

Trade and Agriculture Commission: Advice to the Secretary of State for International Trade on the UK- New Zealand Free Trade Agreement

June 2022

CP 709



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Presented to Parliament by the Secretary of State for International Trade by Command of Her Majesty

June 2022

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Trade and Agriculture Commission

Advice on UK-New Zealand FTA

16 June 2022

Executive Summary

On 3 March 2022, the Rt Hon Anne-Marie Trevelyan MP, the Secretary of State for International Trade, requested us to advise her on the UK-New Zealand FTA on the extent to which those provisions of the UK-New Zealand FTA that are applicable to trade in agricultural products are consistent with the maintenance of UK levels of statutory protection in relation to (a) animal or plant life or health, (b) animal welfare, and (c) environmental protections. The Secretary of State asked us three questions, which we answered as follows:

a. Question: Does the FTA require the UK to change its levels of statutory protection in relation to (a) animal or plant life or health, (b) animal welfare, and (c) environmental protection?

Answer: No. The FTA does not require the UK to change its existing levels of statutory protection in relation to animal or plant life or health, animal welfare and environmental protection. In particular, the FTA does not restrict the UK's WTO rights to regulate in these areas. It even enhances these rights in some respects.

b. Question: Does the FTA reinforce the UK's levels of statutory protection in these areas?

Answer: Yes. The FTA reinforces the UK's statutory protections in the areas covered for two reasons. First, it contains environmental obligations that require the UK to maintain its statutory protections in relation to animal welfare and environmental protection. Second, these obligations also ensure that New Zealand will not gain a trade advantage by lowering its standards of animal welfare and environmental protection or not properly implementing its domestic laws in these areas.

c. Question: Does the FTA otherwise affect the ability of the UK to adopt statutory protections in these areas?

Answer: No. The FTA does not otherwise affect the ability of the UK to adopt statutory protections in the areas covered.

In answering this question, we also addressed several concerns that were raised with us during consultations. To answer these concerns, we met UK and New Zealand officials, as well as several experts to gain an understanding of agricultural practices and conditions of production in both countries, and the extent to which the concerns that were raised with us were likely to be manifested in practice. Concretely, for each concern we asked four questions: (a) whether agricultural production practices and production conditions differ between the two countries; (b) whether any such differences affect products likely to be imported in increased

quantities under the FTA, (c) whether any such differences were likely to confer a cost advantage on New Zealand farmers, and (d) whether the FTA restricted the UK's WTO rights to regulate imports in order to address harms caused by those different practices and production conditions.

These concerns, and our findings, are as follows:

- Use of antibiotics for growth promotion. Neither New Zealand nor the UK permit the use of antibiotics for growth promotion purposes. In any event, the FTA does not restrict the UK's WTO rights to regulate imports of meat produced using antibiotics. To the contrary, Article 5.14 of the FTA requires the parties to explore initiatives to reduce antimicrobial use, and, where practical and economically feasible, to follow international standards aiming to promote the prudent and responsible use of antimicrobial agents.
- 2. Use of hormonal growth promotants (HGPs): HGPs are not used in New Zealand. The FTA does not change the WTO legal position on the UK's current import prohibition on hormone treated beef.
- 3. Use of feed additives (ractopamine): New Zealand is unlikely to export products produced using ractopamine to the UK. In any event, the FTA does not change the UK's WTO rights to regulate imports of such products.
- 4. Use of battery cages for egg laying hens: UK and New Zealand practices in relation to egg laying hens will be identical from 1 January 2023. It is technically possible for the UK to regulate imports of egg products on public morals grounds, but it is difficult to establish the basis for doing so where practices in both countries are similar.
- 5. Livestock transport conditions: Livestock transport conditions in New Zealand and the UK in are in practice very similar, even though the two countries have different regulatory approaches to achieving this end. The key difference is that the UK takes a more prescriptive approach, with a focus on detailed regulatory standards and processes, while New Zealand's regulations and code of practice focus on whether a given animal is fit for transport. In any event, the FTA does not restrict the UK's rights to regulate imports of beef if this is necessary to protect UK public morals. Given the similarity in practices between the two countries, and New Zealand's overall approach to animal welfare in its rules on transport conditions, it is difficult to imagine that this will be the case.
- 6. Use of pesticides: New Zealand does authorise certain pesticides for uses that are prohibited by the UK. A distinction needs, however, to be drawn between the potential harmful effects of such pesticides within the UK and within New Zealand. In principle, the UK is permitted to protect its own environment, animals and plants (as well as humans), in accordance with the WTO SPS Agreement, as affirmed in the SPS chapter of the FTA. The FTA does not change this. On the other hand,

the UK is not, in principle, permitted under WTO law to restrict imports of products that are produced in a manner that might cause harm to New Zealand's environment. That is fundamentally a matter for New Zealand to regulate, in the absence of any effect on the UK. That said, the FTA goes further than WTO law in this respect, requiring New Zealand to 'endeavour to ensure' that its environmental laws provide for high levels of protection. Given its soft wording, this provision would protect the UK against serious failures by New Zealand to maintain environmental laws providing for a high level of protection. While we cannot make a definitive assessment, it is unlikely that the approved uses of pesticides discussed here would rise to that level.

7. Climate Change: New Zealand's regulatory approach to climate change mitigation is more comprehensive than the UK's approach in several respects. In particular, New Zealand includes agriculture within its Emissions Trading Scheme, whereas the UK does not. In addition, the emission intensity of producing beef and sheep meat in New Zealand is less than that in the UK, including if one takes transport-related emissions into account. In any event, the FTA does not restrict the UK's rights to adopt measures to protect the Earth's climate. To the contrary, under the FTA, the UK is able to adopt measures related to the conservation of exhaustible natural resources, and Articles 22.6 and 32 explicitly provide that this includes measures to mitigate climate change. In this respect, the FTA enhances the UK's right to adopt climate change measures vis-a-vis WTO law. In addition, the UK can raise emission-intensive production as a concern with New Zealand in the Environment and Climate Change Sub-Committee.

We also considered the extent to which the FTA would entitle the UK to regulate imports if conditions changed. We found that it does not restrict the UK's existing WTO rights to maintain and adopt future import controls in order to protect its legitimate interests. In relation to certain environmental issues, the FTA may also enhance these rights. For example, the FTA gives the UK enforceable rights to ensure that New Zealand maintains a certain level of environmental protection. The FTA also establishes joint UK and New Zealand working groups which will play an important role in delivering its aim of mutually maintaining and improving animal welfare and environmental standards.

We hope that, in addressing these concerns directly, we are able to provide a measure of assurance that even though this FTA is likely to increase competition in certain sectors – this being the essence of free trade – any such competition will be fair, and not based on impermissibly low standards. Furthermore, and fundamentally, we hope to have demonstrated that this FTA does not limit the UK's rights under WTO law to protect its legitimate interests, including animal and plant life and health, animal welfare, and the environment, and even enhances its ability to ensure that such standards are maintained, and even improved.

Our mandate

Terms of reference and request for advice

Our terms of reference, which we adopted on 6 December 2021, state as follows:

The TAC's purpose is to provide advice under section 42 of the Agriculture Act 2020. In particular, the TAC will provide advice on whether, or to what extent, the measures provided for by new free trade agreements (FTAs) that are applicable to trade in agricultural products are consistent with the maintenance of UK levels of statutory protection in relation to a) animal or plant life or health, b) animal welfare, and c) environmental protections

On 3 March 2022, the Rt Hon Anne-Marie Trevelyan MP, the Secretary of State for International Trade, requested us to advise her on the UK-New Zealand FTA as follows:

In line with the TAC Terms of Reference, which can be found on gov.uk, I request your advice on whether, or to what extent, the measures in the UK-New Zealand FTA that are applicable to trade in agricultural products are consistent with the maintenance of UK levels of statutory protection in relation to a) animal or plant life or health, b) animal welfare, and c) environmental protections.

I would like to request that this advice be produced on a chapter-by-chapter basis, though the TAC is welcome to include additional sections it sees fit.

In producing its report I would envisage that the TAC would:

- Conduct an initial assessment of which chapters it considers to be in / out of scope (ie which contain measures relating to trade in agricultural products)
- Consider all relevant measures within in-scope chapters
- With regard to relevant measures within in-scope chapters, consider the following questions:
 - Does the UK-New Zealand FTA require a change to UK domestic statutory protections in relation to animal or plant life or health; animal welfare; and the environment?
 - Does the UK-New Zealand FTA affect the UK Government's ability to set statutory protections in these specified areas?
 - Does the UK-New Zealand FTA underline any existing UK domestic statutory protections – or in some instances go beyond them – in relation to: animal or plant life or health; animal welfare; and the environment?

The TAC should also:

- consider the landscape of statutory protections across the UK, reflecting on all parts of the UK
- consult those it considers may assist in the preparation of this advice and note in the advice – where relevant – those whom the TAC consulted
- given the Government's trade agenda is of interest to many, consider how to make its advice accessible and readable to a non-technical audience

Our approach

Reading our terms of reference and the request from the Secretary of State together, we consider that our mandate requires us to address three questions.¹ First, we

¹ For analytical clarity, we answer these questions in a different order than posed.

consider (1) whether the FTA requires the UK to change its levels of statutory protection in relation to (a) animal or plant life or health, (b) animal welfare, and (c) environmental protection.² Second, we consider (2) whether the FTA reinforces the UK's levels of statutory protection in these areas. In this context, we consider obligations in the FTA which require the UK and New Zealand to maintain, or improve, standards of protection in the relevant areas. Third, we consider (3) whether the FTA otherwise affects the ability of the UK to adopt statutory protections in these areas. In this context, we consider several issues: how decisions are made under the FTA and how that might affect the UK's statutory protections, the potential resource implications of increased imports on border controls, and the extent to which the FTA affects the ability of the UK to respond to concerns, raised during our consultations, about the potential effects of the FTA on animal or plant life or health, animal welfare and environmental protections.

Our approach in detail

We consider how the UK-New Zealand FTA, insofar as it relates to trade in agricultural products, relates to relevant UK statutory protections in relation to animal or plant life or health, animal welfare and the environment. We must therefore identify both the relevant provisions of the FTA and relevant statutory protections in these areas.

The WTO as a baseline

The FTA does not exist in isolation. It assumes, incorporates and, in some cases, goes beyond WTO rights and obligations which already apply to trade between the UK and New Zealand in their capacity as WTO Members. In answering the questions posed, our approach is to consider the difference (if any) that the FTA makes to the WTO legal framework. That is to say, where the FTA simply replicates the UK's legal position under WTO law, we do not consider that the FTA has any added effect on the UK's maintenance of statutory protections. We explain where this is the case below.

The FTA

We identify four main categories of FTA provisions that are relevant to trade in agricultural products between the UK and New Zealand: (a) trade liberalisation obligations, (b) rights to restrict trade, (c) obligations to maintain standards, and (d) institutional provisions.

Trade liberalisation obligations

The FTA contains provisions that create enhanced market access opportunities to the UK for New Zealand agricultural products. This is done in three main ways.

The first way that this is done is via the UK's **obligation to reduce customs duties** beyond WTO commitments on certain products.³ In line with our mandate, we do not seek to quantify the extent to which these tariff reductions are likely to result in increased imports of these products. However, we do consider these provisions in order to identify the products that are likely to be traded at an increased rate between

² Our mandate does not include consideration of the effects, if any, of the FTA on the maintenance of UK statutory protections in relation to human health. That is being considered separately by the Food Standards Agency.

³ This is done in several ways. For many products, duties are eliminated on the FTA's entry into force. For others, duty reductions take place over time.

the UK and New Zealand as a result of the FTA, so that we can consider the likely effect of the FTA on UK statutory protections relevant to these particular products and any related (ie downstream or upstream) products or services.

This is not the only way that the FTA can result in increased imports of New Zealand products. A second way that this can be done, under the FTA (but also under WTO law), is via rules on non-tariff barriers, good regulatory practice, customs and trade facilitation. A particularly relevant means of reducing trade barriers is by means of **equivalence determinations** by which the UK can permit New Zealand products to enter the UK market when they are produced according to standards that are deemed equivalent to UK standards even if these two sets of standards differ. Where this involves a cost saving for New Zealand production, this could have a bearing on the competitive position of New Zealand imports. We consider this issue below.

A third way in which the FTA can increase trade in a given product is by **reducing the burden of UK import controls**, instead delegating part of this process to New Zealand prior to export. This can be done by various means, from pre-listing to socalled 'mutual recognition agreements' on conformity assessment procedures (eg accepting the results of testing and certification performed in the other contracting state).⁴ The FTA does not require any such reductions in the UK import control regime, but we consider below the options under the FTA for such arrangements in the future. It bears noting that it is possible for the UK to do this under WTO law; the FTA merely sets out a more detailed mechanism for how this can be done in practice.

Rights to restrict trade in products that do not meet domestic standards Obligations that enhance market access for products from the FTA parties – which include rules on tariff reductions, non-tariff barriers, good regulatory practice, equivalence and customs and trade facilitation – are the core of every FTA. However, these obligations are always subject to exceptions and other rules which *permit* the **FTA parties to protect non-trade interests**, including plant or animal life or health, animal welfare and environmental protection. Accordingly, our advice considers those provisions in the FTA which permit the UK to restrict imports of New Zealand agricultural products that do not meet UK standards on animal or plant life or health, animal welfare and environmental protection. The key chapters in this regard are Ch 5 (Sanitary and Phytosanitary Standards (SPS)), Ch 6 (Animal Welfare), Ch 7 (Technical Barriers to Trade), Ch 21 (Good Regulatory Practices), Ch 22 (Environment), and Ch 32 (General Exceptions).

Obligations to maintain statutory protections

The FTA also establishes certain obligations that *require* the parties to maintain (or even improve) statutory protections in certain areas, most notably in Ch 22 (Environment) and Ch 6 (Animal Welfare). These chapters have two important functions in respect of trade in agricultural products under the FTA. First, they reinforce the UK's ability to maintain its statutory protections, both directly (by requiring the UK to continue certain protections) and indirectly (by serving as interpretive context to other provisions that give the UK a right to maintain statutory protections). Second, these obligations require New Zealand to enforce its statutory protections, thereby

⁴ A point on terminology: in this context, 'mutual recognition agreements' refer to agreements on conformity assessment procedures rather than agreements on the 'mutual recognition' of the parties' underlying standards. The term used for the latter is 'equivalence'. But there are exceptions. For example, the Trans-Tasman Mutual Recognition Agreement is an agreement on the mutual recognition of the underlying standards.

preventing New Zealand from obtaining cost and trade advantages by not applying certain of its own laws. We consider how these chapters relate to relevant UK statutory protections (identified below).

Institutional provisions

A separate set of provisions relates to the way that the FTA is administered. This involves the mechanisms in which the UK and New Zealand are able to discuss concerns arising under the agreement but also the mechanisms by which the parties are able to agree on enhanced market access. Most importantly, this concerns future decisions on equivalence of UK and New Zealand standards. Another important institutional provision is the chapter on dispute settlement, which applies to most (but not all) FTA obligations. We consider how these institutional provisions relate to the UK's ability to maintain, adopt and enforce relevant UK statutory protections, and its ability to ensure that New Zealand does the same.

'UK levels of statutory protection'

Our mandate requires us to consider the likely effect of the FTA on the maintenance of 'UK levels of statutory protection'. We therefore need to distinguish between rules, standards and practices that fall within the definition of 'statutory protection' and those that do not.

In this respect, we consider that this definition covers *mandatory* rules, standards and practices, whatever their legal form. However, it does not cover *voluntary* standards and practices, which may be followed by producers and retailers, and which are usually advertised to consumers by labels, for example the Red Tractor, Leaf Marque and RSPCA Assured labels, and which typically involve higher standards.⁵ Such voluntary standards have value, first of all to consumers, who are interested in whether products are made according to these conditions, and, secondly, to producers (and others in the value chain), who have a commercial incentive to produce according to these standards. We note that UK agricultural products are, in many cases, almost entirely produced in accordance with such voluntary standards⁶ and these enjoy widespread public recognition. In addition, producers complying with these voluntary standards are routinely subjected to independent inspection at higher rates than would be required by law.

We also consider UK levels of statutory protections to include mandatory rules, standards and practices adopted at all levels of government including, importantly, the

⁵ Voluntary standards go beyond UK legislation in several areas, for example, mutilations (castration, dehorning, disbudding and tail docking), herd health planning and antibiotic use. In addition, producers complying with these voluntary standards are routinely subjected to independent inspection by ISO accredited bodies at higher rates than would be required by law. See United Kingdom Accreditation Service, *Food Sector Accreditation*, https://www.ukas.com/accreditation/sectors/food/.

⁶ UK voluntary standards compliance rates are as follows: dairy (99%), beef (90%), lamb (40%) and cereals (90%). See Agriculture and Horticulture Development Board, UK Dairy Trade Balance (March 2022) at https:// ahdb.org.uk/dairy/uk-dairy-trade-balance; British Meat Processors Association, Beef & Veal [accessed 31/03/ 2022] at https://britishmeatindustry.org/industry/imports-exports/beef-veal/; Agriculture and Horticulture Development Board, Supply and Demand March Update, (March 2022), at https://projectblue.blob.core.windows.net/media/Default/Market%20Intelligence/cereals-oilseeds/supplydemand/uk-supply-demand/2021-22%20-%20Mar%20update.pdf.

devolved jurisdictions. We also consider, where relevant, statutory protections that are not yet in force, but are going through the parliamentary process.

UK statutory protections at issue

We consider that we should not address the FTA in the abstract but rather, as it is likely to have an impact on trade in agricultural products, in reality. This means that we focus on UK statutory protections relevant to those agricultural products likely to be affected by increased trade under the FTA.

Products likely to be traded under the FTA

Accordingly (and taking into account the Government's impact assessment, tariff and quota reductions and previous traded quantities) we focus on statutory protections relevant to products which we believe will be traded in greater quantities than presently when all tariffs and TRQs have been removed and products that could be traded in greater quantities, but which will be in competition with other UK suppliers or where tariffs are already low. We assume for these purposes the impact of the FTA on those products traded now but, over longer periods of time, we acknowledge that new conditions and supply chain re-orientation may make other products tradeable. However, these timescales are significant and we consider it is more helpful for the government to understand the short and medium term effects of the FTA in these product areas.

A large number of agricultural products are unlikely to see increased trade either because the UK already imports large amounts of a New Zealand product under existing country specific WTO quota (for example, for New Zealand sheep meat); or New Zealand production is close to its production limits (such as Manuka honey); or there is no UK market for the product; or New Zealand does not produce the product in commercial quantities; or both New Zealand and the UK are either net importers or net exporters of these commodities, vastly reducing the potential of increased trade unless there is a seasonal advantage between the two countries.

	Increased imports
Product code	Product name
0202	Beef, frozen
0304	Fish fillets and other fish meat, whether or not minced, fresh, chilled or frozen
0307	Molluscs in shell or not, live, fresh, chilled, frozen, dried, salted, etc
0703	Onions, shallots fresh or chilled
0709	Pumpkin, squash and gourds and courgettes
0808	Apples, and pears fresh
0810	Kiwifruit
2004	Vegetables prepared or preserved, frozen
2005	Other vegetables, prepared or preserved, not frozen

2007	Jams, jellies, marmalades, fruit or nut puree and fruit or nut pastes
2009	Fruit juices and vegetable juices, unfermented
2106	Food preparations, n.e.s.
2202	Waters, mineral waters and aerated waters, sweetened, flavoured and non-alcoholic
2204	Wine of fresh grapes, including fortified wine
3502	Albumins, incl concentrates of two or more whey proteins

Small increase in imports		
Product code	Product name	
0201	Meat of bovine animals fresh or chilled	
0208	Meat and edible offal of deer or venison	
0303	Frozen fish excluding fish fillets	
0402	Milk and cream, concentrated or containing added sugar or other sweetening matter	
0403	Buttermilk, yogurt, kephir and other fermented milk and cream	
0404	Whey, whether or not concentrated or sweetened	
0405	Butter, ghee and other fats and oil derived from milk; dairy spreads	
0406	Cheese and curd	
0409	Natural honey	
0601	Bulbs, tubers, tuberous roots, corms, crowns, rhizomes, dormant, in growth or in flower	
0804	Avocados, fresh or dried	
0809	Fresh cherries	
1108	Starches; inulin	
1209	Seeds, fruits and spores, for sowing	
150210	Fats of bovine animals, sheep or goats	
160250	Prepared or preserved meat, offal or blood	
160420	Prepared or preserved fish	
160553	Mussels prepared or preserved	
170211	Lactose	
180632	Chocolate and other food preparations containing cocoa	
190110	Infant food	
190590	Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, sealing wafers, rice paper and similar products	
210390	Preparations for sauces and prepared sauces; mixed condiments and seasonings	

200410	Soups and broths and preparations therefor
220890	Ethyl alcohol of an alcoholic strength of <80% vol, not denatured; spirits and other spirituous beverages
230910	Dog or cat food, put up for retail sale

We have also determined that the following agricultural products are unlikely to be imported at an increased rate under the FTA, either because there is a large duty free quota which is already not being filled (for sheepmeat), or the UK is a larger net exporter than New Zealand, or because there is no relevant export industry in New Zealand or no relevant demand in the UK for the product, or for economic or logistical reasons.

FTA unli	kely to result in increased imports for economic or logistical reasons
Product code	Product name
0101-06	Live animals
0203	Meat of swine, fresh chilled or frozen
0204	Meat of sheep and goats, fresh, chilled or frozen
0205	Meat of horses, asses, mules or hinnies, fresh chilled or frozen
0206	Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules, hinnies, fresh chilled or frozen
0207	Meat and edible offal of fowls
0209	Pig fat, poultry fat, fresh chilled or frozen, salted in brine dried or smoked
0210	Meat and edible offal, salted, in brine, dried or smoked
0301	Live fish
0302	Fish, fresh or chilled (excluding fish fillets)
0305	Fish, fit for human consumption, dried, salted or in brine; smoked fish; flours, meals and pellets of fish
0306	Crustaceans, live, fresh, chilled, frozen, dried, salted, in brine, smoked, flours, meals and pellets, fit for human consumption
0308	Aquatic invertebrates other than crustaceans and molluscs, live, fresh, chilled, frozen, dried salted or in brine, smoked, flours, meals, pellets fit for human consumption
0401	Milk and cream, unconcentrated nor sweetened
0407	Birds' eggs, in shell, fresh, preserved or cooked
0408	Birds' eggs not in shell, and egg yolks, fresh, dried, cooked, moulded, frozen or preserved
0410	Turtles' eggs, birds' nests, and other edible products of animal origin
0603	Cut flowers and flower buds
0701-02	Potatoes, fresh or chilled, tomatoes, fresh or chilled

0704-08	Cabbages, lettuce, carrots, cucumbers, and leguminous vegetables, fresh or chilled
0710	Vegetables, uncooked or cooked, frozen
0712	Dried vegetables, whole, cut, sliced, broken, or in powder
0714	Roots and tubers or manioc, arrowroot, salep, Jerusalem artichokes, sweet potatoes
0802-07	Nuts, bananas, citrus fruit, grapes, melons, tropical fruit
0811, 13,14	Frozen fruit and nuts; Dried fruit; peel of citrus or melons
0901-07	Coffee, tea, mate, vanilla, cinnamon, cloves, nutmeg, cardamon, anis and ginger
1001 -8	Wheat and meslin, barley, oats, rice, buckwheat, millet, and other cereals
1101-07	Wheat and cereal flours, rolled grains, meal, and malt
1109	Wheat gluten, whether or not dried
1210-14	Hop cones, plants for perfume or medicaments, locust beans, seaweeds, swedes, mangolds, alfalfa and fodder roots
1301-1302	Lac; natural gums, resins, balsams and other natural oleoresins
1401	Vegetable materials used for plaiting, eg bamboos, rattans, reeds and rushes
1501	Pig fat, lard and poultry fat rendered or otherwise extracted
1507-22	Soy oil, seed oil, olive oil, palm oil, copra, rape, colza, jojoba, margarine, degras, including fixed or hydrogenated
1601	Sausages and similar products of meat offal or blood
1603	Extracts and juices of meats, fish or crustaceans, molluscs and other aquatic invertebrates
1701	Cane or beet sugar and chemically pure sucrose in solid form
1703-04	Molasses, sugar confectionary not containing cocoa
1803-04	Cocoa paste, cocoa butter, fat and oil
1902-04	Pasta, prepared foods made of cereals
2001-06	Preserved fruits, nuts or vegetables
2101, 2105	Extracts and concentrates, and ice cream
2206-09	Ciders, alcohol over 80%, rum and vinegars
2302-03	Brans, sharps and other residues derived from cereals; residues of starch manufacture
2401-03	Tobacco; cigars and cigarettes; tobacco substitutes
2905	Acyclic alcohols and their derivatives
3304	Beauty or make-up preparations, skin care including sunscreen
3504-5	Peptones and their derivatives; Dextrins, modified starches and glues
3809	Finishing agents, dye carriers
3824	Prepared binders for foundry moulds or cores

4103-04	Other raw hides and skins; Tanned or crust hides and skins of bovine or equine animals
4301	Furskins and artificial fur

Does the FTA require the UK to change its levels of statutory protection? Introduction

All trade agreements, including the WTO agreements, contain a mix of trade liberalisation obligations and exceptions to those obligations. These exceptions give the parties to these agreements (in this case, the UK, which includes its devolved jurisdictions) a right to regulate, subject to certain conditions, so as to protect important policy interests, including animal or plant life or health, animal welfare and the environment.

As noted, we consider that the FTA may have an effect on UK levels of statutory protection when it changes the legal position of the UK *vis-à-vis* New Zealand when compared to WTO law. This will occur when, in respect of any given UK statutory protection, each of two conditions is fulfilled: first, the UK has assumed more extensive trade liberalisation obligations under the FTA than under WTO law; and second, the exceptions that apply to these obligations under the FTA are more restrictive than they would be under WTO law.

If, for example, the FTA *does not* reduce tariffs on a given product or facilitate trade in that product by other means, then the FTA cannot have any causal impact on trade in that product and hence not on any statutory protections that might be affected by trade in that product. If, alternatively, the FTA *does* reduce tariffs on a given product or facilitates its trade by some other means but this obligation is subject to an exception that is no more restrictive than under WTO law, then the FTA cannot have any causal impact on the UK's statutory protections.

Obligations to liberalise trade in goods

Border restrictions

In Chapter 2 ('National Treatment and Market Access for Goods') and its associated Annex 2A, the FTA sets out the UK's key trade liberalisation obligation in relation to trade in goods,⁷ which is an obligation not to impose **customs duties** on imports of products from New Zealand (subject to certain time-limited quotas and safeguard measures).⁸ But there are duty reductions on almost all other imports, in many cases after an implementation period in the form of tariff reductions and quota increases over time.⁹

In addition, in Chapter 2 the FTA prohibits all other border restrictions on imports and exports, in the same terms as WTO law.¹⁰ This does not, however, apply to border

⁷ In this advice, the term 'trade liberalisation obligation' is taken to refer only to trade in goods. The FTA also has obligations to liberalise trade in services.

⁸ Article 2.5 ('Elimination of Customs Duties'), referring to the liberalisation schedule in Annex 2A ('Schedule of Tariff Commitments for Goods'). Article 2.15 ('Export Duties, Taxes and Other Charges') adds a prohibition on export duties, which does not exist in WTO law. Other provisions repeat WTO obligations, sometimes with detail on implementation. There are also some provisions that are not relevant to this advice.

⁹ Section 2B (Tariff Schedule of the United Kingdom).

¹⁰ Article 2.10 ('Import and Export Restrictions').

restrictions which are enforcing domestic law and they do so in a non-discriminatory manner, such as ban on sales of unsafe products. Again, this is the same as in WTO law.¹¹

Internal laws

Chapter 2 further provides that, once a product has been imported into the UK, it cannot be subject to any discrimination *vis-à-vis* 'like' domestic products.¹² So, for example, the UK cannot impose a higher sales tax on imported beef than on domestic beef, or require food manufacturers only to use raw materials originating in the UK. This 'national treatment' obligation is identical to an obligation in WTO law, so including it in the FTA does not change anything for imported New Zealand products.

There are two chapters that contain rules targeted at a subset of internal measures. Chapter 5 ('Sanitary and Phytosanitary Measures') applies to 'SPS measures', which are directed at risks caused by pests and diseases, as well as from additives, contaminants, toxins or disease-causing organisms in foods and feedstuffs, as well as other damage caused by pests.¹³ However, Chapter 5 does not apply to measures or goods covered by the UK-New Zealand Sanitary Agreement.¹⁴

Chapter 7 ('Technical Barriers to Trade') applies to technical regulations, technical standards and conformity assessment procedures.¹⁵ These chapters are largely based on their WTO equivalents, the WTO SPS and TBT Agreements¹⁶ respectively, and their obligations either repeat or elaborate on existing WTO rules.

For example, the TBT chapter states that where domestic standards based on product characteristics (which means their physical characteristics and includes labelling)¹⁷

¹¹ Article 1.3 ('General Definitions') states that 'references in this Agreement to articles in the GATT 1994 include the interpretative notes'. The reference in Article 2.3 ('National Treatment') to Article III of GATT 1994 therefore includes the Note to Article III in GATT 1994, which states this rule.

¹² Article 2.3 ('National Treatment'). In the WTO, the 'most favoured nation' obligation in Article I:1 of GATT 1994 prohibits discrimination between imports from different countries. This rule is subject to an exception, in Article XXIV:5 of GATT 1994, for free trade agreements.

¹³ Article 1.3 ('General Definitions'), referring to the definitions of a sanitary or phytosanitary measure in paragraph 1 of Annex A of the WTO SPS Agreement.

¹⁴ Article 5.2 ('Scope').

¹⁵ Technical regulations are mandatory rules based on product characteristics or their related process and production methods. Technical standards are voluntary rules based on product characteristics or their related process and production methods. Conformity assessment procedures involve testing and certification to demonstrate that products meet the conditions set out in technical regulations and technical standards.

¹⁶ Article 7.3 ('Scope') states that 'that '[n]othing in this Chapter shall prevent a Party from adopting or maintaining technical regulations, standards, or conformity assessment procedures in accordance with its rights and obligations under this Agreement, the TBT Agreement, and any other relevant international agreement'. In Article 7.4 ('Incorporation of Certain Provisions of the TBT Agreement') the parties 'affirm their rights and obligations under the TBT Agreement'.

¹⁷ Article 7.15 ('Cosmetic Products') states that '[e]ach Party shall maintain its prohibitions on animal testing in its cosmetic products laws and regulations' and that '[n]either Party shall require that a cosmetic product or ingredient be tested on animals for the purposes of determining safety, efficacy, or to comply with the respective laws and regulations governing the placing on the market of cosmetic products'. Cosmetic products are not agricultural products, and hence we do not consider this rule in this advice. It is questionable whether these rules would qualify as 'technical regulations' under Article 7.1 of the TBT Chapter ('Definitions'), as they do not relate to product characteristics: WTO Appellate Body Report, *EC – Seal Products*, WT/DS400/AB/R, adopted 18 June 2014, para 5.58.

are not based on international harmonised standards the regulating party is required to explain why this is the case, based on evidence, where this is available.¹⁸ This builds on Article 2.4 of the WTO TBT Agreement, which allows domestic standards not to be based on international standards where this would be inappropriate or ineffective in relation to a legitimate policy goal. In short, the SPS and TBT Chapters of the FTA cannot be taken in isolation from their WTO context.

This said, there are several provisions in which the SPS Chapter differs – or could be interpreted as differing – from the position under WTO law. One concerns the role of science in the adoption of SPS measures, while two others concern the way in which the contracting states are to treat each other's regulatory systems as 'equivalent' to their own, even when they differ in certain respects. Before turning to these provisions in more detail, it should be recalled that the SPS Chapter is not subject to dispute settlement and, in any event, both the SPS and TBT chapters are subject to the exceptions to be discussed in the following section.

The first point of potential difference with WTO law is contained in Article 5.8 ('Risk Analysis'). Paragraph 1 of this provision states that:

The Parties shall ensure that ... if its sanitary and phytosanitary measures are not based on international standards, guidelines, or recommendations, ... they are based on a risk analysis carried out in accordance with relevant provisions, including Article 5 of the SPS Agreement.

This provision reflects the obligation, contained in Article 5.1 of the WTO SPS Agreement, to base SPS measures on scientifically valid risk assessments. However, Article 5.1 of the SPS Agreement does not apply where there is insufficient scientific evidence to perform such a risk assessment. In such situations, Article 5.7 of the SPS Agreement permits the parties to adopt provisional measures 'on the basis of available pertinent information' while seeking to obtain additional information that would permit a scientific risk assessment to be undertaken.

It is not entirely clear from Article 5.8 of the FTA whether the UK's right to adopt provisional measures along these lines has been maintained in the FTA. To be sure, Article 5.4 of the FTA ('Affirmation of the SPS Agreement') states that the parties' rights (and obligations) under the WTO SPS Agreement remain intact. But that does not say anything about their rights and obligations under the FTA. The outstanding question is therefore whether the 'other relevant provisions of the SPS Agreement' in accordance with which SPS measures are to be based on risk assessments, can be read to include Article 5.7 of the WTO SPS Agreement. All of this said, it is unlikely that the parties would have wished to abandon their Article 5.7 rights under the WTO SPS Agreement;¹⁹ the ambiguity is probably best explained in terms of unclear drafting. In any event, as noted above, the obligation in Article 5.8 is not subject to dispute settlement and is also subject to the exceptions to the FTA discussed below.

The FTA also establishes mechanisms whereby the UK may treat New Zealand technical regulations and conformity assessment procedures as 'equivalent' to its own,

¹⁸ Article 7.6 ('International Standards, Guides, and Recommendations'), para 3(b).

¹⁹ We note that this has been confirmed by the UK government in relation to the identically worded Article 6.5.2 in the Australia-UK FTA: UK Government, *Report pursuant to Section 42 of the Agriculture Act 2020*, 6 June 2022, at 5. See <u>https://www.gov.uk/government/publications/uk-australia-fta-report-under-section-42-of-agriculture-act-2020</u>.

even when they differ in certain respects. The TBT chapter repeats the WTO rule on this, which goes no further than encouraging the contracting states to act in this way, though it also adds that; if a contracting state decides not to do so it must, on request, explain the reasons for its decision.²⁰

The FTA's SPS chapter is similar to WTO law in relation to the equivalence of SPS measures,²¹ though there is greater ambiguity. Article 4.1 of the WTO SPS Agreement states that:

Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

Article 5.6 of the FTA is slightly different. It states that:

1. The Parties acknowledge that recognition of the equivalence of sanitary and phytosanitary measures is an important means to facilitate trade. The determination of equivalence rests with the importing Party. ...

6. The importing Party shall recognise the equivalence of sanitary or phytosanitary measures, even if the measures differ from its own, if the exporting Party objectively demonstrates to the importing Party that the exporting Party's measures achieve the importing Party's appropriate level of protection.

7. If an equivalence assessment does not result in an equivalence determination by the importing Party, the importing Party shall provide the exporting Party with the rationale for its decision.

This differs from Article 4.1 of the WTO SPS Agreement in two respects. First, although this is still an unsettled point, Article 4.1 gives some indication that the importing WTO Member has an obligation to treat the exporting WTO Member's measures as equivalent, provided that the exporting WTO Member can 'objectively demonstrate' that these measures achieve the importing WTO Member's appropriate level of protection. In support of such a reading is the obligation on the part of the exporting WTO Member to give reasonable access to the importing WTO Member for inspection, testing and other relevant procedures. This can be explained as ensuring that the importing WTO Member is not under an obligation to accept a request for an equivalence determination without being in a position to determine fully whether equivalence has been 'objectively demonstrated'. In practice, so far, however, importing WTO Members have operated on the basis that they have the right to reject equivalence requests.

In contrast to this ambiguity in Article 4.1 of the WTO SPS Agreement, the first paragraph of 5.6 of the FTA states that '[t]he determination of equivalence rests with

²⁰ Articles 7.7 ('Equivalency of Technical Regulation'). Article 7.8 ('Conformity Assessment') refers to the New Zealand-UK Mutual Recognition Agreement (signed 21 January 2019).

²¹ Article 5.6 ('Equivalence'), para 1 incorporates aspects of a decision on equivalence adopted by the WTO SPS Committee: see WTO Doc G/SPS/19/Rev.2.

the importing Party.' We note that this is different from the text of the Australia-UK FTA, where this sentence was located at the end of the paragraph concerning the making of equivalence determinations.²² The fact that this sentence is located at the very beginning of Article 5.6, in an otherwise introductory paragraph, may indicate that this is *not* a limitation on any obligation to make a positive equivalence determination when a party 'objectively demonstrates' that its measures achieve the importing party's appropriate level of protection. Instead, it may be a mere acknowledgement of the fact that, in procedural terms, it is the importing party that makes the decision on equivalence. There is, however, an ambiguity as to whether an importing contracting state has an unfettered right to reject an equivalence request if it so chooses. These different readings cannot and do not need to be resolved here. Suffice to say that the FTA does not reduce the WTO rights of the UK to reject a request for equivalence.

Good regulatory practice

The FTA also contains a good regulatory practice (GRP) chapter. These chapters contain provisions on the way that regulations are made and respond to concerns about the impact of behind the border barriers, in particular regulatory actions of governments which could have a negative impact on trade.

It is important to note that GRP chapters do not replace domestic regulation and do not limit the choices that can be made by domestic regulators. Indeed, Article 21.2 of the New Zealand-UK FTA specifies that the GRP chapter does *not* require a party to '(a) take actions that would undermine or impede the timely adoption of regulatory measures to achieve its public policy objectives, or would otherwise risk undermining or compromising those public policy objectives; (b) achieve any particular regulatory outcome; or (c) adopt or apply domestic procedures, processes, and mechanisms that are unlikely to be cost effective for that Party.'

GRP provisions are rather focused on the procedures that should be followed in the course of developing regulatory policies and the factors that must be considered in the regulatory promulgation process. They are essentially directed at ensuring that regulations are made fairly, transparently and on the basis of proper considerations. The GRP chapter in the UK-NZ FTA requires the parties to maintain 'internal coordination processes and mechanisms' and encourages the parties to run public consultation exercises when developing major regulatory measures. In addition, the parties are to 'endeavour to carry out, in accordance with its own rules and procedures, proportionate impact assessments of proposed major regulatory measures' and 'to establish and maintain processes and mechanisms for carrying out proportionate impact assessments'. These processes and mechanisms are to consider the need for the measure and any alternative regulatory or non-regulatory options. They are also required to consider reasonably obtainable existing information including scientific, technical, and economic information.

In practice, it is unlikely that these considerations will require the UK to do more than it does currently in terms of its regulatory promulgation. Both New Zealand and the UK already follow these norms in their regulatory practices. Article 21.12 ('Regulatory Cooperation Activities') also permits the parties to engage in regulatory cooperation activities of various kinds and, in this context, they are encouraged to inform each

²² Article 6.7.2 of the Australia-UK FTA.

other about prospective new regulations. This could cover regulatory activities in relation to animal welfare and environmental protection. However, this does not mean, in any sense, that there is a fetter on the UK's ability to adopt regulatory measures in these areas. There is a consultation mechanism that does envisage consultation between the parties as a part of the regulatory promulgation process of both parties. However, since there is no binding dispute resolution associated with this chapter, if a party chooses to regulate without consultation, there is little the other party can do.

If the event that one party thought that the other had breached any of its obligations under the GRP chapter it could, at most, raise the issue in the Joint Committee.

The UK's right to regulate under the FTA

Outline

Importantly, all of these trade liberalisation obligations (except for the GRP chapter just discussed) are fully covered by general exceptions, taken from WTO law, ensuring that the UK can regulate to protect animal or plant life or health, to protect public morals (including animal welfare) and to conserve exhaustible (living and non-living) natural resources, provided that certain conditions are met.

In addition, the FTA contains several rules in its environment chapter that expand on these rights to regulate, which gives the UK more leeway to override its trade liberalisation obligations than it would have under WTO law. In short, even to the extent that the FTA imposes greater trade liberalisation obligations on the UK as it does, for example, by reducing customs duties, the UK not only has the same rights as it would under WTO law to maintain and adopt protections in the areas covered by this advice, but in relation to certain environmental issues, the UK has even greater rights than under WTO law.

The general exceptions

Human, animal or plant life or health

Measures protecting human, animal or plant life or health

Article 32.1 of the FTA ('General Exceptions') permits the UK to adopt measures that are necessary to protect the life or health of humans, animals and plants. It does this by incorporating the relevant exception in Article XX(b) of the WTO GATT 1994, which is stated in these terms. Importantly, however, Article 32.1.3 clarifies that:

The Parties understand that the measures referred to in Article XX(b) of GATT 1994 and Article XIV(b) of GATS include environmental measures necessary to protect human, animal or plant life or health and measures necessary to mitigate climate change.

Nothing is added to Article XX(b) by describing measures covered by this provision as 'environmental' measures: so long as the measures at issue address a risk to human, animal or plant life or health, it is irrelevant if they are described as 'environmental' or as something else. But the express inclusion of measures 'necessary to mitigate climate change' is significant. The reason is that it deems there to be a link between climate change measures and the protection of human, animal and plant life or health. That means that a measure that is necessary to mitigate climate change is deemed to be necessary to protect human, animal and plant life or health.

In practice, these changes to Article XX(b), as incorporated, are very unlikely to have any importance. The reason is that all environmental measures, including those especially defined here for climate change, will almost certainly be defended under Article XX(g), as incorporated. This is because, as described below, there is a relatively strict 'necessity' test in Article XX(b), which does not exist for Article XX(g). Accordingly, every 'environmental' measure litigated in the WTO has been defended on the basis of Article XX(g), not Article XX(b), which the exception of *EC* – *Seal Products*,²³ which was defended on the basis of Article XX(a), for measures 'necessary' to protect public morals. This was most likely because of uncertainty as to whether Article XX(g) permits measures to protect resources within the territory of another WTO Member.

Conditions on measures

For a UK measure to fall within the terms of this exception, it needs to meet four conditions.²⁴ The first requires the measure to be at least *minimally effective* in achieving its objective (here, protecting animal or plant life or health); the second requires it to be the *least trade restrictive measure* reasonably available to achieve that objective; the third requires it to be the *least discriminatory measure* reasonably available to achieve that objective; and the fourth requires it not to be for a *protectionist purpose* (or other illegitimate purpose).

Effectiveness

First, the measure must be likely to be *minimally effective* in achieving the objective. The test for this is whether the measure is apt to make a contribution to the protection of the relevant interest (for present purposes, the life or health of animals or plants).²⁵

Trade restrictiveness

Second, the measure must be 'necessary' to achieve that objective. That requires a comparison between the measure adopted and a hypothetical alternative measure (typically suggested by a complaining party). The measure will be 'necessary' when there is no alternative measure that: (a) is reasonably available to the regulating party, (b) achieves the same level of protection as the actual measure, and (c) is less trade restrictive than the measure that was adopted. Thus, for example, it might be that the objectives of an import ban could equally be achieved by a less trade restrictive measure, such as a labelling scheme.

In the WTO, the WTO SPS Agreement elaborates on this 'necessity' test in several ways and a measure that conforms to the WTO SPS Agreement is presumed to conform to Article XX(b) of GATT.²⁶ It is highly likely that, in the same way, a measure that complies with the FTA's SPS Chapter would be presumed to comply with its general exceptions. However, and unlike the situation in WTO law, the SPS Chapter

²³ WTO Appellate Body Report, *EC – Seal Products*, WT/DS400/DS401/AB/R, adopted 18 June 2014.

²⁴ The analysis here and below is based on WTO caselaw. Article 31.11 ('Rules of Interpretation of a Panel') adds that '[t]he panel shall also consider relevant interpretations in WTO panel and Appellate Body reports adopted by the Dispute Settlement Body of the WTO.'

²⁵ WTO Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS322/AB/R, adopted 17 December 2007, paras 150-51; WTO Panel Report, *Brazil – Taxation*, WT/DS472/R, adopted 11 January 2019, paras 7.526-7.528 and 7.921.

²⁶ Article 2.4 of the WTO SPS Agreement.

in the FTA is *itself* subject to Article XX(b) (as incorporated by Article 32.1.1). This means that a measure that violates the SPS Chapter might still be justified under the FTA general exceptions. It is difficult to envisage when this might be the case, but the possibility that this does become important cannot be excluded.²⁷

Unjustifiable discrimination

The third and fourth conditions, are set out in the so-called 'chapeau' of Article XX of GATT 1994 and apply to all measures justified under this Article.²⁸ The third condition requires that the measure does not constitute unjustifiable or arbitrary discrimination between countries where the same conditions prevail. This condition is incorporated by reference into the FTA.

In this phrase, the 'conditions prevailing' in different countries are to be understood in terms of the purpose of the measure adopted. For example, an import restriction on dolphin-unsafe tuna does not need to be extended to tuna from a country in which there are no dolphins, because the 'conditions prevailing' between the different countries will not be the 'same'. However, if that country has dolphins and they are at some risk from tuna fishing, even if this risk is lower, the 'conditions prevailing' in the different countries will be the 'same'. Likewise, in assessing a prohibition on imports of apples carrying a particular disease, the 'conditions prevailing' depend on whether the disease exists in the exporting country, but not its overall prevalence where it does exist. In short, 'conditions prevailing' are the 'same' when there is any relevant risk in the relevant countries, without quantifying that risk.²⁹

The next question is whether the measure at issue discriminates between these countries, in which the 'conditions prevailing' are the same. This will often be the case, as almost all obligations in trade agreements involve discrimination, either between imports or between imports and domestic products. It is only when a measure violates one of these obligations that it becomes necessary to determine whether the measure needs justification under an exception. An import ban on dolphin-safe tuna will necessarily discriminate against imports on countries where there are fewer (or no) atrisk dolphins than a country in which there are more at-risk dolphins. An import ban on diseased apples will necessarily discriminate against apple exporting countries where the disease exists and in favour of those where the disease does not exist.

In practice, the most important question under this 'chapeau' condition is whether that discrimination is 'arbitrary or unjustifiable'. What this means, in practice, is whether there is a legitimate reason for the discrimination and whether that discrimination is necessary. This is where it is important to calibrate the measure to the degree of risk

²⁷ If, for example, Article 5.8 ('Science and Risk Assessment') discussed above, excludes reference to the right of the parties to adopt precautionary measures in accordance with Article 5.7 of the WTO SPS Agreement, it might be possible to justify such a precautionary measure as 'necessary' under Article 32.1 ('General Exceptions'). This is, however, somewhat academic, as there is no dispute settlement for the SPS chapter.

²⁸ This is a complicated area of law. See Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 American Journal of International Law 95.

²⁹ WTO Appellate Body Report, *US – Tuna II (Mexico – Art 21.5)*, WT/DS381/AB/RW, adopted 3 December 2015, para 7.308; WTO Appellate Body Report, *EC – Seal Products*, above at n 23, para 5.300. It is unsettled whether the 'conditions prevailing' in a given 'country' are to be understood in the presence or absence of that country's regulatory interventions. Most likely, the answer is not, as this question (like that of risk prevalence) can be addressed in a more nuanced manner while questioning, later, whether any discrimination is 'arbitrary or unjustifiable'.

at issue. An import ban on dolphin-unsafe tuna will not be 'justifiable' if it does not take into account the degree of risk that dolphins pose in a given country, thereby permitting a less discriminatory measure to be adopted; and an import ban on diseased apples will not be 'justifiable' if a lower risk of disease in a given country can be addressed in a less discriminatory manner.³⁰

Disguised restriction on international trade

The second 'chapeau' condition is that the measure adopted cannot be a 'disguised restriction on international trade'. This essentially means that the measures cannot be a 'disguise' for protectionism, but in 25 years of WTO practice this has never been a burden for any government seeking to justify its measures.³¹

Summary

The FTA incorporates the WTO exception for measures necessary to protect human, animal or plant life or health. It goes further than WTO law, however, by deeming measures necessary to mitigate climate change to be measures necessary to protect human, animal or plant life or health. This makes it unnecessary under the FTA to demonstrate that such measures are necessary to protect animal or plant life or health. In practice, this makes it easier to justify measures necessary to mitigate climate change under this FTA. The result is that the FTA does not restrict the UK's WTO rights to protect human, animal or plant life or health and even it makes it somewhat easier to do this in respect of climate change measures, even if this is unlikely to be important in practice (because the measure could more easily be justified under Article XX(g), as incorporated).

The conclusion is that the FTA preserves the legality of any UK statutory protection of animal or plant life or health that can be justified under WTO law, and in practice makes this easier for climate change measures.

Public morals (animal welfare)

Article 32.1 of the FTA also permits the UK to adopt measures necessary for the protection of its public morals. Again, this is done by incorporating a WTO exception to this effect, in this case Article XX(a) of the GATT 1994. For a measure to be justified on these grounds, it needs to be concerned with the protection of the 'public morals' of the regulating party, and it also needs to be 'necessary' for that purpose.

³⁰ A further complication arises when the policy reason for the discrimination is different from the policy underlying the measure. In WTO Appellate Body Report, *EC – Seal Products*, above at n 23, for example, the EU's prohibition on seal products discriminated against Canada and in favour of Greenland because of an exception in the measure for seal products deriving from Inuit hunts, and there were proportionately fewer Inuit hunted seal products from Canada than from Greenland. In principle, the EU's basis for this form of discrimination was justifiable, although the EU's measure was still held to be overly discriminatory (and hence unjustifiable) vis-àvis Canadian Inuit seal products. See Bartels, above at n 33, and Gracia Marín Durán, 'Measures with Multiple Competing Purposes after *EC – Seal Products*: Avoiding a Conflict between GATT Article XX-Chapeau and Article 2.1 TBT Agreement' (2016) 19 Journal of International Economic Law 467.

³¹ An open question, and in important one, is whether a mixed measure for both environmental and protectionist purposes would fail this test.

Measures protecting public morals (animal welfare)

In principle, a concern for animal welfare can constitute the public morals of a regulating party. In EC - Seal Products,³² a WTO dispute brought by Canada and Norway against the EU, the WTO Appellate Body determined that the EU was permitted to prohibit imports and sales of seal products on the grounds that this was necessary to protect EU public morals concerning 'animal welfare' and, in particular, the manner in which seals are hunted. It did not matter that the animals being protected were outside of the EU's territorial jurisdiction. This ruling would need to be taken into account in any interpretation of 'public morals' in the FTA.³³ It follows that the 'public morals' exception in the New Zealand-UK FTA permits the UK to prohibit the sale and importation of products that are produced in a manner that violates UK public morals on animal welfare regardless of where the animals at issue are located. This is also confirmed by Article 6.2.2 of the FTA which states that '[t]he Parties recognise that the protection and improvement of animal welfare may, in accordance with their WTO commitments, be an interest in the context of a Party's trade objectives.' However, a concern for animal welfare must be shown to be part of the UK's public morals in any given case. Not every concern about animal welfare will rise to the level of the UK's 'public morals'.

There are two main ways to determine what constitutes 'public morals' for any given treaty party. One is based on evidence of what the public thinks. In EC – Seal *Products,* such relevant evidence included the fact that numerous members of the public had written to the European Commission asking for a prohibition on seal products. Public petitions would therefore serve as good evidence. The second type of evidence, which is more commonly used in WTO disputes on public morals, is a pattern of legislation and other policies adopted by the country seeking to rely on the public morals exception.

In practice it has proved to be comparatively easy to demonstrate that a concern constitutes 'public morals'. However, this would be more difficult if there is an inconsistent application of UK laws on the same issue, for example, between different devolved jurisdictions, in particular if products from one of these jurisdictions can be exported to the other jurisdictions. In addition, not every difference in treatment of animals can be objected to on the grounds of public morals. If the UK allows a particular procedure to be performed on an animal up to 3 years of age and another country allows that procedure to be undertaken up to 4 years of age, this regulatory difference may not necessarily offend the UK's public morals. The situation is not comparable to EC - Seal Products, where the choice was binary, as between clubbing seals and not clubbing seals.

Conditions on measures

Even if a measure is adopted for the protection of public morals, several other conditions must be satisfied, which are similar to those discussed above for Article XX(b) GATT.

³² See above at n 17.

³³ See above at n 23.

a) Minimal effectiveness

First, the measure must be *minimally effective* in achieving the objective of protecting public morals (ie apt to make a contribution to that objective).³⁴

Trade restrictiveness

Second, the measure must be 'necessary' to the protection of public morals. As noted already, this 'necessity' condition requires a comparison between the measure adopted and a hypothetical alternative measure and there must be no alternative measure that: (a) is reasonably available to the regulating party, (b) achieves the same level of protection as the actual measure and, (c) is less trade restrictive than the measure that was adopted. In EC - Seal Products, the EU was able to demonstrate that its measure was the only reasonably available measure that would achieve its desired level of protection. Canada suggested an alternative of seal welfare certification and labelling requirements but this would not have achieved the same level of animal welfare protection than the EU's sale and import ban.

Unjustifiable discrimination

Third, a measure that is necessary to protect the UK's public morals must be no more discriminatory than necessary as between countries. This was discussed above.

Disguised restriction on international trade

Finally, the measure may not be a disguised restriction on international trade. This condition was also discussed above.

Summary

The FTA incorporates the WTO exception for measures necessary to protect public morals, including several conditions applicable to such measures under WTO law.

The conclusion is that the FTA preserves the legality of any UK statutory protection in relation to animal welfare that can be justified under WTO law.

Conservation of living and non-living exhaustible natural resources (environmental protection)

Article 32.1 also permits the UK to adopt measures relating to the conservation of exhaustible natural resources, including non-living resources (such as hydrocarbons, minerals, and clean air) and living resources (such as plants and animals). It does this by incorporating Article XX(g) of the WTO GATT 1994.

Measures to protect living and non-living exhaustible natural resources

Article 32.1.3 adds several clarifications to the WTO definition of measures to protect living and non-living exhaustible natural resources. It states:

The Parties understand that ... Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.¹

³⁴ WTO Appellate Body Report, *EC – Seal Products*, above at n 23, paras 5.213-5.214 and 5.289; WTO Panel Report, *Brazil – Taxation*, WT/DS472/R, adopted 11 January 2019, paras 7.526-7.528.

¹ 'non-living exhaustible natural resources' includes clean air and a global atmosphere with safe levels of greenhouse gases.

Some of these clarifications are codifications of existing WTO caselaw. It has been established, for example, that Article XX(g) applies to living exhaustible natural resources³⁵ and that 'non-living exhaustible natural resources' includes clean air.³⁶ However, the further inclusion of 'a global atmosphere with safe levels of greenhouse gases' within the definition of 'non-living exhaustible natural resources' is significant. It is unsettled in WTO caselaw when a 'resource' that can be protected under Article XX(g) can be outside of the ordinary territorial jurisdiction of the regulating WTO Member.³⁷ The FTA clarifies that 'a global atmosphere with safe levels of greenhouse gases' is able to be protected by both FTA parties.

Conditions on measures

Again, several conditions must be met for a measure to be justified on this basis.

Minimum connection with the objective

First, the measure must 'relate' to the protection of the natural resource at issue; in this case, including a global atmosphere with safe levels of greenhouse gases.³⁸ This does not mean that any particular effect needs to be demonstrated; rather, the measure must have a minimum connection with the objective at issue, whether now or in the future.

Domestic restrictions

In contrast to the first two exceptions discussed, concerning animal or plant life or health and public morals, this exception has no 'necessity' test. Hence, in WTO dispute settlement practice, environmental measures are typically justified under this exception rather than the exception for animal or plant life or health. This gives governments more policy discretion in how to protect environmental resources, as there is no need for the measure to be the least trade restrictive measure that could have been adopted to achieve the level of protection sought by the regulating state.

However, there is a different condition. A measure must be adopted in conjunction with restrictions on domestic production or consumption. This ensures that the regulating party is genuine about conserving natural resources and requires that effective restrictions be imposed on domestic production or consumption, even though

³⁵ Article 31.1, para 2. This clarification reflects the interpretation of 'exhaustible natural resources' by the WTO Appellate Body in *US – Shrimp*, WT/DS58/AB/R, adopted 6 November 1998, para 131.

³⁶ WTO Panel Report, *US* – *Reformulated Gasoline*, WT/DS2/R, adopted 20 May 1996, para 6.37. This finding was not appealed, and assumed by the Appellate Body to be correct: see WTO Appellate Body Report, *US* – *Reformulated Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 14.

³⁷ WTO Appellate Body Report, *US* – *Shrimp*, WT/DS58/AB/R, above at n 35, para 133. The first instance of a provision with the wording of this provision is Article 14.1.3(c) n 88 of the UK-Norway, Liechtenstein and Iceland FTA, signed 8 July 2021.

³⁸ In WTO Appellate Body Report, *China – Rare Earths*, WT/DS431/AB/R, adopted 29 August 2014, para 5.117, the Appellate Body said that 'relating to' did not require (nor preclude) a demonstration of a causal effect between the measure and an objective; it was sufficient for a panel to consider the 'general design and structure' of the measure. The Appellate Body often uses the terms 'design,' structure' and even 'architecture' when it seems to have presumed causal effects in mind. It is likely that in this instance the Appellate Body meant that there was no need to find an *actual* effect, but that a potential effect would suffice.

the burden of conservation does not need to be evenly distributed between foreign and domestic producers (or consumers).³⁹

Unjustifiable discrimination

As with the other two exceptions, this exception is also subject to a third and fourth condition, under the 'chapeau' to Article XX of the WTO GATT 1994. The third condition is that the measures must not constitute unjustifiable discrimination between countries where the same conditions prevail. This has been discussed above.

Disguised restriction on international trade

The fourth condition is that the measure cannot be a disguised restriction on international trade. This condition has also been discussed above.

Summary

The FTA incorporates the WTO exception for measures relating to the conservation of exhaustible natural resources, under the same conditions as in WTO law. However, it clarifies that the parties are able to protect the 'global atmosphere with safe levels of greenhouse gases', making it unnecessary to consider whether there is any 'sufficient jurisdictional nexus' with the regulating party. This makes it somewhat easier in practice to adopt climate change measures under the FTA than under WTO law.

The conclusion is that the FTA preserves the legality of any UK statutory protection of the environment that can be justified under WTO law and, in relation to climate change measures, makes it easier in practice to justify such measures.

Right to regulate under other FTA chapters

SPS chapter (antimicrobial resistance)

The SPS chapter contains several obligations in Article 5.14 ('Cooperation on Antimicrobial Resistance') which underline the UK's statutory protections in this area. Article 5.14 begins with an acknowledgement that '[t]he Parties recognise that AMR is a serious threat to human and animal health and that the agricultural and aquaculture sectors are capable of contributing to this health threat.'⁴⁰ It also contains obligations to 'explore initiatives to promote the reduction or prohibition of unnecessary use of antibiotic agents in the rearing of animals for food production',⁴¹ to 'follow, where practical and economically feasible, existing and future guidelines, standards, recommendations, and actions developed in relevant international organisations, initiatives, and plans, aiming to promote the prudent and responsible use of antimicrobial agents'⁴² and to 'support the implementation of agreed international action plans and strategies on AMR'.⁴³

These are relatively soft obligations, although the obligation to follow (with exceptions) international standards is somewhat stronger, and they are not enforceable in dispute

³⁹ See WTO Appellate Body Report, *China – Rare Earths*, WT/DS431/AB/R, ibid, para 5.136.

⁴⁰ Article 5.14.1.

⁴¹ Article 5.14.3.

⁴² Article 5.14.9.

⁴³ Article 5.14.10.

settlement. Nonetheless, these obligations go in the direction of encouraging reductions in the use of antibiotics in the rearing of animals for food production.

Animal welfare chapter

Chapter 6 adds some colour to the public morals exception, set out in Article 32.1, for animal welfare measures.

As noted, in Article 6.2.2 ('General Provisions'):

The Parties recognise that the protection and improvement of animal welfare may, in accordance with their WTO commitments, be an interest in the context of a Party's trade objectives.

This means that the possibility that animal welfare forms part of the UK's public morals cannot be excluded (a point that is, as noted, already established under WTO caselaw). As said, that does not mean that any given concern about animal welfare rises to that level. It needs to be established, by evidence, that such a concern genuinely amounts to a matter of 'public morals' in the UK'. The reference to 'WTO commitments'⁴⁴ operates as a constraint on the scope of this provision and this also informs the scope of other provisions in this chapter.

Article 6.3.1 contains an 'affirmation' of the rights of the parties to protect animal welfare:

The Parties affirm the right of each Party to set its policies and priorities for the protection of animal welfare and to adopt or modify its laws, regulations, and policies in a manner consistent with each Party's international commitments, including this Agreement.

The qualification 'in a manner consistent with each Party's international commitments, *including this Agreement*' means that this paragraph is legally neutral.

Article 6.3 ('Right to Regulate and Improvement of Farmed Animal Welfare') is concerned with levels of domestic protection on farmed animal welfare. The first sentence of Article 6.3.2⁴⁵ states:

The Parties recognise that it is inappropriate to encourage bilateral trade or investment by weakening or reducing the protection afforded to farmed animal welfare in their respective animal welfare laws and regulations.

Along the same lines, Article 6.3.3 states:

Each Party shall use its best endeavours not to weaken or reduce the protection afforded to the welfare of farmed animals in its animal welfare laws and

⁴⁴ We note that the term 'WTO commitments' is unusual in this context. Usually the word 'commitments' refers to scheduled market access commitments. However, such commitments have nothing to do with the parties' regulatory interests. The term 'commitments' might be being used here to refer to the right of the parties to regulate for animal welfare purposes, eg in Article XX(a) GATT 1994, as incorporated by Article 32.1. However, that right is not a 'commitment'. The term is more likely to be understood as a loose reference to the parties' WTO obligations as a whole, taking into account their rights to regulate, and in particular any conditions (including the necessity and 'chapeau' conditions) on those rights to regulate.

⁴⁵ The second sentence of Article 6.3.2 is simply a 'reaffirmation' of a commitment to improving animal welfare, and hence legally neutral. It is not clear where such a commitment might be located, but at any rate it is not in this FTA.

regulations, in a manner materially affecting trade or investment between the Parties.

The way to read these two provisions is that the parties' 'recognition' that animal welfare protections should not be weakened to gain an economic advantage (in the first sentence of Article 6.3.2) is given concrete legal meaning in Article 6.3.3, which establishes a 'best endeavours' obligation to the same effect.

Article 6.3.4 is on a similar theme but, instead of focusing on the overall weakening of animal welfare protections, this provision is concerned with the *partial application* of animal welfare protections. It states:

Neither Party shall waive or derogate from its animal welfare laws and regulations in a manner materially affecting trade or investment between the Parties.

A waiver or derogation of an animal welfare law is one specific form of 'weakening' animal welfare protection, but the nature of the obligation is harder: whereas Article 6.3.3 is a soft 'best endeavours' obligation, Article 6.3.4 is a hard obligation.

The question, then, is whether it can be assumed that these obligations come with implied rights to do what is necessary to implement these obligations. It is suggested that this must be the case. It makes no sense to impose an obligation on a party to perform an act without this implying that the party also has a right to perform that act. However, any such right must be strictly limited to what is necessary to perform that obligation.

What does this mean for the obligations at issue? A right to adopt measures necessary to comply with a 'best endeavours' obligation (Article 6.3.3) will not be very extensive, simply for the reason that it is difficult to identify what measures are necessary to comply with such an obligation. Perhaps Article 6.3.4 prevents the UK from reducing its existing levels of protection on farmed animal welfare, but it is no more than that. Moreover, such a right is constrained by the reference to 'WTO commitments' in Article 6.2.2. This serves as context for the interpretation of the obligations, and hence the implied rights, established in Article 6.3.4. That constraint is that the right of the parties to adopt animal welfare laws cannot go beyond what is otherwise permitted by 'WTO commitments'.⁴⁶ The right that might be implied from such an obligation might be a right to maintain its existing laws on farmed animal welfare, subject to meeting the ordinary 'chapeau' conditions in Article XX(a) GATT, as incorporated by Article 32.1 of the FTA.

Summary

In sum, Chapter 6 does not enhance or add to the rights of the parties to adopt animal welfare measures. Those measures must be justified under Article 32.1, under the same conditions that already exist in WTO law.

Environment chapter

Unlike Chapter 6 ('Animal Welfare'), Chapter 22 slightly expands the UK's rights to adopt measures to protect the environment beyond its rights under the general exceptions in Article 32.1. For this purpose, one can divide Chapter 22 into three types of provisions: obligations with respect to domestic 'environmental laws' (Article 22.4),

⁴⁶ See above at n 44.

rights to adopt certain environmental measures (Article 22.6) and obligations to implement certain multilateral environmental agreements (MEAs).

The same logic discussed in the context of the animal welfare chapter applies here: obligations to maintain and improve 'environmental laws' must imply rights to do what is necessary to comply with such obligations.⁴⁷ That is of limited effect in the context of 'best endeavours' obligations, as such obligations do not necessarily require the parties to adopt new environmental laws. But it probably means that they cannot, at least without good reason, reduce their existing levels of environmental protection which also implies that, to this extent, they have a right to maintain those existing levels of environmental protection.

The question, then, is whether these implied rights are subject to any limitations. As far as the obligations in Article 22.4 are concerned, there is one blanket limitation. Article 22.4.6 requires the parties not to establish or use their environmental laws in a manner that would constitute a disguised restriction on international trade (or investment) between the parties. But there is no equivalent limitation in relation to unjustifiable discrimination. This means that Article 22.4 implies that the parties have the *right* to adopt environmental laws that are necessary to comply with the obligation to maintain environmental protections, provided that these measures do not constitute a disguised restriction on international trade.

There is an additional self-standing right to adopt measures to implement multilateral climate change commitments. Article 22.6 ('Climate change') states:

The Parties recognise that nothing in this Agreement prevents a Party from taking measures to fulfil its commitments under the UNFCCC and the Paris Agreement provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination against the other Party or a disguised restriction on trade. The Parties reaffirm their right to make use of the general exceptions and general provisions in Chapter 32 (General Exceptions and General Provisions), recalling their understanding that the measures referred to in Article XX(b) of GATT 1994 and Article XIV(b) of GATS include environmental measures necessary to protect human, animal or plant life or health and measures necessary to mitigate climate change, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

This is a clear right to adopt such measures, though expressly subject to the two 'chapeau' conditions discussed above – namely, that the measure may not discriminate unjustifiably or be a disguised restriction on international trade.⁴⁸ The fact that this right *expressly* includes these conditions further supports the conclusion that other rights – whether express or implied – are not otherwise subject to such conditions.

Chapter 22 also contains obligations to implement MEAs which, for the reasons given above, imply that the parties have rights to adopt measures necessary to perform those obligations. Two examples are obligations to restrict trade in accordance with

⁴⁷ As discussed below, Article 22.1 gives a precise definition to 'environmental law', the term used throughout Article 22.4.

⁴⁸ In practice, this does not make a difference, because Article 3(5) of the UNFCCC itself contains the same 'chapeau' conditions.

the 1973 Convention on Trade in Endangered Species⁴⁹ (CITES) and the 1987 Montreal Protocol on Ozone-Depleting Substances.⁵⁰

Interestingly, these obligations (as with all obligations in Chapter 22) do not benefit from the general exceptions in Article 32.1. That means that any trade restrictive measures implementing these obligations would violate the FTA's trade obligations, in particular Article 2.10 ('Import and export restrictions'), unless justified on the basis of Article 32.1.

As noted above, Article 32.1 only permits environmental measures that meet the 'chapeau' conditions discussed above: that measures do not constitute unjustifiable discrimination or a disguised restriction on international trade. In theory, though perhaps not in practice, an MEA might require a measure that does not comply with both of these conditions.⁵¹

Summary

What this means for the right of the UK to adopt measures to protect the environment can be stated as follows. First, the UK has an implied right to maintain its existing environmental statutory protections,⁵² provided that these measures do not constitute a disguised restriction on trade or investment between the Parties. Second, the UK has an express right to adopt measures to implement UNFCCC and Paris Agreement obligations, provided that these measures do not discriminate arbitrarily or unjustifiably between countries where the same conditions prevail or constitute a disguised restriction on trade or investment between the Parties. Third, the UK has an implied right to adopt measures necessary to implement certain listed MEAs.

Conclusion

The FTA incorporates a number of WTO trade liberalisation obligations and also adds some additional trade liberalisation obligations, in particular the obligation not to charge customs duties on most imports (subject to time limited quotas and safeguards). All of these trade liberalisation obligations are, however, subject to exceptions which are at least as extensive as under WTO law and, in the case of environment measures, particularly those concerning climate change, more extensive than under WTO law. Therefore, on the basis that the FTA does not constrain the UK's right to regulate compared to WTO law and even enhances such a right for certain environmental matters, **it can be concluded that the FTA does not require the UK to change its existing levels of statutory protection in relation to animal or plant life or health, animal welfare, and environmental protection.**

⁴⁹ Articles 22.12.5 and 22.12.6.

⁵⁰ Article 22.14.2.

⁵¹ A regulating WTO Member cannot justify discrimination *per se* on the basis that this is mandated by a non-WTO treaty. WTO Appellate Body, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, above at n 25, para 228.

⁵² Article 22.1 ('Definitions') defines 'environmental laws' as laws that have the primary purpose of protecting the environment through (a) the prevention or control of pollutants or environmental contaminants, including greenhouse gases, (b) the control of environmentally hazardous or toxic chemicals and wastes, (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas, and (d) the protection of natural water resources.

Does the FTA reinforce the UK's levels of statutory protection?

The environment and animal welfare chapters contain certain obligations, binding on both the UK and New Zealand, concerning their levels of statutory protection in two of the areas under consideration: environmental protection and animal welfare.

These obligations reinforce the UK's levels of statutory protection in two ways. First, directly, these obligations require the UK, in certain cases, to maintain (or even improve) these protections. Second, indirectly, they ensure that New Zealand will, in certain cases, maintain its own levels of statutory protection. This addresses the theoretical possibility that New Zealand might lower its standards to give its producers a competitive advantage over UK producers.

Enforceability of the environment and animal welfare chapters

The structure of the additional obligations in the environment and animal welfare chapters is similar but not identical in substantive terms. In addition, there is one significant distinction between the two chapters, which is that the obligations in the environment chapter are enforceable by means of dispute settlement, while those in the animal welfare chapter are not.⁵³ Should there be a concern about New Zealand's compliance with its animal welfare obligations, the UK would need to seek a solution by political dialogue, in the first instance in the Animal Welfare Working Group.⁵⁴

Obligations in the environment and animal welfare chapters

The environment and animal welfare chapters also contain obligations with respect to the maintenance and improvement of the parties' standards of protection, as well as specific obligations on certain environmental issues, including obligations to implement several multilateral environmental agreements.

Obligations to implement/enforce protections

Both the environment and animal welfare chapters contain obligations requiring the parties to implement domestic laws if failure to do so would have the effect (or purpose) of gaining a competitive advantage over the other, for example by relieving a domestic industry of regulatory costs.⁵⁵ Conceptually, these obligations have a similar function to obligations prohibiting financial subsidies with anticompetitive effects *vis-à-vis* foreign products. They can be thought of as rules targeting regulatory subsidies.

One such obligation is about waiving and derogating from certain 'environmental laws'.⁵⁶

Article 22.4.3, in the environment chapter, states:

[A] Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or

⁵³ Article 6. 6 ('Dispute Settlement').

⁵⁴ Article 6.5 ('Animal Welfare Working Group').

⁵⁵ These obligations do not cover competition in third country markets. In contrast, the WTO SCM Agreement, which disciplines financial subsidies, does cover competition in third country markets.

⁵⁶ Article 22.1 defines 'environmental law' for the purpose of this obligation as a law that has the primary purpose of protecting the environment through (a) the prevention or control of pollutants or environmental contaminants, including greenhouse gases, (b) the control of environmentally hazardous or toxic chemicals and wastes, (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas, and (d) the protection and preservation of natural water resources.
reduces the protection afforded in that law in order to encourage trade or investment between the Parties.

Articles 6.3.4 in the animal welfare chapter states:

Neither Party shall waive or derogate from its animal welfare laws and regulations in a manner materially affecting trade or investment between the Parties.

There are several differences between these. First, there will be a breach of the environmental obligation if there is a mere *offer* to waive or derogate from an environmental law, so long as this has the purpose of encouraging trade or investment, while there will only be a breach of the animal welfare obligation in Article 6.3.4 if there is an *actual* waiver or derogation. Second, the environmental obligation is triggered if the partial application of the law is 'in order to encourage' trade or investment between the parties, regardless of any actual effect. The two animal welfare obligations are triggered when there is an *effect* on trade or investment and, indeed, a *material effect.*⁵⁷ That means that a breach of the environmental obligation will be easier to establish. Moreover, the environmental obligation – but not the animal welfare obligations – is enforceable through dispute settlement.

The second obligation is about *non-enforcement* of certain 'environmental laws'.⁵⁸ This obligation is only found in the environment chapter. Article 22.4.4 states that:

Neither Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction to encourage trade or investment between the Parties.

A breach of this obligation is subject to showing an intention to encourage trade or investment, as discussed above, and a certain measure of discretion in the allocation of enforcement resources is permitted.⁵⁹ The term 'sustained or recurring course of action or inaction' has been defined by another FTA panel to mean; '(i) a repeated behavio[u]r which displays sufficient similarity, or (ii) prolonged behavio[u]r in which there is sufficient consistency in sustained acts or omissions as to constitute a line of connected behavio[u]r by a labo[u]r law enforcement institution, rather than isolated or disconnected instances of action or inaction.'⁶⁰

Best endeavours obligations to maintain/improve protections

Both the environment and the animal welfare chapters also have obligations with respect to the parties' levels of protection. In other words, they go beyond the implementation or enforcement of these standards, as discussed in the previous section. That said, there is some overlap insofar as a failure to implement a domestic law necessarily also reduces levels of protection. The main difference is that in the

⁵⁷ See CAFTA-DR Panel Report, US v Guatemala (2014), <u>https://tinyurl.com/2s37kctu</u>, on 'effect'.

⁵⁸ See above at n 56.

⁵⁹ Article 22.4.5.

⁶⁰ For the meaning of these terms, see CAFTA-DR Panel Report, *US v Guatemala (Labor Standards)*, above at n 57, para 152. Article 22.4.5 goes on to explain that a party is entitled to exercise a certain discretion in allocating resources to enforcement activities.

obligations to be discussed it is the *overall* levels of protection that are reduced, not *partial* levels of protection.

Article 22.4.2 of the environment chapter states:

Each Party shall endeavour to ensure that its environmental and other relevant law and policies provide for and encourage, high level [sic] of environmental protection and to continue to improve its respective level of environmental protection.⁶¹

Article 6.3.3 of the animal welfare chapter states:

Each Party shall use its best endeavours not to weaken or reduce the protection afforded to the welfare of farmed animals in its animal welfare laws and regulations, in a manner materially affecting trade or investment between the Parties.⁶²

There are some differences between these obligations, both vis-à-vis the obligations discussed above concerning partial implementation, and vis-à-vis each other.

As compared to the partial implementation obligations, the main difference is that these two obligations are both soft obligations. The parties are *not* obliged to *ensure* the levels of protections mentioned, but rather to 'endeavour' to ensure these levels of protection. This means that, in principle, the parties are able to reduce these protections. However, even a soft obligation to endeavour to ensure levels of protection is an obligation and it would not be correct state that this obligation can never be breached. A 'best endeavours' obligation might, for example, require the parties not to reduce their levels of protection without good reason; it might also amount to a procedural obligation to consider ensuring high and improved levels of protection. In short, it is not entirely clear what these best endeavours obligations mean. They are not as stringent as the hard obligations concerning partial implementation, but they are still obligations.

A second difference, of lesser importance, particularly in relation to this advice, is that the partial implementation obligations in Article 6.3.4 are focused on 'animal welfare laws and regulations', whereas Article 6.3.3 is more narrowly focused on 'the protection afforded to the welfare of *farmed animals* in its animal welfare laws and regulations'.

As between the environment and farmed animal welfare obligations, the environment obligation is broader in that it specifies the target as 'high' levels of protection and improving its levels of protection, whereas the farmed animal welfare obligation does not specify that the respective standards of protection are 'high'. That said, Article 6.3.5 states that '[t]he Parties recognise that ... each Party affords a high priority to animal welfare in its farming practices', so this difference is not very significant in practice. Second, the environment obligation is broader insofar as it targets levels of protection without any qualification, whereas the farmed animal welfare obligation targets levels of protection connected to trade or investment between the parties.

⁶¹ Defined in Art 22.1. See above at n 56.

⁶² Article 6.3.2 also 'reaffirms' a commitment to improve domestic protections on the welfare of farmed animals. It does not establish any obligation to that effect.

Finally, the environmental obligation is subject to dispute settlement, whereas the farmed animal welfare obligation is not.

Specific environmental obligations

The environment chapter, but not the animal welfare chapter, also contains a set of specific obligations. As noted above, these include obligations to implement a number of MEAs, such as CITES,⁶³ the Montreal Protocol⁶⁴ and the International Convention for the Prevention of Pollution by Ships (MARPOL).⁶⁵

Besides obligations under MEAs, Chapter 22 sets out commitments on a range of environmental issues, including obligations to 'promote carbon pricing as an effective policy tool for reducing greenhouse emissions',⁶⁶ to eliminate customs duties on listed environmental goods,⁶⁷ to 'encourage the transition to clean energy for electricity, heat, and transport',⁶⁸ to operate sustainable fisheries management systems,⁶⁹ to 'promote sustainable agriculture and associated trade', including taking 'measures to reduce greenhouse emissions from agricultural production',⁷⁰ to 'contribute to combatting illegal logging, illegal deforestation and associated trade' and to 'endeavour to reduce deforestation and forest degradation, including from land use and land use change'.⁷¹

Of particular importance to the agricultural sector is the prohibition of harmful fisheries subsidies, namely those that contribute to overfishing and overcapacity or illegal, unreported and unregulated (IUU) fishing.⁷² This prohibition must be seen in the context of ongoing WTO negotiations on a similar prohibition.⁷³ Also of relevance to the agricultural sector is the commitment to 'take steps to eliminate harmful fossil fuel subsidies where they exist, with limited exceptions in support of legitimate public policy objectives'.⁷⁴ These subsidies are not defined and, on a broad interpretation, they might include differential tax rates for diesel fuel predominantly used in farming. This would, in the first instance, depend on whether such subsidies are defined by reference to the WTO Agreement on Subsidies and Countervailing Measures (SCM),⁷⁵ in which case they would need to be 'specific' to a particular sector. Other questions which would then arise are whether the subsidies at issue are 'harmful' (usually understood in environmental terms) and, if so, whether they are for a legitimate public public policy policy reason.

⁷⁴ Article 22.8.2(a).

⁶³ Article 22.12.

⁶⁴ Article 22.13.

⁶⁵ Article 22.16.

⁶⁶ Article 22.6.2(c).

⁶⁷ Article 22.7.2(a) and Annex 22.A.

⁶⁸ Article 22.8.2(c).

⁶⁹ Articles 22.9.4.

⁷⁰ Article 22.10.3.

⁷¹ Article 22.11.3.

⁷² Article 22.9.6. Subsidies that contribute to overfishing and overcapacity shall be eliminated 'as soon as possible' and no later than three years after the entry into force of the agreement (Article 22.9.7).

⁷³ WTO Ministerial Conference, Agreement on Fisheries Subsidies – Draft Text, WT/MIN(21)/W/5, 24 November 2021. This will be considered at the 12th WTO Ministerial Conference on 12-15 June 2022.

⁷⁵ Articles 1.1 and 2 SCM Agreement.

However, for both obligations concerning fisheries and fossil fuel subsidies there is an important carve-out in Article 32.4.2, which states that '[e]xcept as provided in this Article, nothing in this Agreement shall apply to taxation measures.' There are certain limitations on this exception, mainly concerning discrimination,⁷⁶ but these are not relevant here. This means that subsidies to the fishing industry that take the form of tax exemptions (including fuel subsidies) are not subject to the prohibition in Article 22.9.6, even if they contribute to overfishing and overcapacity or IUU fishing. Similarly, even if differential tax rates for diesel fuel are deemed 'harmful fossil fuel subsidies' that are not for a legitimate public policy objective, by virtue of Article 32.4.2 there is no obligation to take steps to eliminate them.

Summary

The New Zealand-UK FTA has several obligations in the area of farmed animal welfare and environmental protection, although it is only those for environmental protection that are enforceable by way of dispute settlement proceedings. A dispute about the FTA's animal welfare obligations can at most be brought to the FTA's Animal Welfare Working Group.

These obligations are of several types, summarised here. First, each party is obliged to implement their domestic laws if *not to do so* would give it an economic advantage (through reduced regulatory costs) over competing products from the other party. Second, each party is under a soft obligation to 'endeavour' to maintain its farmed animal welfare and environmental protections (and in the latter case to improve the levels of protection). In the case of farmed animal welfare protections, this obligation is limited to situations in which weakening standards of protection would give a party an economic advantage. Third, each party is required to respect specific environmental commitments. These include obligations to implement several multilateral environmental agreements, to promote environmental practices in several areas, and in particular to prohibit harmful fisheries subsidies and to 'take steps' to eliminate harmful fossil fuel subsidies. There are certain limitations on these last two obligations, in particular in that these obligations do not apply to subsidies in the form of tax breaks.

Conclusions

These various obligations reinforce the UK's ability to maintain its levels of statutory environmental and animal welfare protection in in two main ways.

First, the UK not only has a right to maintain its statutory protections, but it has an obligation to do so, in certain cases. The UK has a soft obligation to provide for high levels of environmental protection and not to weaken its farmed animal welfare protections in a manner affecting trade or investment, an obligation not to derogate from or waive certain of its domestic environmental laws and its farmed animal welfare laws if this has the purpose of encouraging trade or investment between the parties (environment) or a material effect on trade or investment (farmed animal welfare) and an obligation not to fail to enforce certain of its environmental laws so as to encourage trade and investment. The UK also has certain specific obligations to implement several multilateral environmental agreements, to promote certain environmental practices and to prohibit harmful fisheries subsidies and to take steps to eliminate

⁷⁶ This means that a carbon tax discriminating against imports would not fall under the terms of this exception.

certain harmful fossil fuel subsidies (except, in both cases, subsidies in the form of tax breaks).

Second, the UK is able to protect its levels of statutory protection *indirectly* by ensuring that New Zealand does not gain an economic advantage by lowering its standards of protection, in certain cases, or not properly implementing its domestic laws. In particular, the UK is able to commence dispute settlement proceedings if New Zealand fails to abide by its obligations in the environmental chapter. This is not possible for New Zealand's commitments in the animal welfare chapter, but for such matters the UK is able to raise issues with New Zealand in the Animal Welfare Working Group.

Does the FTA otherwise affect the ability of the UK to adopt statutory protections?

In this section we consider three issues relevant to the evolution of the FTA in practice. First, we consider the practical operation of the FTA, in particular via its mechanisms for UK-New Zealand cooperation and its decision-making procedures. Second, we consider the resource implications of controlling increased imports into the UK. Third, we consider the extent to which the FTA affects the UK's ability to respond to concerns that have been raised in consultations about practices that are stated to occur in New Zealand affecting products likely to be imported into the UK.

The practical operation of the FTA

As has been described above, the FTA comprises a set of rights and obligations which are designed, on the one hand, to liberalise trade between the parties and, on the other, to ensure that they are still able to regulate to protect legitimate policy interests. In several cases, these rules are left to be operationalised by future joint action of the parties.

To this end, the FTA establishes several organs with bilateral representation. The primary organ is the Joint Committee, which meets at ministerial or senior official level⁷⁷ and has the power to adopt interpretations of the agreement,⁷⁸ amend certain trade liberalisation commitments⁷⁹ and, in several other ways, consider the implementation and operation of the agreement.⁸⁰ The Joint Committee also supervises the work of subsidiary organs established under the FTA which, relevantly, include the SPS Sub-Committee,⁸¹ an SPS Technical Working Group,⁸² the Environment and Climate Change Sub-Committee⁸³ and the Animal Welfare Working Group.⁸⁴ In relation to matters covered by the environment chapter, the FTA also requires the parties to 'make use of existing, or establish new, independent advisory groups of appropriate persons, seeking a balanced representation of relevant interests, including business organisations, environmental organisations, and academics' and to 'engage those groups as appropriate.⁸⁵

These groups will not only play an important role in dispute resolution in the FTA, but in sharing knowledge, best practice and research and development between the two parties. Regular and constructive dialogue between members of the groups is important.

Moreover, especially in relation to the Joint Committee, some of these organs are responsible for making or recommending certain decisions.

⁸³ ibid.

⁷⁷ Article 30.1 ('Establishment of the Joint Committee').

⁷⁸ Article 30.2 ('Functions of the Joint Committee'), para 2(e).

⁷⁹ Article 30.2, para 2(g).

⁸⁰ Article 30.2.

⁸¹ Article 30.9 ('Sub-committees').

⁸² Article 15.6.1. It might be noted that this provision refers to '[a] technical working group established under paragraph 2 of Article 30.2', but Article 30.2 only provides for the possibility of establishing working groups. The SPS Technical Working Group therefore still needs to be established.

⁸⁴ Article 30.10 ('Working Groups').

⁸⁵ Article 22.22.

Such decisions can have significant effects. For example, the parties might adopt an interpretation that would settle the questions raised above; for example, whether Article 5.8 of the FTA includes the right to adopt precautionary SPS measures along the lines of Article 5.7 of the WTO SPS Agreement. Any decision to adopt an interpretation is entirely voluntary. However, from a transparency perspective, it is worth noting that these decisions can be taken without the type of parliamentary scrutiny that might be required for a formal amendment of the agreement.⁸⁶ Of course, in all cases and as a matter of UK law, to the extent that such decisions require implementation in the UK legal system, Parliament will be involved in the ordinary way.

Border controls

We note that any increase in absolute trade flows as a result of this agreement could place pressure on those agencies tasked with ensuring that imports comply with domestic standards. Having said this, an increase in products from New Zealand will not necessarily lead to an increase in overall imports, as these could simply displace imports from other sources. But should there be an overall increase in imports, this may have implications for the workload of those agencies. Where these controls take place in New Zealand, it will be New Zealand and/or New Zealand firms that bears their costs, although the UK bears the costs of audits.⁸⁷ We note that the UK-New Zealand Sanitary Agreement, which continues the 1996 EU-New Zealand Sanitary Agreement, provides for a significant degree of recognition of New Zealand sanitary regulations and production controls and, hence, a reduction in the intensity of border checks on imports from New Zealand.

The ability of the UK to respond to concerns raised in consultations

In our consultation, we were made aware of several concerns about certain New Zealand production, environmental and animal welfare practices and about the cost advantages that products made according to these practices might enjoy when compared to UK products. We considered the following issues:

- Use of antibiotics for growth promotion
- Use of hormonal growth promotants (HGPs)
- Use of feed additives (ractopamine)
- Use of battery cages for egg-laying hens
- Livestock transport conditions
- Use of pesticides
- Climate change

We addressed these concerns by asking the following four questions.

- 1. whether the practices at issue exist in New Zealand in a manner that would not be permitted in the UK
- 2. whether these practices involve products likely to be imported at an increased rate into the UK because of the FTA
- 3. whether these practices imply any cost savings for New Zealand producers compared to UK producers
- 4. whether the FTA restricts the UK's rights under WTO law to regulate imports of any products produced by these practices

⁸⁶ Article 32.2 ('Amendments'). See Part 2 of the Constitutional Reform and Governance Act 2010.

⁸⁷ Article 5.9 ('Audit'), para 7.

The following sets out our conclusions on each of these issues. Our analysis of these questions is contained in an Annex attached to this advice.

Preliminary remarks

We would like to introduce our conclusions with some general remarks. In some cases, different production practices between countries are a function of different climatic, geographical, agronomic, environmental, economic and cultural conditions. New Zealand cattle and sheep live their lives outdoors, which different in the UK, and farms in New Zealand tend to be larger. It can never be assumed that what is appropriate for one country is appropriate for another. Nor, as a rule, does international law, or trade agreements, entitle one country to determine production practices in another country. The assumption is that States are sovereign and when they cede sovereignty, they do so voluntarily.⁸⁸

Moreover, the international trading system, of which free trade agreements form a part, is predicated upon the understanding that countries should be able to benefit from advantages which they enjoy over their trading partners. Trade law, in principle, prohibits countries from restricting imports of products simply based on how they are made, whether this is by using their more abundant sunshine, land, educational skills or lower labour costs. The way to protect against this form of competition is to exclude certain products from trade liberalisation when negotiating a trade agreement. This is common for agriculture, for example in the WTO, although it is more difficult in free trade agreements, which are voluntary, but are subject to a WTO condition that they be almost completely trade liberalising. The UK-New Zealand FTA is trade liberalising, in both directions, even if it comes with certain transitional periods.

On the other hand, trade liberalisation does not necessarily trump other policy considerations and States retain the right in trade agreements to protect their own legitimate interests, regardless of any trade liberalisation obligations contained in those agreements.⁸⁹ As described above, those interests include the protection of domestic animal or plant life and health, the protection of the environment and the protection of public morals – but also the protection of human life and health, competition law, consumer protection law, intellectual property law and national and international security, among others. But this right to regulate for legitimate reasons is limited: it does not, as a general rule, allow a country to undermine the other country's legitimate productive advantages. Moreover, this right to regulate is subject to a set of conditions, which are designed to prevent exception clauses from being used arbitrarily, or in bad faith, or unnecessarily.

Moreover, international agreements are the result of negotiations and countries can – and do – agree, in some cases, that they have a common interest in practices taking place in the territory of the other party. They can also agree that some domestic practices do not constitute fair competition, but are rather an example of unfair competition. So, for example, the UK and New Zealand have agreed, in this FTA, that they should endeavour to maintain high standards in their environmental and farmed animal welfare laws and that they should not fail to implement their environmental and

⁸⁸ In other areas of international law, states have agreed, by various means, that their own compliance with core human rights norms, for example, is also an interest of other states.

⁸⁹ There are some exceptions, most notably in the WTO Agreement on Subsidies and Countervailing Measures.

farmed animal welfare laws if this gives them an unfair competitive advantage over the other. Moreover, in the case of their environmental laws, they can also be held to these obligations by means of dispute settlement.

These introductory remarks are intended to give a context to our conclusions about concerns presented to us about various effects of the New Zealand-UK FTA. In some cases, we conclude that the UK has reserved the right to regulate imports from New Zealand because of a legitimate interest, for example, the health of its plants, animals and environment, or its public morals. In others, we conclude that the UK is able to prohibit imports of products because it has an agreed interest in certain practices in New Zealand, either because they are agreed to be a common interest, or because they are agreed to result in an unfair trade advantage. But in some cases, we conclude that the UK will be unable to restrict imports from New Zealand (though the FTA does not make this more difficult than WTO law), even though this might be of economic interest, or otherwise, to certain constituencies in the UK. That is the inevitable result of the UK's decision to liberalise trade with New Zealand under the FTA. But it is relevant to point out, nonetheless, that countries are different and sovereign, and that some matters are for them to regulate as they see fit.

Our conclusions on the concerns raised

Use of antibiotics for growth promotion

Neither New Zealand nor the UK permit the use of antibiotics for growth promotion purposes. In any event, the FTA does not restrict the UK's WTO rights to regulate imports of meat produced using antibiotics. To the contrary, Article 5.14 of the FTA requires the parties to explore initiatives to reduce antimicrobial use, and, where practical and economically feasible, to follow international standards aiming to promote the prudent and responsible use of antimicrobial agents.⁹⁰

Use of hormonal growth promotants (HGPs)

HGPs are not used in New Zealand. The FTA does not change the WTO legal position on the UK's current import prohibition on hormone treated beef.

Use of feed additives (ractopamine)

New Zealand is unlikely to export products produced using ractopamine to the UK. In any event, the FTA does not change the UK's WTO rights to regulate imports of such products.

Use of battery cages for egg-laying hens

UK and New Zealand practices in relation to egg-laying hens will be identical from 1 January 2023. It is technically possible for the UK to prohibit imports of egg products on public morals grounds, but it is difficult to establish the basis for doing so where practices in both countries are similar.

Livestock transport conditions

Livestock transport conditions in New Zealand and the UK in are in practice very similar, even though the two countries have different regulatory approaches to

⁹⁰ We note that New Zealand follows Principle 12 of the Codex Alimentarius Code of Practice to Minimize and Contain Foodborne Antimicrobial Resistance CXC 61-2005 (updated in 2021), at <u>https://www.fao.org/fao-who-codexalimentarius/sh-</u>

proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FStandards%25 2FCXC%2B61-2005%252FCXC_061e.pdf. achieving this end. The key difference is that the UK takes a more prescriptive approach, with a focus on detailed regulatory standards and processes, while New Zealand's regulations and code of practice focus on whether a given animal is fit for transport.

It is possible that beef from cattle that have been produced according to New Zealand standards which differ from UK standards (eg being transported for 12 hours, as opposed to the proposed 9-hour UK maximum) will enter the UK. Other potentially relevant products are not expected to be imported into the UK at increased rates under the FTA.

The FTA does not restrict the UK's WTO rights to regulate imports of beef if this is necessary to protect UK public morals. Given the similarity in practices between the two countries, and New Zealand's overall approach to animal welfare in its rules on transport conditions, it is difficult to imagine that this will be the case.

Use of pesticides

New Zealand does authorise certain pesticides for uses that are prohibited by the UK. A distinction needs, however, to be drawn between the potential harmful effects of such pesticides within the UK, and within New Zealand. In principle, the UK is permitted to protect its own environment, animals and plants (as well as humans), in accordance with the WTO SPS Agreement, as affirmed in the SPS chapter of the FTA. The FTA does not change this. On the other hand, the UK is not, in principle, permitted under WTO law to prohibit imports of products that are produced in a manner that might cause harm to New Zealand's environment. That is fundamentally a matter for New Zealand to regulate, in the absence of any effect on the UK. That said, the FTA goes further than WTO law in this respect, requiring New Zealand to 'endeavour to ensure' that its environmental laws provide for high levels of protection. Given its soft wording, this provision would protect the UK against serious failures to maintain environmental laws provide for a high level of protection in New Zealand. While we cannot make a definitive assessment, it is unlikely that the approved uses of pesticides discussed here would rise to that level.

Climate Change

New Zealand's regulatory approach to climate change mitigation is more comprehensive than the UK's approach in several respects. In particular, New Zealand includes agriculture within its Emissions Trading Scheme, whereas the UK does not. In addition, the emission intensity of producing beef and sheep meat in New Zealand is less than that in the UK, even if one takes transport-related emissions into account. In any event, the FTA does not restrict the UK's rights to adopt measures to protect the Earth's climate. To the contrary, under the FTA, the UK is able to adopt measures related to the conservation of exhaustible natural resources, and Articles 22.6 and 32 explicitly provide that this includes measures to mitigate climate change. In this respect, the FTA enhances the UK's right to adopt climate change measures vis-a-vis WTO law. In addition, the UK can raise emission-intensive production as a concern with New Zealand in the Environment and Climate Change Sub-Committee.

Conclusions

In this advice, in accordance with our mandate, we addressed three questions.

Question 1

Does the FTA require the UK to change its levels of statutory protection in relation to (a) animal or plant life or health, (b) animal welfare, and (c) environmental protection?

While the FTA incorporates a number of WTO trade liberalisation obligations and adds additional trade liberalisation obligations, in particular an obligation not to charge customs duties on most imports, all of these trade liberalisation obligations are subject to exceptions which are at least as extensive as under WTO law and, in some cases, concerning environmental protection, even more extensive than under WTO law. This is particularly the case in the area of climate change, where the FTA makes it easier to justify climate change measures than under WTO law by specifying that the parties are able to protect the 'global atmosphere with safe levels of greenhouse gases'.

Answer: The FTA does not require the UK to change its existing levels of statutory protection in relation to animal or plant life or health, animal welfare and environmental protection.

Question 2

Does the FTA reinforce the UK's levels of statutory protection in these areas?

The FTA contains a number of obligations which go beyond WTO obligations. The UK and New Zealand must use best endeavours to ensure that their environmental laws provide for high levels of protection, and to improve these levels of protection. They must also use their best endeavours not to weaken or reduce the level of protection in their farmed animal welfare laws, where this would confer upon their producers an unfair economic advantage. In addition, they must not fail to implement or enforce their environmental and animal welfare laws where this would confer upon their producers an unfair economic advantage. The FTA also contains specific obligations with respect to certain environmental matters, including harmful fisheries and fossil fuel subsidies (though not tax breaks). These obligations are significant, even if they are not fully comprehensive.

Answer: The FTA reinforces the UK's statutory protections in the areas covered for two reasons. First, it contains environmental obligations that require the UK to maintain its statutory protections in the areas covered. Second, these obligations also ensure that New Zealand will not gain a trade advantage by lowering its standards of protection or not properly implementing its domestic laws in the areas covered.

Question 3

Does the FTA otherwise affect the ability of the UK to adopt statutory protections in these areas?

In this context, we considered several issues. First, we examined the process of decision-making under the FTA and how that might affect the UK's statutory protections. In this respect, we noted that the FTA foresees that the contracting parties may agree on several types of decisions, including on interpretations of the agreement. Such decision may affect the scope of the agreement in future. These

decision-making powers do not, as such, affect the ability of the UK to adopt statutory protections in the areas at issue, but they could be used to reach decisions that do have such an effect. We note in this respect that these decisions are not necessarily subject to parliamentary scrutiny in the same way as amendments to the agreement, although any implementation of these decisions in domestic law would follow ordinary parliamentary procedures.

Second, we noted that increased imports under the FTA may increase the workload of border control agencies.

Third, we considered the extent to which the FTA might affect the ability of the UK to regulate in response to concerns, raised during our consultations, about the potential effects of the agreement on statutory protections in relation to animal or plant life or health, animal welfare and the environment. We asked four questions in relation to each concern:

(a) whether there is a New Zealand practice that would not be permitted in the UK;

(b) whether this practice, if any, might affect agricultural products that are likely to be imported into the UK at an increased rate under the FTA (for example, because of tariff reductions),

(c) whether this practice, if any, results in a cost saving for New Zealand producers compared to UK producers, and

(d) whether the FTA restricts the UK's rights under WTO law to regulate imports of any products produced by these practices.

On the first question we determined that, in several cases, the practice at issue was not different from UK practices. As in the UK, New Zealand producers do not use antibiotics for growth promotion purposes, or hormonal growth promotants. From 1 January 2023, New Zealand rules on battery cages for egg-lying hens will also be identical to those in the UK. Livestock transport conditions are regulated in a different way than in the UK, but with very similar outcomes. And New Zealand's regulatory approach to climate change mitigation is world leading, especially in the agricultural sector. In particular, even accounting for transport-related emissions, imports of beef and sheep meat from New Zealand would come with less emission intensity than equivalent UK production.

On the second question, we determined that, in some cases, even though practices were different, they did not affect products likely to be imported to the UK in increased quantities under the FTA. This was true, for example, of the use of ractopamine in pigs, as New Zealand is not a significant pork exporter, and it is highly unlikely that it will be exporting pork to the UK.

This left one concern, which related to the use of pesticides that are prohibited in the UK. We agreed that this practice exists in New Zealand, that it affects some products likely to be imported into the UK at an increased rate under the FTA, and, answering the third question, that this would come with a cost advantage for New Zealand producers.

Turning then to the fourth question, whether the FTA restricted the UK's ability to regulate imports to address potential harms, we distinguished between two types of harm. The first is the harm that could be caused to UK consumers, animals, plants

and environment. We note that the potential impact of the FTA on human health is outside of our remit, but also that the FTA does not reduce the UK's existing rights under WTO law to protect its people. The same is true for the UK's WTO rights to protect its animals, plants and environment from harms caused by imports, which falls within our remit. This applies to New Zealand's use of pesticides in particular, but the same would be true for other harms which might be caused by imports.

The second type of harm is quite different and relates to potential harms within New Zealand caused by production of products likely to be imported into the UK at increased rates under the FTA. In principle, such matters are to be regulated by New Zealand, with certain express exceptions (for example, where this would be necessary to protect UK public morals). With regards to the environmental effects of pesticide use in New Zealand, we emphasise that, under WTO law, there is no basis for the UK to regulate imports for this reason. New Zealand's environment is, as a general rule, for New Zealand to protect. Indeed, the UK currently imports many products produced using pesticides that are not permitted in the UK, so long as they do not pose any risk within the UK itself. However, we also noted that the FTA, unlike WTO law, contains certain obligations that protect the UK against serious failures to maintain environmental laws providing for a high level of protection in New Zealand. In particular, this would be possible if New Zealand failed in its obligation to 'endeavour to' maintain high levels of environmental protection. We did not, however, consider it likely that New Zealand would be in breach of this obligation in the case of the pesticides at issue.

Answer: The FTA does not otherwise affect the ability of the UK to adopt statutory protections in the areas covered.

In particular, the FTA does not restrict the UK's WTO rights to regulate in these areas, and even enhances these rights in some respects. In relation to the concerns raised, we concluded that, in most cases, practices did not differ at all (or more than insignificantly) in New Zealand and the UK, and that even where they did, except in one case (pesticides) this did not involve products likely to be imported to the UK at an increased rate under the FTA, or give a cost advantage to New Zealand producers. Even in the one remaining case where we agree with the concerns raised, concerning pesticides used in New Zealand that are prohibited in the UK, we concluded that the FTA did not reduce the UK's existing rights under WTO law to regulate imports. The UK continues to be able to restrict imports of products in order to protect human, animal or plant life or health in the UK, and it has enhanced rights under the FTA to ensure that New Zealand does not fail to 'endeavour' to maintain high levels of environmental protection. We did not however consider it likely that New Zealand's existing pesticide rules would put it in breach of this obligation.

Finally, we noted that the UK is able to adopt decisions under the agreement, together with New Zealand, that may constrain its freedom to regulate in the future. It is also important to note that increased imports under the FTA may increase the workload of UK border control agencies.

Annexes

1. Use of antibiotics for growth promotion

One submission raised the use of antibiotics for growth promoting purposes as a concern.⁹¹ We note that antibiotics, and more generally antimicrobials,⁹² are used for veterinary purposes when necessary, and also, as recognised in Article 5.14 of the FTA, that overuse poses a threat of antimicrobial resistance to human and animal health.

a) Are antibiotics for growth promotion permitted in New Zealand in a manner that is not permitted in the UK?

No. Both New Zealand and the UK ban the use of any antibiotic as a growth promotant.⁹³

b) Does this practice involve products likely to be imported into the UK at increased rates under the FTA?

No, as the practice does not take place.

c) Does this practice imply cost savings for New Zealand producers vis-à-vis UK producers?

No, as the practice does not take place.

d) Does the FTA prevent the UK from regulating imports of products produced according to this practice?

No. The FTA does not affect the UK's WTO rights to regulate imports of meat from animals produced using antibiotics for growth promotion purposes. In this respect, it is relevant that Article 5.14 of the FTA recognises the harmful effects to human and animal health worldwide of antimicrobial resistance, and requires the parties to explore initiatives to promote the reduction or prohibition of unnecessary use of antibiotic agents in the rearing of animals for food production and, where practical and economically feasible, to follow international standards aiming to promote the prudent and responsible use of antimicrobial agents.

e) Conclusion

Neither New Zealand nor the UK permit the use of antibiotics for growth promotion purposes. In any event, the FTA does not restrict the UK's WTO rights to regulate imports of meat produced using antibiotics. To the contrary, Article 5.14 of the FTA requires the parties to explore initiatives to reduce antimicrobial use, and, where practical and economically feasible, to follow international standards aiming to promote the prudent and responsible use of antimicrobial agents.⁹⁴

⁹¹ Submission 005 (Trade Justice Movement).

⁹² Antimicrobials target microbes (bacteria, fungi, viruses, protozoa), while antibiotics, a type of antimicrobial, target bacteria.

⁹³ In New Zealand, four veterinary medicines with some antibacterial action not used in human medicine are licensed for use for non-growth promotion purposes. Neither the UK or NZ officially classifies these medicines as antibiotics. These are monensin, lasalocid and salinomycin for cows and pigs and Bambermycin for chickens. The first three are also licensed for use in the UK for their ionophoric effect in preventing coccidiosis disease in poultry.

⁹⁴ We note that New Zealand follows Principle 12 of the Codex Alimentarius Code of Practice to Minimize and Contain Foodborne Antimicrobial Resistance CXC 61-2005 (updated in 2021), at <u>https://www.fao.org/fao-who-</u>

2. Use of hormonal growth promotants (HGPs)

a) Are hormonal growth promotants that are prohibited in the UK used in New Zealand?

Hormonal growth promotants are prohibited for use in sheep in New Zealand. HGPs are permitted for cattle, subject to certain criteria.⁹⁵ Some reports give a figure of 1 percent of cattle.⁹⁶ We heard evidence that this figure relates to one farm that, in fact, no longer uses HGPs.⁹⁷ Similarly, HGPs are authorised for pigs, but pig producers agreed in 2002 not to use HGPs, and producers must sign a declaration that pigs are HGP-free prior to slaughter.⁹⁸

Since 1981, the EU has prohibited use of HGPs in farmed animals, as well as imports of products, including beef, produced using HGPs. This prohibition has been maintained by the UK and products from cattle or pigs reared using HGPs cannot currently be imported or sold in the UK. The EU's HGP import prohibition was for human health reasons, not animal welfare reasons. Statutory protections for this purpose are outside of the TAC's remit.

b) Does the use of hormonal growth products involve products likely to be imported into the UK at increased rates under the FTA?

No. HGPs are not used in New Zealand.

c) Does this practice imply cost savings for New Zealand producers vis-à-vis UK producers?

No. HGPs are not used in New Zealand.

d) Does the FTA restrict the UK's WTO rights to regulate imports of the products produced according to this practice?

No. The FTA does not change the legal position under WTO law. The EU ban on HGPs was found by the WTO to be illegal in 1996 on the basis that it was not based on a scientific risk assessment.⁹⁹ An EU challenge to this ruling in 2008, in part on a different basis, was inconclusive with the result that the original findings remain operative.¹⁰⁰ The UK's own import prohibition has not been challenged.

codexalimentarius/sh-

⁹⁶ Beef and Lamb New Zealand, Use of Hormone Growth Promotants (HGPs), at

proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FStandards%25 2FCXC%2B61-2005%252FCXC_061e.pdf.

⁹⁵ New Zealand Ministry for Primary Industries, *Animal Products Notice – Regulated Control Scheme for Hormonal Growth Promotants*, 20 June 2017, at <u>https://www.mpi.govt.nz/dmsdocument/4484-</u> <u>Animal-Products-Notice-Regulated-Control-Scheme-Hormonal-Growth-Promotants-2017</u>.

https://beeflambnz.com/compliance/food-safety/use-hormonal-growth-promotants-hgps. ⁹⁷ Beef and Lamb New Zealand, Oral Evidence.

⁹⁸ New Zealand Pork, *Pig Nutrition and Health* at <u>https://www.nzpork.co.nz/farmers/pig-nutrition-and-health</u>.

⁹⁹ WTO Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, adopted 13 February 1998.

¹⁰⁰ WTO Appellate Body Report, *US* – *Continued Suspension of Obligations in the EC* – *Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, para 737. The Appellate Body overruled several Panel findings against the EU, but did not itself complete the legal analysis, due to flaws in the Panel's analysis and the contested nature of the facts: ibid, para 735. For a discussion, see Renée Johnson, *The US-EU Beef Hormone Dispute*, Congressional Research Service Report R40449, 2015, at <u>https://sgp.fas.org/crs/row/R40449.pdf</u>.

e) Conclusion

HGPs are not used in New Zealand. The FTA does not change the WTO legal position on the UK's current import prohibition on hormone treated beef.

3. Use of feed additives (ractopamine)

One submission raised a concern about the use of ractopamine in New Zealand pigs.¹⁰¹

a) Are feed additives permitted in New Zealand in a manner that is not permitted in the UK?

Ractopamine use is prohibited in New Zealand for beef, but authorised for pigs. Ractopamine is prohibited in the UK.

b) Does this practice involve products likely to be imported into the UK at increased rates under the FTA?

This is unlikely. At the moment, New Zealand only exports insignificant volumes of pork, almost all to neighbouring Pacific islands.

c) Does this practice imply cost savings for New Zealand producers vis-à-vis UK producers?

Yes. Ractopamine promotes more efficient feed conversion.

d) Does the FTA prevent the UK from regulating imports of the products produced according to this practice?

The FTA does not change the UK's WTO rights to regulate imports of products produced using ractopamine.

e) Conclusion

New Zealand is unlikely to export products produced using ractopamine to the UK. In any event, the FTA does not change the UK's WTO rights to regulate imports of such products.

4. Use of battery cages for egg laying hens

One submission raised a concern about the use of battery cages for egg-laying hens in New Zealand.¹⁰²

a) Are battery cages used in New Zealand in a manner that would be prohibited in the UK?

In New Zealand, egg-laying hens can be kept in cages with a minimum size of 550cm² until 31 December 2022. After then, egg-laying hens can be kept in colony cages with

¹⁰¹ Submission 006 (Humane Society International UK).

¹⁰² Submission 005 (Trade Justice Movement).

a minimum space of 750cm² per hen.¹⁰³ The UK permits the use of 'enriched' or 'colony' cages with a minimum space of 750 cm² of cage area per hen.¹⁰⁴

b) Does this involve products likely to be imported into the UK under the FTA?

New Zealand is a very small exporter of hen eggs to its Pacific neighbours. No significant imports of New Zealand eggs are expected under the FTA. Those products which may be imported will have been produced to standards very similar to current UK standards.

c) Does the use of battery cages imply cost savings for New Zealand producers vis-a-vis UK producers?

The similarity of practices in New Zealand and the UK means it is highly unlikely that there are any cost savings for New Zealand producers.

d) Does the FTA restrict the UK's WTO rights to regulate imports produced according to this practice?

The UK's WTO rights are unaffected by the FTA. However, it would be very difficult for the UK to prohibit imports of New Zealand egg products on public morals grounds, given the very close similarity of production systems, especially after 1 January 2023.

e) Conclusion

UK and New Zealand practices in relation to egg laying hens will be identical from 1 January 2023. It is technically possible for the UK to regulate imports of egg products on public morals grounds, but it is difficult to establish the basis for doing so where practices in both countries are similar.

5. Livestock transport conditions

One submission highlighted a disparity between the UK (including recent Government proposals) and New Zealand practices in relation to livestock transport conditions, in particular concerning journey times, rest periods, temperature and head room.¹⁰⁵

a) Do transport conditions differ between New Zealand and the UK? The UK and New Zealand are similar sized countries so, in practice, the distance animals are transported is likely to be similar. In both countries, long distance journeys are normally undertaken when herds/flocks are being relocated or breeding animals are being moved, and meat animals are normally transported to the nearest suitable slaughter facility. Young animals, those in late pregnancy and any animal unfit to travel are prohibited from being transported in both countries unless this has been authorised by a veterinary surgeon.

¹⁰³ Animal Welfare (Care and Procedures) Regulations 2018 NZ, at <u>https://www.legislation.govt.nz/regulation/public/2018/0050/latest/whole.html</u>, and New Zealand Ministry for Primary Industries, *Code of Welfare: Layer Hens*, at <u>https://www.mpi.govt.nz/dmsdocument/46036-Code-of-Welfare-Layer-hens</u>.

¹⁰⁴ DEFRA, *Code of practice for the welfare of laying hens and pullets, 2018,* <u>https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment data/file/732227/</u> <u>code-of-practice-welfare-of-laying-hens-pullets.pdf</u>.

¹⁰⁵ Submission 008 (Quality Meat Scotland).

The UK¹⁰⁶ and New Zealand¹⁰⁷ have different regulatory approaches to transport of animals. The UK takes a more prescriptive approach, with a focus on detailed regulatory standards and processes, while New Zealand's regulations and code of practice focus on whether a given animal is fit for transport. This difference in regulatory approach also means that the auditing processes are different in each country. In both countries, farmers and transporters can be prosecuted for regulatory breaches.

(1) Journey times

New Zealand does not have any specific limits on journey times for cattle, except for very young calves. The New Zealand Code of Welfare states that '[a]ll animals should be transported for the shortest possible time' and that '[t]he appropriate maximum duration of a journey depends on the ability of the animals to cope with the stress of transport.' It also states that '[u]nnecessary transport should be avoided and if animals are to be killed, they should, if possible, be killed at the nearest facility.'¹⁰⁸

New Zealand permits calves over four days old to be transported.¹⁰⁹ The UK has no age limit, unless the journey distance is more than 100km, in which case calves must be at least 10 days old.¹¹⁰ New Zealand permits calves to be transported for a maximum of 12 hours,¹¹¹ while in the UK the new proposal is nine hours.

(2) Rest Periods

New Zealand does not specify how long farmed animals must rest between journeys, but industry practice is to avoid long rest periods for livestock because of biosecurity risks associated with animals being held at facilities with an unknown disease risk. The UK proposals are seven days for cattle and 48 hours for sheep and pigs.

¹⁰⁶ For the UK, see Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations, at <u>https://www.legislation.gov.uk/eur/2005/1</u>. The UK has recently suggested stricter animal welfare rules, set out in DEFRA, *Consultation on improvements to animal welfare in transport*, December 2020, at <u>https://consult.defra.gov.uk/transforming-farm-animal-health-and-welfare-team/improvements-to-animal-welfare-in-transport/supporting_documents/</u>

<u>consultationonimprovementstoanimalwelfareintransport.pdf</u> The following refers to these documents, in particular the proposals in the consultation.

¹⁰⁷ For New 1999 Zealand see the Animal Welfare Act NZ. at https://www.legislation.govt.nz/act/public/1999/0142/latest/DLM49664.html the Animal Welfare (Care and Procedures) Regulations 2018 N7 at https://www.legislation.govt.nz/regulation/public/2018/0050/latest/whole.html, and the Ministry of Primary Industry, Code of Welfare: Transport within New Zealand, at https://www.mpi.govt.nz/dmsdocument/46015-Code-of-Welfare-Transport-within-New-Zealand. The following references are based on these instruments.

¹⁰⁸ Ministry of Primary Industry, *Code of Welfare: Transport within New Zealand*, at <u>https://www.mpi.govt.nz/dmsdocument/46015-Code-of-Welfare-Transport-within-New-Zealand.</u>

¹⁰⁹ Regulation 33 of the Animal Welfare (Care and Procedures) Regulations 2018 NZ.

¹¹⁰ Article 6(3) of Council Regulation (EC) No 1/2005 of 22 December 2004, above at n 106, referring to Annex I, Ch 1, rule 2e.

¹¹¹ Regulation 32 of the Animal Welfare (Care and Procedures) Regulations 2018 NZ.

(3) Temperature

In the UK, no journey can take place if the temperature is forecast to be outside the range of 0-35°C.¹¹² The UK proposal is for 0-25°C except for journeys under 8 hours where it can be up to 30°C, unless the temperature is internally regulated. In New Zealand no temperature range is given, but the normal temperature range in New Zealand is naturally the same as the specified UK range.

(4) Headroom

The UK's new proposals list specific headroom heights for beef cattle, pigs and sheep. New Zealand's Code of Welfare does not specify heights but states that animals must not be transported in a way that causes back-rub.¹¹³

b) Does this practice involve products likely to be imported into the UK in increased quantities under the FTA?

The FTA is expected to increase New Zealand beef exports to the UK. However, it is very unlikely that the FTA will result in increased imports of sheep meat, which already benefit from a large quota which routinely remains unfilled, or of pork as New Zealand exports only very insignificant quantities of pork (to its Pacific neighbours).

c) Does this practice imply cost savings for New Zealand producers vis-a-vis UK producers?

Transporting animals incurs significant costs and is something that farmers in both countries try keep to a minimum and only do so when necessary. In particular, longer journey times do not result in savings for producers.

d) Does the FTA affect the UK's WTO rights to regulate imports of products produced according to this practice?

The FTA does not change the UK's WTO rights to regulate imports of products on animal welfare grounds, provided that the UK can show that this is necessary to protect UK public morals. This might be difficult to demonstrate when conditions are not very different between the two countries.

e) Conclusion

Livestock transport conditions in New Zealand and the UK are in practice very similar, even though the two countries have different regulatory approaches to achieving this end. The key difference is that the UK takes a more prescriptive approach, with a focus on detailed regulatory standards and processes, while New Zealand's regulations and code of practice focus on whether a given animal is fit for transport.

It is possible that beef from cattle that have been produced according to New Zealand standards which differ from UK standards (eg being transported for 12 hours, as opposed to the proposed 9-hour UK maximum) will enter the UK. Other potentially relevant products are not expected to be imported into the UK at increased rates under the FTA.

The FTA does not restrict the UK's rights to regulate imports of beef if this is necessary to protect UK public morals. Given the similarity in practices between the two

¹¹² Article 6(3) of Council Regulation (EC) No 1/2005 of 22 December 2004, above at n 106, referring to Annex I, Ch 6, rule 3.1.

¹¹³ Regulation 32 of the Animal Welfare (Care and Procedures) Regulations 2018 NZ.

countries, and New Zealand's overall approach to animal welfare in its rules on transport conditions, it is difficult to imagine that this will be the case.

6. Use of pesticides

One submission raised concerns about pesticide usage in wine production and, in particular, the use of hazardous fungicides to control *Botrytis* and their adverse impact on biodiversity (eg earthworms) and the environment (eg groundwater).¹¹⁴ In addition to these environmental effects, we note that pesticides may also pose a risk to consumers.

It is worth noting that these are two separate issues. The first, the risk to the environment, stems from the use of pesticides in the country of production, namely New Zealand, rather than in the importing country, and so is generally not relevant to import controls. The second, the risk to consumers (including to animals through feed), arises as a result of pesticide residues on food. In relation to New Zealand production and UK consumers, this risk is managed through SPS controls which are designed to limit residues on imports. Under its SPS controls, the UK can monitor maximum residue levels (MRL) of pesticides which are the maximum concentration of a pesticide residue in, or on, food or feed that is legally tolerated when the substance is applied correctly. In addition, the UK has import tolerances, which are specific MRLs set for imported food or feed, usually where there is no UK MRL because the substance is not approved for use in the UK. This means that small residues of substances banned in the UK may be permissible on imports, but at very low levels that are deemed safe. The FTA has no effect on the UK's existing WTO rights to apply these protections. We note further that the potential effects of the FTA on the UK's statutory protections in relation to human health are outside of our remit.

a) Are pesticides that are prohibited in the UK used in New Zealand? We observe that the UK and New Zealand operate independent pesticide approval regimes for the use of pesticides in agriculture, assessing the safety and licensing the use of both the active ingredient and the fully formulated product. Approvals are granted on a crop-by-crop basis, taking into account local climatic and environmental conditions, while also setting parameters on issues such as application rates, dilution and timing.

It is inevitable that different pesticides will be authorised for use in different parts of the world without this automatically indicating a higher or lower level of safety or protection. However, it is also true that the fundamental approach to how pesticides are registered differs across countries. The UK continues to operate a regime based on the EU's authorisation system, imposing a higher, 'hazard-based' threshold for demonstrating that pesticides present an acceptable level of safety. New Zealand operates a 'risk-based' approach that takes into account additional risk mitigation. In the UK, cut-off criteria mean that such risk management factors will not be considered in cases where a hazard threshold has been exceeded.

¹¹⁴ Submission 011 (Fera).

New Zealand authorises several pesticides that are not authorised for the same use in the UK.¹¹⁵ This includes the following:

- Iprodione is approved for use to manage botrytis in grape production.
- Propargite is approved for use in apple cultivation.
- Chlorpyrifos is approved for use on kiwifruit and avocados.
- Propham is approved for use on stored potatoes to prevent them from sprouting.
- Diazinon is approved for use on apple and pear trees, avocado trees and strawberry plants.
- Chlorothalonil is approved for use on potatoes and on apples and pears.
- Procymidone is approved for use on onions and potatoes.
- Thiram is approved for use on apples and pears.
- Carbendazim is approved for use on apples, grapes, kiwifruit and onions
- Cyprodinil is approved for use on grapes and onions
- Acephate is approved for use on avocados.
- Fludioxonil is approved for use on onions and grapes.
- Methamidophos is approved for use on onions and potatoes.

It is worth noting that low MRLs or import tolerances in export destinations like the UK may disincentivise use of pesticides in New Zealand.¹¹⁶ We also note that there are initiatives to encourage New Zealand growers, like those in the UK, to use integrated pest control techniques to reduce their reliance on pesticides.¹¹⁷

b) Does the use of pesticides involve products likely to be imported into the UK at increased rates under the FTA?

Yes. Wine, apples, kiwifruit, onions and avocados may see an increase in imports under the FTA.

c) Does this practice imply cost savings for New Zealand producers vis-à-vis UK producers?

Yes. Pesticides are used by farmers primarily to protect yields and manage biosecurity risks.¹¹⁸ Where New Zealand farmers use pesticides that are banned in the UK, UK farmers may be required to deploy an alternative intervention (eg a biopesticide) which may necessitate multiple and more costly applications.

While it is difficult to quantify cost savings, the availability of a wide range of tools to suppress pest and disease pressures in growing crops is an important element of profitable farming and any restriction thereof may reduce profit. A UK industry-sponsored study by agricultural consultants Andersons in 2014 found that the loss of 40 commonly used pesticides considered under various threats of withdrawal from use

4J7GA7645OVGN6VQFSG1D8A5B0.

¹¹⁵ Regulation (EU) No 649/2012 of 4 July 2012 concerning the export and import of hazardous chemicals (recast), at <u>https://www.legislation.gov.uk/eur/2012/649/contents#</u>, as amended by Commission Delegated Regulation (EU) 2019/330, at <u>https://www.legislation.gov.uk/eur/2019/330/contents</u>.

¹¹⁶ Eden Research Plc, *Sipcam Agreement for Australia and New Zealand*, 15 October 2018 at <u>https://markets.ft.com/data/announce/full?dockey=1323-13827904-</u>

¹¹⁷ Hon Damien O'Connor, 'Spray-free target for New Zealand apples and pears to boost export growth', 26 April 2022, at <u>https://www.beehive.govt.nz/release/spray-free-target-new-</u> <u>zealand-apples-and-pears-boost-export-growth</u>.

¹¹⁸ Pesticide use can also be due to the SPS requirements of other importing countries.

would see UK agriculture's Gross Value Added (GVA) fall by c £1.6bn per annum, a drop of 20% on the 5-year average (2009-2013).¹¹⁹

d) Does the FTA restrict the UK's WTO rights to regulate imports produced according to this practice?

No. The FTA does not reduce the UK's WTO rights to regulate imports produced using pesticides.

In this respect, a distinction must be drawn between import restrictions to protect consumers, plants, animals and the environment in the UK and in New Zealand. The UK is entitled to protect its own consumers, plants, animals and environment in accordance with the conditions set out in the WTO SPS Agreement, as also affirmed in the SPS chapter of the FTA.

In contrast, the UK is not entitled under WTO law to impose import restrictions that are solely aimed at protecting biodiversity or the environment in New Zealand, unless this has an impact on the UK environment. We note, however, that the FTA contains several enforceable environmental obligations, which go beyond WTO law. In particular, Article 22.4.2 of the FTA states that '[e]ach Party shall endeavour to ensure that its environmental and other relevant law and policies provide for, and encourage, high level of environmental protection, and to continue to improve its respective level of environmental protection.' Such laws include laws concerning 'the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes'. As mentioned, this is a soft obligation, and it is only likely to be breached where there is a very clear case, quite probably an egregious case, of a party *not* providing for high levels of environmental protection. That does not seem to be the case here.

e) Conclusion

New Zealand does authorise certain pesticides for uses that are prohibited by the UK. A distinction needs, however, to be drawn between the potential harmful effects of such pesticides within the UK and within New Zealand. In principle, the UK is permitted to protect its own environment, animals and plants (as well as humans), in accordance with the WTO SPS Agreement, as affirmed in the SPS chapter of the FTA. The FTA does not change this. On the other hand, the UK is not, in principle, permitted under WTO law to prohibit imports of products that are produced in a manner that might cause harm to New Zealand's environment. That is fundamentally a matter for New Zealand to regulate, in the absence of any effect on the UK. That said, the FTA goes further than WTO law in this respect, requiring New Zealand to 'endeavour to ensure' that its environmental laws provide for high levels of protection. Given its soft wording, this provision would protect the UK against serious failures to maintain environmental laws providing for a high level of protection in New Zealand. While we cannot make a definitive assessment, it is unlikely that the approved uses of pesticides discussed here would rise to that level.

7. Climate Change

One consultee raised concerns about the impact of the FTA on the UK's environmental footprint, and in particular that trade liberalisation under the FTA may lead to increased

¹¹⁹ The Andersons Centre, *Crop Production Technology: The Effect of the Loss of Plant Protection Products on UK Agriculture and Horticulture and the Wider Economy* (2014), at <u>https://www.nfuonline.com/andersons-final-report/</u>.

imports of emission-intensive agricultural products from New Zealand, as well as transport-related emissions associated with increased trade flows between the UK and New Zealand.¹²⁰

a) Is New Zealand agricultural production more emission-intensive than UK agricultural production?

As reflected in Article 22.6.2 of the FTA, both New Zealand and the UK are committed to reducing net GHG emissions to zero by 2050 under their domestic law¹²¹ and the Paris Agreement.¹²² One of the key tools for meeting such targets is their respective emissions trading schemes (ETS), which is a market-based mechanism for pricing greenhouse gas (GHG) emissions.¹²³ In the UK, the ETS does not apply to the agricultural sector and there are no plans at present to include it.¹²⁴ Conversely, in New Zealand, the ETS does cover the agriculture sector.

At present, New Zealand's ETS only prices emissions from inputs into the production process (such as fuel or electricity), and not direct emissions (such as methane emissions from enteric fermentation by ruminant animals or nitrous dioxide emissions from agricultural soils).¹²⁵ However, by December 2022, farmers in New Zealand will be subject to measurement and reporting obligations for *all* (direct and indirect) their on-farm emissions. Moreover, by January 2025, they must have a written plan in place to measure and manage these emissions which will be subject to a carbon price.¹²⁶ This will be done by fully incorporating the agriculture sector into the ETS, or through the alternative pricing system proposed in June 2022 by the He Waka Eke Noa partnership,¹²⁷ which is being considered by Government. One way or the other, all GHG emissions from agriculture will be subject to a carbon price from 2025 onwards, making New Zealand the first country in the world to require livestock farmers to pay for methane emissions by ruminants.

¹²⁰ Submission 005 (Trade Justice Movement).

¹²¹ For New Zealand, see Climate Change Response (Zero Carbon) Amendment Act 2019, Part 1B, section 5Q. For the UK, see Climate Change Act 2008, Part 1, section 1.

¹²² In its current Nationally Determined Contribution (NDC), the UK commits to reduce economy-wide GHG emissions by at least 68% compared to 1990 levels by 2030. In its current NDC, New Zealand commits to reduce economy-wide GHG emissions by 50% below 2005 levels by 2030. These are available in the NDC Registry at https://unfccc.int/NDCREG.

¹²³ ETS usually works on the 'cap and trade' principle, where a cap is set on the total amount of certain greenhouse gases that can be emitted by sectors covered by the scheme. Within this cap, participants receive free allowances and/or buy emission allowances at auction, which they can trade with other participants as needed. Each year, participants covered by the scheme must surrender sufficient allowances to cover their reported emissions.

¹²⁴ Greenhouse Gas Emissions Trading Scheme Order 2020, Schedule 1 (aviation) and Schedule 2 (installations). ¹²⁵ The latter are the main sources of agricultural emissions in New Zealand: Ministry for the Environment, *New Zealand's Greenhouse Gas Emissions Inventory 1990-2020*, p149, at https://environment.govt.nz/publications/new-zealands-greenhouse-gas-inventory-1990-2020/.

¹²⁶ Climate Change Response (Emissions Trading Reform) Amendment Act 2020, Part 1, sections 202 and 215-216.

¹²⁷ He Waka Eke Noa – Primary Sector Climate Action Partnership is a group of 13 partners from the primary sector (including Federated Farmers, Beef & Lamb NZ, Dairy NZ, Horticulture NZ), Government agencies (Ministry for Primary Industries, and Ministry for the Environment), and iwi/Māori (Federation of Māori Authorities). The proposed alternative pricing system can be found at: <u>https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/he-waka-eke-noa-primary-sector-climate-action-partnership/</u>.

Studies by AgResearch NZ¹²⁸ and by the UK Centre for Innovation Excellence in Livestock (CIEL)¹²⁹ have estimated the emission intensity of livestock products likely to be imported from New Zealand, compared with the same products produced in the EU and, for most products, also the UK. The figures are reproduced in the table below. This evidence suggests that the emission intensity of the listed products is lower in New Zealand, even though figures vary across studies.

Emission intensity of livestock products likely to be imported from New Zealand, compared with the same products produced in the EU and/or the UK (AgResearch NZ and CIEL)

Product	NZ		UK		EU27	
Dairy	0.77	AgResearc h	1.0- 1.3	CIEL Range depends on indoor/outdoor and non- organic/organic	0.86 - 1.53	AgResearc h
Beef	8.97	AgResearc h	31.0 16.0- 20.2	AgResearch CIEL lowland beef; range depends on feed		
Sheepme at	6.01	AgResearc h	14.92	AgResearch		
			10.9- 17.9	CIEL range depends on lowland/upland/hill sheep		

Figures in Kg CO2-eq; Kg FPCM (dairy) or liveweight (beef/sl	neep meat)
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The DIT Impact Assessment estimates that the increase in annual transport-related emissions associated with the UK's exports as well as imports under the FTA is small (around 0.13 and 0.14 MtCO2 each year; a 48-50% increase), when compared to UK production emissions.¹³⁰ This figure is for all trade under the FTA, and no separate figure for agriculture was given. But it will naturally be even smaller. We also note that a study by AgResearch NZ finds that processing (1.7-3.0% for beef and 5.3-6.5% for

¹²⁸ André Mazzetto, Shelley Falconer and Stewart Ledgard, *Mapping the Carbon Footprint of Milk for Dairy Cows*, Report for DairyNZ, RE450/2020/081, AgResearch (2021); André Mazzetto, Shelley Falconer and Stewart Ledgard, *Review of the Carbon Footprint of Beef and Sheep Meat*, Report for the Meat Industry Association (MIA) and Beef + Lamb New Zealand, RE450/2020/097, AgResearch (2021).

¹²⁹ CIEL, Net Zero Carbon and UK Livestock Report (October 2020), pp. 20, 24 and 26, <u>https://www.cielivestock.co.uk/expertise/net-zero-carbon-uk-livestock/report-october-2020/</u>.

¹³⁰ UK Department of International Trade, *Impact Assessment of the Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand* (28 February 2022), pp 47-48, at https://www.gov.uk/government/publications/uk-new-zealand-fta-impact-assessment.

sheep meat) and shipping (1-4%) represented a very small proportion of the total carbon footprint of beef and sheep meat products.¹³¹ This data suggests that livestock production in NZ has a lower emission intensity than European and UK production even after taking shipping into account.

A concern was also raised by the same consultee regarding the size of dairy herd in New Zealand and its impact on GHG emissions.¹³² Contrary to what the submission states, the Climate Change Commission has *not* recommended that the herd size needs to be reduced by 10-15% in order to reach New Zealand's greenhouse gas reduction obligations by 2050.¹³³ We note that some farmers in New Zealand consider that such a reduction may become necessary, if alternative technologies are not found, in order to meet the 2030 targets for methane emissions.¹³⁴

b) Does emission-intensive production (if any) involve products likely to be imported into the UK under the FTA?

No. The emission intensity of livestock products likely to be exported to the UK from NZ, including sheep meat, beef and dairy, is lower than the emission intensity of the same products produced in the UK.

c) Does emission intensity (if any) imply cost savings for New Zealand producers vis-a-vis UK producers?

No. New Zealand is making farmers pay for their emissions while the UK is not, so emission-intensive production in New Zealand would cost more than low emission production.

Does the FTA prevent the UK from regulating imports of products produced according to this practice?

No. Under the FTA, the UK is able to adopt measures related to the conservation of exhaustible natural resources, and Articles 22.6 and 32 explicitly provide that this includes measures to mitigate climate change. In this respect, the FTA enhances the UK's right to adopt climate change measures vis-a-vis WTO law. In addition, the UK can raise emission-intensive production as a concern with New Zealand in the Environment and Climate Change Sub-Committee.

Conclusion

New Zealand's regulatory approach to climate change mitigation is more comprehensive than the UK's approach in several respects. In particular, New Zealand includes agriculture within its Emissions Trading Scheme, whereas the UK does not. In addition, the emission intensity of producing beef and sheep meat in New Zealand is less than that in the UK, including if one takes transport-related emissions into

¹³¹ Stewart Ledgard, Shelley Falconer and André Mazzetto, *Carbon Footprint of New Zealand Beef and Sheep Exported to Different Markets*, Report for the Meat Industry Association (MIA) and Beef + Lamb New Zealand. RE450/2021/006, AgResearch (2021).

¹³² Submission 005 (Trade Justice Movement).

¹³³ Climate Change Commission, Advice to the New Zealand Government on its first three emissions budgets and direction for its emissions reduction plan 2022 – 2025 (31 May 2021), pp 305-306, <u>https://ccc-production-media.s3.ap-southeast-2.amazonaws.com/public/Inaia-tonu-nei-a-low-emissions-future-for-Aotearoa/Inaia-tonu-nei-a-low-emissions-future-for-Aotearoa.pdf</u>.

¹³⁴ New Zealand's domestic targets for biogenic methane emissions are: (i) 10% less than 2017 emissions by the calendar year beginning on 1 January 2030; and (ii) are 24% to 47% less than 2017 emissions by the calendar year beginning on 1 January 2050 and for each subsequent calendar year. See Climate Change Response (Zero Carbon) Amendment Act, Part 1B, section 5Q.

account. In any event, the FTA does not restrict the UK's rights to adopt measures to protect the Earth's climate. To the contrary, under the FTA, the UK is able to adopt measures related to the conservation of exhaustible natural resources, and Articles 22.6 and 32 explicitly provide that this includes measures to mitigate climate change. In this respect, the FTA enhances the UK's right to adopt climate change measures vis-a-vis WTO law. In addition, the UK can raise emission-intensive production as a concern with New Zealand in the Environment and Climate Change Sub-Committee.

List of consultees

- 1. His Excellency, Bede Corry, New Zealand High Commissioner to the United Kingdom
- 2. Alex Gowen, Regional Manager (UK and Europe), Beef and Lamb New Zealand
- 3. Dave Harrison, General Manager (Policy and Advocacy), Beef and Lamb New Zealand
- 4. Dr Tracey Epps, Former New Zealand Government Trade Lawyer
- 5. Dr Lindsay Burton, Chair of the Veterinary Council for New Zealand
- 6. Professor Nicola Shadbolt, Professor of Farm and Agribusiness Management, Massey University, and Member of the New Zealand Climate Change Commission
- 7. Gareth Hateley, Junior Vice President at the British Veterinary Association
- 8. UK Government officials
- 9. New Zealand Government officials
- 10. Mark Casey, Fonterra
- 11. Dr Emily Lydgate, University of Sussex
- 12. Dr Aoife Dillon, Fera
- 13. Julia Lovell, Forestry Commission
- 14. Kirsten Hughes, Meat Promotion Wales
- 15. Amro Hussain, The Humane League UK
- 16. Rebecca Dharmpaul, Four Paws UK
- 17. Lucia Zitti, NFU and NFU Cymru
- 18. George Holt, Trade Justice Movement
- 19. Stephanie Maw, Humane Society International UK
- 20. Michael McGilligan, British Veterinary Association
- 21. Lucy Ozanne, Quality Meat Scotland
- 22. Rebecca Zard, Nigel Blackaby QC, Laurie Morgan, Convention on Animal

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