LEGAL OPTIONS FOR POST-BREXIT CLIMATE CHANGE AND ENERGY PROVISIONS IN A FUTURE UK-EU TRADE AGREEMENT

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INTRODUCTION

International trade of goods and services has become an important determinant of natural resource depletion and environmental degradation.[1] In 2016, the European Union (EU) accounted for 48% of goods exported from the United Kingdom (UK), while goods imported from the EU were worth more than goods imported from the rest of the world combined.[2] Trade between these two regions may continue at – or close to – this level post-Brexit. However, there is a need for fresh legal analysis, backed by a supportive community of practice, that considers how to maintain high environmental standards within any such trade agreement.

By seeking to harmonise economic growth, environmental sustainability and social objectives, a future cooperation, link or trade agreement could help to ensure that: the UK continues to meet its domestic commitments to climate change; the EU meets its commitment to sustainable development as an operating principle; and both regions contribute towards the achievement of the Sustainable Development Goals (SDGs) and the Paris Agreement.

This special opportunity arises because climate law and regulations are currently aligned between the EU and the UK. A previous study conducted by CISDL also demonstrates that trading partners are increasingly using creativity to underline climate change and energy as a priority in their trade and investment relationships.[3]

In this paper, we analyse current climate and energy provisions in the draft Withdrawal Agreement and draft Political Declaration, alongside five potential models for future UK-EU climate policy. We then examine examples of climate change and energy provisions in existing bilateral and multilateral trade agreements and propose how the Brexit deal could – with changes – set a new gold standard.

CURRENT PROVISIONS

WITHDRAWAL AGREEMENT

The current draft Withdrawal Agreement already contains rules designed for the backstop, which fosters close climate and other cooperation as a joint customs territory. Annex 4, Part Two on Environmental Protection contains a non-regression clause in Article 2:

> *"Non-regression in the level of environmental protection: 1. With the aim of ensuring the proper functioning of the single customs territory, the Union and the United Kingdom shall ensure that the level of environmental protection provided by law, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period in relation to: access to environmental information, public participation and access to justice in environmental matters; environmental impact assessment and strategic environmental assessment; industrial emissions; air emissions and air quality targets and ceilings; nature and biodiversity conservation; waste management; the protection and preservation of the aquatic environment; the protection and preservation of the marine environment; the prevention, reduction and elimination of risks to human health or the environment arising from the production, use, release and disposal of chemical substances; and climate change."*

This type of non-regression clause counts as one of the most comprehensive versions of such a clause in a trade agreement and should be welcomed. However, serious questions remain about whether standards would keep apace with the rest of the EU27 in future, and whether the rules would be properly and independently enforced because of uncertainty over the powers, scope and independence of the British government's proposed new Office for Environmental Protection.

More concretely, this same Article 2 also contains commitments to:

> *"4. The Union and the United Kingdom shall take the necessary measures to meet their respective commitments to international agreements to address climate change, including those which implement the United Nations Framework Conventions on Climate Change, such as the Paris Agreement of 2015.*
>
> *5. The United Kingdom shall implement a system of carbon pricing of at least the same effectiveness and scope as that provided by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community.*
>
> *6. The Union and the United Kingdom reaffirm their commitment to implement effectively the multilateral environmental agreements to which they are party in their laws, regulations and practices.*
>
> *7. Articles 170 to 181 of the Withdrawal Agreement shall not apply in respect of disputes regarding the interpretation and application of this Article."*

The concrete commitment to carbon pricing and full Paris Agreement implementation is relatively rare in a trade agreement and should be welcomed. However, full participation in the EU Emissions Trading System (ETS) would have been preferable for the backstop (and is envisioned to continue for one year beyond the transition period in derogation of the general rule that participation in all EU systems seizes) because it would mean stringent monitoring and compliance for carbon trading. It should also be noted that there are no provisions for involving the Court of Justice in the settlement of disputes, raising further questions about the integrity of any future trading regime and its general enforcement.

POLITICAL DECLARATION

By contrast, the draft Political Declaration only contains a vague negotiation mandate for similar purposes and is not legally binding. There is a commitment in paragraph 18 of the Political Declaration to allow for a general exception clause which in this case contains climate change explicitly. The recognition of the joint objective of sustainable development is welcome but whether it is meaningful will depend on the concrete formulation in the future trade agreement.

> *"18. The Parties will retain their autonomy and the ability to regulate economic activity according to the levels of protection each deems appropriate in order to achieve legitimate public policy objectives such as public health, animal health and welfare, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, and promotion and protection of cultural diversity. The economic partnership will recognise that sustainable development is an overarching objective of the Parties. The economic partnership will also provide for appropriate general exceptions, including in relation to security."*

The UK and EU would also agree on future collaboration in climate change matters (paragraph 77) and affirm their commitment to the Paris Agreement, but once again the language is so vague that it risks not being meaningful:

> *"78. The future relationship should reaffirm the Parties' commitments to international agreements to tackle climate change, including those which implement the United Nations Framework Conventions on Climate Change, such as the Paris Agreement."*

The negotiation mandate for the future carbon pricing relationship is contained in paragraph 72:

> *"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."*

This mandate is, in some respects, more concrete than the commitment under the backstop. However, the term "should consider" indicates no pre-conceived assumption that cooperation will necessarily result in the UK joining or linking to the ETS over the long term.

Broadly, we conclude that the joint commitment to combating climate change could be much more pronounced in both the Withdrawal Agreement and especially the Political Declaration.

EXTERNAL FACTORS

The UK is subject to a complex framework of energy and climate change policies and commitments.

The World Bank's 2018 report, State and Trends of Carbon Pricing, found that there are currently 51 carbon pricing initiatives at regional, sub-national and national levels. These are either already implemented or are to be implemented by 2020. This figure, which has increased from a mere 16 initiatives a decade earlier, includes 25 emissions trading systems and 26 carbon taxes. Combined, these initiatives will cover approximately 20% of global greenhouse gas emissions.[4]

In 2018, the total value of carbon pricing initiatives was up 56% from the previous year, at $82 billion.[5] The increased rate of adoption of these initiatives demonstrates an active commitment to achieving the emission reduction goals set out in the Paris Agreement.[6] Indeed, of the 175 Parties that have ratified the Paris Agreement, 169 have submitted a nationally determined contribution (NDC), 88 of which mention carbon pricing (either international or domestic).[7]

The EU ETS is the world's first and largest major carbon market, operating in 31 countries, including all 28 EU member states, as well as non-member states Iceland, Liechtenstein and Norway. The EU ETS covers 45% of the EU's greenhouse gas emissions,[8] with the dual aims of reducing greenhouse gas emissions and promoting business investment in low carbon technologies.[9]

The system operates on a 'cap and trade' model, capping the emissions of specific gases from more than 11,000 installations, including power stations and industrial plants. Participants are permitted to trade emission allowances within the cap, which is gradually reduced over time to result in lower emissions in line with Paris commitments. Fines can be levied against companies that produce emissions above and beyond their allowance. Conversely, if a business reduces its emissions, it will be allowed to keep the surplus to cover future needs, or else sell them to another company.

Current projections suggest that, as a consequence of the system, emissions covered under the EU ETS will be 21% lower by 2020, and 43% lower by 2030, compared to 2005 levels.[10] Phase 3 of the EU ETS commenced in 2013, introducing an EU-wide cap on emissions, and, in February 2018, EU ETS phase 4 was approved, spanning the period from 2021-2030. During this phase, the annual linear cap reduction will increase from 1.74% to 2.2%,[11] the Market Stability Reserve will be reinforced, and low-carbon funding mechanisms will be introduced. These are the Modernization Fund, supporting investment into modernising energy and power systems, and the Innovation Fund,[12] which will support technological innovation in the field.

EU law currently governs the UK on matters relating to targets on emissions, efficiency and renewable energy. UK climate change policy has developed over the course of its EU membership, with EU policies contributing to 40% of UK emissions reductions since 1990.[13] In the international arena, the UK also acts within the United Nations Framework Convention on Climate Change (UNFCCC) as part of the EU. It is therefore vital that UK and EU Brexit negotiators explore alternative methods of collaboration on climate change and energy matters, so as to avoid the risk of regression on existing environmental commitments.[14]

POTENTIAL MODELS FOR FUTURE UK-EU CLIMATE POLICY

There are various options available for future UK-EU climate policy, some of which would involve adoption of current EU legislation, and others that would require the creation and implementation of separate, stand-alone UK-EU agreements.

1 PARTICIPATION IN THE EUROPEAN ECONOMIC AREA (EEA)

The UK would remain a member of the EEA – a model currently adopted by Norway, Liechtenstein and Iceland - the Preamble of which states the Parties' determination to "preserve, protect and improve the quality of the environment and to ensure a prudent and rational utilisation of natural resources on the basis of the principle of sustainable development".[15] The UK would be required to fully participate in all climate-related legislation, as almost all EU environmental legislation is implemented in the law of EEA member states. In return, the UK would retain full access to EU energy markets and remain party to the EU ETS.

In their 2018 paper, Farstad, Cartet and Burns observed the concerns voiced by governmental and NGO staff alike regarding Brexit-induced risks to domestic climate legislation and policy engagement, finding that interviewees were "unanimous in lamenting the loss of access to the ETS in particular".[16] Although there are some areas of EU law that do not apply to the EEA members, such as the Birds and Habitats Directives, the Bathing Water Directive and the Common Agricultural and Fisheries Policies,[17] following this route would mean current levels of collaboration and cooperation would be preserved, with the UK continuing to be bound by minimum standards in relation to pollution control, water, air, chemicals, waste, environmental impact assessment and GM organisms (and many other Directives/Regulations of relevance for the Single Market and marked as such in the legislation).[18]

From a climate and energy law perspective, this option is preferable as the opportunity for disruption is minimal and no side would gain an economic advantage by adopting lower climate standards. However, this is not the preferred option of the UK government, given its previously stated 'red lines' regarding continued domestic compliance with EU rules and regulations. Indeed, the UK would have only an informal say in the creation or reform of such legislation and would remain subject to the jurisdiction of the supranational court, the EFTA.

2 THE SWISS MODEL

Switzerland is neither an EU nor an EEA member, but, as a party to EFTA, has access to the Single Market. The EU and Switzerland have agreed 100+ bilateral agreements, mainly in two packages (Bilaterals I and II) signed in 1999 and 2004, which govern their relationship and collaboration across a spectrum of matters, including trade and the environment. The agreements are managed through 20 joint committees.[19]

Since the signing of Bilateral II, Switzerland has participated in the European Environment Agency, and has also reached an agreement with the EU on trade in agricultural products.[20] There is, however, no separate, stand-alone Swiss-EU environmental agreement.

In 2017, Switzerland and the EU signed an agreement linking their emissions trading systems. This permits EU ETS members to use allowances from the Swiss system for compliance (and vice versa), with each party creating and exchanging annual reports on allowances and usage. The agreement is intended to "strengthen the functioning of the respective systems, enhancing carbon pricing and ultimately create a solid international carbon market".[21]

If the UK was to move to EFTA membership post-Brexit, the Swiss model would provide opportunities for collaboration or linkage in areas such as the ETS, without having to maintain the entire aquis of EU environmental law.

3 THE CHEQUERS AGREEMENT

This would involve the retention of a free-trade area for goods but not for services, along with the introduction of a new customs arrangement for the collection of tariffs (a Facilitated Customs Arrangement, FCA). Much would depend on the details of this option because there is a possibility – albeit only a small one – that electricity and gas could be treated as goods, as is the case in some trade deals. Any product designated as 'goods' would continue to benefit from a significant free trade and 'common rulebook' commitment.

As strict climate and energy rules can have a significant impact on the price of a product, it is possible that the common rulebook would include climate change and energy-related EU legislation. In any case, the EU would want to ensure a certain degree of UK participation in climate and energy agreements, including ETS participation at the very least.

The UK would have no formal say in the development of the agreements and rules by which it would be bound. However, such rules would depend on Paris Agreement implementation and would follow the prescribed international guidelines. The UK could potentially affect the development of rules through negotiations at an international level regarding environmental standards and climate policy, thereby maintaining some level of influence but no control.

The UK could potentially participate in the Energy Community. The Energy Community currently includes the EU (represented by the European Commission), Albania, Bosnia and Herzegovina, Georgia, North Macedonia, Kosovo, Moldova, Montenegro, Serbia, and Ukraine. This multilateral agreement aims to extend the EU's internal energy market to south-eastern Europe and the Black Sea region, and, in doing so, create a pan-European energy market, leading to easier, less restrictive cross-border trading and enhanced security of energy supply. The third country contracting parties are required to meet EU environmental law and energy targets, and to develop adequate regulatory frameworks.[22] The EU finances approximately 95% of the Community's budget, with national contributions based on the contracting parties' respective energy consumption levels. Although this would mean retaining access to EU energy markets, participation would also necessitate effective mandatory implementation of EU energy-related climate provisions, which would appear at odds with the UK's current stance.

This is the UK Government's preferred option and could be particularly beneficial in the area of climate change. In any case, the UK will remain party to the Energy Charter Treaty, including its 1994 Protocol on Energy Efficiency and Related Environmental Aspects. Withdrawal from the EU will not mean automatic termination of this Treaty, which tries to harmonise energy rules and investments across Europe.

4 A NEW UK-EU TRADE DEAL

A common thread in modern free trade agreements (FTAs) is the inclusion of climate provisions. Such provisions may take many forms, but are almost ubiquitous in contemporary trade deals, or at least those that involve the EU. Any modern trade treaty needs to recognise that effective climate action could constitute a competitive disadvantage in some areas and should therefore try to provide for broad collaboration.[23]

Many FTAs include climate change in the scope of the dispute settlement provisions. CETA's chapter on Trade and Environment, for example, includes a dispute resolution clause and provides for the creation of a Committee on Trade and Sustainable Development to implement chapter provisions. The Committee is also tasked with addressing matters of mutual concern, allowing parties to divert the issue to a panel of experts for consideration. The EU-Korea trade agreement also contains provision for a Committee on Trade and Sustainable Development, as well as for government consultations and the creation of a panel to adjudicate on disputes as they arise. These dispute settlement provisions are integrated within trade and environment or sustainable development chapters, and therefore operate separately and distinctly from the general dispute resolution procedures within such agreements. They also carry less force, as they do not specify penalties such as tariff sanctions. Nevertheless, any trade deal between the UK and EU post-Brexit would benefit from a chapter dedicated to climate and the environment more generally, including adequate procedures for recourse to settlement processes in case of dispute.

Broad cooperation constitutes a competitive advantage. Examples of EU trade agreements that provide for broad cooperation on climate and environmental issues include the EU-Singapore Agreement, which contains a distinct chapter on renewable energy. Another key example is the EU-Japan Agreement, which was the first trade deal to contain a comprehensive commitment to implementing the Paris Agreement. The provision explicitly commits each party to work together to realise UNFCCC aims, to take steps to meet Paris objectives, and to promote trade as a means of reducing greenhouse gas (GHG) emissions and of achieving climate-resilient development, including full implementation of the Paris Agreement. It is likely that such provisions will continue to be included in trade agreements, with increasing calls for mutual compliance with the Paris Agreement to be a precondition of any trade negotiation or agreement, as signalled by French President, Emmanuel Macron.[24]

Some modern FTAs include non-regression clauses. Non-regression, which has been described by Professor Jorge Viñuales as "perhaps a major new principle of international environmental law in the years to come",[25] constitutes an agreement on behalf of the parties not to regress on internationally recognised environmental standards and obligations in order to secure trade advantage or economic gain. The EU-Korea FTA provides a good example of this, with a clause affirming the commitment not to derogate from environmental protection to encourage trade or investment. CETA contains a similar provision, as does the EU-Japan agreement. The UK government has already expressed a commitment to the non-regression of environmental standards and to maintaining ongoing environmental cooperation, but not necessarily to full dynamic alignment on future standards. A non-regression clause within an EU-UK trade agreement would hence signify a pledge to maintain environmental standards and NDCs, in accordance with the Paris Agreement. If regression was established, it would constitute a violation of treaty obligations and could lead to a formal dispute and eventual suspension of part or parts of the agreement. There could be questions as to how to prove regression and if regression would also include, for example, lack of enforcement of existing provisions and the dependence on a UK domestic environmental institution to enforce provisions, which is yet to be established. In the European Court of Justice (ECJ), there is a wealth of jurisprudence on non-compliance with EU norms; and, in the North American Free Trade Agreement (NAFTA), the Submissions on Enforcement Matters (SEM) process often focuses on lack of proper enforcement, rather than formal changes to the law.

In recent years, the world has seen a proliferation of trade and investment agreements that reflect a growing awareness of climate change and sustainable development concerns. Recent surveys document over 140 new FTAs that explicitly commit to sustainable development, including EU-CARIFORUM EPA,[26] US-PERU TPA[27], TPP[28] and CETA.[29] In these agreements, Parties display innovation and experimentation.[30] Such FTAs could, if drafted and implemented carefully, play a pivotal role in achieving Article 2.1c of the 2015 UNFCCC Paris Agreement, which encourages members to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development, including implementation of the sustainable development goals (SDGs).

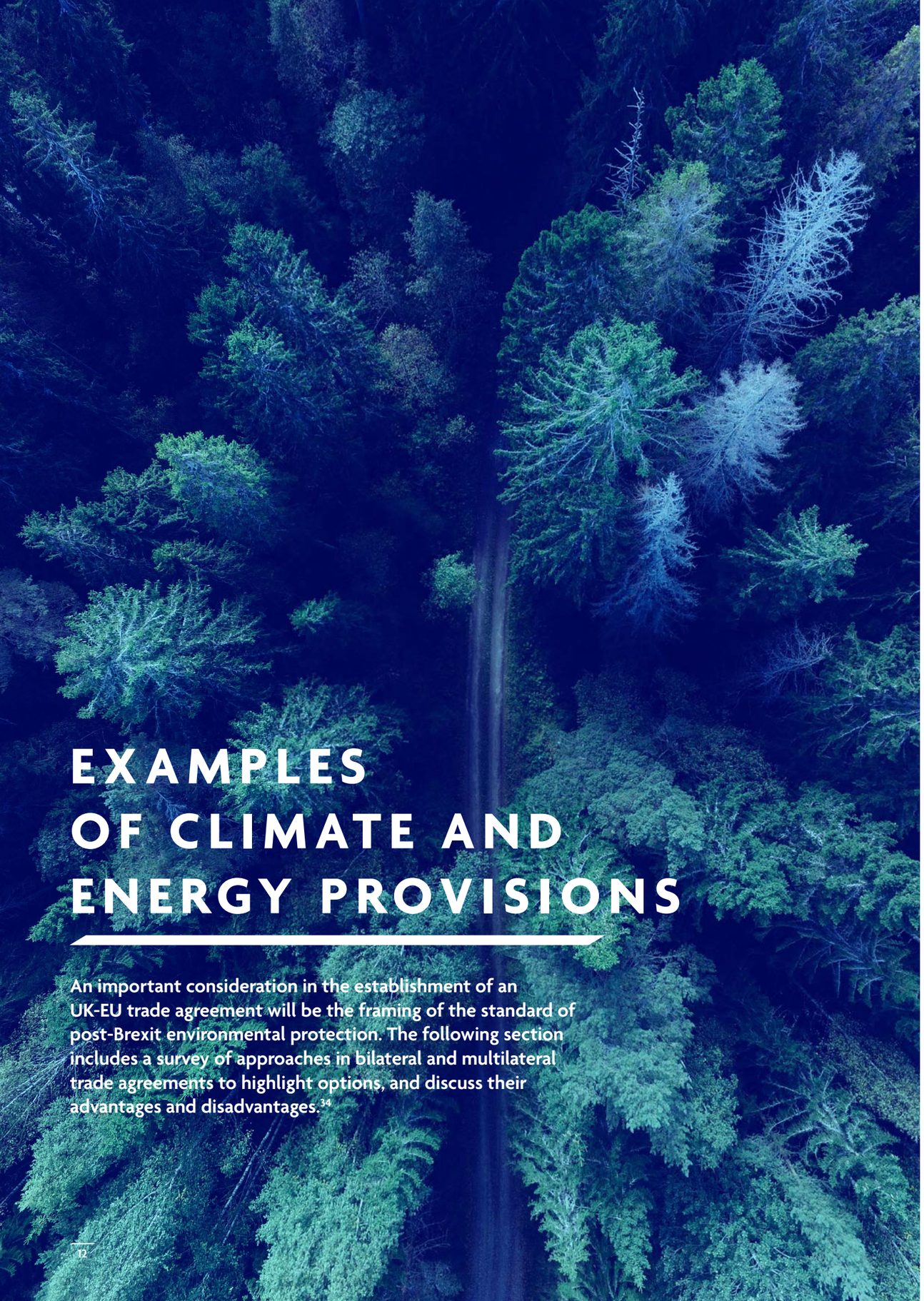
It should be noted that moving from EU integration to a mere free trade model means a significant step down in terms of policy coordination and common rules. While mutual recognition is an accepted methodology to bridge this gap, it is unlikely that the EU will accept climate change rules that are less ambitious or less autonomously applied. This might mean that trade in certain products or services with a significant carbon footprint could not be offered in the EU, or not in the same way, in case the UK was to lower its overall climate change ambition.

5 A NO-DEAL SCENARIO

If the UK leaves the EU by automatic operation of law, whether or not an agreement between the parties has been reached, there would clearly be no agreement in which to incorporate climate change provisions. Although it stresses that this outcome would be undesirable, the UK Government has produced guidance entitled "Meeting climate change requirements if there's no Brexit deal"[31], which is intended to support the climate change-related contingency planning of those who might be affected in the event of a 'no-deal' scenario. The guidance emphasises the Climate Change Act 2008 and the commitment therein to reduce emissions by at least 80% against 1990 levels by 2050. This is domestic legislation and will therefore remain in force and effective when the UK exits the EU. The guidance also states that the UK's commitment to the international climate change agreements to which it is a party will remain undiminished, and that the UK will continue to take "ambitious steps to reduce greenhouse gas emissions".[32]

The UK would be excluded from participation in the EU ETS. The government intends to remove requirements relating to the surrender of emissions allowances, but to maintain monitoring, reporting and verification of allowances. The UK would no longer have guaranteed access to the Consolidated System of European Registries, which includes the ETS registry and the Kyoto Protocol National Registry. It also would need to develop its own NDCs under the Paris Agreement, as it would no longer be covered by the EU's NDC or its long-term ambition document.

The guidance sets out only very short-term contingency plans in the event that there is a breakdown in negotiations or if other circumstances result in a no-deal scenario. It does not therefore indicate the long-term intentions of the government. The importance of the EU as a market for the UK and the costs of trading on WTO terms make it likely that some kind of trade deal will eventually be concluded. The inclusion of enforceable climate change obligations in this agreement is particularly desirable given that the targets set out in the Climate Change Act 2008 are not readily enforceable and that, according to the Committee on Climate Change, around 55% of the UK's climate policies to 2030 are associated with EU membership.[33]



EXAMPLES OF CLIMATE AND ENERGY PROVISIONS

An important consideration in the establishment of an UK-EU trade agreement will be the framing of the standard of post-Brexit environmental protection. The following section includes a survey of approaches in bilateral and multilateral trade agreements to highlight options, and discuss their advantages and disadvantages.[34]

First, the level of protection agreed between the Parties must be established. A common approach is used where the Parties, recognising sovereign rights over environmental governance, agree to continue to improve environmental protection. NAFTA (1992) provides an example:

> *"Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations."*[35]

As opposed to "shall ensure that its laws ... provide for high levels of environmental protection", an alternative approach is provided in Jordan US (2000) where each Party "shall strive to ensure".[36] The inclusion of 'strive' in this clause weakens the obligation from one of result (ensure) to one of conduct (strive). Canada Costa Rica (2001), Canada Colombia (2008), Canada Peru (2008), Australia US (2004), and Bahrain US (2004), adopt the result-based approach, while Colombia US (2006), Morocco US (2004), Korea US (2007), Nicaragua Taiwan (2006), NAFTA (1992), Oman US (2006), Panama US (2007), Singapore US (2003) and Korea Peru (2011) adopt the conduct-based approach.

An additional example can be drawn from Canada EC (CETA) (2016). While CETA uses the conduct-based approach, two caveats are added: (i) the Parties note that governance of environmental protection is to be conducted "in a manner consistent with the multilateral environmental agreements"; and (ii) laws and policies are to "provide for and encourage high levels of environmental protection".[37] These nuances add additional layers of obligations, whereby the standard of protection is grounded in standards established in international instruments, and the conduct-based standard is supplemented with the outcome focused "encourage". China Korea (2014) includes a similar "provide for and encourage" approach.[38]

Both Canada Honduras (2013) and Canada Panama (2010) note that improvement is not limited to "environmental law and policies" but also management systems which support them.[39] Both EC Korea (2010) and Bosnia and Herzegovina EFTA (2013) broaden the scope to high levels of environmental and labour protection.[40] EC Singapore (2015), EC Ukraine (2014), and EC Vietnam (2016) similarly link both environment and labour, but also integrate international standards, with EC Singapore (2015) and EC Vietnam (2016) also noting the objective to be fostering sustainable development.[41] A final example comes from CARIFORUM EC EPA (2008), which links environment and human health.[42]

An alternative formulation can be found in Central America EC (2012):

> *"Each Party shall strive to ensure that its laws and policies provide for and encourage high levels of environmental and labour protection, appropriate to its social, environmental and economic conditions and consistent with the internationally recognised standards and agreements referred to in Articles 286 and 287 to which it is a party, and shall strive to improve those laws and policies, provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on international trade".*[43]

While the Parties adopt this lower "strive to ensure" standard, broader socio-economic considerations are permitted. In addition, the application of the law is qualified by the stipulation that it cannot result in "arbitrary or unjustifiable discrimination".

Of the agreements surveyed, only Colombia Peru EC (2012) does not explicitly include language for the improvement of environmental standards. An overwhelming majority of the agreements reviewed include a commitment to strive to improve environmental laws.

Second, the Parties often provide a floor for investments whereby environmental laws, and other socio-economic regulatory standards, are not to be derogated from in order to encourage trade. A minimalist example of this may be found in Brunei Japan (2007):

> *"Each Party recognises that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental measures."*

This clause can be found in multiple bilateral agreements including Canada Jordan (2009), Canada Panama (2010), China Korea (2014), Canada Costa Rica (2001), Japan Philippines (2006), Japan Thailand (2007), Colombia Israel (2013), India Japan (2011) and China Switzerland (2013). Interestingly, Colombia Israel (2013) extends the scope of this non-derogation clause beyond the bilateral relationship to include investments from third parties, while China Switzerland (2013) adds more the precise language of "environmental laws, regulations, policies and practices".

A slight variation is also widely used including in Canada EC (CETA) and EC Vietnam (2016):

> *"The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws."*

As opposed to "relaxing", the phrase of "weakening or reducing the protections afforded" begins to broaden the scope of actions that could result in a derogation beyond outright reductions in the legal framework to include actions related to enforcement. This clause is found in multiple agreements.[44]

The Chile Malaysia (2010) and Chile Thailand (2013) agreements explicitly include "to relax or fail to enforce or administer their environment laws" as well as indicating that environmental law cannot be used as a protectionist measure. The Trans Pacific Strategic EPA (2005), Belarus Kazakhstan Russia Vietnam (2015) and Hong Kong New Zealand (2010) similarly specifically note failure to enforce as within the scope of the obligation. Chile Turkey (2009) grounds environmental standards in "international environment commitments".

Stronger variants have also been observed. As opposed to the language of "recognising" as "inappropriate", some agreements include "shall" to further buttress the provision. An example can be found in Japan Malaysia (2005): "Each Country shall not encourage investments … relaxing its environmental measures".[45] Malaysia New Zealand (2009), Chile Malaysia (2010), and China Korea (2014) provide further precision with the inclusion of weakening or failing to enforce or administer its environment laws.[46]

Another formulation that aims to again broaden the prohibited practices can be found in the EC Korea (2010), Korea Peru (2011), and Korea New Zealand (2015) agreements:

> *"A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties."*[47]

This clause is also included in the Transpacific Partnership, albeit under the "inappropriate to encourage" formulation.[48] Interestingly, this approach includes the prevention that environmental or labour standards could be reduced.

A range of agreements also take a broader formulation extending beyond solely environmental measures to encompass broader socio-economic factors. An example can be drawn from Canada Chile (1996): "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures".[49] This clause can be found in multiple other agreements.[50] While again utilising the "recognising" as "inappropriate" formulation, the broader inclusion of socio-economic factors broadens the scope of the obligation. Others such as EC Georgia (2014), EC Moldova (2014) and EC Singapore (2015) simply include labour in addition to environmental standards.

Central America EC (2012) requires Parties to "at least maintain and preferably develop the level of good governance, social, labour and environmental standards achieved through the effective implementation of international conventions of which the Parties are part of at the time of entry into force of this Agreement".[51] This formulation grounds the obligations in the implementation of international conventions.

A further example is a formulation that is included in the objectives of the agreement. Canada Honduras (2013) includes among other things the "conservation, protection and improvement of the environment in the territory of each Party for the well-being of present and future generations; (b) non-derogation from domestic environmental law in order to encourage trade or investment".[52]

An additional example can be drawn from Korea Turkey (2012) and EC Korea (2010) where both aim to comply with international agreements such as GATT, GATS, and intellectual property standards, but also:

> *"... to contribute, by removing barriers to trade and by developing an environment conducive to increased investment flows, to the harmonious development and expansion of world trade; to commit, in the recognition that sustainable development is an overarching objective, to the development of international trade in such a way as to contribute to the objective of sustainable development and strive to ensure that this objective is integrated and reflected at every level of the Parties' trade relationship; and to promote foreign direct investment without lowering or reducing environmental, labour or occupational health and safety standards in the application and enforcement of environmental and labour laws of the Parties."*[53]

Lastly, incentives are, at times, included in the agreement in conjunction with obligations to maintain environmental standards to support compliance. Oman US (2006), Jordan US (2000), Morocco US (2004), Korea US (2007) and Central American Free Trade Agreement (CAFTA) Dominican Republic (2004) indicate:

> *"The Parties recognize that incentives and other flexible and voluntary mechanisms can contribute to the achievement and maintenance of high levels of environmental protection ... As appropriate and in accordance with its law, each Party shall encourage the development of such mechanisms, which may include: (a) mechanisms that facilitate voluntary action to protect or enhance the environment, such as: (i) partnerships involving businesses, local communities, nongovernmental organizations, government agencies, or scientific organizations; (ii) voluntary guidelines for environmental performance; or (iii) sharing of information and expertise among government agencies, interested parties, and the public concerning: methods for achieving high levels of environmental protection, voluntary environmental auditing and reporting, ways to use resources more efficiently or reduce environmental impacts, environmental monitoring, and collection of baseline data."*[54]

The Transpacific Partnership (2015) provides an additional formulation:

> *"The Parties recognise that flexible, voluntary mechanisms, for example, voluntary auditing and reporting, market-based incentives, voluntary sharing of information and expertise, and public-private partnerships, can contribute to the achievement and maintenance of high levels of environmental protection and complement domestic regulatory measures. The Parties also recognise that those mechanisms should be designed in a manner that maximises their environmental benefits and avoids the creation of unnecessary barriers to trade."*[55]

Similar formulations that echo the recognition of flexible voluntary measures can be found in New Zealand Taiwan (2013) and Australia US (2004).

CLIMATE CHAPTER

Given the scale of climate change as a governance challenge, provisions that explicitly or implicitly impact climate change are often found in multiple places within a single trade agreement. Japan EC (2018) provides an interesting approach. First, the Parties include a chapter on 'Trade and Sustainable Development' which situates the overall agreement in the context of current international governance priorities.[56] Second, the importance of multilateral environmental agreements is stressed, and the Parties reaffirm their commitment to implement "laws, regulations and practices" underpinning these agreements.[57]

Third, a specific clause on climate change is included (16.4(4)):

> *"The Parties recognise the importance of achieving the ultimate objective of the United Nations Framework Convention on Climate Change, done at New York on 9 May 1992 (hereinafter referred to as "UNFCCC"), in order to address the urgent threat of climate change, and the role of trade to that end. The Parties reaffirm their commitments to effectively implement the UNFCCC and the Paris Agreement, done at Paris on 12 December 2015 by the Conference of the Parties to the UNFCCC at its 21st session. The Parties shall cooperate to promote the positive contribution of trade to the transition to low greenhouse gas emissions and climate-resilient development. The Parties commit to working together to take actions to address climate change towards achieving the ultimate objective of the UNFCCC and the purpose of the Paris Agreement."*[58]

In this clause, the Parties recognise the importance of achieving the objectives of the UNFCCC, reaffirm their commitment to effectively implement the Paris Agreement, and encourage cooperation to that end. In aiming to position trade in support of sustainable development, the Parties also agree to "strive to facilitate" trade and investment in climate relevant areas such as renewable energy and energy efficient goods and services.[59] This clause is supplemented by a commitment to cooperate on trade-related aspects of the climate change regime, including promotion of low-carbon and energy efficient technologies.[60] Finally, protection of the environment, including tackling climate change, is explicitly provided as an element of good regulatory practice and an objective of the agreement.[61]

Canada EC (CETA) (2016) includes a chapter on trade and environment, as well as a chapter on trade and sustainable development. Similar to Japan EC, the Parties emphasise the importance of international environmental governance, reaffirm a commitment to implementing the obligations of agreements to which they are a Party, and agree to consult and cooperate on trade-related environmental issues of mutual interest.[62] The Parties also establish the promotion of sustainable development as a key objective.[63] Special attention is paid to the removal of trade obstacles relevant to climate mitigation, particularly in relation to renewable energy goods and services.[64] In addition, the Parties aim to enhance cooperation on a range of matters including climate change, specifically:

> *"... trade-related aspects of the current and future international climate change regime, as well as domestic climate policies and programmes relating to mitigation and adaptation, including issues relating to carbon markets, ways to address adverse effects of trade on climate, as well as means to promote energy efficiency and the development and deployment of low-carbon and other climate-friendly technologies".*[65]

In aiming to promote trade that supports the goal of sustainable development, the Parties agree to encourage the use of voluntary schemes, best practices, integration of sustainability criteria into decision-making, and the improvement of environmental performance goals and standards.[66] An institutional mechanism is established – the Committee on Trade and Sustainable Development – along with a Civil Society Forum to support the objectives of the agreement.[67]

ENERGY CHAPTER

Energy as a commanding heights sector is addressed at various junctures of Japan EC (2018) and the Japan EC SPA. Under the Japan EC SPA, the Parties agree to promote industrial cooperation to improve the competitiveness of their enterprises, with a view to exchanging best practices related to climate change and energy efficiency.[68] In addition, a specific cooperation clause on energy is added:

> *"The Parties shall endeavour to enhance cooperation and, where appropriate, close coordination in international fora and organisations, in the area of energy, including energy security, global energy trade and investment, the functioning of global energy markets, energy efficiency, and energy related technologies".*[69]

Under Japan EC (2018), subsidies that are granted or maintained for designated sectors are to be communicated to the other Party, including the name of the recipient. Sectors include energy and environmental services.[70] Promotion of trade and investment in goods and services of relevance to climate change, such as renewable energy and energy effect technologies, is prioritised,[71] in addition to cooperation on trade-related aspects of climate-friendly technologies.[72] Parties also retain the right to regulate their own levels of protection to further policy goals related to the environment and climate change, human, animal and plant life and health, and energy security.[73] Similar provisions related to the promotion of renewable energy and low-carbon technologies, and cooperation on trade-related aspects, can be found in CETA.[74]

INCLUSION OF UK IN EU CLIMATE AND ENERGY LEGISLATION

Integration of the UK into the EU climate framework or ETS could be done through a simple reference. Japan EC (2018) provides a list of domestic laws and regulations of both Parties in an Annex, and compliance with this list is referred to at various points throughout the agreement. While this approach is adopted in relation to geographic indicators, (Annex 14-A), it can nonetheless be applied to areas such as climate change.

Japan EC also provides self-certification of producers of designated goods indicating conformity with the "laws and regulations" of the Party, with this documentation sufficient for importation and sale.[75] The specific goods are listed in the agreement, with the laws and regulations listed in an Annex.

Japan EC (2018) also provides an approach for considering the impacts on domestic industries. Where, as a result of reduced customs duty, importation of a good increases in quantities that threatens serious injury to a domestic industry, the other Party may adopt bilateral safeguard measures to prevent or remedy the injury.[76] These safeguard measures include a suspension or increase of the customs duty rate, or the application of the most-favoured-nation rate.[77] Given the UK, along with Canada, is a founding member of the Powering Past Coal Alliance, a group of 29 countries, 17 sub-national governments, and 28 originations committed to phasing out coal power generation and supporting clean energy generation,[78] consideration could be given to the use of such a provision to restrict imports of coal to promote clean energy use.

In Japan EC (2018), Article 14.22(1) defines the scope of the section as applicable to wines, spirits and other alcoholic beverages, in addition to agricultural products.[79] The list of specific "geographical indications" are provided in Annex 14-B based on the types of goods domestically protected in accordance with the laws and regulations listed in Annex 14-A.[80] As per Article 14.53, recommendations for refinement of the Annex are made to the Joint Committee by the Committee on Intellectual Property.[81]

This approach could be adopted in the climate or environmental context to list the specific environmental targets, standards or measures that the Parties agree are material to the agreement, with applicable domestic laws and regulations identified in an Annex. Incorporation of domestic legislative instruments by reference through an Annex allows the Parties to refine the applicable list without renegotiating the whole agreement. Refinement of the applicable list of domestic measures can be similarly delegated to an institutional committee on climate change, with recommendations to be approved by a joint committee of ministers or associates.

REGULATORY COOPERATION AND HARMONISATION

Both Japan EC (2018) and CETA (2016) provide mechanisms to further regulatory cooperation. Japan EC aims to promote good regulatory practices and cooperation in a range of fields including health, biodiversity, the environment, and climate change.[82] Flexible language empowers any Party to propose regulatory cooperation activity,[83] with the aim of fostering greater regulatory compatibility. The Parties also agree to promote common principles, guidelines and codes of conduct, and to cooperate bilaterally or in multilateral forums to promote adoption and implementation of internationally recognised regulatory standards.[84]

CETA (2016) provides a chapter on regulatory cooperation and bilateral dialogues and cooperation. In aiming to ensure high levels of protection for health, plant life and the environment, the Parties recognise the value of bilateral and multilateral regulatory cooperation pursuing the elimination of barriers to trade, regulatory compatibility and transparency.[85] The objectives of regulatory cooperation are to: (i) contribute to the protection of humans, biodiversity, and the environment through leveraging of international resources, research and information to identify risks; (ii) build trust, improve planning, promote transparency, and enhance the efficacy of regulations; (iii) avoid unnecessary regulatory differences; and (iv) contribute to the improvement of competitive of domestic industries.[86]

A broad and non-exhaustive list of potential areas of cooperation is listed, principally aimed at the sharing of information and the removal of policy divergences,[87] as well as the establishment of a Regulatory Cooperation Forum to foster ongoing discussions to review regulatory initiatives and enhance convergence of approaches.[88] The Forum is co-chaired by senior representatives of each Party and meets annually to further the implementation of the chapter. Additionally, subject specific 'dialogues' are established relating to biotech market access, raw materials, forest products, and enhancing science, technology, and innovation.[89]

Similar mechanisms may be useful to include in any potential UK-EU agreement to support ongoing regulatory cooperation and alignment.

DISPUTE SETTLEMENT

Dispute settlement is a fundamental aspect of trade-related agreements, allowing Parties a modality for constructive enforcement. Japan-EC (2018), as a very recent example, provides helpful approaches.

Japan EC (2018) Article 16.2(1) provides that each Parties may establish domestic sustainable development policies in accordance with international agreements and standards, and "shall strive to ensure" the legal framework provides high levels of protection to environmental and labour, while working to improve the "laws and underlaying levels of protection".[90] Article 16.2(2) integrates a requirement of non-derogation with the Parties obliged to not relax, or lower levels of protection, or wave, otherwise derogate, or fail to enforce regulations.[91] In addition, the Parties are restricted via Article 16.2(3) from using respective environmental or labour laws as a means of unjustifiable discrimination or a disguised restriction on trade.[92] In Article 16.4 the Parties also affirm the importance of multilateral environmental agreements to which they are both a Party, including the Paris Agreement, and stress the importance of achieving mutual supportiveness of trade and environment.[93]

In addition to dispute settlement, a range of facilitative options that can support constructive amelioration of the dispute are also available. First, the scope of the dispute settlement provisions includes all disputes under the agreement,[94] except as indicated in the agreement, such as the case of technical barriers to trade whereby the WTO is determined as the appropriate forum.[95] Prior to initiation of dispute settlement procedures, a Party may make a request for information, which is to be answered within 20 days of receipt.[96] Parties are encouraged to resolve disputes first through good faith consultation and mediation,[97] with specialised procedures established for the creation of a three-person panel.[98] In case of urgency, the panel is to decide if the matter is urgent within 15 days,[99] and provide an interim report ideally within 60 days, and within 75 days at the latest.[100] Conventional matters provide for an interim report within 120 days,[101] and a final report 30 days after.[102]

Each Party commits to fully comply in good faith with the obligations of the final report providing notification to the other Party of a reasonable timeline for compliance.[103] In cases of non-compliance, a compliance review may be initiated whereby the original panel reviews the information provided and makes a factual and legal determination.[104] Where non-compliance persists, the Parties may enter into consultations to agree on mutually satisfactory compensation.[105] Where no compensation is agreed, the complaining Party may provide notification of suspension of concessions or other obligations, with the aim of nullifying the impairment caused by the failure to comply,[106] and the chance of a second compliance review following adoption of the temporary measures.[107]

Where the dispute is not resolved through consultation or mediation, or a mutually agreed solution cannot be implemented,[108] it may be moved to dispute settlement procedures under this agreement, or another agreement where both are Parties, including the WTO.[109] In addition, the Joint Committee may assist in facilitating a solution to any disputes that arise.[110] Non-compliance can lead to suspension of privileges, and even suspension of trade in certain areas, with potentially drastic economic consequences for the sectors involved.

A similar approach is found in CETA (2016), which promotes consultation and mediation,[111] with dispute settlement procedures established under the agreement,[112] and provisions for urgent proceedings,[113] along with the ability to utilise the WTO Dispute Settlement Body as the chosen forum.[114]

Disputes under CETA relating to environmental provisions are addressed through consultative mechanisms, such as expert groups or consultations,[115] and where they are not satisfactorily addressed, they may be referred to a panel of experts for consideration.[116] Experts are approved by the Committee on Trade and Sustainable Development,[117] who, based on information provided by relevant bodies under the agreement,[118] provide a report determining conformity with the respective obligations. This informs the development of response measures.[119] Civil society organisations may provide input to the Committee on the developed measures through consultations or the Civil Society Forum.

TRANSPARENCY AND ALIGNMENT WITH FUTURE AGREEMENTS

Inclusion of transparency, cooperation, and alignment provisions assist Parties in maintaining cohesion across instruments and allow for refinement, development and evolution of obligations over time.

Examples can be drawn from Japan-EC (2018). First, the Joint Committee may adopt decisions to amend the agreement relating to a list of annexes, as well as provisions incorporating elements relating to international agreements.[120] Second, in the context of intellectual property protection, agreed principles are identified,[121] and international instruments that the agreement is intended to complement and comply with are listed.[122] Lastly, a procedure is established for accession of a third country into the agreement by virtue of joining the EU, whereby information regarding the matter is shared and concerns identified, with the Joint Committee to examine the matter and provide a decision on necessary arrangements.[123] Overall transparency and refinement mechanisms – be they through explicit inclusion in the agreement or utilisation of institutional approaches – allow for the rights and responsibilities of the Parties to remain balanced, grounded in constructive dialogue and cooperatively refined.

Transparency measures are provided in CETA (2016) through reference in the sustainable development chapter,[124] in procedural requirements relating to public information and awareness,[125] and in a dedicated chapter.[126] Importantly, transparency extends beyond the Parties to include civil society, empowering stakeholders and supporting accountability.

Prioritising public participation and cooperation supporting trade and sustainable development,[127] the Committee on Trade and Sustainable Development coordinates cooperative activities relating to environment, labour, and sustainable development.[128] Biannual bilateral dialogues are also established to facilitate cooperation on key issues, including biotechnology, forest products, raw materials and encouraging innovation.[129] To increase transparency, legal or policy instruments impacting aspects of the agreement are published for public comment,[130] provide responses to public inquiries,[131] and provide for judicial or administrative review and appeal procedures.[132] The inclusion of these mechanisms increases transparency and identifies civil society as an important stakeholder in compliance with obligations, in particular relating to the environment.

PROPOSED EU-UK CLIMATE CHANGE AND ENERGY TEXT

If the UK opted for a deep integration trade agreement, we propose a collection of provisions that should be included, noting that the closest climate cooperation can only be safeguarded by continued EU membership.

LEVEL OF PROTECTION

CETA (2016) - "The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. 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."[133]

NON-DEROGATION

EC Korea (2010) - "A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties."[134]

Canada Chile FTA (1996) - "... it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures."[135]

CLIMATE CHANGE

Japan EC (2018) - "The Parties recognise the importance of achieving the ultimate objective of the United Nations Framework Convention on Climate Change, done at New York on 9 May 1992 (hereinafter referred to as "UNFCCC"), in order to address the urgent threat of climate change, and the role of trade to that end. The Parties reaffirm their commitments to effectively implement the UNFCCC and the Paris Agreement, done at Paris on 12 December 2015 by the Conference of the Parties to the UNFCCC at its 21st session. The Parties shall cooperate to promote the positive contribution of trade to the transition to low greenhouse gas emissions and climate-resilient development. The Parties commit to working together to take actions to address climate change towards achieving the ultimate objective of the UNFCCC and the purpose of the Paris Agreement."[136]

INCENTIVISATION

Transpacific Partnership (2015) - "The Parties recognise that flexible, voluntary mechanisms, for example, voluntary auditing and reporting, market-based incentives, voluntary sharing of information and expertise, and public-private partnerships, can contribute to the achievement and maintenance of high levels of environmental protection and complement domestic regulatory measures. The Parties also recognise that those mechanisms should be designed in a manner that maximises their environmental benefits and avoids the creation of unnecessary barriers to trade."[137]

COOPERATION

CETA - "The Parties recognise that enhanced cooperation is an important element to advance the objectives of this Chapter, and commit to cooperate on trade-related environmental issues of common interest, in areas such as: ... (e) trade-related aspects of the current and future international climate change regime, as well as domestic climate policies and programmes relating to mitigation and adaptation, including issues relating to carbon markets, ways to address adverse effects of trade on climate, as well as means to promote energy efficiency and the development and deployment of low-carbon and other climate-friendly technologies."[138]

CONCLUSIONS

Climate cooperation is limited in the current Withdrawal Agreement and Political Declaration. The Withdrawal Agreement recognises the need for close climate cooperation, particularly in the Backstop, and includes a carbon price as an important element. However, it falls short of full participation in the EU ETS. Meanwhile, the Political Declaration leaves the question of whether any climate cooperation commitments have been made at all worryingly open.

The UK does not want to be obligated to maintain the entire aquis 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.

ANNEX: OPTIONS FOR LEGAL TEXTS BASED ON A SURVEY OF RECENT PRACTICES

LEVELS OF PROTECTION: "MAINTAIN OR DEVELOP"

NAFTA 1992, Canada Jordan 2009 (similar), Canada Peru 2008, Chile US 2003, Colombia US 2006, Australia US 2004, Bahrain US 2004, Jordan US 2000

"Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations."

Canada Panama 2013

"Recognizing the sovereign right of each Party to establish its own levels of domestic environmental protection and its environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its environmental laws and policies provide for high levels of environmental protection and shall strive to continue to develop and improve those laws and policies and the environmental governance that supports them."

Canada Korea 2014, Australia Korea 2014

"Recognizing the right of each Party to set its own environmental priorities, to establish its own domestic levels of environmental protection, and to adopt or modify its relevant laws and policies accordingly in a manner consistent with the multilateral environmental agreements to which they are a party and with this Agreement, 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 those laws and policies and their underlying levels of protection".

China Korea 2014

"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 its respective levels of environmental protection."

New Zealand Thailand 2005

"The Participants reaffirm their shared responsibilities and commitments, as global citizens, to high levels of environmental protection, taking into account the particular socio-economic conditions in each country."

Jordan US 2000, Morocco US 2004, Korea US 2007, Nicaragua Taiwan 2006, NAFTA 1992, Oman US 2006, Panama US 2007, Singapore US 2003, Korea Peru 2011, US

"Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws, each Party shall strive to ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws."

Canada Honduras 2013, Canada Panama 2010

"Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental law and policies, each Party shall ensure that its environmental law and policies provide for high levels of environmental protection, and each Party shall strive to continue to develop and improve that law and those policies and the environmental management systems which support them, taking into consideration their respective levels of development, technologies, and financial resources available to them."

Central America EC 2012

"Each Party shall strive to ensure that its laws and policies provide for and encourage high levels of environmental and labour protection, appropriate to its social, environmental and economic conditions and consistent with the internationally recognised standards and agreements referred to in Articles 286 and 287 to which it is a party, and shall strive to improve those laws and policies, provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on international trade."

EC Korea 2010

"Recognising the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies, each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental and labour protection, consistent with the internationally recognised standards or agreements referred to in Articles 13.4 and 13.5, and shall strive to continue to improve those laws and policies."

Bosnia and Herzogovina EFTA 2013

"Recognising the right of each Party, subject to the provisions of this Agreement, to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies, each Party shall seek to ensure that its laws, policies and practices provide for and encourage high levels of environmental and labour protection, consistent with standards, principles and agreements referred to in 2. When labour is referred to in this Chapter, it includes the issues relevant to the Decent Work Agenda as agreed on in the ILO... Articles 37 and 38, and shall strive to further improve the levels of protection provided for in those laws and policies."

EC Singapore 2015, EC Ukraine 2014,

"DETERMINED to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote trade and investment in a manner mindful of high levels of environmental and labour protection and relevant internationally recognised standards and agreements to which they are Parties. The Parties shall continue to improve those laws and policies, and shall strive towards providing and encouraging high levels of environmental and labour protection."

EC Vietnam 2016

"DETERMINED to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote trade and investment under this Agreement in a manner mindful of high levels of environmental and labour protection and relevant internationally recognised standards and agreements; Each Party shall strive to ensure that its laws and policies provide for and encourage high levels of domestic protection in the environmental and social areas and shall strive to continue to improve those laws and policies."

Colombia Peru EC 2012

"Recognising the sovereign right of each Party to establish its domestic policies and priorities on sustainable development, and its own levels of environmental and labour protection, consistent with the internationally recognised standards and agreements referred to in Articles 269 and 270, and to adopt or modify accordingly its relevant laws, regulations and policies; each Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection."

EC Amsterdam 1997, EC Nice 2001

"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States... The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective."

CARIFORUM EC EPA 2008

"Recognising the right of the Parties and the Signatory CARIFORUM States to regulate in order to achieve their own level of domestic environmental and public health protection and their own sustainable development priorities, and to adopt or modify accordingly their environmental laws and policies, each Party and Signatory CARIFORUM State shall seek to ensure that its own environmental and public health laws and policies provide for and encourage high levels of environmental and public health protection and shall strive to continue to improve those laws and policies."

India Japan 2011 (Sustainable Development)

"Each Party, acknowledging the importance of environmental protection and sustainable development and recognising the right of each Party to establish its own domestic environmental policies and priorities, shall ensure that its laws and regulations provide for adequate levels of environmental protection and shall strive to continue to improve those laws and regulations."

NON-DEROGATION

Brunei Japan 2007 (envi), Japan Philippines 2006, Japan Thailand 2007, Colombia Israel 2013, India Japan 2011, China Switzerland 2013

"Each Party recognises that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental measures."

China Switzerland 2013

"Each Party recognises that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental laws, regulations, policies and practices."

Chile Malaysia 2010, Chile Thailand 2013

"The Parties agree that it is inappropriate to enact or use their environmental laws, regulations, policies and practices for trade protectionist purposes; as well as it is inappropriate to relax, or fail to enforce or administer, their environment laws and regulations to encourage trade and investment."

Canada Jordan 2009, China Korea 2014, Canada Costa Rica 2001

"[ACKNOWLEDGING/RECOGNIZING] that it is inappropriate to relax environmental laws in order to encourage trade and investment."

Japan Malaysia 2005

"Each Country shall not encourage investments by investors of the other Country by relaxing its environmental measures."

Malaysia New Zealand 2009, Chile Malaysia 2010, China Korea 2014

"Neither Party shall seek to encourage or gain trade or investment advantage by weakening or failing to enforce or administer its environment laws, regulations, policies and practices in a manner affecting trade between the Parties."

Canada Chile 1996, Canada Colombia 2008, Canada Peru 2008, Chile Korea 2003, Chile Mexico 1998, EFTA Egypt 2007, EFTA Korea 2005, EFTA Serbia 2009, EFTA Southern African Customs Union (SACU) 2006, El Salvador Honduras Taiwan 2007, India Korea 2009, Indonesia Japan 2007, Guatemala Taiwan 2005, Japan Switzerland 2009, NAFTA 1992, Panama Taiwan 2003, Canada Honduras 2013, Canada Panama 2010, EFTA Montenegro 2011, Korea Peru 2011, Bosnia and Herzogovina EFTA 2013, Canada Korea 2014, Japan Mongolia 2015

"The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures."

EC Georgia 2014, EC Moldova 2014, EC Singapore 2015

"The Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental or labour law."

Canada Colombia 2008, Canada Jordan 2009, Colombia Peru EC 2012

"Neither Party shall encourage trade or investment by weakening or reducing the levels of protection afforded in their respective environmental laws."

EC Korea 2010, Korea Peru 2011, Korea New Zealand 2015, New Zealand Taiwan 2013 (similar), Transpacific Partnership 2015 (similar)

"A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties.

EFTA Hong Kong 2011, Bosnia and Herzogovina EFTA 2013, Central America EFTA 2013

"A Party will not weaken or reduce the level of environmental protection provided by its laws, regulations or standards with the sole intention to encourage investment from another Party or to seek or enhance a competitive trade advantage of producers or service providers operating in that Party."

Belarus Kazakhstan Russia Vietnam 2015

"Neither Party shall seek to encourage or gain trade or investment advantage by weakening or failing through a sustained or recurring course of action or inaction to enforce or administer its environmental and labour laws and regulations, policies and practices in a manner affecting trade between the Parties."

Canada Honduras 2013 (Non-derogation-2+positive ob. + future gen), Canada Panama 2010

"Further to Article 18.1, the Parties have set out their mutual obligations in the Agreement on Environmental Cooperation between Canada and the Republic of Honduras (the "Agreement on Environmental Cooperation") that addresses, among other things:

(a) conservation, protection and improvement of the environment in the territory of each Party for the well-being of present and future generations; (b) non-derogation from domestic environmental law in order to encourage trade or investment."

CARIFORUM EC EPA 2008

"The EC Party and the Signatory CARIFORUM States shall ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity."

Objectives approach (Broader) Korea Turkey 2012, EC Korea 2010

"... to contribute, by removing barriers to trade and by developing an environment conducive to increased investment flows, to the harmonious development and expansion of world trade; to commit, in the recognition that sustainable development is an overarching objective, to the development of international trade in such a way as to contribute to the objective of sustainable development and strive to ensure that this objective is integrated and reflected at every level of the Parties' trade relationship; and to promote foreign direct investment without lowering or reducing environmental, labour or occupational health and safety standards in the application and enforcement of environmental and labour laws of the Parties."

INCENTIVES

Oman US 2006, Jordan US 2000, Morocco US 2004, Korea US 2007, Central American Free Trade Agreement (CAFTA) Dominican Republic 2004

"The Parties recognize that incentives and other flexible and voluntary mechanisms can contribute to the achievement and maintenance of high levels of environmental protection, complementing the procedures set out in Article 17.4. As appropriate and in accordance with its law, each Party shall encourage the development of such mechanisms, which may include: (a) mechanisms that facilitate voluntary action to protect or enhance the environment, such as: (i) partnerships involving businesses, local communities, nongovernmental organizations, government agencies, or scientific organizations; (ii) voluntary guidelines for environmental performance; or (iii) sharing of information and expertise among government agencies, interested parties, and the public concerning: methods for achieving high levels of environmental protection, voluntary environmental auditing and reporting, ways to use resources more efficiently or reduce environmental impacts, environmental monitoring, and collection of baseline data."

Transpacific Partnership 2015

"The Parties recognise that flexible, voluntary mechanisms, for example, voluntary auditing and reporting, market-based incentives, voluntary sharing of information and expertise, and public-private partnerships, can contribute to the achievement and maintenance of high levels of environmental protection and complement domestic regulatory measures. The Parties also recognise that those mechanisms should be designed in a manner that maximises their environmental benefits and avoids the creation of unnecessary barriers to trade."

New Zealand Taiwan 2013, Australia US 2004

"The Parties recognise that flexible, voluntary mechanisms, such as voluntary sharing of information and expertise, voluntary auditing and reporting, and market-based incentives, can contribute to the achievement and maintenance of high levels of environmental protection."

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