centre. (n.d.). Trade map - List of importing markets for a product exported by New Zealand. Retrieved from http://www.trademap.org/Country_SelProductCountry_TS.aspx?nvpm=1|554||||04|||2|1|1|2|2|1|2|1|1

in fact, comprised more than New Zealand's total worldwide export growth in wool, fish and seafood and meat products in that period as well.

While China is obviously an important source for increasing New Zealand's export revenue, the reality is that the greatest proportion of the products sold there tend to have lower 'value added'; the extent of manufacturing to increase the value of a raw product in the production process, thereby increasing returns on capital.⁸³ Within dairy exports, remaining limits on trade have caused products to be of lower value. Whole milk powder, for example, faces the lowest limits on trade, and comprised just over half of New Zealand's exports to China. In 2016, the return for this product equated to an average of \$3.55/kg, in contrast with higher value-added milk powder products such as baby formula powder at \$13.13/kg. This latter category sold only 492 tonnes to China, however, compared with 386,039 tonnes of whole milk powder.⁸⁴ Similarly, a higher volume of unsalted butter (47,545 tonnes returning \$4.81/kg) than salted butter (618 tonnes returning \$9.33/kg) was sold to China.⁸⁵ The same is clear for cheese; in 2016 the greatest amount of cheese product exported was fresh cheese (24,872 tonnes) returning \$5.70/kg, whereas only 4 tonnes of higher returning Gouda cheese (\$13.50/kg) was exported.⁸⁶

Wood exports to China have also had limited processing. In 2016, 80 per cent of New Zealand's total wood exports to China were rough-sawn untreated *Pinus radiata*, returning on average \$148.74/cubic metre. This compared unfavourably with lightly processed untreated cut *Pinus radiata* exports which averaged \$334.56/cubic metre, but only comprised 4 per cent of wood exports there.⁸⁷ Similarly, sheep meat exports are only allowed in frozen form, cutting out fresh or chilled which fetch higher prices. In 2016, 91 per cent of products to China were frozen bone-in cuts, returning on average \$4.24/kg for lamb cuts and \$3.68/kg for cuts from sheep. Both of these figures are also lower than what New Zealand receives worldwide for similar products (\$6.26/kg and \$3.95/kg respectively). Such figures are particularly of concern when it is realised that exports to China have equalled or more than contributed to the growth in New Zealand's sales of these products worldwide in the past eight years.

While exports to China have been important for maintaining and growing New Zealand's primary industries since 2008, the continued reliance on low value-added products does little for related secondary industries, and makes the country vulnerable to future competition. New Zealand products' place in that market could be seen as being based on being 'first in', rather than any specific preference for

⁸³ Fonterra, for example, cites return on capital for lower value-added 'ingredients' products such as whole milk powder at 13.4 per cent for 2016, compared with 41.7 per cent for higher value-added 'consumer' and 'food service' products. Fonterra. (2016). *Fonterra Annual Review 2016* (p. 12). Auckland, New Zealand: Fonterra Cooperative Group Limited. Retrieved from <https://view.publitas.com/fonterra/fonterra-annual-review-2016/page/1>

⁸⁴ Returns calculated by dividing 2016 FOB total with quantity exported for HS codes 0402210019 and 0402210001; Statistics New Zealand. (n.d.). *Infoshare*. Retrieved from <http://www.stats.govt.nz/infoshare/>

⁸⁵ Returns calculated for HS codes 040510001 and 040510009; Statistics New Zealand, Infoshare.

⁸⁶ Returns calculated for HS codes 0406100001 and 0406900031; Statistics New Zealand, Infoshare.

⁸⁷ Comparisons are made between 2016 exports in 2016 for HS codes 4403200031 and 4407109913; Statistics New Zealand, Infoshare.

niche products. The vast Chinese market is seen as an opportunity for many primary producing countries, and as it extends its trade relationships, similar low-value commodities from other sources may easily replace New Zealand products. Australia is noted as being particularly well placed to compete with New Zealand in the Chinese market, with a review of its 2015 free trade agreement already underway. That country is China's main alternative source for sheep meat imports, and is also the second largest source of dairy product imports. In frozen sheep meat cuts it appears that holding market share is based on a tenuous 'race to the bottom' in prices, with average costs per quantity of frozen cuts decreasing progressively over the past three years from all the main sources.⁸⁸ Chile, which also has a free trade agreement with China, has in the last decade developed specific initiatives to grow its sheep meat industry and worldwide exports,⁸⁹ and could also present real competition for New Zealand in future. Some success in the Chilean policies is indicated from small increases in Chilean sheep meat product sales to China in recent years.

Possibilities for future development?

There are signs that some higher valued exports from New Zealand have enjoyed increases in sales to China. Mechanical machinery exports to China have grown, despite some fluctuations from year to year. An average of \$53.8 million in mechanical machinery was exported from 2012 to 2016, compared with an average of \$31 million over the previous five years.⁹⁰ Therapeutic respiration equipment exports have also increased from \$3.2 million in 2008 to \$17 million in 2016.⁹¹ Higher value primary products have also enjoyed some increases in exports, such as honey which reached \$48 million in exports to China in 2016. These products have high average returns per kg, with the main two honey product categories averaging \$35.37/kg and \$43.53/kg respectively in China,⁹² a slightly higher than the average return than received worldwide. Still wine exports to China have also increased, reaching \$26 million in 2015 and 2016. Some heart may be taken by these examples of value-added export growth, but they must be recognised as very small export earners compared with the main five product areas; even added together these exports represented only two per cent of the total to China in 2016.

The review of the New Zealand-China FTA may hold hope for New Zealand to develop more sophisticated exporting activity. The FTA 'upgrade' has been heralded as an opportunity to 'modernise' and enhance areas of the agreement.⁹³ Political leaders have argued that there is high consumer demand for New Zealand's goods

⁸⁸ Costs calculated from imported value vs. quantities of Chinese imports of HS codes 020442 and 020443. International Trade Centre. (n.d.). *Trade map*. Retrieved from <http://www.trademap.org/>

⁸⁹ Muller, N. (2009, July 15). Chilean sheep farming industry targets double lamb exports by 2010. *Santiago Times-MercoPress*. Retrieved from: <http://en.mercopress.com/2009/07/15/chilean-sheep-farming-industry-targets-double-lamb-exports-by-2010>

⁹⁰ HS code 84, nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.

⁹¹ HS code 9019101900.

⁹² Returns calculated for HS codes 0409000001 and 0409000018; Statistics New Zealand, Infoshare.

⁹³ Ministry of Foreign Affairs and Trade. (n.d.). *NZ-China FTA upgrade*. Retrieved from: <https://mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-china-free-trade-agreement/>

in the Chinese market, but have equally recognised the predominance of low value products in New Zealand's exports there so far,⁹⁴ and commentators have argued for the review to develop opportunities for higher-value trading.⁹⁵ Of particular pertinence is the call to pave the way for more small and medium New Zealand businesses to be able to engage in export trade with the Chinese market, because they may be able to supply more distinctive, higher value products.⁹⁶ This may be the key means by which New Zealand's export products can come to competitively hold their own in the expansive and increasingly wealthy Chinese marketplace.

Conclusion

The call to modernise the New Zealand-China FTA is apt, because the evidence indicates that New Zealand's trade activity may be regressing rather than evolving under the current arrangements. China has undoubtedly been very important for increasing New Zealand's export revenue, but the nature of this activity so far has done little to enhance this country's status in the global marketplace. The substantial shift in focus to the Chinese market leads one to question whether New Zealand primary industries have simply redirected reliance, rather than truly diversifying or creating a sustainable developmental platform for the future. The limited amount of processing that many of the exports to China require has done little for progressing New Zealand's secondary industries or optimising returns that might be gained from further and more diverse processing of dairy, meat and forestry products.

The current review of the free trade agreement, therefore, presents a necessary opportunity for New Zealand to break out of the status of being a provider of low value primary products in the global marketplace. The Chinese market has been recognised as exhibiting demand for New Zealand's high-value consumer goods, but the potential remains untapped under the current trading context, and may well need greater support from government to push the more lucrative relationships into being. While there are clearly a number of services in place to facilitate trade in the Chinese market, the question remains whether the different areas of business, investment source and diplomatic need are sufficiently 'joined up' to genuinely progress new opportunities for New Zealand in the Chinese market. The recent Ministry of Foreign Affairs and Trade strategy to engage with the public and exporters could be an important step in establishing where the areas of need most lie. It is clear, however, that the learnings, and actions from them, need to be timely in order for New Zealand to properly capitalise on its early trade relationship with China.

⁹⁴ Leslie, D. (2017, May 8). *Insight: Upgrading the China free trade agreement* [Radio broadcast]. Auckland, New Zealand: Radio New Zealand. Retrieved from: <http://www.radionz.co.nz/national/programmes/insight/audio/201799415/insight-upgrading-the-china-free-trade-agreement>

⁹⁵ For example, O'Riley, B. (2017, March 28). FTA upgrade can open new doors (p.D22). *New Zealand Herald*; Zhao, W. (2017, March 28). China's changing – and NZ needs to change too (p.D11). *New Zealand Herald*.

⁹⁶ Barnett, M. (2017, March 28). Smaller companies need to come into play with China (p.D12). *New Zealand Herald*.

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11: On International Trade, Copyright, and Indigenous Rights

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An important issue that arises in the context of globalisation and international trade is the impact of harmonisation or further strengthening of copyright laws through regional, multilateral, or bilateral free-trade agreements on indigenous rights. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994 was arguably the most significant step in harmonising intellectual property law including copyright on a global scale.⁹⁷ Instruments such as the now stalled TPP and the still under negotiation RCEP are some of the more recent examples of agreements that reinforce the existing law or push the boundaries of intellectual property protection in their member states.

Over the past few decades, there has been a worldwide increase of interest in indigenous culture and cultural expression.⁹⁸ This includes a demand for both tangible goods such as original artefacts and intangible assets such as traditional cultural expressions that can be exploited in industries around design, fashion, or music.⁹⁹ This trend follows the existing interest in the commercial exploitation of indigenous knowledge by large corporations mainly in the field of medicines and drug manufacturing. This increase in trendiness of indigenous ties affects Māori heritage both in New Zealand and abroad.

Intellectual property law can facilitate the use of indigenous traditional knowledge and traditional cultural expressions.¹⁰⁰ However, there is a myriad of examples of free and unauthorised use of indigenous traditional knowledge and traditional cultural expressions by third parties to gain financial benefits, in which the community that the work has originated from had no share.¹⁰¹

⁹⁷ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1869 UNTS 299 opened for signature 15 April 1994, entered into force 1 January 1996.

⁹⁸ See United Nations Department of Economic and Social Affairs, Secretariat of the Permanent Forum on Indigenous Issues. (2009). *State of the world's indigenous peoples*. ST/ESA328. New York. p. 69,71. http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf

⁹⁹ Solomon, M. (2005). Protecting Māori heritage in New Zealand. In Hoffmann, B. T. (Ed.). *Art and cultural heritage. Law, policy, and practice* (pp. 352–362). New York, NY: Cambridge University Press.

¹⁰⁰ See Kono, T. (Ed.). (2009). *Intangible cultural heritage and intellectual property: Communities, cultural diversity and sustainable development*. Antwerp, Belgium: Intersentia.

¹⁰¹ See for example Tan, L. (2013). Intellectual property law and the globalization of indigenous cultural expressions: Māori tattoo and the Whitmill v. Warner Bros case. *Theory, Culture & Society*, 30(3), 61. doi: 10.1177/0263276412474328; *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 48 where the Reserve Bank of Australia obtained a licence from an intermediary agency to reproduce the design of Terry Yumbulul's 'Morning Star Pole' on a commemorative bank note. Yumbulul's claim of copyright infringement on the grounds of the limited use nature of the license due to the cultural significance of the Morning Star design in Australian aboriginal ceremonies was settled outside the Court while his claim for unconscionable conduct by the agency was dismissed; and, *John Bulun Bulun & Anor v R. & T. Textiles Pty Ltd*. FCA 1082. (1998).

It has become conventional wisdom to assert that intellectual property provides inadequate protection to indigenous peoples.¹⁰² Issues that arise at the intersection of intellectual property and indigenous rights relate to protection and exploitation of indigenous traditional cultural expressions (what should not be exploited and how to best use and protect the knowledge and cultural expressions that are available). The incompatibility of copyright and traditional cultural expressions is mainly due to the fundamental differences between the values behind the Western intellectual property system and the worldviews of indigenous peoples.

When trade-related aspects of intellectual property were being cooked up in 1994 as part of the TRIPS negotiations, trade in traditional cultural expressions was not properly considered, if at all. Approximately a year before the adoption of the TRIPS Agreement, the Bellagio Declaration highlighted that:

Intellectual property laws have profound effects on issues as disparate as scientific and artistic progress, biodiversity, access to information, and the cultures of indigenous and tribal peoples. Yet all too often those laws are constructed without taking such effects into account, constructed around a paradigm that is selectively blind to the scientific and artistic contributions of many of the world's cultures and constructed in fora where those who will be most directly affected have no representation.¹⁰³

Overall, the intellectual property system fails to appreciate that indigenous peoples have a complex spiritual, social, and economic connection to their heritage and its manifestations. This is usually different from the connection of authors of non-indigenous works to their creations. Further global or regional harmonisation allows copyright to assert itself in indigenous communities where cultural expressions and the knowledge that accompany them are treated differently from copyright works.

The lack of consideration for the value of indigenous cultural expressions and their treatment by copyright law is not surprising considering that a change in the international community's attitude towards indigenous rights in general did not happen until the 1960s and 1970s,¹⁰⁴ and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted only ten years ago.¹⁰⁵

¹⁰² Bowrey, K. (2011). Indigenous culture, knowledge and intellectual property: The need for a new category of rights (p. 46). In Bowrey, K., Handler, M., & Nicole, D. (Eds.). *Emerging challenges in intellectual property*. Oxford, England: Oxford University Press.

¹⁰³ Boyle, J. (1996). *Shamans, software, and spleens: The construction of the information society* (p. 193). Cambridge, MA: Harvard University Press.

¹⁰⁴ See for example the International Labour Organization Convention C107 of 1957 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries; the International Labour Organization Convention C169 on Indigenous and Tribal Peoples in Independent Countries, (1989); the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention for the Safeguarding of Intangible Cultural Heritage (2003); and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression (adopted on 20 October 2005, came into force 18 March 2007).

¹⁰⁵ United Nations. (2007). United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf ; United Nations. (2007). Resolution adopted by the General Assembly 61/295 United Nations Declaration on the Rights of Indigenous Peoples. <http://www.un-documents.net/a61r295.htm>

The UNDRIP is generally viewed as the most prominent authority on the rights of indigenous people, complementing and emphasising the human rights previously recognised in key international human rights agreements. The Declaration recognises the States' responsibility regarding misappropriation of cultural and intellectual property of indigenous peoples.¹⁰⁶ The UNDRIP also expressly stipulates that 'indigenous peoples have the right to maintain, control, protect and develop their cultural heritage ... traditional cultural expressions, as well as the manifestations of their ... cultures'.¹⁰⁷

In addition to New Zealand's obligations under international instruments, the Treaty of Waitangi, as part of the unwritten constitution of New Zealand,¹⁰⁸ also necessitates protection of mātauranga Māori (Māori knowledge, traditional cultural practices, or worldview).¹⁰⁹ The Waitangi Tribunal's Wai 262 Report specifically highlighted the need for involvement of Māori in negotiations of international instruments that are likely to affect their rights and interests. The report states that 'Māori must have a say in identifying their interest and devising the protection for it'.¹¹⁰ The report even recognises that in the case of matters of utmost 'central importance to Māori' it may be necessary 'to place the Māori voice as the New Zealand voice in the international arena'.¹¹¹

Regulating copyright in international trade without due consideration for its impact on traditional cultural expressions and indigenous rights would violate New Zealand's liabilities under both international and domestic law. Therefore, it is important to highlight the role of copyright in international trade on the use and appropriation of tikanga Māori (Māori culture or way of doing things),¹¹² parts of which may also be taonga (treasures, sacred).

Currently, the Advisory Committees in the Trade Marks Act 2002 and Patents Act 2013¹¹³ advise the Patents and Trade Mark Commissioners regarding any conflict between the interests of Māori and granting of a patent or registration of a trade

¹⁰⁶ UNDRIP, art 11(2).

¹⁰⁷ UNDRIP, art 31. See for an analysis of the scope and meaning of an indigenous right to intellectual property in the context of New Zealand, V. Toki. (2015). An indigenous right to intellectual property? *Intellectual Property Quarterly*, (4), 370-385; and J. C. Lai. (2017). What is an Indigenous right to intellectual property? *Intellectual Property Quarterly* 78(1).

¹⁰⁸ *New Zealand Māori Council v Attorney General* NZLR 513, 516 (1994) in which Lord Woolf (PC), stated that the 'Treaty records an agreement executed by the Crown and Māori, which over 150 years later is of the greatest constitutional importance to New Zealand'.

¹⁰⁹ Treaty of Waitangi (1840), art 2.

¹¹⁰ Report of the Waitangi Tribunal on Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity (2011) (Wai 262 report), at 681.

¹¹¹ Wai 262 report, at 685.

¹¹² New Zealand Law Commission (NZLC) *Māori Custom and Values in New Zealand Law* (NZLC, Wellington, 2011) at 17. See also H M Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 12.

¹¹³ The Trade Marks Māori Advisory Committee was formed as a result of consultations with Māori in mid 1990s and on the grounds that previous trademarks laws did not protect the interests of Māori sufficiently. Upon entry into force of the Geographical Indications (Wine and Spirits) Registration Act (2006), the Committee will also provide advice regarding the proposed use or registration of a geographical indication likely to be offensive to Māori. The Patents Māori Advisory Committee was part of the broader changes introduced in 2013 to the Patents Act (1953).

mark.¹¹⁴ These measures help ensure that Māori indigenous knowledge and culture is not misappropriated under the framework of patents and trademarks legislation.

However, it is not possible to replicate the exact same checks and balances within the copyright law framework. The automatic protection of copyright law means that any work derived from traditional cultural expressions that fits the copyright subsistence requirements is considered a copyright work.¹¹⁵

Therefore, in order to comply with their obligations under human rights law, countries including New Zealand should consider the protection of traditional cultural expressions when further harmonising copyright in the realm of international trade. The potential effects of copyright harmonisation on traditional cultural expressions should be examined in the local context before going forth with such initiatives. A pluralistic approach to international trade that gives countries the chance to choose policy measures that suit the best interests of their indigenous communities is preferred. Finally, indigenous communities should be directly involved in the process of harmonisation and adoption of any policies and laws that affect their culture and heritage.

¹¹⁴ Section 226, Patents Act (2013) and s178, Trade Marks Act (2002).

¹¹⁵ However, as per art 17 of the Berne Convention (and 9(1) of the TRIPS Agreement) countries can control or prohibit the 'circulation, presentation, or exhibition of any work or production' without violating their obligations under these instrument. While this does not stop unauthorised, offensive, or culturally inappropriate TCE-derived works from attracting copyright protection, countries can use their discretion to limit the exclusive rights of authors of such works. See for a further discussion of art 17, Lai J. C. (2014). *Indigenous cultural heritage and intellectual property rights: Learning from the New Zealand experience?* (p. 277-278). Cham, Switzerland: Springer International Publishing. There is also an ongoing debate on whether certain type of works such as pornography or works generally seen as contrary to public order or morality are copyright protected. See for example Bartow, A. (2012). Copyright law and pornography. *Oregon Law Review*, 91(1), 1; Shirae, Y. (2014). Copyright protection on pornography in Japan. *NTUT Journal of Intellectual Property Law and Management*, 3(2), 213.

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12: On Intellectual Property Rights and Globalisation: An Optimist's View

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The patents system for medicines, under the World Trade Organisation (WTO) umbrella, faces an ethical dilemma. It must balance the pharmaceutical industry's reliance on patent protection to recoup their investments on new drugs and incentivise further research and development, with the public's interest to encourage inventiveness and the dissemination of knowledge. However, the broader issue is not just about rights to knowledge after the patent term is over. It is also about access to cheaper life-saving medicines for diseases such as AIDS in the developing world during the monopoly period. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has provided a breakthrough on this important issue despite being mired in multilateral trade rules. With free trade agreements covering a significant proportion of international trade today,¹¹⁶ I am optimistic that this augurs well for bilateralism or regionalism to complement a multilateral approach.

The Trans-Pacific Partnership Agreement (TPPA), if it survives without the United States, would be the free trade agreement between New Zealand and the other ten of our Asian and Pacific-rim neighbours.¹¹⁷ In the patent arena, I have written before about the controversy surrounding the changes in the TPPA to the data protection regime,¹¹⁸ and concerns that data protection under the guise of free trade rules alongside patent protection lengthens the period of protection of pharmaceutical data and undermines access to essential medicines for the developing world.

Presently, a patent grants a monopoly term of protection for twenty years for any inventions that are novel, inventive (i.e. non-obvious) and useful. Apart from and alongside this patent monopoly for a new drug, the data protection regime grants an 'exclusivity' period for pharmaceutical and other test data obtained from clinical trials to ensure the efficacy and safety of the drugs. Housed under Article 39.3 of the TRIPS Agreement for the protection of undisclosed information, its primary purpose is to guard against 'unfair commercial use'; its secondary purpose is secrecy.¹¹⁹ Competitors obtaining marketing approval for cheaper generic medicines are unable to obtain such data during the protected exclusivity period. Needless to say, having to conduct their own clinical trials for similar data would be a wasted duplication of time, effort and money resulting in more expensive drugs.

¹¹⁶ See World Trade Organization. (1994). Understanding on the interpretation of article XXIV of the General Agreement on Tariffs and Trade 1994. Retrieved from https://www.wto.org/english/docs_e/legal_e/10-24_e.htm

¹¹⁷ The other ten countries being Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore and Vietnam.

¹¹⁸ Lim, P. H. (2016, February 3). Intellectual property and the TPPA. Does it affect us? *Briefing Papers*. <http://briefingpapers.co.nz/intellectual-property-and-the-tpa-does-it-affect-us/>

¹¹⁹ Li, P., & Lim, P. H. (2014). A precautionary approach to compulsory licensing of medicines: Tempering data exclusivity as an obstacle to access. *Intellectual Property Quarterly*, (3), 241-255.

New Zealand's current provision of five years for test data¹²⁰ is relatively shorter than the period of protection allowed in other countries. The United States allows five years for new pharmaceutical chemical entities, three years for new indications for pharmaceutical drugs, and twelve years for new biologic products. The twelve years comprises only four years of data exclusivity with eight years for market exclusivity.¹²¹ The European Union has eight years (plus two years market exclusivity and one year for new indications).¹²² China's provision against disclosure of such data sets a period of six years.¹²³

Such data protection has been viewed as the insidious evergreening of a patent, which means that the data exclusivity period may still be in place after the patent term. This delays the dissemination of knowledge that is supposed to be the trade-off for a grant of a patent. Responding to the lobbying of pharmaceutical companies for mandatory international protection of test data, the data exclusivity provision is prominent on the agendas for free trade agreements setting specific periods of protection that vary from country to country.¹²⁴ The lobbying under the TPPA for twelve years of protection for biologics to align countries with the United States' position met with intense scrutiny and opposition. The negotiations were concluded to provide for ten years of data protection for new agricultural chemicals and a review of New Zealand's current five-year protection period for biologics after ten years.¹²⁵

It is clear that patent monopoly and data exclusivity compound the problem of access to essential medicines for the poor. It is not disputed that the TRIPS Agreement would serve the interests of developed countries well. However, challenges remain over how it could serve the interests of developing and least developed countries in terms of access to essential medicines. For the first time, countries in the developing world without patent laws have had to introduce (under the transition arrangements) a twenty-year protection period for all new products and processes to comply with the TRIPS Agreement. To remedy the negative effects of this patent monopoly there is provision for 'compulsory licensing' under Article 31 of the Agreement. Essentially, a

¹²⁰ Medicines Act (1981). No. 118 s 23B *Protection of confidential supporting information about innovative medicines*.

¹²¹ 2 USC §262, Biologics Price and Competition and Innovation Act (2009). See §262(k) para 7.

¹²² European Union. (2004, 30 April). Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83 relating to medicinal products for human use, introducing a new data exclusivity system for original medicines. http://ec.europa.eu/health/sites/health/files/files/eudralex/vol-1/dir_2004_27/dir_2004_27_en.pdf

¹²³ Rongji, Z. (2002). *Regulations for the implementation of Drug Administration Law of PRC*, Art 35. Retrieved from <http://eng.sfda.gov.cn/WS03/CL0767/61640.html>

¹²⁴ World Trade Organization, World Intellectual Property Organization & World Health Organization. (2013). *Promoting access to medical technologies and innovation* (pp. 189-190). Retrieved from https://www.wto.org/english/res_e/booksp_e/pamtiwhowipowtoweb13_e.pdf

¹²⁵ See Text of the Trans-Pacific Partnership signed on 4 February 2016 by all twelve countries (including the United States) but not in force: Ministry of Foreign Affairs and Trade. (n.d.). Chapter 18, Art 18.47 (Agricultural Chemical Products) and Art 18.52 (Biologics). Retrieved from https://www.mfat.govt.nz/assets/_securedfiles/trans-pacific-partnership/text/18.-intellectual-property-chapter.pdf

compulsory licence is granted by a government or court authorising another party to manufacture a patented drug without the patent owner's consent.¹²⁶ The authorisation overrides the patent to allow for the production of cheaper generic drugs giving the pharmaceutical giants (patent holders) no choice in the matter. A government may require a pharmaceutical company to license the use of their right based on adequate remuneration,¹²⁷ or issue a compulsory licence where negotiations fail to obtain authorisation on reasonable commercial terms.¹²⁸ Negotiations may be waived in cases of national emergency, extreme emergency or public non-commercial use.¹²⁹

This in-built flexibility and safeguard for compulsory licensing faced a hurdle presented by an export restriction. Drugs manufactured under the compulsory licensing provision must be predominantly for domestic use.¹³⁰ This posed a paradox as the least developed countries with no manufacturing capacity in the pharmaceutical sector were unable to produce cheaper medicines with or without compulsory licensing. Developing countries such as India, Brazil and Thailand that had the manufacturing capacity to do so were prevented from supplying to countries in need under the export restriction. Thus, the very name 'free trade' is illusory if the results are a pyrrhic victory for developing countries. In a sense, not only have they lost the freedom to be able to 'reverse engineer' the expensive drugs invented by developed countries, but their ability to supply other countries in need has been curtailed as well.

It is worth recalling that, more than a decade ago, intellectual property rights under the WTO umbrella faced an uncertain future. India had a self-reliant pharmaceutical industry producing generic drugs without patent laws on products. To cater for the reservations of developing countries, a transition period for compliance was provided. India joined the WTO and signed TRIPS in January 1995.¹³¹ On the other hand, joining the WTO gave Brazil sufficient leverage to arm-twist the pharmaceutical giants, Roche and Merck, to reduce prices. As Brazil had the manufacturing capacity to produce cheap drugs, the threat of compulsory licensing worked. Both companies succumbed and agreed to a substantial reduction in the cost of the AIDS drugs.¹³² The uncertainty was exacerbated when developing nations were tempted into compromises not to

¹²⁶ TRIPS Agreement, Article 31 allows for 'other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorised by the government' subject to certain conditions. World Trade Organization. (n.d.). *TRIPS Part II - Standards concerning the availability, scope and use of intellectual property rights*. https://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm

¹²⁷ TRIPS Agreement, Article 31(h).

¹²⁸ TRIPS Agreement, Article 31(b).

¹²⁹ TRIPS Agreement, Article 31(b).

¹³⁰ TRIPS Agreement, Article 31(f).

¹³¹ See World Trade Organization. (n.d.). *India and the WTO*. Retrieved from https://www.wto.org/english/thewto_e/countries_e/india_e.htm

¹³² Meland, M. (2003). *Brazil threatens to import Indian copy of Roche anti-HIV drug*. Retrieved from <https://www.law360.com/ip/articles/673/brazil-threatens-to-import-indian-copy-of-roche-anti-hiv-drug>.

issue compulsory licences for generic drugs in exchange for favourable trading deals, as alleged in the bilateral negotiation between the United States and Thailand before it had to be suspended.¹³³

Today, we muse over similar concerns contemplating the future of trade while the TPPA was negotiated and again if the TPPA is resurrected. However, free trade or the freedom to trade must lie in the political will of nations. The developing world showed during the Doha round of negotiations that, en bloc, they were able to muscle their views through. It resulted in the 'Declaration on the TRIPS Agreement and Public Health' to combat the public health dilemma faced by the developing world.¹³⁴ Initially, speculation was rife that the Doha Declaration was a breakthrough only in theory. Nevertheless, the follow up 'Decision of 30 August 2003'¹³⁵ freed up the restriction to allow generic drugs produced under compulsory licensing to be exported to eligible countries. Thus rules or challenges posed by obstacles are not the problem as there is room for negotiations and change. The TRIPS Agreement, as amended on 23 January 2017, changes the WTO intellectual property rules to give legal effect to the 2003 Decision.¹³⁶

The experience under the WTO paved the way for a better collective understanding of developing countries' concerns. I applauded the spirit of Doha at that time preferring not to sceptically limit it as only a breakthrough in theory or a political answer to the issue. Arguably, as noted by the WTO, it is often the tendency to focus on 'perceived procedural and institutional inadequacies' when there are failures and setbacks in negotiations.¹³⁷ However, I believe the way forward is not to put the blame on even actual inadequacies, but rather to overcome them and equalise the bargaining powers between nations. Brazil led the way and change was evident in the subsequent bold effort by Thailand to issue compulsory licences under the TRIPS provision.¹³⁸ Brazil issued a compulsory licence on 'Efavirenz' on the grounds of 'public interest' to ensure the supply of the drug for its national AIDS programme

¹³³ Boseley, S. (2004, July 14). France accuses US of aids blackmail. *The Guardian*. Retrieved from <http://www.guardian.co.uk/international/story/0,1260695,00.html> See also Office of the United States Trade Representative. (n.d.). *Thailand*. Retrieved from <http://www.ustr.gov/countries-regions/southeast-asia-pacific/thailand>

¹³⁴ World Trade Organization. (2001, November 20). Declaration on the TRIPS Agreement and Public Health. WT/MIN(01)/DEC/2.

¹³⁵ World Trade Organization. (2003, September 1). Implementation of Paragraph 6 of the DOHA Declaration on the TRIPS Agreement and Public Health. WT/L/540 and Corr 1. https://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm

¹³⁶ See Article 31bis World Trade Organization. (n.d.). Amendment of the TRIPS Agreement. Retrieved from https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm

¹³⁷ Sutherland, P., Bhagwati, J., Botchwey, K., FitzGerald, N., Hamada, K., Jackson, J. H., Lafer, C., & de Montbrial, T. (2004). *The future of the WTO: Addressing Institutional challenges in the new millennium*. Switzerland: World Trade Organization. p.3. Retrieved from http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf

¹³⁸ The Ministry of Public Health & The National Health Security Office, Thailand. (2007). *Facts and evidences on the 10 burning issues related to the Government use of patents on three patented essential drugs in Thailand, document to support strengthening of social wisdom on the issue of drug patent*. Retrieved from <http://apps.who.int/medicinedocs/fr/m/abstract/Js18718en/>.

after negotiations with the patent holder, Merck, broke down.¹³⁹ Thailand issued a compulsory licence for Plavix for a heart disease on the grounds of 'public non-commercial use' in January 2007.¹⁴⁰

It is difficult not to be sceptical over the rhetoric of the powers that be who say 'that the WTO and the multilateral system is not just about mindless liberalization, or kow-towing to globalization [but] that the WTO can and will put people before markets'.¹⁴¹ Nevertheless, the fundamental element that drives trade is each nation's responsibility, collectively. No responsible government should place the wellbeing of its citizens at stake for the sake of the pharmaceutical industry. Both the developed and developing world showed that they could work around the rules for access to essential medicines in a crisis. During the Anthrax scare (a biological terrorism threat via mailing of anthrax-laden powder in the Washington D.C. area), the United States had similarly threatened Bayer successfully with compulsory licensing to reduce the price for the drug Cipro.¹⁴² As players in this game, each country will act in its own self-interest under the free trade rules. I remain optimistic that parties can sort out the reality of trade between or among themselves under their respective free trade agreements.

¹³⁹ Brazil has since renewed the compulsory licence for Efavirenz. Government of Brazil STD, AIDS and Viral Hepatitis Department. (2012, May 7). Brazil renews compulsory license for Efavirenz. http://www.aids.gov.br/en/en/noticia/2012/brazil_renews_compulsory_license_efavirenz

¹⁴⁰ See: American University Washington College of Law. (2008). Timeline for Thailand's Compulsory Licenses. <https://www.wcl.american.edu/pijip/documents/timeline.pdf>

¹⁴¹ World Trade Organization. (2003, September 10). Statement by Mr Pascal Lamy Commissioner for Trade. WT/MIN(03)/ST/5 Ministerial Conference Fifth Session Cancún. https://www.wto.org/english/thewto_e/minist_e/min03_e/statements_e/st5.pdf

¹⁴² BBC News. (2001, October 23). America's anthrax patent dilemma. <http://news.bbc.co.uk/1/hi/business/1613410.stm>

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13: On Climate Change, Trade and the Paris Agreement

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The economic implications for all countries of both adapting to the effects of climate change and limiting global warming to below 2 degrees above pre-industrial levels are huge. It is thus important that climate change and trade and investment policies are mutually supportive. There has been increasing attention on trade issues with the progress of international climate change negotiations. Much remains to be clarified. There are four current issues at the intersection of climate change and trade.

1: Trade liberalisation in climate-friendly goods and services

This is fully within the scope of the World Trade Organisation (WTO). There are in fact several work streams within the WTO covering this area, though progress is slow. The WTO's Committee on Trade and Environment (CTE) is a forum for bringing forward new ideas at the intersection of trade and the environment.

2: Border tax adjustment (BTA) and variants

This refers to import taxes on goods from countries where firms are not subject to a cost on their emissions. This is highly controversial, divisive, and problematic from both practical and WTO-compliance perspectives. The arguments in favour rest on:

- punishing free riders and recalcitrants;
- protecting the competitiveness of national firms subject to climate change costs at home while their competitors are not;
- avoiding 'carbon leakage', caused by production shifting to countries with more lax climate change policies, and hence causing an increase in emissions.

But the problem with the latter two arguments, as the OECD has demonstrated, is that there is very poor empirical evidence for either competitiveness risk or for carbon leakage.¹⁴³ They also rest on a further assumption that combating climate change is always a net cost. This is being increasingly challenged.

The argument against BTAs and their variants centres on the evil of 'unilateral measures' as a means of coercing developing countries. The sensitivity of such measures is shown by the fact that, until a very late stage of COP21 negotiations, developing countries were insisting on the following language in the Paris text:

¹⁴³ Kožluk, T., & Timiliotis, C. (2016). Do environmental policies affect global value chains? France: OECD. http://www.oecd-ilibrary.org/economics/do-environmental-policies-affect-global-value-chains_5jm2hh7nf3wd-en

‘Developed country Parties shall not resort to any form of unilateral measures against goods and services from developing country Parties on any grounds related to climate change’. An even more controversial alternative would be an arbitrary border tax not based on carbon content but simply designed to be punitive.

Some mainly academic thinkers have predicted a coming climate change trade war, and have argued that a country like New Zealand is vulnerable if its climate targets are seen as inadequate. However this is an improbable scenario. Any attempt to impose BTAs against countries which have signed up to the Paris Agreement and met its requirement to table a ‘nationally determined contribution’ (NDC) which is each nation’s pledge to contribute to global emissions reduction would face enormous practical difficulties, as well as risk undoing the international consensus.

Transparency, peer review, and ‘naming and shaming’ of countries with an inadequate NDC, or countries that fail to implement an adequate one, may prove more effective than any of these unilateral measures. Evidence from the climate change negotiations is that countries do care about their reputation.

A further resource to encourage countries to act would be the so-called ‘carbon clubs’¹⁴⁴, where countries wanting to accelerate their transition to a low carbon economy would join together and link their climate measures through a common carbon price via their emissions trading schemes. Imposing BTAs or other measures against other countries would have the same practical difficulties, but it may well be that such clubs, if successful, would serve more to encourage emulation rather than legitimise coercion.

3: International carbon trading and offsets

The Kyoto Protocol mechanisms (the Clean Development Mechanism, Joint Implementation and Emissions Trading) can be used by those countries who have tabled a 2020 target under the Protocol (European countries and Australia). International market mechanisms beyond 2020 have not yet been created under the Paris Agreement but its Article 6 foresees them. Such mechanisms are being developed bottom-up by groups of countries, who can make much faster progress than is possible within the United Nations Framework Convention on Climate Change (UNFCCC). Any new mechanisms are likely to be linked in some way to the UNFCCC however. There is no coverage of carbon trading under the WTO at present and there appears to be no appetite to bring it within WTO disciplines.

¹⁴⁴ As proposed by William Nordhaus. Nordhaus, W. (2015, April). Climate clubs: Overcoming free-riding in international climate policy. *American Economic Review* 105(4) 1339-1370.

4: Compatibility of climate change measures and trade rules

One fear is that WTO rules will have a chilling effect on climate change measures such as subsidies, technical regulations or bans on certain products. But Article 3.5 of the UNFCCC (which applies to the Paris Agreement as it does to the earlier Kyoto Protocol) is clear. In using WTO language to state that 'measures taken to combat climate change, including unilateral ones, should not constitute a means of *arbitrary* or *unjustifiable* discrimination or a *disguised* restriction on international trade' [emphasis added], the UNFCCC, like the WTO, acknowledges the legitimate purpose of climate measures, including that they may involve restrictions on trade. There is ample and growing WTO jurisprudence on measures taken for environmental purposes which confirms their legitimacy in WTO law. The jurisprudence is not static; it evolves with international thinking as expressed in treaties and less formal agreements. Helpfully the WTO Treaty (1994) included an objective relating to protection and preservation of the environment (first preambular paragraph) that was not present in the earlier General Agreement on Tariffs and Trade (GATT). This provision has already been used in interpretation by the highest WTO jurisdiction, the Appellate Body.¹⁴⁵

Conclusion

- Some carbon markets will develop amongst 'carbon clubs'. Trading rules will be determined by those countries involved and will rest on the environmental integrity of the units traded.
- BTAs are not the panacea sometimes suggested and are hugely problematic, but the threat of them may be a political lever to gain cooperation in negotiations.
- There are other ways of achieving similar ends; for example, requiring all goods, domestic and imported, to meet sustainability standards. This is potentially allowable under the WTO Technical Barriers to Trade agreement (TBT) as a type of processing and production method (PPM). But even if not, the existence of the Paris Agreement – a universal agreement with clear objectives and requirements on all Parties to act on climate change – would be a further useful reference in any dispute settlement proceedings.
- Expect slow progress on WTO trade and services liberalisation.

¹⁴⁵ See the Appellate Body Report on a US-Mexico dispute known as 'shrimp-turtle' which confirmed the right of the United States to ban the import of shrimp from countries that were not taking measures to protect sea turtles in their shrimp fisheries. World Trade Organization. (1998, 12 October). United States – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R. Report of the Appellate Body. https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf

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About The Policy Observatory

Based at Auckland University of Technology, The Policy Observatory provides a lens on public policy in Aotearoa New Zealand. We both conduct and commission research on economic, social and environmental policy issues, with the intention of publishing results in a form that is accessible to the general public. We work in a collaborative, networked way with researchers across institutions and in the private sector. Ultimately, we are concerned with how policy advances the common good.

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