

The UK Environmental Law Association – Written evidence (EEH0029)

SUMMARY

The UK Environmental Law Association (UKELA) responds to the call for evidence to the House of Lords EU Environment Sub-Committee inquiry on the UK-EU Trade and Cooperation Agreement (TCA) providing discussion and analysis in the policy area of environment and climate change. It makes the following recommendations:

- 1) That the Government clarifies how the UK as a whole (including representation from England, Northern Ireland, Scotland and Wales) will be represented on the Partnership Council and that the representation is open, transparent and subject to Parliamentary scrutiny.
- 2) That the UK should call for the establishment of a Specialised Committee on Environment, Climate and Sustainability to be introduced into the TCA.
- 3) That the Government clarifies how the UK as a whole (including representation from England, Northern Ireland, Scotland and Wales) will be represented on the Specialised Committees and that the representation is open, transparent and subject to Parliamentary scrutiny.
- 4) That, in order to tackle the urgent environmental concerns of today including air pollution, biodiversity loss and climate change (including the reduction of greenhouse gas (GHG) emissions) and the need for adaptive measures, the UK should call for the establishment of a Working Group on environment, climate and sustainability to inform the Specialised Committees and the Partnership Council.
- 5) That the Government clarifies how the UK as a whole (including representation from England, Northern Ireland, Scotland and Wales) will be represented on the Working Groups and that the representation is open, transparent and subject to Parliamentary scrutiny.

- 6) That the UK ensures the TCA Parties engage with a wide range of civil society groups, communities and individuals at the earliest opportunity to consult upon and settle effective means of communication, collaboration and engagement.
- 7) That the UK ensures the engagement through the Civil Society Forum and the Advisory Groups is on an effective and continuing basis and that this is achieved by providing for quarterly reporting rather than on an annual basis.
- 8) That the UK clarifies the role of the domestic advisory groups and clarifies how they may associate, interact and/or work with the Expert Panels and also clarify the composition of the advisory groups.
- 9) That the Government clarifies how the UK as a whole (including representation from England, Northern Ireland, Scotland and Wales) will be represented on the Civil Society Forum and Domestic Advisory Groups and that the representation is open, transparent and subject to Parliamentary scrutiny.
- 10) That the UK affirms its commitment to the Aarhus Convention 1998 by securing express reference to the Convention within the TCA or otherwise confirms with the EU that the Aarhus Convention applies.
- 11) That the UK develops early, effective, open and transparent procedures and opportunities to set out how it and the Parties are implementing the TCA.
- 12) That there is an early UK internal review, with public consultation, of how current, and expected, institutions for governance across the four devolved nations, including Northern Ireland, will collaborate and how these interact with the TCA. Such a review can also inform the establishment of new inter-governmental cooperation mechanisms for the four nations within the UK and the effective application of common frameworks.

- 13) That the proposal of a Parliamentary Liaison Committee (comprising the Chairs of Commons select committees) is adopted with consideration as to how this and other Parliamentary scrutiny engages with civil society.
- 14) That the Government clarifies the specific role of the TCA in the context of domestic legislation.
- 15) The Government reviews and clarifies the adequacy of provision for cross-border environmental regulation.
- 16) That the Government is asked to clarify what is meant by the phrase 'economy-wide climate neutrality'.
- 17) That the UK Government amends the Climate Change Act 2008 to include aviation and domestic consumption in its carbon accounting and sets out its policy on carbon pricing, including how it will consider linking to the EU emissions trading system.
- 18) That the Parties clarify whether the main dispute mechanism applies to the ambition to achieving the net-zero climate target.
- 19) That the UK Government reviews the dispute mechanism provisions and provides clarity to ensure that disputes relating to the environment, climate and sustainability are resolved efficiently, effectively and without delay.
- 20) That the UK Government should clarify the extent to which new UK trade agreements will require the UK to adopt a science-based approach and how this will affect domestic environmental and public health standards, in light of the TCA's commitment to a precautionary approach (and its non-regression provisions; see paragraphs 39-42 below).
- 21) That the Government should clarify its understanding of the meaning and scope of Art 7.2, and whether it considers it means the same as Art 24.5 (1) and (2) in the EU-Canada Trade Agreement. or something different.

- 22) That the UK Government clarifies that non-regression of environmental provisions will be ensured through its commitment to the provisions of the TCA.
- 23) That the policy statements on environmental principles under the Environment Bill 2019-21 are carefully scrutinised for their compliance with the TCA provisions on principles.
- 24) That the UK Government confirms that there will be continuing collaboration between all the domestic environmental crime departments and agencies and associates in the EU.
- 25) That the UK Government confirms that legislating and enacting the Environment Bill is a priority and that the Welsh Senedd provides for effective environmental governance as a priority.
- 26) That the UK be aware of the complexity of this issue and the complicated legal position of the TCA and UK territorial constitution on keeping pace with environmental standards, through an early and continuing review of intra-UK environmental law and policy and how it relates to the TCA.

INTRODUCTION

1. UKELA responds to the call for evidence to the House of Lords EU Environment Sub-Committee inquiry on the TCA. UKELA comprises over 1,500 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment. It has been exploring what EU Exit means for environmental law since 2016 and published a series of briefing papers and reports on the topic. Details of the briefings, reports and submissions are available on UKELA's website¹.

¹ <https://www.ukela.org/brexitactivity>

2. This evidence has been prepared by UKELA's members of the Governance and Devolution Group (GDG), which aims to inform the debate on how UK environmental law and policy should develop post-EU Exit. It does not necessarily represent the views and opinions of all UKELA members.
3. This evidence highlights those matters that UKELA considers are areas for early discussion as the TCA moves forward and recommends specific points of action. The commentary is not designed to be a detailed legal analysis and instead it provides opinion in the context of environmental law and policy, and highlights areas for further discussion.
4. In answer to the specific questions raised by the call for evidence:
 - 1) The policy area we are responding on is environment and climate change.
 - 2) Our assessment of the relevant provisions in the TCA, and their impact on the policy area of interest to us, is set out in the substantive discussion below.
 - 3) The substantive discussion includes what we consider the relevant provisions achieve and where there are gaps.
 - 4) We note what challenges arise because of those provisions and in some instances make recommendations as to how these may be resolved.
 - 5) We set out where relevant what we consider the UK should seek to accomplish with the EU in relation to our policy area within the parameters of the Agreement in the short- and mid-term.
5. This evidence follows the TCA structure and covers the following Parts of the TCA:

Part 1, Title III Institutional Framework and in particular governance provisions, including provisions on public participation and advisory

groups.

Part 2, Trade, Transport, Fisheries and other arrangements which includes within Title XI: Level playing field for open and fair competition and sustainable development, Chapter 7 on Environment and climate.

Part 3, Law Enforcement and Judicial Cooperation on Criminal Matters.

PART 1, TITLE III INSTITUTIONAL FRAMEWORK

The Partnership Council (Art INST.1)

6. UKELA notes the establishment of the Partnership Council under Article INST.1 to oversee the attainment of objectives, implementation, and application of the TCA objective and that this is to be supervised by the parties with representation by a Member of the European Commission (EC) and a UK Minister. The Partnership Council has considerable power under Art INST1.4 including adopting decisions, making recommendations to the Parties and adopting amendments to the TCA. It can also delegate some powers to specialist committees. Trade Specialised Committees also have powers to adopt decisions under the TCA (Art INST.2). Decisions of the Partnership Council and Trade Specialised Committees are binding; recommendations have no binding force (Art INST.4).

7. UKELA agrees with concerns raised in the report of the House of Commons Committee on the Future Relationship with the European Union: *The shape of future parliamentary scrutiny of UK-EU relations 5th Report of Session 2019-21*² about a shift of power from the Legislature to the Executive³.

² HC, 21.1.21, HC977 (the Future UK-EU relations 5th Report).

³ 16. Professor Adam Cygan, Dr Philip Lynch and Dr Richard Whitaker, University of Leicester, point to new accountability challenges Parliament will encounter with the UK outside the EU's institutional architecture. They argue that the Executive, not Parliament, will be the primary beneficiary of the repatriation of competences to the UK. Dr Hannah White, Deputy Director of the Institute for Government, supported this analysis, telling us that "there has been a massive shift of power towards the Executive and away from the legislature."

8. The development of environmental law and policy to help entrench the UK as a world environment leader⁴ will have to proceed on an open, transparent and democratic basis if it is to be meaningful. Despite the best intentions in securing environmental improvement and enhancement and with a purpose of securing sustainability, it would be incorrect for a government to enact environmental measures without effective public participation. This underlying principle is found in Principle 10 of the Rio Declaration 1992. The future EU-UK relationship through, among others, the Partnership Council should support that process of engagement. The UK must also ensure that it proceeds on an equitable and effective basis across its four nations, as the EU will need to do across its member states.

9. ANNEX INST (p410), setting out rules of procedure of the Partnership Council and Committees, does not refer to reporting to the UK Parliament or European Parliament (EP). However, there will be asymmetry between the two bodies since, according to the European Commission (EC)⁵, Article 218(10) of the Treaty of Functioning of the European Union (TFEU) and 'working modalities' require the EP to be duly informed of decisions taken by the Partnership Council and Committees. Similarly, Council Decision 2020/2252 on signing of the TCA requires the EP: 'to be put in a position to exercise fully its institutional prerogatives'. To this end, it shall receive annual reports on implementation and be informed of enforcement measures and unilateral measures taken by the EC.

Recommendation 1: that the Government clarifies how the UK as a whole (including representation from England, Northern Ireland, Scotland and Wales) will be represented on the Partnership Council and that the representation is open, transparent and subject to Parliamentary scrutiny.

The Specialised Committees

⁴ Prime Minister's speech to the United Nations (28.9.20): Leadership Pledge: <https://www.gov.uk/government/news/pm-commits-to-protect-30-of-uk-land-in-boost-for-biodiversity>

⁵ https://ec.europa.eu/info/sites/info/files/slides_on_governance_and_enforcement.pdf

10. UKELA notes that some of the committees established under Article INST.2 will have an environmental component or interest including e.g. (f) the Trade Specialised Committee on Services, Investment and Digital Trade, covering matters such as 'Energy Goods and Raw Materials'; (j) the Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development, matters such as energy and environmental; and (l) the Specialised Committee on Energy.

11. UKELA submits that it is likely that key environmental concerns such as air pollution and biodiversity loss may not obviously be considered by such specialist committees. This is particularly so when potential environmental harm may be an indirect, but significant, consequence of developing trade and investment. One way to ensure that clean water, good air quality and biodiversity are maintained and enhanced is to establish a standing specialised committee on environment, climate and sustainability matters ('the Specialised Committee on the Environment, Climate and Sustainability') which overlays and informs the specialised committees and also informs and advises the Partnership Council.

Recommendation 2: that the UK should call for the establishment of a Specialised Committee on Environment, Climate and Sustainability to be introduced into the TCA.

Recommendation 3: that the Government clarifies how the UK as a whole (including representation from England, Northern Ireland, Scotland and Wales) will be represented on the Specialised Committees and that the representation is open, transparent and subject to Parliamentary scrutiny.

Working groups

12. UKELA notes the establishment under Art INST.3 of Working Groups. As a preliminary point, it is unclear to UKELA how the specialised committees and/or the working groups will cooperate with one another. There does not appear to be a working group focussing on environment (which

reasonably includes those areas covered in the definitions section in Part 2, Title XI, Ch. 7, Art 7.1 (page 201) and climate change and this could well result in gaps in environmental analysis.

Recommendation 4: that, in order to tackle the urgent environmental concerns of today including air pollution, biodiversity loss and climate change (including the reduction of greenhouse gas (GHG) emissions) and the need for adaptive measures, the UK should call for the establishment of a Working Group on environment, climate and sustainability to inform the Specialised Committees and the Partnership Council.

Recommendation 5: that the Government clarifies how the UK as a whole (including representation from England, Northern Ireland, Scotland and Wales) will be represented on the Working Groups and that the representation is open, transparent and subject to Parliamentary scrutiny.

Domestic advisory groups and the Civil Society Forum

13. UKELA welcomes the provision under Articles INST.6-8, requiring consultation with civil society by e.g. the development of domestic advisory groups and the organisation of a Civil Society Forum (CSF). However, it is unclear how engagement with civil society will unfold: it is uncertain, for instance, what the composition of the advisory groups will be and how their members will be recruited. It is also unclear how the advisory groups may inter-relate or work with/alongside the Expert Panels.
14. The current engagement provisions for civil society of once a year is likely to be inadequate in securing effective consultation. UKELA submits that effective engagement with civil society should be secured at the earliest opportunity, including to help establish robust structures for consultation

and input into the development of the TCA and that the Parties should establish continuing engagement with e.g. reporting mechanisms on a quarterly rather than an annual basis. Any domestic advisory groups should be supported by, for example, the Law Society, the Bar Council and other specialist associations and organisations.

Recommendation 6: that the UK ensures the TCA Parties engage with a wide range of civil society groups, communities and individuals at the earliest opportunity to consult upon and settle effective means of communication, collaboration and engagement.

Recommendation 7: that the UK ensures the engagement through the Civil Society Forum and the Advisory Groups is on an effective and continuing basis and that this is achieved by providing for quarterly reporting rather than on an annual basis.

Recommendation 8: that the UK clarifies the role of the domestic advisory groups and clarifies how they may associate, interact and/or work with the Expert Panels and also clarify the composition of the advisory groups.

Recommendation 9: that the Government clarifies how the UK as a whole (including representation from England, Northern Ireland, Scotland and Wales) will be represented on the Civil Society Forum and Domestic Advisory Groups and that the representation is open, transparent and subject to Parliamentary scrutiny.

General points arising on the institutional framework, cooperation and collaboration

15. The UK and EU have ratified the Aarhus Convention 1998 relating to access to information, public participation and access to justice in environmental matters. An express recognition that the Aarhus

Convention applies to the TCA will help ensure openness and transparency in implementing the TCA. UKELA submits that a commitment to the Aarhus Convention by the Parties would also help encourage community participation and the inclusion of civil society in driving the TCA forward. This is consistent with the EU's approach to the TCA with e.g. its online resources on the TCA including record matters such as transparency⁶; which are, in turn, compliant with Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents. A commitment and alignment to the Aarhus Convention would also be consistent with Part Two, Heading 1, Title X on Good Regulatory Practices.

Recommendation 10: that the UK affirms its commitment to the Aarhus Convention 1998 by securing express reference to the Convention within the TCA or otherwise confirms with the EU that the Aarhus Convention applies.

Recommendation 11: that the UK develops early, effective, open and transparent procedures and opportunities to set out how it and the Parties are implementing the TCA.

The UK's four nations

16. It is important that the UK Government ensures that there is effective representation of the four nations in all aspects of the TCA's institutional framework. This is particularly so in the context of environmental law and policy, which are devolved and experiencing increasing divergence within the UK. At a structural level, for the UK Government to fulfil its obligations in relation to Good Regulatory Practices, (Title X of Heading One of Part 2 of the TCA) there will have to be considerable collaboration between the UK Government and the devolved administrations who have responsibility for environmental policy and regulation. As a substantive illustration, there appear to be at least four different definitions and applications of

⁶ https://ec.europa.eu/info/departments/task-force-relations-united-kingdom/transparency_en

the concept of sustainable development; something central to Part 2, Heading 1, Title XI. By way of illustration Wales defines sustainable development in s. 2 of the Well-being of Future Generations Act 2015 as “the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle, aimed at achieving the well-being goals” and aligns this to the United Nations Sustainable Development Goals⁷. whereas England within the National Planning Policy Framework 2019 adopts an often inconsistent and arguably weaker, economic-led notion of sustainable development with a presumption of supporting what may, in reality, be unsustainable development on often weak terms⁸.

17. A further example of the need for genuine coordination and collaboration among the four nations in pursuing the TCA is the need for consistency in environmental governance. At present, there are at least three different mechanisms for environmental governance in development in the UK, with the establishment of Environmental Standards Scotland, the Office for Environmental Protection (covering England and Northern Ireland) and an interim, yet to be finalised, governance system in Wales⁹.
18. As UKELA noted in its submissions to the House of Lords inquiry on a level playing field¹⁰, there is the need to consider the internal level-playing field as well as that with the EU. If, for example, England and Wales were to favour moving away from EU standards, but the Scottish Government maintains its policy of dynamic alignment, then there is the potential for intra-UK tension which will need to be addressed.

Recommendation 12: that there is an early UK internal review, with

⁷ See e.g. Welsh Government: *Wales and the Sustainable Development Goals Supplementary Report to the UK Voluntary National Review 2019* (Future Generations Commissioner for Wales, 2019).

⁸ In that regard, UKELA noted in its consultation response of 29.10.20 to the Planning White Paper *Planning for the Future* that “... Until planning policy integrates the notion of sustainable development as a societal concept rather than linking its application to simplistic notions of physical development of land and buildings then UKELA considers any attempt to meet critical environmental concerns including air pollution, biodiversity loss and climate change will fail.”

⁹ Wales has introduced an interim assessing body which can be contacted until the Welsh Government finalises its position on how environmental governance will be taken forward. The Welsh Government website (<https://gov.wales/raising-concern-about-functioning-environmental-law>) refers. UKELA understands that one option is to establish an Environment Commission but that a decision on environmental governance will be taken after the Senedd elections in May 2021.

¹⁰ Para ____, House

public consultation, of how current, and expected, institutions for governance across the four devolved nations, including Northern Ireland, will collaborate and how these interact with the TCA. Such a review can also inform the establishment of new inter-governmental cooperation mechanisms for the four nations within the UK and the effective application of common frameworks.

Parliamentary scrutiny

19. In terms of Parliamentary scrutiny, UKELA notes that the House of Commons Committee on the Future Relationship with the European Union recommends in its 5th report of Session 2019-21: *The shape of future parliamentary scrutiny of UK-EU relations* that:

“51. ... the Liaison Committee produce recommended allocations of responsibility for oversight of EU-UK relations to individual departmental select committees and itself establishes a sub-committee to co-ordinate this work to ensure important issues are being addressed and minimise duplication. The sub-committee could consist of the Chairs of committees most affected by EU-UK relations.”

20. UKELA submits that the proposed Parliamentary scrutiny is important, but that there is likely to be the need for a structured approach to Parliament engaging with civil society rather than perhaps, relying upon ad-hoc inquiries, whereby calls for evidence are made and it is never fully clear who will provide evidence, what the nature of the evidence will be and how evidence will be drawn. As with the advisory groups under the TCA, Parliamentary scrutiny provisions that are put in place could be supported by the law societies operating in the four nations, the Bar Council and specialist associations and organisations. There is also scope for collaborations with the devolved parliaments.

Recommendation 13: that the proposal of a Parliamentary Liaison Committee (comprising the Chairs of Commons select committees) is

adopted with consideration as to how this and other Parliamentary scrutiny engages with civil society.

Association between the TCA and domestic legislation

21. UKELA understands the general nature of the TCA as an international trade agreement, although it is unclear the extent to which it interrelates, informs or otherwise fits alongside relevant domestic legislation. Section 29(1) of the EU Future Relationship Act 2020 states that:

“Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement or the Security of Classified Information Agreement so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement”.

22. This provision requiring existing law to have effect *‘with such modifications’* as required for implementing the TCA implies that the TCA will have an impact on disputes in domestic courts, unlike other international treaties which have not been formally implemented into domestic law. Those treaties would only be used as an aid to interpretation of national law rather than permitting actual modification.
23. On one reading, this appears to transpose the TCA into UK domestic law and to require any court or tribunal, whether in the UK or the EU, to treat the TCA as a piece of directly applicable law rather than, say, at the other end of the spectrum being required simply to have some regard to it.
24. UKELA has not yet formed a firm view on the advantages or disadvantages of this apparent transposition of the TCA into domestic law but recommends that the Government clarifies this at the earliest opportunity.

Recommendation 14: that the Government clarifies the specific role of the TCA in the context of domestic legislation.

PART 2, TRADE, TRANSPORT, FISHERIES etc.

Title XI

25. The provisions under Part 2, Heading 1, Title XI Level playing field for fair and open competition and sustainable development are welcomed by UKELA and many of the provisions reflect some of the submissions UKELA made to the House of Lords EU Environment Sub Committee in August 2020¹¹ including e.g. the need to address environment and climate issues within the TCA and the principle of non-regression.
26. However, it is less clear that there is adequate provision for cross-border environmental regulation (including intra-UK borders) which is also necessary to tackle pressing issues affecting both the UK and the EU such as marine pollution (which impacts on, for example, bathing water quality), nitrate pollution, climate change, invasive non-native species, wildlife crime, the conservation of species and habitats and waste management.

Recommendation 15 the Government reviews and clarifies the adequacy of provision for cross-border environmental regulation

Climate

27. Clarification is sought about some key terms. In particular, it is unclear what is meant in Art 1.1.3 by 'economy-wide climate neutrality' by 2050 and whether tangible or objective criteria exist to evaluate the term. Does 'economy-wide' means the collective region of the EU and the UK or is international trade included, indicating a consumption-based measure of carbon footprint. If it is the former, then UKELA submits that at present

¹¹ UKELA: *Written evidence to the House of Lords EU Environment Sub-Committee inquiry to explore what is at stake on the environmental and climate level playing field in the UK-EU future relationship negotiations* (UKELA, 2.7.20).

the phrase is vague and needs clarification. If it is the latter, and a more specific meaning is intended, this should be clarified.

Recommendation 16: that the Government is asked to clarify what is meant by the phrase 'economy-wide climate neutrality'.

28. UKELA notes that the TCA contains novel provisions on carbon pricing, including a commitment to 'effective carbon pricing systems' that are linked to the non-regression provisions (Art 7.2) and cover greenhouse gas emissions from electricity generation, heat generation, industry and, notably, aviation (Art 7.3.1-5). UKELA also notes a commitment to cooperation on carbon pricing and to giving 'serious consideration' to linking each party's carbon pricing systems.

Recommendation 17: the UK Government amends the Climate Change Act 2008 to include aviation and domestic consumption in its carbon accounting and sets out its policy on carbon pricing, including how it will consider linking to the EU emissions trading system.

29. A further point of clarification is that the Parties' commitment to achieving the climate target is excluded from the main dispute mechanism under Art 1.3, but does not appear to be in the list of exclusions from the main dispute mechanism (Art INST.10(2)(e)).

Recommendation 18: the Parties clarify whether the main dispute mechanism applies to the ambition to achieving the net-zero climate target.

Dispute mechanism for environment and climate

30. UKELA notes that the main dispute mechanism for the Agreement (Part Six, Title I - confidential consultations for the Parties, requests for independent arbitration and compliance review (ANNEX INST-X) does not apply to Chapter 7, of Title IV, Environment and climate.

31. Chapter 7, of Title IV, Environment and climate only has recourse to

consultations as set out in Art 9.1, a panel of experts as set out in Art 9.2, and to a panel of experts for non-regression, as set out in Art 9.3. Chapter 7, Environment and climate is not subject to the rebalancing mechanism set out in Art 9.4 (See Art 7.7.2).

32. However, under the rebalancing mechanism it is possible for either Party to apply 'rebalancing measures' where 'material impacts on trade or investment between the Parties are arising because of significant divergences in the areas of labour and social, environmental or climate protection, or subsidy control' (Art 9.4.2). It then follows that the rebalancing mechanism allows for recourse to arbitration under the main dispute mechanism (Art 9.4.3).
33. Art 9.4.4 provides for review of all trade provisions in the Agreement (Heading One) and potentially to the Agreement in its entirety (Art 9.4(4)), upon which the Partnership Council will decide on any action to be taken (Art 9.4(9)). Such a review may also commence at an earlier date if rebalancing measures are 'taken frequently' by one or both Parties or a measure has been applied for a period of 12 months (Art 9.4(5)). The Agreement's Dispute Mechanism does not apply to these provisions (Art 9.4(12); Art INST.10(2)(e)).
34. The dispute mechanism for environment and climate is complex and allows for unilateral measures on a short timescale. This creates significant uncertainty as to how divergence in environmental standards will be dealt with under the TCA. For example if an environmental matter such as divergence of recycling targets caused a trade dispute, would the court of arbitration decide on the environmental impact of those measures? Similarly, what if carbon pricing caused a trade dispute and a disruption to the level playing field?
35. The decision to take any action seems also to be in the hands of political bodies, which may be swayed by political arguments, not whether or not rules have been broken, and initially acting through negotiation. Therefore, any uncertainty may not be promptly, comprehensively and openly resolved¹².

¹² For an initial assessment, see E Lydgate, E Szyszczak, L A Winters, C Anthony, 'Taking stock of the EU-EU

Recommendation 19: that the UK Government reviews the dispute mechanism provisions and provides clarity to ensure that disputes relating to the environment, climate and sustainability are resolved efficiently, effective and without delay.

The precautionary principle

36. UKELA notes that the precautionary approach (not principle) is incorporated into the TCA (Title XI, Chapter 1, Art 1.2.2). Although footnotes 49 and 52 of the TCA (pages 174 and 180) clarify that, for greater certainty in relation to the TCA implementation: "... in the territory of the Union, the precautionary approach refers to the precautionary principle". Moreover, UKELA notes that the Environment Bill 2019-21 (as amended 29.11.20) retains the notion of the precautionary principle 'so far as relating to the environment' in Clause 16. This clause applies to England only although Clause 45 & Schedule 2 of the Bill extend the provisions to Northern Ireland. Further, s. 9 of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill (as passed) includes the precautionary principle as a guiding principle on the environment.
37. UKELA submits that the use of the word 'approach' within the TCA should be construed as having legal effect, in light of the UK domestic adoption of the precautionary principle in post-EU Exit environmental legislation. The differential explanation for the EU poses a risk of differential levels of risk regulation as between the EU and UK regulation going forward, particularly as the precautionary principle has applied beyond the sphere of environmental protection in EU law, most notably in regulating products where there are public health concerns (e.g. Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305). UKELA understands that the incorporation of the precautionary approach into the TCA enables, but does not oblige, the Parties to apply it, although there is a requirement for government decision-making that respects the principle ('lack of full scientific certainty shall not be used as a reason for preventing a Party from adopting' precautionary measures).

38. UKELA understands that the distinction between the precautionary approach of the EU and the 'science-based approach' of the US (i.e. that risks should not be regulated until fully demonstrated through verifiable scientific methods) is a key issue for trade agreements and has been the subject of much dispute. How far new UK trade agreements will require the UK to adopt a science-based approach and how this will affect standards, and the non-regression provisions of the TCA, remain crucial questions.

Recommendation 20: The UK Government should clarify the extent to which new UK trade agreements will require the UK to adopt a science-based approach and how this will affect domestic environmental and public health standards, in light of the TCA's commitment to a precautionary approach (and its non-regression provisions; see paragraphs 39-42 below).

Non-regression

39. UKELA has advocated non-regression of environmental law and policy for some time¹³ and notes that non-regression expressly appears in the Title XI Chapters on Labour and social standards (Art 6.2) and Environment and climate (Art 7.2). Regression is limited to its effects on trade or investment and includes a failure of effective enforcement of laws (Arts 6.2(2), 6.3, 7.2(2) and 7.5).
40. 'Levels of protection' for labour, social, environment and climate standards are defined as those in each Party's law and standards; for the EU it is those which are common to all Member States. Notably these are, to a great extent, devolved areas in the UK. The mutual ambition for enhancement of standards is noted as an objective (Art 8.1(2)) in the Chapter recalling international and multilateral agreements on labour and

¹³ See e.g. UKELA *Submission to Inquiries by the Environmental Audit Committee and the Select Committee on Environment, Food and Rural Affairs for Pre-Legislative Scrutiny of the Draft Environment (Principles and Governance) Bill ("the Bill")* (UKELA, 31.1.19).

environment (including UN declarations on sustainable development, the UNFCCC and the Montreal Protocol, and treaties on biodiversity, forestry, marine resources and aquaculture).

41. Art 7.2 of the TCA states that

“2. A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels 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.”

42. For such an important provision, it is unfortunate that the drafting of the critical phrase, “*in a matter affecting trade or investment between the parties*” is not clear. As an example, were the UK to encourage third country investment in new industrial plants in designated zones with reduced environmental requirements such as those relating to environmental assessment, would that be affecting investment between the parties? The equivalent provision in the EU Canada Comprehensive and Trade Agreement is much more precise as to its meaning stating:

“1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law. 2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.” (Art 24.5).

Recommendation 21: The Government should clarify its understanding of the meaning and scope of Art 7.2, and whether it considers it means the same as Art 24.5 (1) and (2) in the EU-Canada Trade Agreement. or something different.

Recommendation 22: that the UK Government clarifies that non-regression of environmental provisions will be ensured through its commitment to the provisions of the TCA.

Environmental principles

43. In Title XI, Chapter 7, Article 7.4.1, the Parties commit 'to respecting the internationally recognised environmental principles to which it has committed'. 'Internationally recognised' environmental principles are not the same as 'internationally binding' environmental principles, opening up a wide range of principles that might be being referred to (e.g. intergenerational equity, conservation of biological diversity, and so on) but the particularisation of the principles in the Article's sub-paragraphs seems to narrow the scope of this commitment.
44. The five principles listed are those that are constitutionalised in EU law (TFEU, Articles 11 and 191(2)) and which are being embedded in post-EU Exit UK environmental law, at least so far in England, Northern Ireland and Scotland, by virtue of the Environment Bill 2019-21 and The European Union (Continuity) (Scotland) Bill 2020. This Article suggests that the commitment to respect these five principles is a commitment to respect *common* principles of environmental protection, and thus potentially a baseline agreed policy of environmental protection as between the UK and EU. This is clear from The European Union (Continuity) (Scotland) Bill 2020, which is explicit about equivalence between Scottish and EU environmental principles (cl 9(2) and (3)). The TCA's joint commitment to common principles is important in the context of the domestic UK policy statements on environmental principles to be developed under the Environment Bill (cl 16 for England; Sch 2, Pt 2 for Northern Ireland), and will be an important issue to consider in scrutinising and applying those statements.

Recommendation 23: that the policy statements on environmental principles under the Environment Bill 2019-21 are carefully scrutinised for their compliance with the TCA provisions on principles.

PART 3, LAW ENFORCEMENT AND JUDICIAL COOPERATION ON CRIMINAL MATTERS

45. It is unclear how law enforcement and judicial cooperation on environmental crime will develop under the TCA. It appears that the criminal enforcement bodies such as the Environment Agency (EA), Natural Resources Wales (NRW), the Northern Ireland Environment Agency (NIEA) and the Scottish Environment Protection Agency (SEPA) fall within the definition of 'competent law enforcement authority' under Art LAW.PRUM6. However, it is less clear how they will continue to collaborate, cooperate and liaise with some counterparts in the EU e.g. the European Environment Agency (EEA).
46. Article LAW.PNR22.1: provides for police and judicial cooperation in the context of travel and passenger name recognition (PNR), while Part 3, Title V provides for cooperation between Europol and a UK law enforcement authority (a competent authority) in relation to the crimes listed in ANNEX LAW-3. The ANNEX LAW-3 list includes environmental crime, including ship-source pollution. UKELA submits that in the context of environmental crime and harm, it will be vital that there is continuing collaboration between all the domestic environmental crime departments and agencies and associates in the EU and that, while not explicit in the TCA, this should be read into the TCA. Without this, meeting the provisions for cooperation on law enforcement for environmental crime will be problematic.

Recommendation 24: that the UK Government confirms that there will be continuing collaboration between all the domestic environmental crime departments and agencies and associates in the EU.

MISCELLANEOUS MATTERS, CONCLUDING COMMENTS

Collaboration between UK and EU environment agencies

47. It is unclear how agencies such as the EEA and the European Chemicals Agency inter-relate with the EA, NRW, NIEA and SEPA and other

environment departments and agencies.

The lack of environmental governance since 1 January 2021

48. Due to the delays in enacting the Environment Bill and in introducing permanent arrangements in Wales, apart from in Scotland (with the introduction of Environmental Standards Scotland) there is a governance gap in the UK when it comes to enforcement of environmental law.
49. UKELA welcomes the interim measures provided by Defra and the Welsh Government: see e.g. the Interim Environmental Governance Secretariat (IEGS) which aims to uphold environmental governance standards until the Office for Environmental Protection (OEP) begins its work, including that the IEGS will continue to receive and assess complaints from members of the public about failures by public bodies to comply with environmental law. However, Defra explains that the IEGS does not have an investigative or enforcement role.
50. It is therefore vital that the UK Government and the Senedd commit to prioritising their relevant legislation.

Recommendation 25: that the UK Government confirms that legislating and enacting the Environment Bill is a priority and that the Welsh Senedd provides for effective environmental governance as a priority.

Going beyond compliance of environmental standards

51. Finally, UKELA is concerned that the TCA does not require alignment of environmental standards should one party choose to develop more stringent environmental standards (see e.g. Article 7.2(5): 'Parties shall continue to strive to increase their respective environmental levels of protection or their respective climate level of protection referred to in this Chapter'). It is arguable that this provision could be used to challenge more stringent standards should they be found to have negative impacts on trade and investment (as technical barriers to trade: Article TBT.5). The EU ban on the use of lead shot in wetlands by amending the REACH

Regulation¹⁴ is a good example of where there may be trade implications, as lead-free game is a traded good (for instance that Waitrose is keen on sourcing)¹⁵. It is possible that England will follow suit on this ban. but UKELA is not aware of a commitment to do so.

52. The situation across the four nations could seriously complicate matters, as the UK could have a fractured UK internal market, with inconsistent alignment of standards with the EU. Much will depend on the development of common frameworks and the United Kingdom Internal Market Act 2020, and how these then align with the TCA and any differential levels of environmental protection that emerge in UK compared to EU environmental law and policy.

Recommendation 26: That the UK be aware of the complexity of this issue and the complicated legal position of the TCA and UK territorial constitution on keeping pace with environmental standards, through an early and continuing review of intra-UK environmental law and policy and how it relates to the TCA.

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¹⁴ Regulation (EC) No 1907/2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals

¹⁵ See e.g. Why Dynamic Alignment is Alive and Well: The story of lead shot and wetlands (Dr Vivian Gravey, 22.1.21) article on the banning of lead in wetlands: <https://www.brexitenvironment.co.uk/2021/01/22/why-dynamic-alignment-is-alive-lead-shots-and-wetlands/>

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