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Submission to the International Trade Committee

Cambridge, 11 Nov 2020

Dear Members of the Committee,

Please find our joint submission in answer to your call for evidence attached. Together with Marios Tokas, Associate Fellow of the Centre for International Sustainable Development Law (CISDL) we would like to inform the Committee of our initial legal analysis. The CISDL in which I am also involved, aims to promote sustainable societies through law. We initially drafted this rapid response as part of a new Working Paper series on UK trade post-Brexit which can be found online here: <https://www.cisd.org/2020/10/01/international-trade-climate-change-and-environmental-interfaces-uk-legal-brief-series/>

In summary, our initial analysis comes to the conclusion that the current version of the UK-Japan FTA differs in several environmentally sensitive areas significantly from the EU-Japan CEPA and thus should be considered a missed opportunity, especially for the sustainable development and climate change – trade nexus.

Please feel free to contact us if you have any questions.

With highest regards,

A handwritten signature in black ink, appearing to read 'Markus W. Gehring' with a stylized flourish at the end.

Dr M W Gehring

Briefing 6: The UK-Japan FTA

Comparing the Agreement with the EU-Japan CEPA and other EU FTAs

Markus W. Gehring and Marios Tokas¹



Executive Summary

Examination of the text of the UK-Japan FTA can yield insight into how the post- Brexit trade picture will be realised. While largely relying on the text of the existing EU-Japan CEPA some smaller changes were made to the text which in their cumulative nature highlight that this UK agreement constitutes a missed opportunity for sustainable development and climate change in particular. Rather than strengthening the sustainable development provisions, we note below that they have been weakened. A much more ambitious agreement could have been concluded given that both the UK and Japan aim to reach carbon neutrality by 2050.

Introduction

1. The UK-Japan FTA mimics largely copies the EU-Japan CEPA. There are a few changes which are significant in their cumulative nature.²
2. Rather than a carbon copy, the UK and Japan could have been more ambitious in their environmental and climate change cooperation.³ Rather than just copying the texts, the common objective of carbon neutrality by 2050 could for example have been included in the agreement. Like the EU-Japan FTA, the normal dispute settlement provisions for example, do not apply to the climate commitment.

Changes to the Sustainable Development Chapter

3. From an environmental perspective it is disappointing that the provisions allowing for Treaty changes to the sustainable development chapter in the EU-Japan EPA was not transferred to the UK-Japan version. They also moved the provision on mutual supportive action in ILO and MEAs to a footnote and erased the reference SIAs (which was given as an example).

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² See full text which formed the basis for the comparison <https://t.co/5Re58auxxj?amp=1> and <https://www.gov.uk/government/publications/ukjapan-agreement-for-a-comprehensive-economic-partnership-cs-japan-no12020>

³ See our analysis of the post-Brexit Climate Change and Energy provisions, in Markus Gehring and Freedom-Kai Phillips, 'Legal Options for Post-Brexit Climate Change and Energy Provisions in a Future UK-EU Trade Agreement' (European Climate Foundation Paper, 2019) online: <https://www.cisd.org/2019/07/26/legal-options-for-post-brexit-climate-change-and-energy-provisions-in-a-future-uk-eu-trade-agreement/>.

- (b) cooperate on evaluating the mutual impact between trade and environment, and trade and labour, as well as on identifying ways to enhance, prevent or mitigate such impact, taking into account the results of the monitoring and assessment carried out by the Parties, ~~for instance, sustainability impact assessments as far as the European Union is concerned;~~
4. UK-Japan FTA also made civil society dialogue dependent on Party consent and will only meet every two years in the Committee on Sustainable Development. This is much less ambitious for the environment and makes NGO discussions dependent on consent of the Parties.

Joint Dialogue with civil society

1. The Parties shall convene, at such times as may be agreed by the Parties, the Joint Dialogue with civil society organisations situated in their territories (hereinafter referred to in this Chapter as "Joint Dialogue"), including members of their domestic advisory groups referred to in Article 16.15, to conduct a dialogue on this Chapter.
 2. The Parties ~~shall~~should promote in the Joint Dialogue a balanced representation of relevant stakeholders, including independent organisations which are representative of economic, environmental and social interests as well as other relevant organisations as appropriate.
 3. The Joint Dialogue shall be convened no later than ~~one year~~two years after the date of entry into force of this Agreement. Thereafter, the Joint Dialogue shall be convened regularly, unless the Parties agree otherwise. The Parties shall agree on the operation of the Joint Dialogue before the first meeting of the Joint Dialogue. Participation in the Joint Dialogue may take place by any appropriate means of communication as agreed by the Parties.
 4. The Parties will provide the Joint Dialogue with information on the implementation of this Chapter. ~~The~~If the Parties agree, the views and opinions of the Joint Dialogue may be submitted to the Committee and may be made publicly available.
5. Another interesting difference to the EU-Japan EPA constitutes the provision on Investor-State Dispute Settlement (ISDS) in the UK-Japan FTA. It contains a commitment to review agreement if any future UK FTA contains investment protection (with the notable

Written submission from Dr Markus W. Gehring and Mario Tokas (UKJ0016) exception of current or even future roll-over FTAs). This might signal that the UK will be negotiating ISDS provisions in future FTAs.

ARTICLE 8.5

Review

1. Each Party shall ~~endeavour~~, where appropriate, to reduce or eliminate the non-conforming measures set out in its respective Schedules in Annexes I to IV to Annex 8-B.
2. With a view to introducing possible improvements to the provisions of this Chapter, and consistent with their commitments under international agreements, the Parties shall review their legal framework relating to trade in services, investment liberalisation, electronic commerce and investment environment, including this Agreement, in accordance with Article ~~23~~24.1.
3. If, after the date of entry into force of this Agreement, a Party signs an international agreement with an investment chapter that contains provisions for investment protection or provides for investor-to-state dispute settlement procedures, the other Party, after the date of entry into force of that agreement, may request that the Parties review this Section and Section B.¹ Such a review shall be conducted with a view to the possible inclusion within this Agreement of such provisions that could provide for the improvement of the investment environment. Unless the Parties otherwise agree, any such review shall be commenced within two years from the date of the request and shall be concluded within a reasonable period of time.

¹ For the United Kingdom, this paragraph does not cover subsequent reviews, amendments or liberalisation under the framework of any international agreement in force for the United Kingdom on, or signed by the United Kingdom prior to, the date of entry into force of this Agreement, or any international agreement between the United Kingdom and a third country concluded with the aim of transitioning an existing international agreement to which the European Union was a party while the United Kingdom was a Member State of the European Union.

6. While it is not clear if a substantive change was intended it should be noted that unlike in the EU-Japan EPA, the UK-Japan FTA has downgraded the Committee on Agriculture to a mere working group. It remains to be seen, if this entails a substantive change in the attitude. It is clear that agriculture thus does not seem to play the same role as it does for the EU.

ARTICLE 19.5

Committee Working Group on Cooperation in the Field of Agriculture

~~1.~~ The Committee Working Group on Cooperation in the Field of Agriculture established pursuant to

~~1.~~ Article ~~22.3~~23.4 (hereinafter referred to in this Chapter as "the Committee Working Group") shall be responsible for the effective implementation and operation of this Chapter.

2. The Committee Working Group shall have the following functions:

(a) ensuring and reviewing the implementation and operation of this Chapter;

(b) discussing any issues related to this Chapter;

7. One of the more progressive changes is the inclusion of a new chapter on Trade and Women. It does create a platform for discussion even though it does not contain any form of enforcement mechanism. It should be noted that many trade and environment chapters also started in the same fashion, so this addition is welcome news.

CHAPTER 21

TRADE AND WOMEN'S ECONOMIC EMPOWERMENT

ARTICLE 21.1

Women and the economy

1. The Parties recognise the importance of enhancing opportunities for women within their territories, including workers and business owners, to participate equitably in the domestic and global economy.

2. The Parties further recognise the benefit of sharing their diverse experiences in designing, implementing and strengthening programmes to reduce the systemic barriers which may exist for women in international trade and which prevent them from participating equitably in the domestic and global economy.

8. Overall, this agreement gives the impression that it was drafted in some haste. For example, it contains several spelling and grammar mistakes. While the changes were very few from the original EU-Japan EPA, the impression, that the UK really wanted to conclude this agreement cannot be avoided. A more forward-looking trade policy could explore the synergies between the trading partners to achieve sustainable development and the transition to a low carbon economy.

Detailed Comparison

Preambles

9. The UK-Japan FTA mimics the preamble of the EU-Japan EPA in terms of scope and phrasing. It recognizes “the importance of strengthening their economic, trade and investment relations, in accordance with the objective of sustainable development in the economic, social and environmental dimensions, and of promoting trade and investment between them, mindful of the needs of the business communities of each Party, in particular small and medium-sized enterprises, and of high levels of environmental and labour protection through relevant internationally recognised standards and international agreements to which both Parties are party”.
10. This is in accordance with the EU practice in CETA, EU-Singapore FTA, EU-South Korea FTAs, EU-Vietnam FTA that include such lengthy preambles that refer, inter alia, to issues of sustainable development.⁴

Environment and Sustainable Development

11. The UK-Japan FTA provides in Article 16.1.1:

“The Parties recognise the importance of promoting the development of international trade in a way that contributes to sustainable development, for the welfare of present and future generations, taking into consideration the Agenda 21 adopted by the United Nations Conference on Environment and Development on 14 June 1992, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted by the International Labour Conference on 18 June 1998, the Plan of Implementation adopted by the World Summit on Sustainable Development on 4 September 2002, the Ministerial Declaration entitled "Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development" adopted by the Economic and Social Council of the United Nations on 5 July 2006, the ILO Declaration on Social Justice for a Fair Globalization adopted by the International Labour Conference on 10 June 2008, the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want" adopted by the General Assembly of the United Nations on 27 July 2012, and the outcome document of the United Nations summit for the adoption of the post-2015 development agenda, entitled "Transforming our world: the 2030 Agenda for Sustainable Development" adopted by the General Assembly of the United Nations on 25 September 2015”.

12. This is the exact language that Article 16.1.1 of the EU-Japan EPA uses. Similarly, the rest of Article 16.1 imitates the language of EU-Japan EPA, by providing, among else:

16.1.2 “The Parties further recognise that the purpose of this Chapter is to strengthen the trade relations and cooperation between the Parties in ways that promote sustainable development, and is not to harmonise the environment or labour standards of the Parties”.

Right to Regulate and Regulation in favour of Sustainable Development

13. Both the UK-Japan FTA and the EU-Japan EPA provide for identical provisions that recognise the capacity of each state to *“to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and regulations, consistently with its commitments to the internationally recognised standards and international agreements to which the Party is party.”*, all while recognising that *“each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and*

⁴ See recent comparison of the environmental obligations found in EU FTA chapters on sustainable development and the environment in the EU-Japan Economic Partnership Agreement, CETA (which contains two separate chapters), EU-Japan FTA, EU-Singapore FTA, and EU-South Korea FTA by Markus W. Gehring, Christian Delev & Freedom Kai Phillips, *Assessing EU FTA Environmental Obligations: Putting The Draft EU-Mercosur Trade Agreement Into Perspective* (CISDL Working Paper, 2020).

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labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection.”(Article 16.2.1)

14. Furthermore, both texts prohibit the usage of *“environmental or labour laws and regulations in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on international trade”* (Article 16.2.3).
15. In the same vein, both texts provide for a lengthy list of best efforts obligations of States towards *“enhancing the contribution of trade and investment to the goal of sustainable development in its economic, social and environmental dimensions”* (Article 16.5) by providing a list of initiatives such as the encouragement of corporate social responsibility and the exchange of views and information on this matter through the Committee on Trade and Sustainable Development, and the recognition of internationally recognized principles and guidelines on this matter.

Implementation of Multilateral Environmental Obligations

General Provisions on Multilateral Environmental Obligations

16. Article 16.4.1 of both texts *“the importance of multilateral environmental agreements, in particular those to which both Parties are party, as a means of multilateral environmental governance for the international community to address global or regional environmental challenges.”*
17. Article 16.4.2 in both texts reaffirms the Parties’ commitments to effectively implement their laws, regulation and practices that derive from Multilateral Environmental Agreements..

Outlined Areas of Specific Focus

18. In general, the Chapter on Trade and Sustainable Development in UK-Japan FTA and the EU-Japan EPA is identical in terms of its scope. In specific, they both provide for specific provisions on International Labour standards and Conventions (16.3), Right to Regulate (16.2), Multilateral Environmental Agreements (16.4), Trade and investment favoring sustainable development (16.5), Biological Diversity (16.6), Sustainable management of forests and trade in timber and timber products (16.7) and Trade and sustainable use of fisheries resources and sustainable aquaculture (16.8).

Climate Change

19. Both texts do not have a separate chapter on Climate Change. Rather they follow the pattern of certain EU FTAs that include issues on climate change mainly in the provision on Multilateral Environmental Agreements and on Co-operation.
20. Firstly, the Article 16.4.4 provides:

“The Parties recognise the importance of achieving the ultimate objective of the United Nations Framework Convention on Climate Change, done at New York on 9 May 1992 (hereinafter referred to as "UNFCCC"), in order to address the urgent

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threat of climate change, and the role of trade to that end. The Parties reaffirm their commitments to effectively implement the UNFCCC and the Paris Agreement, done at Paris on 12 December 2015 by the Conference of the Parties to the UNFCCC at its 21st session. The Parties shall cooperate to promote the positive contribution of trade to the transition to low greenhouse gas emissions and climate-resilient development. The Parties commit to working together to take actions to address climate change towards achieving the ultimate objective of the UNFCCC and the purpose of the Paris Agreement.”

21. Hence, each party commits to work together to realise UNFCCC aims, take steps to meet Paris objectives, and promote trade as a means of reducing greenhouse gas (GHG) emissions and achieving climate-resilient development
22. This language is very similar to the EU-Andean Communities FTA (2012) where in Article 270 reaffirms the commitment of the Parties to effectively implement in their laws and practices the Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted on 11 December 1997 and provides that “*Nothing in this Agreement shall limit the right of a Party to adopt or maintain measures to implement the agreements referred to in paragraph 2 [including the Kyoto Protocol]*”.
23. The last part is very similar to Article 14.5.5 of the EU-Japan EPA and the UK-Japan FTA when providing:

“*Nothing in this Agreement prevents a Party from adopting or maintaining measures to implement the multilateral environmental agreements to which it is party, 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.*”
24. Similar language can be found in the EU-Ukraine Association Agreement which provides in Article 338 that Parties should cooperate to promote the Joint Implementation Mechanism under the Kyoto Protocol to the UN Framework Convention on Climate Change of 1997 to reduce emissions of greenhouse gases through energy efficiency and renewable energy projects.
25. Furthermore, Article 16.12(h) introduces the capacity of the Parties to “cooperate on trade-related aspects of the international climate change regime, including on means to promote low-carbon technologies, other climate-friendly technologies and energy efficiency.”
26. Similar language can be found in Article 65(2D) of the EU-Central America FTA (2012) which provides, among else, cooperation on promoting “*effective risk management in the agribusiness chains aiming to incorporate measures for adaptation and mitigation of climate change and variability*”.

Express MEA references

27. Both texts make references to the following Multilateral Environmental Agreements and Instruments.

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28. In Article 16.1.1, it recognizes the Agenda 21 adopted by the United Nations Conference on Environment and Development on 14 June 1992, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, the Plan of Implementation adopted by the World Summit on Sustainable Development, the Ministerial Declaration entitled "Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development", the ILO Declaration on Social Justice for a Fair Globalization, the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want", and the outcome document of the United Nations summit for the adoption of the post-2015 development agenda, entitled "Transforming our world: the 2030 Agenda for Sustainable Development".
29. In Article 16.4.4. reference is made to the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. It is noteworthy that no specific recognition is given to the Kyoto Protocol as in other EU FTAs.
30. Regarding biological diversity, the texts refer to the Convention on Biological Diversity and its protocols as well as the Convention on International Trade in Endangered Species of Wild Fauna and Flora in Article 16.6.1. while in Article 16.8.2. it refers to the positive obligations under the United Nations Convention on the Law of the Sea, the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and the Code of Conduct for Responsible Fisheries.

Obligations not to Weaken Standards

31. Both texts do not provide any obligation not to weaken standards in absolute terms, ie by setting the level of protection or by generally introducing a commitment to increase the level of protection or at least to not-regress. Rather, we can find in Article 18.1.2 reaffirmation that nothing in the section on "Good regulatory practices and regulatory cooperation" shall effect the right of a Party to define or regulate its own legal of protection on issues of environment, human, animal or plant life/health and climate change.
32. The only obligation that can be found is Article 16.2.2 of both texts. In specific, they provide "2. The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations. To that effect, the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties."
33. This constitute a rather restricted obligation on non-regression since it is not linked to an objective level of protection but rather to domestic laws and regulations, which have been reaffirmed not to be bound by the Agreements under 18.1.2. In addition,

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the introduction of a link between the non-regression and encouragement-promotion of trade and investment gives a rather relative, not absolute, prohibition of non-regression. Indeed, if a Party chooses to lower its level of protection for issues unrelated to trade or investment, it seems that the Agreements may well allow it.

Conclusion

34. The general level of ambition on sustainable development is fairly elevated which is certainly positive. The CPTPP which the UK might also join is more ambitious because it applies the general dispute settlement rules to the environment chapter but at the same time is less ambitious because it does not contain any reference to climate change in its Treaty text. Overall the UK and Japan could have been more ambitious in their bilateral trade relationship.