

Dr Leslie-Anne Duvic-Paoli - Written evidence LPF009

*I am a Lecturer in Law and the Deputy Director of the Climate Law and Governance Centre at The Dickson Poon School of Law, King's College London. I am also a Fellow of the Centre for Environment, Energy and Natural Resource Governance at the University of Cambridge. I have researched international environmental principles extensively, including for my latest monograph, *The Prevention Principle in International Environmental Law* (Cambridge University Press, 2018). I am giving this evidence in my personal capacity as an academic, my views should not be attributed to any of the institutions I am or have been affiliated with.*

Question 10. 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?

I. Environmental principles in Free Trade Agreements

1. Recent Free Trade Agreements (FTA) typically mention two environmental principles – sustainable development and precaution. References to sustainable development are now common in FTAs: they offer a consensual basis upon which to build the economic partnership, they set its objectives and guide policy-making. The UK's draft working text for a Comprehensive Free Trade Agreement between the UK and the EU (as published in May 2020) adopts this approach and presents the promotion of sustainable development as a guiding objective (Art 26(1)). On occasion, references to the precautionary approach/principle can also be found in FTAs (albeit not in the UK's draft text), either as a permissive provision in the context of the parties' right to regulate and determine their own levels of environmental protection,¹ or as an duty to act despite the lack of scientific uncertainty when designing environmental measures that may affect trade or investment.²
2. Evaluating the impacts that references to sustainable development have on the level of environmental protection is a complex task. Such an assessment cannot only focus on the direct effects of incorporating a principle but needs to include the entire framework built around the principle to enhance environmental protection. It is generally estimated that sustainable development chapters in FTAs can lead to a convergence in environmental standards and offer a higher level of environmental protection. However, they go nowhere to meeting the level of protection offered by EU environmental legislation. Notably, sustainable development chapters in EU FTAs are not subject to enforceable dispute settlement procedures in case of non-compliance.

II. Legal background to Article LPFS 2.30(4)

3. The following analysis comments on the EU's proposed inclusion of environmental principles in the *Draft text of the Agreement on the New Partnership with the United Kingdom* (March 2020), in the form of Article LPFS 2.30, para 4 that reads as follows:

¹ Eg. *Draft text of the Agreement on the New Partnership with the United Kingdom* (March 2020), Article LPFS.1.2 (right to regulate and precautionary principle)

² Eg. 2018 EU-Japan Economic Partnership Agreement, Article 16(9) ('when preparing and implementing measures with the aim of protecting the environment or labour conditions that may affect trade or investment' Parties 'shall take account of ... where appropriate ... the precautionary approach').

Reflecting their common principles at the end of the transition period and their commitment to the 1992 Rio Declaration on Environment and Development, in giving effect to the obligations set out in this Section, the Parties shall respect the following principles in their respective environmental law and practice:

- (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.

4. I also look at the role that environmental principles might play in the UK in the future on the basis of the *Environment (Principles and Governance) Bill* (as introduced in January 2020), clauses 16-18, and, when relevant for comparison purposes, of the *UK Withdrawal from the European Union (Continuity) (Scotland) Bill* (as introduced in June 2020), section 9.
5. The EU's proposal to include a list of environmental principles in the UK-EU Agreement is unusual and goes beyond the references to one or two principles commonly found in FTAs. In addition, while commitments not to regress from environmental protections are increasingly included in FTAs, environmental principles have not, to my knowledge, been used as a legal tool to prevent such regression.
6. Article LPFS 2.30(4) justifies the inclusion of environmental principles in the Agreement on two bases: i) they are shared principles and ii) they are the result of the parties' commitment to the 1992 Rio Declaration on Environment and Development.
7. The four proposed principles – precaution, prevention, rectification at source and 'polluter pays' – are, indeed, 'common' in the sense that they replicate those found in Article 191(2) of the Treaty on the Functioning of the European Union (TFEU) and have therefore played an important role in shaping UK environmental law until now. The Scottish Continuity Bill reproduces these four principles and explicitly states that they are derived from their EU equivalent (s 9(2)). Whether the origins of the LPFS 2.30(4) principles in EU law means that they could be considered 'concepts of Union law' is, in my view, unclear. If that were the case, they would, under the EU's proposal, need to be interpreted 'in accordance with the methods and general principles of Union law and in conformity with the case-law of the Court of Justice of the European Union' (Art COMPROV 14).
8. However, the listed environmental principles are not unique to EU law, as the reference to the Rio Declaration, an international non-legally binding text on environmental principles, makes clear. The origins of the principles in international law are emphasized in the Environment Bill's explanatory notes that does not explicitly identify the principles as derived from the FTEU but 'from a number of sources, including, for example, the Rio Declaration on Environment and Development (1992)'.³ This holds true for precaution, prevention and 'polluter-pays' that can be found in the Rio Declaration (as Principles 15, 2 and 16, respectively). However, the 'rectification at source' principle has only found limited recognition in international law and can only be considered as a principle of EU law.
9. Over the years, prevention, precaution and 'polluter-pays' have become widely recognized principles in international environmental law. Prevention is now a well-established norm of customary international law. The legal status of the precautionary and 'polluter-pays' principles is more controversial, although they could potentially be

³ [Explanatory Notes to the Bill](#), prepared by the Department for Environment, Food and Rural Affairs, para 176.

said to be emerging norms of customary international law. These principles have gained in clarity in recent years and have become better able to frame state conduct in relation to environmental protection. However, the minimum standards that international law provides would not necessarily be enough to prevent a divergence in practices between the two parties.

III. Impact on policy-making and domestic courts

10. Attention should be given to how environmental principles have been included in the Environment Bill in order to assess the potential consequences of a reference to environmental principles in the UK-EU Agreement.
11. The added value, or lack thereof, of a reference to environmental principles in the Agreement does not lie in the substance of the provision. Indeed, the list of environmental principles is almost identical in the Environment Bill and Article LPFS 2.30(4). References to the 'polluter-pays' and rectification at source principles are exactly the same, while the minimal variations in wording for the prevention and precautionary principles are unlikely to make a significant difference. The integration principle – according to which 'environmental protection should be integrated into the making of policies' – is missing from the EU proposal when it has been included in the Environment Bill. However, this is unsurprising because EU law takes a separate approach to integration (included at TFEU Art 11), which is generally considered to operate independently from the four other environmental principles. Notably, the Scottish Continuity Bill replicates this approach and does not list integration as an environmental principle.
12. The main difference between the principles in the Bill and in the Agreement relates to their status. Including environmental principles in the UK-EU Agreement could strengthen the role they play in environmental policy-making in comparison to a situation in which they are only included in the Environment Bill. In EU law, environmental principles benefit from a strong legal basis. In the Environment Bill, however, they are restricted to a policy role, with Ministers required to 'have regard to' the policy statement on environmental principles. The UK-EU Agreement would create a stronger duty on the UK, one to 'respect' the four environmental principles – to the extent that the application of the principles, or lack thereof, would impact the level playing field. In addition, in contrast with the Bill that is directed solely at Ministers, LPFS 2.30(4) would create a general duty on the UK to respect environmental principles, which would thus extend to all public authorities (as is currently the case under EU law).
13. A provision on environmental principles included in an international treaty like the UK-EU Agreement would not have a direct effect, in that it would not allow individuals to rely on it to, for instance, contest new national legislation. A reference to environmental principles could, nevertheless, have a 'soft' influence on domestic courts. In my view, it would encourage UK courts to rely on EU case-law more readily. Courts will, of course, use the extensive EU case-law on environmental principles that forms part of retained EU law, but they can also, pursuant to the EU (Withdrawal) Act, have regard to subsequent EU legislation and case-law 'so far as it is relevant to any matter before the court'. The willingness of the UK to ensure an alignment with the EU on environmental principles, as would be consecrated in the Agreement, would therefore act as a

persuasive argument for UK courts to use subsequent EU case-law as non-binding guiding sources.

IV. The level playing field and the interpretation of environmental principles

14. The question of the interpretation of environmental principles is fundamental in the context of level playing field commitments. At present, the Environment Bill leaves open the extent to which Ministers could depart from environmental principles as understood in EU law. The environmental principles set out in the Environment Bill do not ensure a level playing field with the EU in the longer term. While the non-regression provision in the Environment Bill (cl. 19) *might* prevent regression, it does not necessarily align UK environmental law with EU law. Importantly, even if the legislation does not change, there is still a risk of regression in environmental standards if retained EU law is re-interpreted to, for instance, give more weight to economic and social development to the detriment of environmental protection.
15. The open-textured nature of environmental principles facilitates a fluid adaptation of environmental law. However, environmental principles are so flexible that their application and interpretation can evolve fairly rapidly. This would not necessarily mean that domestic courts would depart from precedent, but, rather, they would apply environmental principles differently to a new environmental problem for instance. The Scottish Continuity Bill responds to this problem by providing for a dynamic alignment of the interpretation of environmental principles, with that Ministers must give due regard to the European Court interpretation of the environmental principles 'from time to time' (s 9(3)). A provision like LPFS 2.30(4) would guarantee some consistency or equivalence by creating an obligation on the UK to respect the four listed environmental principles by ensuring that their application and interpretation does not disrupt the level playing field.

V. Conclusion

16. Including environmental principles in the UK-EU Agreement could be an important tool to ensure a level playing field. Indeed, environmental principles have been particularly influential in the development of EU environmental law. Ensuring equivalence in how the principles are applied and understood would be important to avoid significant divergences between EU and UK environmental law and practices. A reference to environmental principles in the Agreement would also respond to some of the limitations of the Environment Bill: with regards to environmental principles, the Bill certainly builds upon EU practice but does not necessarily offer an equivalent framework, and certainly not one concerned with long-term alignment. At the same time, environmental principles do not dictate specific outcomes: including environmental principles would therefore not be too constraining and would still give the UK enough flexibility to design its own environmental frameworks. A provision like Article LPFS 2.30(4) would go significantly beyond what is commonly found in an FTA but offers a tool to ensure that the UK is able to 'deliver the most ambitious environmental programme of any country on earth'.⁴

⁴ [Environment Bill 2020 policy statement](#) (January 2020), para 3.