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Q1. Please indicate which of the following industries or policy areas are you responding in relation to: energy, environment, health, food trade, agriculture, fishing, climate change, chemicals.

1. Our evidence primarily focuses upon environment and climate change, but the governance/institutional dimensions we highlight (e.g. devolution) are cross-cutting and hence relevant to other sectors.

Q2. What is your assessment of the relevant provisions in the UK-EU Trade and Cooperation Agreement, and their impact on your business or policy area?

2. The level playing field provisions of the TCA proved to be a significant sticking point in the negotiations (alongside fish and state aids) and apparently were some of the last sections to be agreed. Looking back at the draft texts that were tabled in mid-2020[1] and comparing them with the final text of the TCA, it is obvious that both sides made some important concessions in order to secure agreement.

3. The EU wanted and was able to secure some changes that are not normally found in a modern FTA:

    a. The inclusion of the main policy principles, including precaution (which in the TCA is referred to as the precautionary approach (Article 7.4.1.c) rather than as the precautionary principle).
    b. Reference to policy progression as a general provision of Title XI (Level Playing Field) (i.e. both parties 'are determined to maintain and improve their respective high standards') (Article 1.1 (4).
    c. A commitment that each side should have an appropriate enforcement body or bodies in place (Article 7.5.1).
    d. Specific references to the words 'regression' and 'the level playing field', which were pointedly not used in the UK's draft text. Interestingly, in the TCA, non-regression is defined in relation to EU standards 'that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection' (Article 7.2.2)

4. At the same time the UK was able to secure:

    a. Changes so it can flex its newfound regulatory autonomy, with, for example, no explicit provisions on ongoing dynamic alignment with EU standards, and no across the board commitment to environmental non-regression.
    b. A more limited commitment to non-regression in relation to trade and investment advantages (the EU had originally sought to connect regression to ten specific

[1] Jordan, A.J., V. Gravey, B. Moore and C. Reid (2020) EU-UK trade relations: why environmental policy regression will undermine the level playing field and what the UK can do to limit it. 29 September. Friends of the Earth, London. https://cdn.friendsoftheearth.uk/sites/default/files/downloads/Regression%20report%202020.pdf

areas of environmental policy, and pointedly defined it as *any* lowering of standards).

c. That environment is subject to its own specific dispute resolution system. Moreover, the emphasis is on making efforts to resolve disputes "through dialogue, consultation, exchange of information and cooperation" (Article 7.7.1).

Q3. What do those provisions achieve?

5. The TCA is a very long and complex agreement with many interconnecting environmental provisions, whose full effects will take years to emerge. Therefore, it is more straightforward to assess what the provisions *seek* to achieve; what they *actually* achieve is rather more difficult to determine currently.

6. When it comes to environmental matters, the TCA seeks to achieve three things.

    a. First, it includes an environmental chapter that is much more developed than in previous EU trade agreements, with statements of environmental principles (Article 7.4.1) which are not directly addressed in the EU-Canada CETA agreement, or environmental policy integration which is absent from EU-Ukraine Cooperation Agreement. It also goes further than CETA in relation to procedural rights. For example, there are: more extensive discussions of public participation and consultation (Article 7.4.3); requirements regarding enforcement levels (including the provision of injunctive reliefs, but also that proceedings are not 'prohibitively costly'); very specific references to specific policy instruments, the choice of which is normally reserved to states (e.g. both parties pledge to have an effective system of carbon pricing Article 7.3).

    b. Second, it seeks to protect the most environmentally ambitious party from environmental dumping (Article 7.2.1). It includes a mechanism to ensure non-regression in environmental areas (not simply, as in CETA, a recognition that it is 'it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law'). In the case of disputes over non-regression, a weak governance mechanism (involving a panel of experts and a long enforcement process) is available; if one party does not conform to the panel of experts' report, temporary remedies can be adopted. Crucially, non-regression is concerned with preserving current standards; in an area such as the environment where much more action is urgently needed, it is also important to consider new policy developments.

    c. This is where the TCA is potentially more innovative (i.e. going beyond the general commitment to policy progression – see above), with the addition of a 'rebalancing mechanism' (Article 9.4), which the UK Trade Policy Observatory terms 'dynamic alignment in disguise'. This seeks to re-assure a party wishing to adopt more ambitious environmental rules that it will not be undercut by the other. However, it only refers to situations where the change would have 'material impacts on trade or investment between the parties' (Article 9.4.2). Moreover, such measures 'shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation'.

    d. Third, it seeks to provide opportunities for further cooperation between the UK and the EU on environmental manners, with articles on regulatory cooperation

and Multilateral Environmental Agreements going further than in CETA. The TCA mentions shared objectives on reaching carbon neutrality by 2050 and the possibility to coordinate Emission Trading Systems to reach them (Article 7.3.6). More broadly, it discusses regulatory cooperation in depth, and notably the possibility to coordinate 'in international fora', with both parties pledging to 'regularly and as appropriate exchange information' (Article 8.4) on both the implementation of existing Multilateral Environmental Agreements and 'on-going negotiations' of new ones. COP26 will offer a crucial first test for these pledges to cooperate and coordinate after Brexit.

Q4. What, if any, challenges arise because of those provisions? How could these challenges be resolved?

7. The TCA raises several important policy challenges that could be the focus of future committee inquiries.

    a. First, there is the *challenge of policy areas moving at different speeds* – The TCA confirms that climate change (and specifically the drive to achieve net zero) is where the EU and UK interests align; there is a risk that other environmental issues (and notably cooperation in tackling these issues) are relegated.

    b. Second, there is the *challenge of servicing the TCA.* Ensuring a coherent cross Whitehall / cross Parliament / cross UK relationship with the EU is important not just to this TCA but also to the negotiation of future FTAs. Crucially, it also raises questions over how the UK will project its influence into the EU and 'speak with one voice'.

    c. Third, there is the challenge of *whether and how to update retained EU law.* This body of law is now a significant (the most significant?) part of UK environmental law. As we have pointed out before, there is a risk of 'gradual zombification of retained EU laws and policies through a lack of timely review and revision'[2], especially as Brexit SIs adopted to 'clean' retained EU law have tended to remove review and revision clauses[3].

    d. Fourth*, to what extent does the TCA provide a minimum baseline for future FTAs*? Or will the TCA be regarded as an exception in modern UK trade policy – a throwback to when it was an EU Member State? While environmental issues are discussed at length, the mechanisms to prevent an environmental race to the bottom, while innovative, are cumbersome and will be difficult to use precisely.

    e. This does not mean they will not be used. The EU is currently engaged in a trade dispute with Korea on a matter of labour commitments (falling under Level Playing Field in the TCA treaty, under trade and sustainable development obligations in the EU-Korea agreement), which gives an insight in the length such disputes can take. The original request for consultations was made in December 2018; Expert Panel Conclusions were not published until January 2021 supporting the EU ('the report confirms the EU's concerns that Korea has not acted

[2] Jordan, A., Moore, B. (2020) Regression by Default? An Analysis of Review and Revision Clauses in Retained EU Environmental Law, https://www.brexitenvironment.co.uk/wp-content/uploads/dlm_uploads/2020/05/BrexitenvRegressionbyDefault.pdf

[3] As detailed in Jordan and Moore (2020).

consistently with its trade and sustainable development obligations under the EU-Korea trade agreement'[4]).

f. Fifth, the UK must now work out *when and how to use its hard-won regulatory autonomy*. Crucially, what is the vision and who's vision is it? The Environment Bill and the 25YEP are important first steps but are essentially England focused. Environmental governance gaps are only partly addressed – and the delay of the Environment Bill pushes further back the establishment of the OEP for England and Northern Ireland. While not all parts of the UK are as affected by the delay, as both Scotland and Wales have decided to develop their own independent environmental regulator, forthcoming Scottish and Welsh elections may disrupt intergovernmental work.

g. Sixth, *how will the TCA interact with UK devolution*? One this question issue there are several issues to be considered not least because the TCA largely ignores the devolved nature of policy making in the UK. The term devolved is used only once, in relation to defining the regulatory authority of the UK (article GRP:2).

h. It is unclear how devolved administrations, civil society, experts will be recruited and represented in the large number of new committees and panels created by the TCA, such as the Civil Society Forum, the specialised committees, the Partnership councils etc. In light of the challenges raised for devolution by the TCA, it would be astute for the UK government to be as inclusive as possible in deciding who represents the UK in these new bodies. For the devolved nations there is a need to ensure representation in the relevant bodies for both practical and democratic reasons.

i. There is also a challenge associated with managing the interaction between devolution and the level playing field. Chapter 7 of the TCA addresses environment and climate matters. Contrary to Title X (see below), it makes no reference to devolution; instead it talks of 'the levels of protection provided overall in a Party's law'. On the EU side, it is further stated 'For the Union, 'environmental levels of protection" means environmental levels of protection that are applicable to and in, and are common to, all Member States.' As no such qualification is added for the other party, we can thus assume that in case of internal UK divergence, the levels of protection provided in any of the four nations of the UK are considered here.

j. These provisions imply that in theory, the non-regression and rebalancing clauses could be triggered by the EU in reaction to the action of one (or more) UK administrations. In other words, while the UK government would be held liable, rebalancing measures could target a different part of the UK from where the action had been triggered (the Concordat on International Relations makes it clear the administration in breach of its international obligations will bear the costs).[5] In practice, the need to demonstrate substantial impact on trade and investment and the much smaller sizes compared to England of Wales, Northern Ireland (and to a lesser degree, Scotland) means we would expect these

[4] https://trade.ec.europa.eu/doclib/press/index.cfm?id=2238

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf

provisions to be principally geared against either UK-wide or English-led policy developments. But it could also go the other way i.e. in principle the UK government could potentially find itself triggering the rebalancing clause because for example Wales has become significantly more ambitious than the EU.

k. Title X defines the UK's regulatory authority as comprised of both 'Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland, and the devolved administrations of the United Kingdom' (the only mention of devolved or devolution in the agreement). As such it encompasses environmental matters that are both reserved and devolved in the UK, while it excludes member states' national policies on the EU side (only EU-wide, common policies, with the Commission as the recognised regulatory authority). This raises questions over how this cooperation will work in practice. For example, each party is expected to make 'publicly available, in accordance with its respective rules and procedures on at least an annual basis, a list of planned major regulatory measures that its regulatory authority reasonably expects to propose or adopt within a year.' (Article GRP6.1) – and in similar fashion requirements on public participation, impact assessment and retrospective evaluation.

l. We can expect this requirement to bind both the UK government and the devolved administrations. Gathering this information in a comparable manner will be another task for the UK's intergovernmental relations mechanisms (Joint Ministerial Committee etc.) which are already under severe strains and whose reform has been repeatedly put back. Under GRP12, where 'the Parties may engage in regulatory cooperation on a voluntary basis', and where 'each party may propose a regulatory cooperation activity to the other party', it remains to be seen which of the four component parts of the UK's regulatory authority could trigger such cooperation and how each of the component part will be represented in any future cooperation exercise.

m. Finally, the interactions between the TCA, future FTAs and the emerging internal market and intergovernmental architecture (such as the common frameworks and the Internal Market Act) are also potentially challenging. There is the scope for internal divergence within the UK. For example, Scotland has committed to dynamic alignment with the EU, but England may regress. There is also lack of clarity as to how product standards and non-product standards will be treated across the UK.

Q5. What should the UK seek to accomplish with the EU in relation to your industry or policy area within the parameters of the Agreement in the short- and mid-term?

8. The TCA provides a framework for cooperation. However, to maximise the scope for collaboration flesh needs to be put on the bones of the agreement and quickly. For example, Article 7.6 states that both sides 'shall ensure that the European Commission and the supervisory bodies of the United Kingdom regularly meet with each other and co-operate on the effective monitoring and enforcement of the law with regard to environment and climate as referred to in Article 7.2' (i.e. non-regression). Agreement on how this cooperation will work in practice (how regularly the meetings will be held, who will attend and what types of data will be monitored) needs to be reached. Given that NI continues to report data to the European Environment Agency (EEA) under the NI Protocol, the UK may wish to continue to use similar approaches to gathering and

recording data as required under EU law. Longer term, the UK could consider associate membership of the EEA.

9. The treaty provides for a Civil Society Forum. The UK government should move quickly to establish a mechanism for meaningfully engaging and involving Civil Society actors (and thus give meaningful substance to INST.8).

10. COP26 provides another early test of both side's capacity and desire for implementing the regulatory cooperation provisions of the TCA, notably the option to cooperate in international negotiations. Early discussions on how this will operate should be actioned.

Conclusion

11. The TCA is a large, uniquely complex and dynamic trade-related agreement. It has lots of moving parts and is accompanied by several joint declarations. Implementation will be a challenge, especially given how much 'unfinished business' still remains to be transacted (e.g. cooperation on carbon pricing). Scrutiny of its implementation by expert parliamentary bodies such as the House of Lords EU committee will be essential.

12. The TCA provides numerous opportunities to maintain and enhance constructive relations with the EU – with whom the UK shares many important long-term objectives (including but not limited to net zero).

13. However, the TCA will only work if there is political will on all sides. It may be that in the immediate aftermath of Brexit and with the spectre of vaccine nationalism haunting the EU/UK relationship, productive political relationships are challenging to maintain. However, at the level of experts and diplomats there is ample scope to maintain good working relations and thus lay the groundwork for a more cooperative political relationship in the future.

14. Finally, the timely adoption of the Environment Bill and establishment of the Office for Environmental Protection are central to the UK's ability to uphold its commitments under the TCA and should be prioritised.