

Please note that for ease of reference I have put recommendations in italics.

Introductory questions

1. What are the key parts of the environment and climate level playing field proposed by the EU, and what has the UK proposed in these areas?

The EU's draft FTA for the UK, of 18 March 2020, puts forth a proposal that departs from many of its previous FTAs in two main ways: **1) novel approach to benchmarking** of environmental and climate regulation; and **2) dispute settlement is tied to sanctions.**

- 1) In contrast to CETA and many other EU FTAs, which commit countries to uphold domestic standards, Section 6 of the EU draft requires upholding shared 'common standards' between the UK and EU at the end of the transition period. It does not refer to specific EU legislation, but lists thematically the areas covered, which are broad, if not comprehensive. In CETA and other EU FTAs, to find a violation it is necessary to establish that environmental deregulation took place in order to 'benefit' trade and investment. The EU draft eliminates this requirement. This seems to broaden the reach of the Agreement, making it less like an attempt to 'level the playing field' and more like an agreement securing environmental coordination for its own sake.

The EU draft provides a so-called 'ratchet clause': if both parties raise levels of protection, this will become a new common standard (Article LPFS 2.31). This is a rudimentary form of dynamic alignment that might be described as 'dynamic benchmarking'. It also contains requirements for both Parties to enforce effectively their own environmental laws, presumed met on the EU side (Article LPFS 2.32).

Section 7 of the EU draft extends the commitments described above to both Parties' climate change commitments; more specifically they must to uphold their net-zero targets and have a system of carbon pricing of equivalent scope and effectiveness to the EU ETS (Articles LPFS 2.34-6). The EU has never included such strong climate commitments in a Trade and Environment chapter. Section 8 deals mainly with cooperation under Multilateral Environmental Agreements, and the 'benchmarking' approach is not utilised here.

- 2) Unlike many EU FTAs, the EU has tied Section 6 and 7, on environment and climate non-regression, to the primary dispute settlement mechanism of the FTA, which means that violation could result in fines and also one side suspending concessions (ie, applying tariffs) against the other. Section 8 has a parallel dispute settlement mechanism which more closely approximates previous FTAs; however, non-compliance can also ultimately result in fines and suspension of concessions (Article LPFS 2.52[10]).

The UK Government has proposed an Environment chapter in its draft FTA

for the EU which was made available 19 May 2020. With a few small differences, notably the elimination of all obligations on climate change (Articles 24.9(2) and 24.12(1)(e) of CETA), the chapter is copied from the EU-Canada Comprehensive Economic Partnership Agreement (CETA). The UK Government has indicated that it will address climate change in a separate Energy chapter.

Like other EU Trade and Environment chapters, the UK's CETA-derived chapter reinforces the Parties' right to regulate for environmental protection. It requires them to uphold and enforce their own domestic environmental laws, but only if failing to do so would encourage trade and investment. Violation of this commitment does not lead to trade sanctions or fines. It also provides for cooperation on a wide range of issues, including the implementation of multilateral environmental agreements, exchange of scientific and technical information and thematic issues – the one named here is forestry, likely a relic of the parent agreement rather than a reflection of any particular strategic interest for the UK. It reinforces both parties' commitment to procedural rights and access to justice.

2. What are the key disagreements on this topic between the UK and the EU, and how substantive are they?

The EU's basic argument is that it is because they are offering no quota no tariff access, which goes beyond their usual FTA offer, but also because of the historic integration, trade volumes and geographic proximity, they need stronger LPF provisions. The UK does not agree that these reasons merit such a departure in approach and fears losing control over domestic legislation. The UK Government seems prepared to accept dispute settlement attached to trade sanctions for its environmental chapter with the US (see DIT's recent 'UK-US Free Trade Agreement'), but has rejected such sanctions with the EU.

In my view, the disagreement results from entrenched political positions and lack of trust on both sides rather than substantive differences in regulation and outlook. Both sides identify themselves as climate and environment leaders and there are opportunities for collaboration and innovation in this area. Unfortunately both sides' positions seem fairly entrenched; for example the European Parliament in a resolution from June 18 affirms that even if tariffs are introduced, they would still seek a strong and robust LPF, including a 'ratchet clause' to secure ongoing benchmarking of standards.

Scope of the provisions

3. Is there a big difference in the environment and climate policy areas covered by the UK and EU proposals, and do you expect this to be a significant point of contention?

The scope of the EU's coverage is bigger in the sense that it eliminates the requirement to establish that lowering of standards took place in order to benefit trade and investment. This means that the threshold for violation is lower, with any lowering potentially constituting a violation. But in practice I don't think this would be heavily litigated, as I address in my response to Q. 4.

Another important difference is that the EU has foregrounded climate change whilst the UK has relegated it to a separate energy agreement. We await more details of the UK energy chapter proposal to evaluate its approach. However it does seem odd to deal with climate change only in an energy and not an environment chapter, as it is clearly an environment as well as an energy issue.

Recommendation: The UK should concede that climate change has implications that go beyond energy, and be open to addressing it in a Trade and Environment chapter as well.

Non-regression

4. Both the EU and UK have included clauses on upholding levels of environmental protection: what are the implications of the different approaches?
 - a. How would the EU and UK's different approaches to non-regression affect UK policy-making?

The UK's approach to requiring that environmental protection is upheld would have virtually no mandatory effect on UK policymaking. It provides a commitment not to lower domestic standards, but with no strong deterrent emanating from the FTA itself (ie sanctions). In practice non-regression commitments in Trade and Environment chapters haven't been enforced in the EU, or more broadly. However ongoing communication on environmental matters through the institutional mechanisms established by the chapter could result in greater *voluntary* alignment in approaches.

It's difficult to assess the practical impacts of the EU's proposal on UK policymaking because the approach is so innovative. However I would expect that in practice it would pose few constraints, for two reasons. First, the interpretative complexity would likely have a chilling effect on disputes. As the UK moves away from EU regulation, it might for example eliminate a public participation or reporting requirement, or move from an approach to monitoring particular ecosystems as a whole to monitoring based on counties or specific thematic issues, or change its approach to scientific assessment. It is not entirely clear whether this is an environmental enforcement issue or one of lowering common level of protection, or neither. It would be most straightforward to interpret whether a level of protection had been lowered if there is a shared quantitative target. However, even there it is not entirely straightforward – what if, for example, the UK decided to switch from quantitative pollution emissions limits to tradeable permits? These are challenging issues for a trade tribunal to sort out and past FTAs have showcased a lack of enforcement eagerness in this area.

The second and more compelling reason is that the EU's fundamental concern is not controlling UK environmental regulation *per se*, but rather competitive deregulation. Therefore it seems likely that the EU would only pursue enforcement if its competitive interests were clearly at stake. This would most likely apply in the areas that the Commission has particularly highlighted: industrial emissions, atmospheric and marine fuels pollutants. Carbon tax is an additional area that is quite sensitive for EU exporters. These are also probably the areas most likely to prompt a contentious dispute.

Recommendation: The UK should propose to negotiate common standards in selected areas that represent key LPF concerns for both sides - industrial emissions (including use of Best Available Technologies), atmospheric and marine fuels pollutants and carbon tax. Derogation from these could result in sanctions. The other commitments would not be tied to sanctions. Note that this more closely resembles the approach taken in the Withdrawal Agreement of November 2018, Annex 4.

Which standards

5. Must the agreement refer to the common standards that apply in the EU and UK at the end of the transition period to be acceptable to the EU, or could it refer to other standards in some areas, for instance those in international environmental and climate agreements?
 - a. Would the EU's proposal to refer to common standards result in a role for the Court of Justice of the European Union (CJEU) in disputes over the interpretation of those standards?

It seems unambiguous that the EU means common standards between EU and UK. If there were to be a change in this section, it would likely be toward each Party agreeing to uphold ITS OWN domestic standards rather than international ones. Section 8 deals with shared commitment to international agreements.

With respect to the CJEU, there is no specific underlying EU legislation invoked here. For this reason, I don't think that CJEU has the ability undertake a decisive interpretation of what common standards mean (as opposed to the State Aid provisions), though this adds to the interpretative complexity of what a 'common standard' constitutes.

Recommendation: The UK should clarify that the CJEU does not have the ability to interpret decisively whether the UK has derivated from a 'common standard'. The role of the CJEU is somewhat ambiguous and clarity would help to assure UK negotiators that these provisions do not interfere excessively with UK autonomy.

Environmental principles

6. If the environmental principles are included in a UK-EU agreement, what difference would that make to policy-making and the decisions of courts

in the UK?

The principles the EU are proposing to include are virtually identical to those the UK included in its draft Environment Bill – prevention, precaution, rectifying pollution at the source and polluter pays. (LPFS 2.30(4)) Thus there is no external imposition of these principles. They are also included by virtue of transposed EU legislation, which contains these principles and integrates them into UK domestic legislation.

However the question remains about how these principles will be understood and applied. The draft Environment Bill proposes including environmental principles in a 'policy statement' to be applied by Ministers. In this respect, as the UK moves away from EU legislation, the courts could play a big role in evaluating whether principles were being respected. I see this as primarily a domestic issue as an EU-UK FTA will not have direct effect or primacy on UK legislation.

Enforcement and dispute resolution

7. What shape should the relevant enforcement and dispute resolution mechanisms take to be both negotiable and to help ensure that the agreement can be maintained in the long-term?
 - a. Does the proposed Office for Environmental Protection (OEP) meet the criteria of the 'independent body' required under the EU's proposal?
 - b. [supplemental question] What will be the implications for devolved nations, in particular Scotland, and how will enforcement take place?

As I discuss in more detail under Q 4, rather than having a blanket commitment to maintain common level of protection, a more feasible approach would be agree a small range of negotiated commitments that are tied to sanctions. In particular, equivalence in level of climate ambition could be beneficial to the UK in ensuring that its producers/exporters aren't bearing more costs than their EU counterparts. The UK should be prepared to concede that the EU's requirements about UK environmental enforcement be tied to sanctions. Pre-Brexit, the UK relied upon EU bodies for environmental monitoring and enforcement, and this latter requirement reflects the EU's interest in ensuring these functions are replicated, particularly as the UK has often faced the CJEU for environmental non-compliance.

It is unclear whether the OEP meets EU criteria. The EU's proposal requires that an independent body 'shall have the right to bring a legal action...with a view to seeking an adequate remedy (Article 2.32 LPFS)'. But the OEP is unable to make binding recommendations, even if it finds that a UK public body has seriously failed to enforce environmental law (Draft Environment Bill, Sections 26-34). The Environment Bill also provides for judicial review, which only evaluates procedural non-compliance and doesn't result in fines. In contrast, the Commission is required to enforce EU environmental rules and can issue fines for non-compliance.

A supplemental question had to do with enforcement implications for devolved nations. The treaty is between the UK and the EU, such that any disagreement between the EU and a devolved nation would be taken forward through a UK-wide Joint Committee. Scotland has published a draft Continuity Bill which calls for continued alignment in environmental legislation between the UK and the EU, so it is less likely that disputes would arise from that quarter.

An adjacent concern stemming from the draft Continuity Bill, particularly in the area of food safety, is that if Scotland maintains alignment with EU legislation whilst the UK diverges (prompted by, for example, a UK-US FTA) this could lead to intra-UK trade barriers between Scotland and other nations of the UK. I address this issue in recent evidence to the Scottish Finance and Constitution Committee:

https://www.parliament.scot/S5_Finance/General%20Documents/submission_from_Emily_Lydgate_2.pdf

Recommendations:

The UK should be prepared to concede that the EU's requirements about UK environmental enforcement be tied to sanctions.

The UK should attempt to ascertain whether its proposed OEP meets proposed EU criteria for independence and environmental enforcement.

The UK should give devolved nations oversight over trade negotiations in devolved areas, which now include food safety, to prevent fragmenting its internal market.

Impact on other trade deals

8. What effect would level playing field commitments in a UK-EU agreement have on the UK's ability to do other trade deals, or the shape of those?
 - a. Would non-regression provisions prevent the UK from allowing lower standard products to enter the UK market, for example through a dual-tariff regime?

I don't think that this chapter should impact upon on the UK's ability to do trade agreements with other countries. The EU should be clearer that their concern with the LPF is about non-product environmental standards. It already requires every country that exports into the EU to conform to its product standards, so there isn't a clear strategic benefit to effectively multilateralise a requirement on the UK to align on EU product standards (even if many constituencies in the UK would thank them for it). Furthermore, there is an SPS and a TBT chapter where product standards are dealt with explicitly, and the EU's draft in those areas provides for divergence, presumably encompassing 'lowering' of standards, so the requirement is internally inconsistent.

For these reasons an environmental non-regression requirement should not prevent the UK from admitting or producing lower standard products banned or restricted in the EU, including through a dual tariff scheme, if mandated by a

new FTA.

Recommendation: UK negotiators should clarify that LPF commitments don't cover product standards and request to eliminate SPS from the EU's thematic list of common standards.

Room for agreement

9. Are there helpful precedents or creative proposals that the negotiators should be considering in the main areas of contention?

I have seen some media that the EU might be open to an approach whereby the EU agreed that it could apply tariffs if the UK diverged from harmonised standards. Without knowing the detail, it seems to be effectively a procedural fudge, as application of tariffs is effectively what could happen anyway if the UK lost a dispute. A potential disadvantage from the EU perspective is that FTAs should create certainty and this seems to suggest less durability of the contract. However if the EU were willing to agree it would constitute a relatively straightforward solution and could be embraced if only on the pragmatic basis of attempting to avoid the cost and disruption of no deal.

10. Where do you see the landing zone between the UK and EU's positions?

A compressed negotiation schedule and distraction from Covid-19 may prevent as much thought as might be merited going into these provisions on the UK end. This would be a lost opportunity for two climate and environmental leaders to develop an innovative and progressive FTA. For what it's worth, here are some suggestions for compromise, based on the recommendations I've made throughout, and drawing from the November 2018 draft Withdrawal Agreement. It provides the UK more assurance that its domestic policy won't be constrained, and eliminates some of the interpretative problems of the EU's draft, but gives the EU leverage on key issues of concern.

- *The UK and EU negotiate common standards in selected areas that represent key LPF concerns for both sides - industrial emissions (including use of Best Available Technologies), atmospheric and marine fuels pollutants and carbon tax/ETS. Derogation from these could result in sanctions. The other commitments to uphold common standards would not be tied to sanctions.*
- *The UK concedes that the EU's requirements about UK environmental enforcement be tied to sanctions, but also attempt to ascertain in advance of entry into force that its proposed OEP meets proposed EU criteria for independence and environmental enforcement.*
- *UK negotiators clarify that non-regression commitments don't apply to product standards and request to eliminate SPS from the EU's thematic list of common standards.*
- *The UK clarifies that the CJEU does not have the ability to interpret decisively whether the UK has derivated from a 'common standard'.*

