

Trade and the Environment Inquiry **28th February 2022**

Authors

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Executive Summary

In response to the International Trade Committee's inquiry on Trade and the Environment we provide evidence and policy recommendations in relation to the following questions:

Kirsty McDougall

Question

1. How well are the Government's free trade agenda and its environmental policies aligned? And is the Government ambitious enough in its approach?

Recommendation

2. Existing and proposed FTAs together with both international and national environmental policy should be considered holistically to inform the negotiation of a new FTA.

Question

3. By what measures should the environmental impacts of new free trade agreements be assessed?

Recommendation

4. Consistent with the recommendation above, rather than assessing a new FTA exclusively against set measures, consideration should be given to the FTA's overall positioning in respect of: furtherance of the UK free trade agenda; impact on national environmental targets; impact on international environmental obligations and commitments; potential to go beyond existing international obligations and commitments; impact on and contribution towards 2050 net zero target.

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Emily Reid

Question

5. What are the benefits and costs of the UK's approach to environmental and climate change commitments in free trade negotiations to date?

Recommendations

6. Explicitly include environment and climate as key elements of cooperation in every trade agreement and provide for appropriate action to be taken in the case of failure to enforce, or violation of environment and climate commitments.
7. Continue to be flexible regarding the substantive commitments agreed in order to secure at least a minimum level of commitment in every agreement.
8. Recognise explicitly in each agreement the inter-dependence of Trade, Environment and Social interests as manifested in sustainable development.

Question

9. What can the UK learn from how other countries' experiences of aligning trade and environmental policies? How have other countries innovated in this area?

Recommendations

10. Have regard to arbitral decisions relating to jurisdiction over labour provisions and disputes in the drafting of the scope of environment provisions.
11. Place environment and sustainable development more broadly at the heart of cooperation in its FTAs, recognising the indivisibility and mutual dependence of economic, environmental and social development, as manifested in sustainable development and thus underpinning the entire agreement, as a basis of cooperation, rather than including these interests as distinct chapters of cooperation.

Michail Risvas

Question

12. To what extent might the inclusion of Investor-State Dispute Settlement clauses in free trade agreements affect the UK's climate change policies?

Recommendation

13. The UK should include Investor-State Dispute Settlement (ISDS) clauses together with 'carve out' clauses in the investment chapters of its free trade agreements (FTAs), protecting investors and investments, while safeguarding its right to introduce or maintain climate-change mitigation measures which are adopted and applied in good faith and on a non-discriminatory basis.

Note

14. These responses and recommendations have been constrained by space and time; the three authors will be happy to answer any questions, or expand on any particular areas, either in writing or orally, at the request of the Committee.

Written evidence submission from Professor Emily Reid, Professor of International Economic Law and Sustainable Development at University of Southampton; Ms Kirsty McDougall, Lecturer in Law at University of Southampton; Dr Michail Risvas, Lecturer in Law at University of Southampton
(TEN0031)

Relevant background publications

Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience* Oxford, Hart 2015.

Emily Reid, 'Trade, Environment and Human Rights' for Trade and Environment, (ed) P Delimatsis and L Reins, Volume 6, Elgar Encyclopedia of Environmental Law, Edward Elgar 2021.

How well are the Government's free trade agenda and its environmental policies aligned? And is the Government ambitious enough in its approach?

(Kirsty McDougall)

15. To establish the extent of alignment between the Government's free trade agenda and its environmental policies, international environmental commitments and obligations must be considered alongside national environmental policy. Environmental policy has both external and internal aspects which should be considered holistically to facilitate a flexible approach to the Government's free trade agenda whilst also ensuring environmental obligations and targets are being worked towards. This approach allows for considerable flexibility which is key to balancing free trade and environment considerations.

16. The Green Trade report aligns UK environmental protection with its *international obligations*.⁴ A holistic consideration of international commitments and obligations alongside UK target based national policies are necessary to establish the current landscape which can allow the UK to make flexible and informed decisions in FTA negotiations. When assessing how future FTAs align with environmental policy obligations, commitments and targets it is necessary to consider both national and international environmental policy to establish how the proposed FTA fits into the overall alignment of free trade and the environment. At present environmental considerations in FTAs focus on international commitments and obligations, unsurprisingly given the context. The UK environmental policy, however, is multifaceted giving rise to a question concerning the extent to which this is or should be considered in the UK's negotiating approach. National policy is target based within a statutory framework, the Environment Act 2021, Part 1 of which is focused on environmental governance and sets out targets to achieve the UK's 25 year Environment Plan, including provisions for remedial action to be taken where targets are unlikely to be met. Comparatively, the UK has increased its environmental commitments internationally and a flexible approach has been taken to UK international environmental policy with Climate commitments for example being

⁴ 'Across FTA's the UK will continue to ensure a high level of environmental protection in line with its international obligations as well as seeking to promote clean growth.' UK Board of Trade, *Green Trade Report* (July 2021)

made both within the UN Convention Framework on Climate Change and outwith that process through other deals and initiatives, for example the US-EU led pact to cut methane emissions by 30% by 2030.

17. Therefore, alignment between the UK government's free trade agenda and environmental protection obligations can be achieved if international and national environmental policy are considered alongside one another during FTA negotiations. In addition, regard should be had to the wider partnership context rather than considering individual FTAs in isolation during the negotiation process. This should support a balancing of trade and environmental protection by the UK government.
18. The importance of the UK free trade agenda cannot be overstated in post-Brexit UK. Drawing from the flexible approach the Government has taken to international environment policy there is potential to be cautiously ambitious whilst aligning free trade and environmental protection. Environmentally focused FTAs may be entered where the trade partner is most amenable. (For example, a more ambitious approach may be taken in the UK-New Zealand FTA.) The individual nature of an FTA allows for this approach and is evident in a comparative analysis of the EU-UK Trade and Cooperation Agreement and the UK-Australia FTA. A flexible approach permits the UK to be a leader in environmentally considered/focused FTA's from concluding agreements with environmental policy clauses through to encouraging environmental policy discussions in agreements with less amenable partners. The success of this approach is reliant on harmonising the consideration of existing and proposed FTAs with both international and national environmental policy when considering the terms of the FTA that is being concluded.

By what measures should the environmental impacts of new free trade agreements be assessed?

(Kirsty McDougall)

19. The need for a flexible approach set out above impacts on the assessment of the environmental impact of new FTAs. Set measures applicable to the assessment of all new FTAs are not possible under a flexible approach which balances trade and

environment overall. Instead, the focus is on checking and balancing the impact of the new FTA against the landscape of existing and future FTAs alongside national and international environmental policy, obligations and commitments.

20. The drawbacks of a flexible approach need to be considered but do not outweigh the benefits. Without set measures, reporting on the potential environmental impact of a new FTA can be less transparent *prima facie*. In establishing the potential impact of the FTA the assessment can be lengthy and open to greater conjecture due to the lack of defined measures. Further, individual FTAs are open to the critique that the UK is willing to undercut environmental protections in the pursuit of FTAs.⁵ However, the time investment allows for alignment between free trade and the environment and in turn delivers a considered approach that increases overall transparency. Individual FTAs will not set standards for the UK's environmental protection policy considerations in trade agreements. Instead, they are considered in the entirety of the UK's free trade agenda and environmental policy.

21. Rather than focus on set measures of assessment, consideration should be given to the FTAs overall positioning in respect of:

- a) furtherance of the UK free trade agenda
- b) impact on national environmental targets
- c) impact on international environmental obligations and commitments
- d) potential to go beyond existing international obligations and commitments
- e) impact on and contribution towards 2050 net zero target

22. This lens of assessment can allow conclusions to be drawn about the value of the FTA overall for both trade and the environment. There are numerous ways to meaningfully quantify and report on the decision to enter a particular FTA, for example a summary statement contextualising the trade and environmental impact of the FTA.

⁵ A concern in the EU-UK TCA due to the internal market and the potential of the UK to benefit from trade distortions and unfair competitive advantages. This was dealt with by establishing the level playing field for open and fair competition. European Commission, 'Political Declaration Setting Out the Framework for the Future Relationship between the European Union and the United Kingdom' para 77

23. To effectively balance free trade and the environment the costs and benefits of entering FTAs need to be widely contextualised. This allows for informed decision making and clear monitoring of trade and environmental protection whilst also providing flexibility where necessary for the furtherance of trade and creating opportunity for increasing environmental protections in free trade practices.

What are the benefits and costs of the UK's approach to environmental and climate change commitments in free trade negotiations to date?

(Emily Reid)

24. This part focuses upon the costs and benefits of two key characteristics of the UK's approach to environmental and climate change commitments in free trade negotiations to date, evident in the outcomes of those negotiations. First that the UK, to date, has achieved universality of inclusion of a commitment to environment and climate change in each of the agreements it has concluded. Secondly, that the environment and climate related commitments included are predominantly reaffirmations of existing commitments and commit the parties to non-regression. That is, they do not commit the UK or the partner state to specific outcomes beyond those to which they have already committed, but they do commit the parties to not reduce their existing commitments.
25. The universality of the UK's inclusion of environment/climate and sustainability commitments in trade agreements allows the UK to position itself as a leader in this field. This however comes at a cost in that there is a lack of consistency with regard to the depth of commitment. For example there is a significant difference between the position taken in the EU-UK Agreement, in which the fight against climate change is an 'essential element' of the partnership (the consequences of which will be discussed below), compared to the outcome in the EU-Japan Agreement in which the Chapter on Sustainable Development is excluded from Dispute Settlement.⁶ In this regard the UK could be criticised for inconsistency. This substantive variation could, however, be argued to be a consequence of the inclusion of a minimum level of commitment to the environment/fighting climate change in every agreement, thereby supporting the

⁶ Article 16.17

development of a culture for environmental protection and climate action, even if the same substantive outcomes cannot be achieved in every context.

26. This flexibility with regard to the substance of the commitment has a further potential benefit: it may help to insulate the UK from criticism that it is seeking to impose its values on partner states, while securing some commitment to environment in every agreement, going further where both parties share a deeper commitment.⁷ Using as the reference point international and multilateral agreements that the parties are already committed to further assists in this regard.⁸ This itself potentially makes it easier to reach agreement on the inclusion of environmental provisions in a trade agreement, which has not always been free of controversy.⁹

27. With regard to their environmental commitments, the Agreements which have been concluded so far largely tend to be non-regressive and based on reaffirmations of the parties' existing commitments. The benefit of this is that, as noted above, this approach to negotiation and drafting can make it easier to achieve agreement on the inclusion of what might otherwise be controversial commitments. The EU-UK Agreement is thus largely 'non-regressive' in that it commits the parties to upholding and maintaining current standards rather than introducing new or deeper commitments relating to environmental protection (including commitments to combat climate change and sustainable development). One benefit of the way in which this is framed is that it would not be inconsistent with the agreement for the UK to increase its environmental standards and commitments. In contrast, it would be problematic for the UK to reduce its domestic standards, which could be perceived as a potential cost.

28. In this context it should be noted that Article 771 of the EU-UK Agreement provides that Article 764 (Fight Against Climate Change) is an essential element of the partnership established by the agreement. Article 772 goes on to provide that 'If either Party considers that there has been a serious and substantial failure by the other Party

⁷ Such criticism has been made of the EU previously, in the context of inclusions of human rights conditionality in trade agreements.

⁸ E.g. see UK-Japan CEPA Article 16.4.

⁹ This is very clearly supported by Scott Morrison's comments in Autumn 2021 regarding the leaked suggestion that the AUS-UK Agreement might commit the states to go beyond the parties' existing Paris Agreement commitments.

to fulfil any of the obligations that are described as essential elements in Article 771, it may decide to terminate or suspend the operation of this Agreement or any supplementing agreement in whole or in part.’

29. This provides a clear benefit in that the fight against climate change is placed at the heart of the agreement. The EU has, however, previously demonstrated itself to be willing to invoke such suspension clauses in the context of labour standards and human rights conditionality. The UK can therefore expect that the EU would be willing to invoke Article 772 if it had cause to do so.
30. The Australia-UK Agreement is also significant as this is the first fully free-standing agreement that the UK has concluded since Brexit; as such it provides perhaps the clearest an indication of the contemporary priorities of the parties. Unlike the UK-Japan CEPA, while the first step relating to any matters arising under the Environment Chapter is consultations, Article 22.26 (Dispute resolution) provides that recourse can be made to Dispute Settlement under Article 30 if consultations fail to resolve issues.
31. The Environment chapter (22) is modelled upon the CPTPP, and the Agreement in Principle indicated it would not go beyond CPTPP. There are, however, a number of additional areas of cooperation including Climate, Circular Economy, Marine Litter and Sustainable Forestry.
32. While many of the commitments in the Australia-UK Agreement are aspirational, and affirmative of existing commitments, such as those deriving from the Paris Agreement, the mere fact of their inclusion is significant. Furthermore, the possibility of recourse to dispute settlement gives them more weight, and teeth, than those existing commitments otherwise had. Once again this may be seen as both a benefit and a potential cost.

What can the UK learn from how other countries’ experiences of aligning trade and environmental policies? How have other countries innovated in this area?

(Emily Reid)

33. The EU has been a leader in this field building on its related innovation in the 1990s: the introduction of human rights conditionality in all its agreements with third states. A similar approach is evident with regard to the fight against climate in Article 771 EU-UK Agreement noted above. Lessons can therefore be drawn by the UK from the EU's experience with human rights conditionality for environment and climate provisions.
34. The approach of the EU regarding Sustainable Development is also worthy of reflection. Its agreement with Korea in 2011 was recognised as the first of the EU's 'new generation' of Agreements and was ground-breaking in including a Chapter (13) on Sustainable Development. The Agreement also put in place a dispute settlement process. This is focussed first upon dialogue, with sanctions or suspension of benefits to be invoked as a last resort. Significantly, however, as with human rights conditionality, the EU has demonstrated itself to be willing to enforce its sustainable development provisions, and brought an action against Korea on the grounds that its labour laws were inconsistent with Article 13.4.3 of the FTA. A key question was whether the Panel had jurisdiction: Korea argued that the matter was outside the scope of the Agreement. The expert Panel found however, based on Article 13.2.1, that it had jurisdiction.¹⁰ Although this dispute concerned the labour provisions of sustainable development, it is possible to extrapolate lessons from this for consideration in the drafting of environmental aspects of sustainable development provisions and commitments.¹¹
35. Building on the EU approach, and depending on the level of depth of commitment the UK wishes to engage, there is a question whether rather than continuing to include distinct chapters on Environment/Climate, the UK should move towards an approach which puts Environment and Climate provisions, and indeed Sustainable Development more broadly, at the core of cooperation, essentially mainstreaming it so

¹⁰ This is very clearly supported by Scott Morrison's comments regarding the leaked suggestion that the AUS-UK Agreement might go beyond the parties' existing Paris Agreement commitments.

¹¹ This dispute can be usefully contrasted with the outcome in the US- Guatemala dispute. *Labour Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (2017), para 190 in which the breach in question was held to be outside the scope of the Agreement as a result of the scope there extending to matters 'affecting trade between the parties'.

that it underpins the entire breadth of cooperation, rather than being one aspect of cooperation. This would be consistent with pragmatic recognition of the indivisibility and mutual dependence of economic, environmental and social development manifested in the commitment to sustainable development.

36. Aside from this, the US-Mexico-Canada Agreement contains a rapid response mechanism through which to address particular breaches of labour standards. There may be some benefit in exploring the potential value or not of such an approach for key environmental issues.

And to what extent might the inclusion of Investor-State Dispute Settlement clauses in free trade agreements affect the UK's climate change policies?

(Michail Risvas)

37. While FTAs recently concluded by the UK do not contain ISDS clauses the UK is in the process of acceding to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which makes provision for ISDS. Although '[a]cademic research is yet to explore climate-related arbitration as strictly understood', the inclusion of ISDS in future FTAs will benefit the UK without posing a significant threat to the UK's climate change policies for several reasons set out below. The chance of successfully using such provisions to challenge measures adopted in pursuit of climate change mitigation policies by the UK, would primarily depend on the way in which such policies are implemented.

38. First, the UK's traditional commitment to (domestic and international) Rule of Law and its dual-role as both a capital-exporting and capital-importing economy clearly speak in favour of the inclusion of ISDS in its FTAs.¹²

39. Second, the power of arbitral tribunals constituted on the basis of investment treaties or investment chapters contained in FTAs ('arbitral tribunals') is circumscribed:

¹² D Collins, 'The UK Should Include ISDS in its Post-Brexit International Investment Agreements' (2017) 14 *Manchester Journal of International Economic Law* 301.

- a) Unlike many domestic courts, arbitral tribunals do not have the power to order States to change their legislative or administrative measures, even if such measures are found to be inconsistent with substantive treaty standards regarding investment protection; arbitral tribunals can only award compensation (monetary damages).¹³
- b) Unlike courts in common law jurisdictions (such as the UK), arbitral tribunals are not legally bound by precedent, *i.e.* earlier decisions of other tribunals.
- c) Although the matter is still extensively debated in scholarship, there is no empirical evidence that ISDS practice is biased against States and in favour of foreign investors.¹⁴
- d) Arbitral tribunals show deference to legislative, judicial, and, more generally, decision-making processes of States, although the precise contours of such deference are still being refined in the relevant case law.¹⁵

40. Third, modern investment treaties or investment chapters of FTAs usually contain explicit ‘carve out’ clauses in relation to environmental protection measures, ensuring that such measures cannot be considered as inconsistent with the substantive protection (that must be) offered to investments or investors. For example, Article 9.16 of the CPTPP provides that ‘[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives’.

¹³ See *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v Argentine Republic*, ICSID Case No ARB/02/1, Award, 25 July 2007, para 87: ‘[t]he judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty’.

¹⁴ See S D Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration* (2007) 86 North Carolina Law Review 1; S D Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press, Oxford 2019).

¹⁵ See S W Schill, ‘Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review’ (2012) 3 Journal of International Dispute Settlement 577.

41. Finally, and depending on the wording of the clause providing for ISDS, States could be able to launch counterclaims against foreign investors, in particular in relation to environment- and climate change-related matters.¹⁶

¹⁶ M Scherer, S Bruce, and J Reschke, 'Environmental Counterclaims in Investment Treaty Arbitration' (2021) 36 ICSID Review 413.