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Reflections on the Questions

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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?

It is very important when considering the different proposals the old and new Political Declaration as well as the Withdrawal Agreement.¹

It should be noted that the level playing field provision have been committed to in the current Political Declaration (“future relationship must ensure open and fair competition, encompassing robust commitments to ensure a level playing field.”).

The language proposed by the EU thus follows the Political Declaration more closely and copies language agreed by the UK in the previous version of the Withdrawal Agreement negotiated by Prime Minister May. I would go as far as to say that the EU will consider its language on this point as a major concession as unlike with other geographically close partners, such as the EEA, Turkey or the Ukraine, the text contains the reference to common standards rather than just copying EU standards, which would otherwise be usual.

We should also understand that the EU has the constitutional objective in Art. 191 TFEU to address climate change. Any Agreement without a reference to combating climate change runs the risk of legal challenge.

While the EU proposal is called level-playing field, it contains a slight

¹New Political Declaration:

LEVEL PLAYING FIELD FOR OPEN AND FAIR COMPETITION

Given the Union and the United Kingdom's geographic proximity and economic interdependence, the future relationship **must ensure open and fair competition, encompassing robust commitments to ensure a level playing field**. The precise nature of commitments should be commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties. These commitments should prevent distortions of trade and unfair competitive advantages. To that end, the Parties should uphold the **common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters**. The Parties should in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition; commit to the principles of good governance in the area of taxation and to the curbing of harmful tax practices; and maintain environmental, social and employment standards at the current high levels provided by the existing common standards. In so doing, they should rely on appropriate and relevant Union and international standards, and include appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement. **The future relationship should also promote adherence to and effective implementation of relevant internationally agreed principles and rules in these domains, including the Paris Agreement.**

Title Energy C. Carbon pricing The Parties **should consider cooperation on carbon pricing by linking a United Kingdom national greenhouse gas emissions trading system with the Union's Emissions Trading System.**

misnomer. Rather the text indicates an enhanced non-regression provision, as there is a possibility to agree future levels of protection as 'common standard' or just to enact higher levels of environmental/climate ambition but no continuous obligation to maintain a level-playing field (which would most likely involve following EU rules).²

The EU is also proposing an economy-wide 2050 carbon-neutrality target. In my view this is entirely compatible with the 2019 Climate Change Act net-zero target. While the net-zero target might seem to provide greater flexibility for example when the UK chooses not to include shipping or aviation, an economy-wide carbon neutrality could be understood to require a more inclusive approach, it is by no means clear that the EU would adopt the most ambitious version of carbon neutrality.

The UK on the other hand proposes in a footnote that climate change should be dealt with in a separate agreement on Energy. I doubt that this will be acceptable to the EU. Otherwise the 'level-playing field' provisions proposed by the UK are not really deserving of that name. They are not establishing a level playing field, rather they prohibit lowering environmental standards similar to provisions found in many other EU FTAs, or even less ambitious because climate change has been taken out of them. I have added the draft CISDL Legal Brief on the different texts to this evidence.

There is one provision in the UK draft which establishes a form of level playing field in the area of SPS.³ Titled equivalence, the UK proposes that both parties should recognise SPS measures as equivalent if the other side can demonstrate that their measures achieve the appropriate level of protection.

² The fundamental provisions in the EU proposal are:

Title III: section 6-7

Article LPFS.2.30: Non-regression of the level of protection

A Party shall not adopt or maintain any measure that weakens or reduces the level of environmental protection provided by the Party's law and practices and by the enforcement thereof, below the level provided by the common standards applicable and targets agreed within the Union and the United Kingdom at the end of the transition period, and by their enforcement.

Article LPFS.2.31: Future levels of protection

Each Party shall seek to increase, in its relevant law and practices and through the enforcement thereof, the level of environmental protection above the level of protection referred to in Article LPFS.2.30 [Non-regression of the level of protection]

Article LPFS.2.34: Climate neutrality and non-regression of the level of climate protection

*1. Each Party reaffirms its objective of achieving **economy-wide climate neutrality by 2050**. 2. A Party shall not adopt or maintain any measure that weakens or reduces the level of climate protection provided by the Party's law and practices, and by the enforcement thereof, below the level provided by the common commitments and targets applicable in the Union and the United Kingdom at the end of the transition period, and by their enforcement.*

³ **ARTICLE 6.12 UK Draft Equivalence 1.** *The importing Party shall accept an SPS measure of the exporting Party as equivalent to its own if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party's appropriate level of protection. The final determination of equivalence rests with the importing Party and shall take into account the respective international standards, guidelines and recommendations of the IPPC, the OIE and the Codex*

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

UK seems not to want to include provisions on climate change since it prefers to have a separate agreement on energy. As indicated, this might well be a deal-breaker for the EU as it is constitutionally bound to agree climate measures.

UK seems not to want specific rules on non-regression of levels of protection nor on commitments regarding future levels of protection. Again, this will not be acceptable to the EU.

EU seeks to achieve common standards with UK, rather than asking the UK to implement EU rules, while the UK underlines its regulatory autonomy. As discussed, the UK agreed to such an arrangement in the May Withdrawal Agreement, so the EU did not see this as too avant-garde.

The EU's proposals set specific goals, for example for carbon neutrality and provide rules on environmental measures such as carbon pricing, while UK's proposal remains silent on this part. In this regard, EU's proposal provides that UK should continue on applying equally effective measures as those enacted under the EU Emission Trading System.

The oversight of the cooperation is left to the proposed Committee on Trade and Sustainable Development and a Panel of Experts as dispute settlement in the UK proposal, while EU proposes a Partnership Council with much larger and wider authorities eg. adopting commitments and targets on climate protection. It still provides for Dispute Settlement with a Panel of Experts yet the Council has a prominent role even before the nascent of a dispute. Again, this might be very important for the EU, if the environment is indeed taken out of the dispute settlement process for trade provisions. Some of the UK's contemplated agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) do include environmental commitments in the dispute settlement provisions.

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 exclusion of climate change rules is a significant point of contention since the EU proposal has very specific and rather significantly binding provisions on climate change especially on non-regression, while the UK proposal strikingly excludes climate change from the Agreement (though this might be because I have no visibility on UK Energy Agreement proposal yet).

The level playing field provision as drafted is essentially a dynamic non-regression provision. It does not bind the UK to EU law and even the EU formulation although called level-playing field read more like a non-regression provision.

The difference in the obligation of non-regression and future levels of protection is bound to be a point of contention especially since those obligations are inextricably linked to the *EU environmental acquis*.

It strikes me as a slightly unusual interpretation of the Political Declaration not to include level playing field provisions in the UK draft.

It should also not be forgotten that the UK has an interest that the EU does not lower its standards either.

Regarding the general environmental measures, the UK proposal operates on a more national level and provides for negative obligations ie not introduced investment friendly measures at the expense of the environment. In contrast, the EU proposal takes the current EU *acquis* as the starting point and provides for positive obligations. It seems that the main point of disagreement will be the level of deference left to the Contracting Parties. UK proposal reserves a larger share of discretion to domestic law making, while EU proposal seeks to ensure non-regression and higher levels of environmental ambition for the future.

The EU proposal places significant emphasis on the Partnership Council which mirrors the Association Council in EU enlargement agreements with non-EU member that wish to accede to the EU. In contrast, the UK proposal contains a much more restrained Committee on Trade and Sustainable Development.

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?

Under the EU's approach, the UK's discretion would be restricted and depend on 'common standards'. But unlike for the EEA, the EU is not proposing automatic adoption of EU rules, rather different shades of equivalence. As such it might not generate a significant impact on UK policy-making, as common standards need to be agreed by both sides. What would be difficult would be a lowering of UK environmental standards in a wholesome fashion which arguably would also not politically very feasible. Differences in approaches leading to the same or higher levels of environmental protection, would be accommodated by this approach.

In this regard, the EU approach includes in the area of environmental protection the following: (i) access to environmental information, public participation and access to justice in environmental matters; (ii) environmental impact assessment and strategic environmental assessment; (iii) industrial emissions; (iv) air emissions and air quality targets and ceilings; (v) nature and biodiversity conservation; (vi) waste management; (vii) the protection and preservation of the aquatic environment; (viii) the protection and preservation of the marine environment; and (ix) the prevention, reduction and elimination of risks to human and animal health or the environment arising from the production, use, release and disposal of chemical substances; and (x) health

and sanitary safety in the agricultural and food sector.

In contrast, UK's proposal reiterates in every instance that the national law and the national legislator has the discretion to adopt and implement its own level of protection. The boundary to that is to a certain extent the pronouncements and obligations under MEAs as well as the commitment not to promote trade and investment at the expense of environmental protection. In addition, the UK proposal does not extend these obligations to specific sectors such as health/sanitary safety in agriculture and food sector.

Under the EU approach, every instance of lowering standards of environmental protection or climate change would provoke a breach which would be resolved by consultations and a subsequent Panel of Experts with the assistance of the Specialised Committee on the Level Playing Field and Sustainability. Its Report shall be appropriately implemented within 3 months, in accordance with the common views of the Parties (discussion on appropriate implementation measures). We note that the EU proposal includes also sanitary measures related to agricultural and food sector in the non-regression obligations.

Under the UK approach, a breach can only be found when it can be proven that the derogation from the level of protection was taken to encourage trade or the establishment, acquisition etc. of an investment; hence, limiting the potential scope of violation significantly. To date mainly labour law related challenges have been successfully brought under FTAs with similar provisions but the burden of proof and threshold are considered very onerous. Should a dispute arise, consultations take place and subsequently a Panel of experts is appointed with the aid of the Committee on Trade and Sustainable Development. Its report is to be adopted within 3 months (after discussions between the parties in order to reach a mutually satisfactory action plan).

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?

The regulatory system of the EU is very sophisticated, and no international standards exist for many important areas. Regarding climate change, no such standard exists that specifically regulates the level of protection. The Paris Agreement leaves the level of protection to domestic regulators. Certain agreements such as the Montreal Protocol of 1987 set minimum standards that may be followed.

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?

I don't see a role for the CJEU after the end of the transition period over common standards. Of course, those standards are open to interpretation by the Court long after the transition has ended and the EU would be bound by

such interpretation and bring it to the joint committee but such interpretations cannot bind the UK. It should also be highlighted that decisions by the Association Councils bind the EU and can generate direct effect inside the EU.

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?

Generally, that depends on whether it has the same legal validity as the Withdrawal Agreement (i.e. could generate direct effect). This is unlikely, so it depends on the validity that Parliament gives it through implementation legislation. Of course, such legislation tends to be interpreted in the light of the international treaty in question and as such general environmental principles could guide interpretation. Future legislation might be judged by the EU by reference to these principles but given that somewhat weaker dispute settlement of environmental provisions, that would be open to legal arguments. Overall, it might be in the interest of the UK also to be able to hold the EU to account, for example when principles of unsustainable fisheries are breached.

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 predominantly non-adversarial procedure as the one proposed by both parties, ie consultations and afterwards a constitution of panel of Experts would ensure a non-confrontational enforcement procedure that provides adequate deference to states to reach commonly acceptable solutions. This is common for environmental agreements relying more on naming and shaming than on judicial decision.

In environmental matters, a strictly legalistic approach ie. a Court's decision is not always the appropriate way to ensure the application of the Agreement as environmental damage is not always remedied by the traditional remedies ie compensation or restitution. Rather, a successful long-term plan requires a constant oversight and flexible implementation.

An innovative approach was choosing in the new US-Mexico-Canada Agreement (NAFTA 2.0). The citizen submission in environmental matters process now forms part of the main agreement and will as such continue. In this information process, citizens can bring it to the attention of the other Treaty parties that they think their country is not enforcing environmental laws. The process is not always successful but has helped to highlight environmental matters in North America.

In this regard, the relevant Committee supervising the commitments such as the proposed by UK Committee on Trade and Sustainable Development or the proposed by EU Specialised Committee on the Level Playing Field and

Sustainability, needs to have a high-level of legitimacy in order to ensure the promotion and enforcement of the commitments and standards set.

Lastly, domestic bodies need to be at place with a high degree of independence, both economic and regulatory, in order to ensure the day-to-day enforcement of commitment at the domestic level. It requires though to have a certain degree of enforcement powers, ie. scrutiny over proposed bills, laws and regulations, either through fines or by having the capacity to initiate judicial proceedings against governmental, public or private bodies, similar to Domestic Competition Authorities that regulate private conduct, state conduct in terms of state-aid and state-owned enterprises/enterprises with special/exclusive rights.

The EU specifically mentions enforcement of common standards.

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

The capacity of the OEP to run its own independent investigations and enforce environmental law, including taking government and other public bodies to court where necessary, as well as its independence from any Ministerial veto seems to satisfy the criteria. It also remains to be seen how open the OEP will handle citizens' complaints – if it will be free to use as DEFRA announced in October 2019, that element will satisfy the EU proposal. The exclusion of climate change from the OEP would be problematic.⁴

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

Ultimately it will be the responsibility of the UK to ensure that all requirements are met and any deviation by the devolved administrations could lead to a treaty violation by the UK. While I cannot comment specifically on the devolved administrations preparations, the current Scottish proposals concerning independence and the inclusion of climate change, appear to be compliant with this obligation.

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?

Given that the current levels in my view don't prevent ambitious trade deals with other countries, it is unlikely that this would occur in the future. The

⁴ Article LPFS 2.32“*The independent body shall have powers to conduct inquiries on its own initiative concerning alleged breaches by public bodies and authorities, and to receive complaints for the purposes of conducting such inquiries. It shall have all powers necessary to carry out its functions, including the power to request information. The independent body shall have the right to bring a legal action before a competent court or tribunal in an appropriate judicial procedure, with a view to seeking an adequate remedy*”

common standards would only apply to the UK if agreed. Some areas are problematic with the USA – GMOs and most animal welfare standards but in these areas, the UK has international legal commitments, such as the Cartagena Protocol preventing wide-reaching deregulation.

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?

Indeed, non-regression would prevent that but so does the UK-South Korea FTA.

The UK will not be restricted in adopting its own trade agenda. However, the proposed common rules on state-owned enterprises, competition and state-aid could pose some level of restriction to the degree that UK could not circumvent these obligations via a different trade deal.

In addition, the non-regression obligations on environment, climate change, labor and health restrict a possible UK option to strike an FTA at the expense for example of food safety standards or labor standards. The same applies for FTAs that involve a regression to tax avoidance standards. Domestic product standards could certainly be covered by level playing field provisions and to make it very clear: Product standards cannot be addressed by lower tariffs.

Under the EU proposal and in specific Article LPFS 2.30 and 2.31 it is prohibited to lower the standards of protection that relate to health and sanitary safety in food sector. Hence, even dual-tariff regimes shall be allowed under the EU proposal. In this regard, a different tariff treatment would not be able to circumvent the obligations under these Articles. If we examine the practice/jurisprudence of WTO in SPS Agreement, the examination of level of protection requires a technical analysis of the risk associated with each measure. Differential treatment, ie different instruments would be allowed as long as they do not lead to different levels of protections, eg. Article 5.5 SPS as interpreted among else by Appellate Body in Australia-Salmon. Should the increased tariff treatment lead to the same level of protection as the sanitary standards on other products, then 2.30 would not be violated. We clarify that this is very difficult to substantiate as an increased tariff treatment cannot substitute increased sanitary or consumer protection standards, unless the tariff leads to a higher price or directly competitive price with the higher standard products or there can be specific evidence that high consumer/sanitary standards constitute the predominant element that shapes the competitive dynamics between the products; hence a possible entry of a lower standard product with reduced price would win market shares.

In contrast, the UK proposal does not seem to include such non-regression obligations. It is noted though that should the decrease of standards be related to labor or the environment, there would be a violation of the relevant provisions especially since those dual-tariff regimes would most probably be enacted as a way to promote trade with specific lower standards trade partners.

Dual tariffs are highly problematic if a process or production method (ppm) such as animal welfare is part of the standard. This would then seem discriminatory under WTO law.

Room for agreement

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

The EU's proposal is different from any previous FTA agreed by the EU with any non-European partner. It is much more ambitious. On the other hand it is much more deferential to the UK than any other EU association agreement (such as EEA or Ukraine or Turkey).

Non-regression will be very important. Rather than wasting time on trying to convince the EU otherwise, it would make sense to negotiate a continued participation of the UK in say the ETS with an emergency break or optout clause.

The UK should conduct an environmental impact assessment of its trade agreement with the EU (similar to the SIA that the EU conducts for its FTA negotiations).

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

The parties could agree to non-regression but perhaps a less legally binding commitment to common standards.

The participation in beneficial climate/energy/environmental legislation to which the UK is invited/must be invited. This will also be important with a view to replacing the Northern Ireland Protocol.

The parties could formulate common visions for the international level and perhaps even consider joint FTAs between the EU, the UK and a third country.

The UK does not want to be obligated to maintain the entire acquis of EU environmental law. Full participation in the ETS, without implementation of all EU environmental laws but maintaining some level of equivalence and, most importantly, creating an independent supervisory institution, could constitute a way forward.

Even better, both Parties could choose to safeguard strong climate legislation within a side agreement or a chapter of a new UK-EU trade deal. Existing FTAs provide plenty of inspiration. A combination of the most robust provisions – that ensure full compliance with the Paris Agreement and the highest level of ambition – has the potential to blaze a trail for deep climate cooperation in future free trade agreements, potentially for all Paris Agreement Parties around the world.⁵

⁵ Markus Gehring and Freedom-Kai Phillips, 'Legal Options for Post-Brexit Climate Change and Energy Provisions in a Future UK-EU Trade Agreement' (European Climate Foundation Paper, 2019) available online: <https://www.cisd.org/2019/07/26/legal-options-for-post-brexit-climate-change-and-energy-provisions-in-a-future-uk-eu-trade-agreement/>.



Briefing 4: The UK's Draft Position Exploring the basis for negotiation with the EU

Marios Tokas and Markus W. Gehring*

Executive Summary

Examination of the current state of UK-EU trade negotiations can yield insight into how the post-Brexit trade picture will be realised. A principal instrument in this process is the UK's Draft Brexit Agreement bill. This paper outlines the sustainable development elements of the UK proposal in comparison to the current EU proposal and practice in previous free trade agreements (FTAs) to provide insights into areas of convergence and divergence. It is noted that the EU proposal is much more ambitious in terms of its level of cooperation and

Introduction

As the Brexit process advances greater technical clarity is gained, in particular through exchange of draft withdrawal agreements. While each provides a stand-alone picture of negotiation positions, comparative insights can be drawn on points of convergence and divergence. This paper offers an initial tentative review of the UK⁶ and EU draft agreement texts⁷ on matters relating to the environment with the aim to identify constructive ways forward.

Preambles

Neither the UK Draft Brexit Agreement, nor the EU Draft, provides a publicly available preamble. This follows in the vein of the available draft EU-Mercosur Trade Agreement, which also does not include a preamble. In contrast, CETA, EU-Singapore FTA, EU-South Korea FTAs, EU-Vietnam FTA and EU- Japan Economic Partnership Agreement include lengthy preambles that refer, inter alia, to issues of sustainable development.

Across EU FTA practice, there are only small divergences in the relevant preambular texts.⁸ Notably, the EU-Japan, EU-Singapore and EU-Vietnam FTAs all highlight the importance of pursuing environmental objectives relevant for achieving sustainable

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⁶ UK Government, Draft UK-EU Comprehensive Free Trade Agreement, available online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886010/DRAFT_UK-EU_Comprehensive_Free_Trade_Agreement.pdf.

⁷ EU Commission, Draft text of the Agreement on the New Partnership with the United Kingdom, available online: <https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf>.

⁸ See recent comparison of the environmental obligations found in EU FTA chapters on sustainable development and the environment in the EU-Japan Economic Partnership Agreement, CETA (which contains two separate chapters), EU-Japan FTA, EU-Singapore FTA, and EU-South Korea FTA by Markus W. Gehring, Christian Delev & Freedom Kai Phillips, Assessing EU FTA Environmental Obligations: Putting The Draft EU-Mercosur Trade Agreement Into Perspective (CISDL Working Paper, 2020).

development within the Contracting Parties' 'economic, trade and investment relationships'. Recent FTAs, however, ascribe varying weight to the importance of a 'social' dimension, which may include the role of society in achieving environmental objectives. For instance, preambles may be restricted the scope to merely allude to the importance of labour rights as a separate sustainable development objective. Only the EU-South Korea FTA makes reference to the protection of natural resources.

Environment and Sustainable Development

The UK draft provides in Article 26.1:

"The Parties [...] reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations. [...] The Parties [...] recognise the contribution that international trade could make to full and productive employment and decent work for all and commit to consulting and cooperating as appropriate on trade-related labour and employment issues of mutual interest".

Inclusion of objectives in specific chapters is similar to the EU-Japan Economic Partnership and the Draft EU-Mercosur Trade Agreement.

In contrast, the EU Draft integrates the sustainable development goals into the general principles and objectives of the proposed Agreement, as evidenced in Part I Title I Article 5 on the Fight Against Climate Change. This technique is also manifested in Title III of Chapter 2 that includes issues of sustainable development and considerations on levelling the playing field through competition law and taxation. As such, the EU Draft includes important provisions on Labour, Environmental Health, Climate Change and other instruments for trade and sustainable development.

For example, Article 1.1 of Chapter 1 of Title III of the EU Draft provides:

"1. The Parties recognise that the establishment of conditions that ensure a level playing field between the Parties is necessary for trade and investment between the Union and the United Kingdom to be conducted within an environment of open and fair competition and in a manner that is conducive to sustainable development.

2. The Parties recognise that sustainable development encompasses economic development, social development and environmental protection, all three being interdependent and mutually reinforcing and affirm their commitment to promote the development of international trade and investment in a way that contributes to the objective of sustainable development."

Hence, we see that the UK Draft imitates mostly a regular EU FTA while the EU Draft attempts to establish a level playing field, similar to the arrangements with other EU partner countries in close geographical proximity such as EEA, EFTA or the EU Association Agreement between the EU and Monaco, Andorra and San Marino.

The Chapter on Sustainable Development in the EU Draft is also much more comprehensive including provisions on forests, biodiversity and climate change. Neither draft subjects its sustainable development chapter to normal dispute

settlement procedures. However, while the EU Draft contains recourse to dispute settlement through an expert panel process, the UK Draft merely proposes diplomatic means by way of a Committee on Trade and Sustainable Development.

Implementation of Multilateral Environmental Obligations

General Provisions on Multilateral Environmental Obligations

Chapter 28.2 of the UK Draft upholds “the environment [as] a fundamental pillar of sustainable development,” while recognising the contribution of trade toward sustainable development. Associated obligations toward environmental protection are similar to those of the Draft EU-Mercosur Trade Agreement, but provide a wider basis for cooperation and institutional mechanisms.

In contrast, the EU Draft more comprehensively recognises environmental obligations through a series of Articles such as 1.1, 1.2, 2.30-2.48 (LPFS). These can be viewed as an aggregated sum of all relevant environmental obligations found in provisions across EU FTAs.

Outlined Areas of Specific Focus

The UK Draft does not specify the area of its application beyond the broad categories of trade favouring sustainable development (28.9) and trade in forest products (28.10). This is a shared characteristic of FTAs such as EU-South Korea and the EU-Japan Economic Partnership Agreement. In contrast, the EU Draft provides for a series of specific areas: Climate Change (Article LPFS.2.34, 2.42), Environment and Health (2.30-2.33 LPFS), Biological Diversity (2.43 LPFS), Trade and Forest (2.44 LPFS), Trade and Investment Favouring Sustainable Development (2.46 LPFS), and Responsible Supply Chain Management (2.47 LPFS).

Climate Change

On climate change, the UK Draft seems to relegate the issue to a future Agreement on Energy, as mentioned in the Services trade chapter. Accordingly, the Draft does not contain any substantive climate provisions or proposals drawing on previous EU FTAs, or even other FTA language.⁹ Yet, the lack of such provisions in the UK Draft is hard to explain because the economic drivers of climate change extend far beyond the contours the energy sector. Indeed, as the EU Draft notes, “[climate change] covers emissions and, where applicable, removals of greenhouse gases and ozone depleting substances. This includes emissions and removals from, in particular, industrial installations, transport, land use and forestry, and agriculture” (Art. 2.34 EU Draft).

In the EU Draft, the collective goal of combatting climate change is elevated to a guiding principle informing the operation of the entire treaty. A strongly worded provision with mandatory language that binds both sides, Art. COMPROV.5 states:

“The Parties consider that climate change represents an existential threat to humanity and reiterate their commitment to strengthening the global

⁹ Markus Gehring and Freedom-Kai Phillips, ‘Legal Options for Post-Brexit Climate Change and Energy Provisions in a Future UK-EU Trade Agreement’ (European Climate Foundation Paper, 2019) available online: <https://www.cisd.org/2019/07/26/legal-options-for-post-brexit-climate-change-and-energy-provisions-in-a-future-uk-eu-trade-agreement/>.

response to this threat. The fight against man-made climate change as elaborated in the United Nations Framework Convention on Climate Change (UNFCCC) process, and in particular in the Paris Agreement, inspires the domestic and external policies of the Union and the United Kingdom.”

The EU Draft also includes in Art 2.42 a dedicated provision in the main agreement. It recognises the importance of combating climate change (as did the Political Declaration in paras. 18, 75 & 76). As with many other EU FTAs, the EU Draft commits both parties to “effectively implement the United Nations Framework Conventions on Climate Change, and the Paris Agreement of 2015 adopted thereunder.” This content can be traced to the EU-Japan Agreement, which was the first FTA to contain a comprehensive commitment to implementing the Paris Agreement. Under EU-Japan, each party to commits to work together to realise UNFCCC aims, take steps to meet Paris objectives, and promote trade as a means of reducing greenhouse gas (GHG) emissions and achieving climate-resilient development. Likewise, the EU Draft provision also envisions a transition to a low GHG economy and climate resilient development. The Draft additionally deploys innovative language, extending climate commitments to encompass EU-UK cooperation on:

“Trade-related aspects of climate change policies and measures bilaterally, regionally and in international fora, as appropriate, including in the UNFCCC, the WTO, the Montreal Protocol on Substances that Deplete the Ozone Layer, the International Maritime Organisation (IMO) and the International Civil Aviation organization (ICAO)” (Art. 2.42 para. 3 EU Draft).

The EU Draft also commits both the UK and the EU to climate neutrality by 2050, and incorporates a strong operational obligation of non-regression of the level of climate protection:

“A Party shall not adopt or maintain any measure that weakens or reduces the level of climate protection provided by the Party’s law and practices, and by the enforcement thereof, below the level provided by the common commitments and targets applicable in the Union and the United Kingdom at the end of the transition period, and by their enforcement” (Art. 2.34).

Finally, the EU Draft refers to existing commitments and targets beyond the transition period, such as nationally determined contributions under the Paris Agreement and scale up of ambition over the long-term. It also commits both sides to maintain carbon pricing policies, requiring the UK to institute measures “of at least the same scope and effectiveness as provided by the EU Emissions Trading System” (Art. 2.35 EU Draft). From an environmental perspective, it would be useful to also include a provision committing the EU to more ambitious carbon pricing in future.

Express MEA references

The UK Draft refers to and recalls commitments toward a number of international agreements, including the Rio Declaration on Environment and Development (1992); Agenda 21 on Environment and Development (1992); the Johannesburg Declaration on Sustainable Development (2002); the Plan of Implementation of the World Summit on Sustainable Development (2002); the Ministerial Declaration of the

United Nations Economic and Social Council on creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development (2006); and the ILO Declaration on Social Justice for a Fair Globalisation (2008). This should be considered as generally helpful as it can aid in the interpretation but it should be noted that all these documents are considered non-binding international declarations, without a clear reference for example to the Sustainable Development Goals (SDGs).

The EU Draft, meanwhile, upholds the UFCCCC and, in particular, Paris Agreement obligations as a guide for “domestic and external policies of the Union and the United Kingdom”(2.42), while additionally integrating core principles codified in the Rio Declaration, including the prevention principle, precautionary approach, and polluter pays principle (2.30).

In addition, the EU Draft recognizes Agenda 21 (1992); the Johannesburg Plan of Implementation of the World Summit on Sustainable Development (2002); the ILO Declaration on Social Justice for a Fair Globalisation (2008); the Outcome Document of the UN Conference on Sustainable Development of 2012 entitled "The Future We Want"; and the UN 2030 Agenda for Sustainable Development.

Furthermore, the EU Draft introduces obligations consistent with Convention on Biological Diversity (CBD) and its protocols, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (2.43) and recognises the importance of the UN Environment Assembly (UNEA) of the UN Environment Programme (UNEP) and multilateral environmental governance and agreements such as the Montreal Protocol on Substances that Deplete the Ozone Layer (2.42).

The UK Draft appears more restrictive in its recognition of border international environmental agreements and instruments when compared to the EU Draft. In this respect, the UK Draft is consistent with the EU-South Korea FTA and the Draft EU-Mercosur Trade Agreement, which detail limited interlinkages with international environmental regimes.

Obligations not to Weaken Standards

The UK Draft provides that the parties should not weaken or reduce their protection standards in terms of environmental law (Article 28.5). In addition, it provides that:

“Each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection”
(Article 28.3).

Going beyond this lowest common denominator, the EU Draft requires non-regression in the level of protection under each of its focus areas, such as climate change and environmental health (e.g., LPFS 2.30 and LPFS 2.34). The EU Draft thus provides more extensively and expressly that the Parties should increase their future levels of environmental protection (e.g., LPFS 2.31) and contains a dynamic common minimum standard provision.

Conclusions

In sum, the UK Draft, in drawing narrowly from some previous EU FTAs, does not contain far-reaching commitments toward sustainable development beyond broad facilitation and cooperation provisions. Most of the more recent EU FTAs, including the UK's roll-over agreements (i.e., UK-South Korea FTA), contain more ambitious sustainable development provisions and chapters.

In contrast, the EU Draft contains firm non-regression provisions, though with a tendency only to commit the UK to non-regression, and much more detailed provisions on all aspects of sustainable development. The Draft establishes a legally binding connection between to MEAs and their domestic implementation as pre-conditions for trade liberalisation. It also introduces a series of specific obligations in relation to various aspects of sustainable development such as forests, biodiversity, climate change and the low carbon economy.