Dr Mary Dobbs and Dr Viviane Gravey, from Queen's University Belfast and Dr Ludivine Petetin from Cardiff University – Written evidence LPF0012

This evidence is written by Dr Mary Dobbs and Dr Viviane Gravey, from Queen's University Belfast and Dr Ludivine Petetin from Cardiff University. Ludivine Petetin and Mary Dobbs are respectively Senior Lecturer and Lecturer in Law with expertise in agri-environmental issues and are currently writing a book on Brexit and Agriculture. Dr Viviane Gravey is a Lecturer in European Politics, co-chair of the Brexit & Environment network, which brings together academics analysing how Brexit is affecting the UK and EU environments. All three have and are engaging with stakeholders across the UK on the impact of Brexit.

Introduction

- In our evidence, we are primarily focussing on questions 8-12 and 14. Regarding the initial points, we would note the following: beyond considerations of stewardship, moral duties to protect nature and conserve the planet, the state of the environment is of fundamental importance to the continued health and life of people. Protecting the environment is for everyone's benefit.
- Whilst the economy and trade form significant parts of human society and contribute to numerous valuable goals, we must not sacrifice the environment (leading to both short and long-term harms) in order to facilitate trade deals. It is possible to achieve both, even if the most lucrative deals are excluded as a result. By not being willing to guarantee high standards of environmental protection (or similarly regarding animal welfare and food standards) and seeking to maintain flexibility on this front for trade negotiation purposes, the implication is that the UK is willing to compromise and sacrifice the environment (and human health objectives). If it is there as a bluff, that speaks volumes also about our society and potential trading partners.
- Furthermore, every State, including the UK, has (moral and legal) responsibilities to others elsewhere in the world (and to future generations) and ought to be caring how actions elsewhere might impact within the UK also. Due to the permeable nature of the environment, the potential for transboundary impacts and indeed the potential for actions in one part of the world to impact upon the environment in an entirely different part of the world, we cannot presume that localised approaches suffice or for instance that individual sources of pollution will only harm that specific locality. Migratory birds and animals exemplify this, as if habitats are destroyed in one location then the species is threatened despite the conservation steps taken in another location. Similarly, air pollution and water pollution spread easily and can lead to significant transboundary harms. This can also be cumulative and take a long time to materialise, as exemplified by climate change – where global cooperative actions are required to help mitigate and reverse the situation.
- From a **legal perspective**, the land and sea borders with neighbouring States are particularly important to bear in mind – besides specific legal obligations under Conventions, e.g. regarding transboundary waters,

transboundary waste, transboundary living organisms etc, there is also simply the principle of non-transboundary harm under customary international law. Although more challenging to enforce and typically vaguer than within domestic or EU law, some legal obligations already exist.

- In sum, the UK could negotiate specific standards, processes, enhanced levels of protection, specific ambitious targets etc, but to use the environment (animal welfare or food standards) as a **bargaining chip** to the point of being willing to reduce existing standards and not meet existing commitments is foolhardy, self-defeating and wrongfooted. Similarly, it has the opportunity to demand that the EU match those standards and not gain any potential competitive advantage. The future relationship can therefore be mutually harmful or beneficial.
- From the EU's perspective – EU environmental law emerged in the 1970s and 1980s hand in hand with the establishment of the Common then Single Market. One of the main rationales for EU environmental action has been to establish a level playing field – **environment and trade issues are intimately and inextricably linked for the EU**.
- There is a serious concern that if there is effectively a hard Brexit (with the exception of the NI Protocol) or a very basic future relationship agreement that does not facilitate easy access to the EU markets, extra pressure may be placed on producers/industry and that corners may be cut in order to remain economically viable – the UK currently has the choice as to how to negotiate, but the consequences of those negotiations may eliminate any choice for individuals and push them towards **environmentally harmful behaviours**.

Non-regression

8. *Both the EU and UK have included clauses on upholding levels of environmental protection, what are the implications of the different approaches?*

- There are four main differences in the EU and UK approaches to non-regression: terminology, scope, dynamic v static and level of constraint. First, a difference in **terminology**: there is no mention of non-regression and level playing field in the UK document, whereas it forms the core of the environmental chapter in the EU document. Instead, the UK document, whose environmental section is a copy/paste from CETA provisions speaks of 'upholding levels of protection'.
- Second, there is a marked **difference in scope** in terms of environmental issues covered. Comparing Article LPFS.2.30 (EU document) and Article 28.1 shows the EU favours a wider scope of environmental protection measures, including for example, the Aarhus Convention rights of 'access to environmental information, public participation and access to justice in environmental matters', as well as 'environmental impact assessments' or the 'health and sanitary safety in the agricultural and food sector' all of which are out of the scope of Article 28.1 (UK document).
- Third, the UK document favours a **static approach** to upholding *current* levels of environmental protection with aspirational text for future policies, while the EU approach favours a dynamic, 'ratchet' system in which future advances in environmental protection could not be undermined (see

Article LPFS.2.31'neither Party shall weaken or reduce its level of environmental protection below a level of protection which is at least equivalent to that of the other Party's increased level of environmental protection'.

- Fourth, in the **level of constraint** on both parties – with the UK text favouring less constraining wording. Thus, on current protection, article 28.5 considers environmental dumping, where policies would be weakened to encourage trade or investment as 'inappropriate'. Reducing environmental protection is only discussed (and 'inappropriate') in the context of encouraging trade or investment. Conversely, the Article LPFS.2.30 states clearly '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'. This non-regression requirement is not simply built on concerns of environmental dumping but on shared environmental principles (non-regression has an environmental purpose too). Similar differences in constraints are found for future policy. While the UK text contends 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), the EU is much more direct "Each Party shall seek to increase, in its relevant law and practices and through the enforcement thereof, the level of environmental protection".

    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?*

- Under the EU's approach, if both UK and EU had increased environmental protection in a similar fashion, a subsequent UK government could not reduce environmental protection below the new, higher levels of EU/UK protection. The environmental level playing field can only rise – and if it has risen on both sides, this forms the new baseline for both parties. Under the UK's approach, upholding environmental standards only matters in the context of encouraging trade and investment – weakening or reducing environmental protection if it had no impact, or no intended impact on trade or investment remains possible.
- Discussions of Level Playing field further have a strong devolution dimension. There has been little progress on internal rules of the game (so called 'common frameworks' and IGC reform) for the UK's own Internal Market, with risks of environmental dumping within the UK, not only between the UK and the EU. If the UK were to sign up to LPF requirements as envisaged by the EU this would constrain the actions of all four UK administrations. As Northern Ireland is already bound by some EU environmental standards under the UK-EU Withdrawal Agreement, strong LPF commitments will reduce risks of divergence and added costs for trading between NI and GB – not to mind arguably reducing the 'risk' of products being smuggled into Ireland and thereby the EU, thereby reducing the need for extensive checks and potentially customs on imports from GB into NI under the Protocol.

9. *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?*
    c. *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)?*

- Basing the future agreement on UK/EU common standards would be preferable on a practical basis for both the EU and the UK since these standards are already existing in the respective legal systems and regulatory bodies, administrators and businesses are familiar with them – therefore creating certainty.
- If the common standards are based on EU law or contains references to EU law, the CJEU would have to rule since the CJEU is the ultimate arbiter of EU law. An agreement could also be found that a separate dispute resolution system will be created to address any issues regarding interpretation or enforcement but consequently it would not be able to refer to EU law.
- The agreement could also rely on standards used in other international agreements. This is what the WTO does for example in the SPS Agreement and TBT Agreement. These agreements rely on standards set by other (non-WTO) international bodies as a basis for their harmonisation, such as the FAO/WHO Codex Alimentarius Commission, the World Organisation for Animal Health (OIE - Office International des Epizooties) or the FAO International Plant Protection Convention.

Environmental principles

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?*

- In considering this question, it is important to bear in mind the difference between the status quo (de facto EU membership still) and various domestic propositions for environmental governance post-Brexit. Currently, EU environmental objectives and principles are part of the binding law in the UK. This includes sustainability and a high level of environmental protection as broad overarching objectives, found in the Treaty on the Functioning of the EU and also case-law of the CJEU. It also includes the 4 traditional core environmental principles (prevention, precaution, polluter-pays and proximity), as well as the 3 principles (and rights) based in the Aarhus Convention (regarding the role of the public in environmental decision-making, access to justice and access to environmental information), as reflected in the EU's proposal. Together these underpin EU environmental law and therefore they also underpin the domestic implementation, interpretation and enforcement of the EU environmental law – with the CJEU playing the final arbiter as to what this involves, but the national courts playing the intermediary role also. All actors are bound by these. National legislation, policy, decisions etc must all comply with EU law, including as interpreted in light of these objectives

and principles. They apply at every stage of decision-making and governance.

- If the principles (and objectives) were included in a UK-EU agreement, this would entail effectively a **continuation of the legal obligations to apply them**. All individuals, administrative agencies, courts etc would need to interpret the relevant law and evaluate decisions in light of the principles. Although the source of law would change (from the TFEU/EU acquis to an international treaty), they would remain binding on the UK (although requiring incorporation from a domestic perspective, since the UK is a dualist legal system). As they are also EU principles and are currently 'common principles', it is likely the EU would want the CJEU to remain the final arbiter on interpretations – at the least, the CJEU would be interpreting these principles for the EU in their application and if the UK were to take a differing interpretation with a conflicting approach, this might raise significant issues as with any other potential conflict. This would also have intra-UK consequences, as the UK Withdrawal from the European Union (Continuity) (Scotland) Bill introduced in Holyrood this month states Scottish ministers must have regard to the CJEU interpretation of these principle.[1]However, this is a significant difference from what is being proposed currently in the UK's Environment Bill 2019. We have previously critiqued this Bill and its predecessors at length.[2] There are various components to it, but we will simply consider the aspect focussed on principles here. Whilst it is positive to see a separate Bill being created, there are several issues, e.g. 1) it does not apply to the UK as a whole, but primarily to England and to NI (Stormont granted legislative consent at the end of June and chose to have relevant provisions apply to NI); 2) the principles will be enshrined effectively in a policy statement, rather than in primary legislation (detracting considerably from their force and allowing them to be changed at all times); 3) the principles are limited in their role, with only Ministers to have 'due regard to' the policy statement; 4) and the principles are more limited in their scope/nature. Consequently, the domestic proposals are much weaker and somewhat narrower than under the existing law.
- In short, encompassing them within the agreement would involve a continuation of their current role to a great extent and help further a high level of environmental protect, sustainability and non-regression. Excluding them and relying solely upon the current domestic proposals would lead to a significant watering down of environmental governance.

Enforcement and dispute resolution

[1] Reid, C. 2020 Environmental principles, governance and alignment in Scotland: The new Continuity Bill https://www.brexitenvironment.co.uk/2020/06/24/environmental-principles-governance-alignment-scotland-new-continuity-bill/

[2] E.g., Charlotte Burns, Viviane Gravey and Mary Dobbs, invited evidence to NI's AERA committee's inquiry on the Environment Bill, February 2020, https://pureadmin.qub.ac.uk/ws/portalfiles/portal/201134740/Evidence_on_the_UK_Environment_Bill_for_AERA_NIA._Brexit_and_Environment_Network._Feb_2020.pdf. For a critique of the earlier approach in the 2018 Bill which is largely applicable in the current 2019 Bill, see Mary Dobbs, 'Environmental Principles in the Environment Bill', https://www.brexitenvironment.co.uk/2019/01/30/environmental-principles-environment-bill/.

11. *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?*

- The EU's proposal requires compliance by the UK as a whole and domestic measures to ensure this. Due to complexities posed by devolution, the proposed OEP does not extend to the entirety of the UK. Whilst the EU's proposal provides for the investigatory and enforcement role to be played by one or more independent bodies, thereby opening up the potential for individual devolved bodies (entirely separate or as part of a collaborative whole/satellite system), this is not currently the case either. Consequently, simply based on the geographical scope of the OEP, it will not suffice as it currently stands.
- Furthermore, the proposal outlines specific powers that the bodies must have. The 2019 Environment Bill has enhanced the powers to be granted relative to the previous Bill, e.g. investigative powers and the powers to initiate litigation. However, it is worth noting that whilst the OEP can receive complaints, it cannot do some from those who hold public functions – which seems an unnecessary and problematic limitation.
- The EU proposal also requires that litigation by the independent body/bodies be with a view to seek 'an adequate remedy'. It is questionable whether the powers and remedies outlined in the Environment Bill for the OEP are adequate in respect of actions by the State/arms of the State.[3] Even if the 2019 Bill were amended, much would also depend on how the courts approached such actions and the flexibility they might show in ensuring compliance – something made more challenging by Parliamentary sovereignty and the tenets of judicial review.
- Each devolved administration would require its own OEP (or equivalent thereof), in some form or other. For political, legal and practical reasons, simply having a UK version with only tokenistic membership from the devolved administrations would not be appropriate. Hence, either a truly UK-wide version with satellite offices in each part of the UK might be appropriate or alternatively devolved bodies with close cooperation.[4]
- The courts would need to be able to undertake an effective substantive review of decisions. Remedies would need to include being able to set aside domestic measures and potentially impose fines upon not only private individuals (achieved under the general system with roles for the environmental agencies rather than the OEP/similar bodies) but also on the arms of the State. There has to be a deterrent for breaches by the State/public actors also.

Trade deals with the rest of the world

12. *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?*

[3] E.g. Maria Lee, 'The Environment Bill – a framework for progressive environmental law?', 18th October 2019, https://www.brexitenvironment.co.uk/2019/10/18/framework-progressive-environmental-law/.

[4] Burns, C. et al. Environmental Policy in a devolved United Kingdom: Challenges and opportunities after Brexit, October 2018 https://www.brexitenvironment.co.uk/wp-content/uploads/2018/10/BrexitEnvUKReport.pdf

- International obligations emanate often from multilateral environmental agreements. The UK has ratified many of these legal instruments and is legally bound by them. Many of these instruments include measures which effectively restrict trade such as the reporting or monitoring requirements, mandatory labelling. This monitoring and controlling of trade in products is required where the uncontrolled trade would lead to or contribute to environmental damage.
- Beyond legal obligations (i.e. hard-law), there are also soft-law instruments, such as guidelines, which also creates 'voluntary' common standards. Examples of these are the WHO and FAO's Codex Alimentarius relating to food labelling, food hygiene, food additives and pesticide residues or the ISO certification from the International Organization for Standardization to ensure safety, reliability and good quality of agri-food products. These technically set voluntary standards or guidelines but effectively create hard obligations followed by most countries and companies in the world. Again, the UK will not be able to go below these 'obligations'.
- The level playing field between the UK and the EU will impact on other trade deals to varying extents depending on the type of the level playing field finally agreed by the EU and the UK. If the final agreement is based on international standards, agreeing other trade deals would be easier. However, if the agreement is based on non-regression or equivalence, there could be issues with trading with the rest of the world that has different (potentially lower) standards.
- To trade with different partners with different standards, UK businesses will have to adapt their supply chains to the requirements of these different markets. This will place extra costs, time and pressure on SMEs and potentially place them at a disadvantage.
- Thinking in particular about the UK/US trade deal, it is important to bear in mind that the basis to create environmental standards (broadly defined) differs between the two systems: the UK adopts the precautionary principle whilst the US relies a risk-based approach – as seen with the regulations around genetic modification, gene editing, growth hormones, pesticides use and antibiotics use in livestock. Similarly, the US often will focus its regulation on the final product rather than the process according to which a food is made (for example GM, gene editing or cloned food).
- Farmers have been concerned about the possibility of lowering standards in future trade deals (barring the one with the EU) as demonstrated by the recent NFU petition or unsuccessful amendments to the Agriculture Bill.
- Another mechanism for the UK to maintain high standards but still trade with other countries is to facilitate regulatory cooperation between different trading partners – as demonstrated in CETA and USMCA. Relying on regulatory cooperation when drafting regulations through good regulatory practices, harmonisation equivalence, international standards and mutual recognition could decrease regulatory divergence amongst trading partners.
- As mentioned above, it is crucial for the UK to think about the level of environmental, animal welfare, climate and food standards it wants to maintain.

Reaching an agreement

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

- Including objectives and principles, including non-regression, without linking then into specific mechanisms might be a suitable way to achieve an acceptable compromise – one where the overall level of environmental protection is maintained, but flexibility is introduced as to the means of achieving this. This would leave open to the UK greater flexibility in other negotiations, whilst ensuring high standards.
- Specific requirements may be made mandatory for any products being put on the market for the use in the environment and for human consumption such as mandatory labelling or premarket authorisation building greater flexibility. In contrast, too much flexibility in the system could be difficult to enforce and could for instance make fraud more likely.
- Overall, the UK could still agree higher regulatory standards to be maintained with the EU but may still import products made with different (and potentially lower) standards provided they were not put into circulation in NI and the rest of the EU. Consequently, standards in GB could be lowered to strengthen the competitive advantages of GB businesses (including farmers) against non-EU products. The difficulty is the practical pressures (time, costs and knowledge) that this would put on domestic farmers/industry (having to cater for different regulatory system) and the environmental and climatic consequences that such choices would have, along with concerns for the consumers.