Dr Belén Olmos Giupponi – Written evidence (LPF0005)

The nature of the future partnership agreement between the European Union (EU) and the United Kingdom (UK) is that of a sui-generis or bespoke free trade agreement. In spite of the attempts to draw parallels with other similar treaties, this is a unique agreement being negotiated with a former member state which embodies "blended clauses" (inspired by previous *acquis communautaire* and contemporary treaty practice) and innovative clauses introduced afresh. It is worth mentioning that not all the relevant environmental law provisions are enshrined in just a section: several other provisions scattered in the text have environmental law ramifications, such as those relating to sanitary and phytosanitary measures. The following considerations are based on the joint analysis of the documents which are publicly available, as follows: on the one hand, the EU's documents on Article 50 negotiations with the United Kingdom, the EU's Draft text of the Agreement on the New Partnership with the United Kingdom (adopted in March 2020); and, on the other hand, the UK's documents adopted in February 2020 including the position on The Future Relationship with the EU, the Draft UK-EU Comprehensive Free Trade Agreement (CFTA), and the UK's Draft Energy Agreement.

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?

1. According to the EU's position, key aspects of the environment and climate level playing field (regulated under Sections 6, 7 and 8 of Title III: Level Playing Field and Sustainability) comprise general principles (including environmental principles), the precautionary principle, the right to regulate, the *acquis communautaire* (the block EU environmental law already incorporated into UK law and "retained"), climate change and carbon pricing as well as non-regression of the levels of protection, future levels of protection, and monitoring and enforcement of the provisions. Overall, these three sections address what would be the externalities from an economic viewpoint with the aim of striking a balance between the different priorities, and avoiding the possibility that an area may act as a deterrent for policy measures adopted in the other, reciprocally. Under the climate change pillar, there is the specific commitment of climate neutrality and no regression of the level of climate protection, including commitments and targets envisaged for the end of the transition period. These areas for cooperation are included together with other priorities identified around the issues of state aid control, competition, taxation, labour and social protection. Some provisions are grouped under an umbrella or a "chapeau" structure comprising provisions applicable across the chapters, such as the precautionary principle and the right to regulate. The draft agreement for the future partnership incorporates short and longer-term goals, the architecture and legal nature of the future partnership, and the whole suite of legal basis.

In turn, the UK's position (crystalized in Chapter 28 -Trade and Environment- of

the CFTA and Chapter 27 -Trade and Environment- of The Future Relationship with the EU) reflects a more inter-governmental approach to these issues, following in the footsteps of other contemporary free trade agreements, such as CETA. There is a loose commitment not to lower environmental standards to favour trade and investment and the recognition of the right to regulate, and the parties' autonomy to set their environmental priorities and adopt their respective environmental policies. Future cooperation with the EU is articulated around commitments under Multilateral Environmental Agreements (MEAs). Undoubtedly, the UK seeks also to achieve an enhanced cooperation with the EU in the future. Climate change cooperation is outside of the scope of the CFTA and considered separately under the Draft Energy Agreement. In this regard, there is consensus on the commitment to effectively implement the Paris Agreement. Carbon pricing has not been yet included under the draft Energy Agreement, but the UK may consider the possible link between any future UK emissions trading system (ETS) and the EU ETS.

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

2. Although the different positions seem to converge on essential aspects, some disagreements are observed. The nature of the disagreements may be more political than substantive in certain areas. From the EU perspective, the priority is to strike a balance of rights, to ensure the respect the integrity of EU law and guarantee the level playing field in environment and climate law. In some cases, the disagreements are more substantive: for instance, the duty to have regard to the EU environmental principles as legal rules with stringent content. Key disagreements on the level playing field obligations between the European Union and the United Kingdom concern the threshold for the application of the precautionary principle. Another source for potential disagreement is the implementation of the right to regulate which is open to interpretation and may condition future state action. Clearly, the exercise of monitoring power by the CJEU presents another area for contention. In some areas, such as climate change, chemicals and industrial emissions, there might be more consensus as the UK moves to have its own systems. Other sectors might be less controversial, such as the issues comprised in the application of the Aarhus Convention and nature conservation.

<u>Scope of the provisions</u>

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?

3. In terms of the differences between the proposals, there are some contentious areas, such as the interpretation of the environmental principles, particularly the precautionary principle. Furthermore, the EU seeks to include more stringent provisions potentially informing legal review tests. Climate change and the emissions trading system after the transition period may constitute an area for future cooperation and negotiation. The UK will need to develop its own Emissions Trading system and align it with the EU. Carbon markets are likely to be another source of potential contention if no agreement is reached in the mid-term. Another controversial area in the way forward is

judicial monitoring and enforcement, particularly concerning the role of the CJEU after the transition period. This is expected to be a divisive point and one question in this regard is how the UK will play along and accommodate the EU's demands. Some aspects can be ironed out in the short term, but it is likely that many other areas will require further negotiations. The key goal here should be to foster a constructive post-Brexit partnership in environmental matters.

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?

b. What happens if a party lowers their standards or level of protection under each approach?

4. Approaches to upholding levels of environmental protection differ on the meaning and scope given to non-regression. Whilst the EU aims to set common standards on environmental protection and common targets, the UK's draft embodies a loose commitment not to weaken or reduce the levels of protection afforded in their environmental law. The said levels (to be applied at the end of the transition period) need to be sufficiently spelled out whether referring to qualitative levels of protection or to quantitative requirements for environmental protection.

a. Non-regression approaches across the environmental law spectrum raise the question of how to address the imbalance between future commitments and the ratchet clause. The stance on this will depend upon the UK's needs to adjust to new scenarios and will influence the EU and the UK's reactions vis-à-vis common trading partners. Interim arrangements are introduced with the aim of avoiding disruption, but the question regards the situation after the transition period. Non-regression may be interpreted by the EU as the commitment not only to maintaining but also to exceeding existing environmental standards which will (up to a certain extent) retain the influence of EU law.

b. It is common practice to include in free trade and investment agreements this type of non-lowering of standards clauses. However, they may prove difficult to be enforced in the event of a breach. The consequence of non-compliance with the clause usually leads to a non-binding result (publication of a report). Enforcement and surveillance are problematic aspects. It is advisable, therefore, that the strict legal position should be to achieve reciprocity in terms of 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 a reference to common standards in the EU and UK at the end of the transition period bring in the Court of Justice of the European Union (CJEU)?

5. For avoidance of doubt, it should be indicated to what extent the parties will

have regard to either common standards (spelling them out) or international standards. Multilateral Environmental Agreements (MEAs) could be taken as a starting point or the base-line for environmental protection, including treaties and other international protocols in the field. Evidently, the Paris Agreement may be the paradigmatic case which is already cited in both draft texts. The overall number of MEAs that the UK is party to is quite considerable, and requires a closer analysis in order to identify common sectoral priorities. Although there is a convergence between the standards set at international level and those set by the EU, the latter tend to be higher and therefore more rigorous. A stark discrepancy in this respect may limit or hinder future action.

a. After the transition period, reciprocity should be the rule, trying to avoid rolled-over agreements. The question of common standards as a way in for the CJEU is quite relevant, as the Court has always operated as a centripetal force wherever a treaty provision contains a reference to common standards. In most cases, there is the *renvoi* to national judicial and administrative systems. As an indirect influence articulating legal interpretations, the CJEU always exercises some monitoring power over international agreements, just as at present. By way of example, the Advisory Opinion 2/15 confirmed that the sustainable development provisions fell within the reach of the common commercial policy, hence being placed under the scrutiny of the Court. Common standards would add certainty, but may open the door to the action of the CJEU. That being said, it is difficult to foresee this for two reasons. First, there should always be a legal basis laid down in the treaty as enabling clause for the CJEU's intervention. Second, interpretation falls first within the remit of the specific treaty body established for this purpose (the Partnership Council in the EU's draft).

<u>Environmental principles</u>

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?

6. There are some environmental principles included in the text: (a) the precautionary principle; (b) the principle that preventive action should be taken; (c) the principle that environmental damage should as a priority be rectified at source; and (d) the "polluter pays" principle. Clearly, other environmental principles such as public participation are embedded in the draft. The application of principles, particularly of the precautionary principle, is relevant as it might necessitate the intervention of the CJEU. The precautionary principle is conceived as a cross-cutting principle applicable to all the different sections of the title and not just to the environmental "bits and pieces". The precautionary principle as understood in the EU approach implies not merely influence on policy making, but also regards the decisions of courts as they are applicable through the tests of a legal review. Conversely, the UK's approach seems to be more rooted in policy as the impending post-Brexit legislation may indicate. The Environment Bill does contain a definition of "environmental principles" providing for the adoption of a "policy statement on environmental principles" that must be regarded by a Minister of the Crown in policy making (Clauses 16 to 17).

<u>Enforcement and dispute resolution</u>

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 Office for Environmental Protection (OEP) meet the criteria of the 'independent body' required under the EU's proposal?

b. Will the devolved administrations have adequate enforcement mechanisms in place?

7. Enforcement and dispute resolution/settlement mechanisms constitute one of the most contentious issues. Now, there are still several unanswered questions. The whole section is excluded from the specific dispute settlement mechanism geared under the draft treaty for other matters (arbitration). It is worth mentioning that under this system whenever a question of Union law arises, the arbitral tribunal "shall request the Court of Justice of the European Union to give a ruling on the question. The Court of Justice of the European Union shall have jurisdiction to give such a ruling which shall be binding on the arbitration tribunal" (Article INST.16: Disputes raising questions of Union law). In contrast, the drafted provisions stipulate that "[b]y way of derogation from Title II of Part Five [Dispute settlement], in case of a disagreement between the Parties regarding the application of this Section, the Parties shall have recourse exclusively to the dispute resolution procedures established under Article LPFS.2.51 [Consultations] and Article LPFS.2.52 [Panel of experts]". The UK favours this solution. Among the scenarios that might be considered, there is also the need of ensuring an appropriate access to relevant stakeholders, for instance, environmental NGOs (public participation). Elements to avoid breaking down and that might ensure a lasting agreement, include the emphasis on dispute prevention and allowing a sufficiently flexible stage of consultations. In shaping the future agreement, a more detailed approached is needed.

   a. In order to make up for the loss of EU scrutiny and assessment of performance, the UK should set up and define the role of a proper body that can receive complaints. Preparations should be made to put in place a strong independent body, as required in the EU's draft, with "powers to conduct inquiries on its own initiative concerning alleged breaches by public bodies and authorities, and to receive complaints (…) [i]t shall have all powers necessary to carry out its functions, including the power to request information" (Article LPFS.2.32. Monitoring and Enforcement). This could certainly be the Office for Environmental Protection (OEP) which will be the UK's post-Brexit watchdog. Nonetheless, some shortcomings in the legal design of the OEP are already noted. First, the OEP covers only England and Northern Ireland, it remains to be seen the solution proposed by the devolved administrations. Second, its independence has been questioned as its non-executive members (which constitute the majority) are appointed by the Secretary of State. Third, the OEP does not have direct enforcement powers. These issues can be addressed by subordinate legislation, but this may entail going through a period of 2-years until the OEP will be fully operational. This represents a

significant challenge vis-à-vis the requirement of having an effective mechanism in place.

b. The UK should coordinate, collaborate and cooperate under the common frameworks, to develop sufficient normative force. Devolved administrations should establish their own mechanisms which may further delay the process and create an enforcement gap. So far, the Scottish government has been discussing how to ensure monitoring and enforcement of environmental compliance in an effective way after Brexit. It is worth noting, that under International Environmental Law, the UK as is the only responsible for the implementation, and enforcement carried out by sub-state entities.

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?

8. Level-playing field commitments may generate asymmetries concerning other agreements negotiated with third countries. Although it may not directly restrict the UK's power to strike new deals, it may create a differential impact as this implies a reinforced cooperation and may lead to claims about concerning "disguised trade discrimination". Conversely, environmental provisions may generate some spill over effects on the rest of agreements concluded with other countries. Ultimately, from a *realpolitik* standpoint what is relevant in trade talks is the respective bargaining power of the parties and their ability to push forward standards in their own benefit.

a. The question of a dual-tariff regime is controversial and potentially inconsistent with World Trade Organisation (WTO) law. If the standards refer to environmental protection and a conflict with the non-discrimination principle arises, they could be justified under the GATT exceptions. In the event of a dispute, the legality of these standards boils down to the specific circumstances of each individual case as demonstrated by the WTO case law. More difficult would be if these standards fall into the category of "process and production methods" (PPMs) which legality under WTO law is highly contested.

Room for agreement

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

10. Is there space for an agreement in this area? Where do you see the landing zone between the UK and EU's positions?

9. As stated before, this is a bespoke agreement which is not comparable with other international treaties, and provisions included therein are sui generis provisions; this is a blended type of international agreement including some CETA resembling provisions. Helpful precedents in this

regard are the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), the EU-Japan Partnership and the free trade agreements EU-South Korea and EU-Vietnam may also offer useful insights. Outside the EU sphere, the US FTAs treaty-making practice and case law (particularly, NAFTA -currently USMCA- and CAFTA-DR) may offer some alternatives. For instance, in NAFTA the environmental provisions are contained in an external side agreement with an independent monitoring system. Other relevant state practice may stem from Australia's recent practice in the conclusion of trade and investment agreements. For instance, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) comprises a separate environment chapter with a robust dispute resolution mechanism (Chapter 20). It should be feasible to find a compromise area to reach consensus among the negotiating parties. This "compromise area" may imply reaching agreement on broad issues and leaving the "small print" or details to be fleshed out by joint committees or specialized negotiating groups or committees in the years to follow.

10. The EU-UK relationships should be considered as a dynamic alliance. The UK has already incorporated EU legislation into UK law, but they still need to find some ways to coordinate for the future. The question that remains is how are the UK and the EU as future partners going to engage in international negotiations? The enforcement system should aim to maintain the same level that we have at the moment, avoiding a backslide on environmental standards. Enforcement mechanisms should be strong and independent to maintain economic and environmental integrity. Due to their geographical proximity (the UK forms part of the same biosphere) it is in the UK's interest to strike a close relationship. Both partners must agree on a basic level of environmental protection which would be compatible with economic progress, eliminating unnecessary "red tape" for businesses. Globally, the UK should not lose its position in environmental protection. These negotiations represent an opportunity for the UK to adopt a distinctive normative position, paving the way for a new environmental leadership.