

Briefing 5: Economic Stimulus, Trade and Investment Agreements

Contributions to the Green Transition



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Executive Summary

Economic policy in response to the COVID-19 pandemic present an opportunity for the UK to develop and accelerate its green transition. This paper first outlines an array of proposed economic stimulus measures, assessing their environmental compatibility and highlighting both encouraging and regressive examples. The paper then looks into how environmental issues have been incorporated in bilateral trade and investment agreements. In the current context of economic relief planning, particularly as pressures to relax green regulations rise, it is argued that governments should sustain and advance their environmental commitments both at national and international levels.

Introduction

As a result of the COVID-19 pandemic, major international environmental conferences have been postponed, notably COP26 of the United Nations Framework Convention on Climate Change (UNFCCC) which was slated to conclude negotiation on the implementation of the Paris Agreement.¹ This has shifted the focus to the domestic implementation of economic stimulus packages. Currently, the discussions have moved beyond the need of policy responses to the crisis, and are focusing on the content and desired long-term effects of economic stimulus measures. Even though there is awareness that sustainability must be addressed (i.e., as stated by G20 finance ministers and central bank governors²), most measures have not been subjected to green considerations, instead narrowly targeting employment and industries subsistence.

Green stimulus

Regarding economic packages for a post-pandemic green transition, some measures integrating economic relief and sustainable development may be identified. For example, Canada is creating an emissions reduction fund of \$750 million CAD to support workers while achieving emissions abatement in the oil and gas sector, with a focus on methane.³ The fund, in order to support investments to reduce greenhouse gas emissions, gives repayable contributions to conventional and offshore oil and gas firms. In an additional labour-related stimulus, a \$1.7 billion CAD investment was committed to clean-up old oil and gas wells in Alberta, Saskatchewan and B.C.⁴ Further, Germany, has proposed an investment programme of 100 billion euros to both tackle emissions reduction across different sectors and, at the same time,

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¹ Nishan Degnarain, 'Ten Areas Where COVID-19 Responses Have Increased Environmental Risks', Forbes, April 16th, 2020. Online <<https://www.forbes.com/sites/nishandegnarain/2020/04/16/ten-areas-where-covid-19-responses-are-leading-to-environmental-setbacks/#756b35d44252>>

² G20 Finance Ministers and Central Bank Governors Meeting. Communiqué. April 15th, 2020, online <[https://g20.org/en/media/Documents/G20_FMCBG_Communique_EN%20\(2\).pdf](https://g20.org/en/media/Documents/G20_FMCBG_Communique_EN%20(2).pdf)>

³ Sharon Riley, '11 things you need to know as Trudeau announces \$1.7 billion to clean up 'festering' orphan and inactive wells', The Narwhal, April 17th, 2020. Online <<https://thenarwhal.ca/11-things-trudeau-1-7-billion-clean-up-festering-orphan-inactive-wells/>>

⁴ Government of Canada, 'Canada's COVID-19 Economic Response Plan', April 19th, 2020. online <<https://www.canada.ca/en/department-finance/economic-response-plan.html>>

promote activities in renewable energy production and industry, among other priorities.⁵ Lithuania is proposing to co-finance climate change investment projects, allocating about 20% of a 250 million euro stimulus.⁶

Some economic measures, however, may have regressive impacts on the green transition. For example, the US announced that fuel efficiency standards for new cars will be reduced, which could result in the rise of gasoline consumption and carbon emissions.⁷ Moreover, the US Environmental Protection Agency will waive monitoring and reporting requirements related to environmental protection for companies affected by COVID-19. To accelerate economic recovery, the Chinese Ministry of Ecology and Environment announced the temporary suspension of environmental standards for small businesses. Other measures that could have a negative impact on the green transition include Egypt's reduction of energy costs for the entire industrial sector,⁸ and Norway's postponement of deadlines in tax payments, including from carbon pricing schemes.⁹

Trade Agreements

Free trade agreements (FTAs), as powerful legal instruments for institutional development, have broad potential to expedite climate change mitigation.¹⁰ Environmental considerations are abundant in recent FTAs, and references can be found throughout the text and in specific chapters. These provisions can be classified as general provisions in the core of the agreement, provisions aimed at expanding international environmental agreements, and those specifically referring to environmental protection.

General provisions in the core of the agreement may appear in different contexts, operationalising the interaction between the environment, trade rules and specific issues (i.e., tourism, social issues, transport). For example, the Singapore-Turkey FTA (2015) provides that risk assessments or international standards agreed by international organisations should be taken into account when designing environmental measures.¹¹ In the harmonisation and preservation of environmental standards, for example, the Chile-Argentina (2017)¹² and New Zealand-Korea (2015)¹³ FTAs include measures prohibiting a high level of environmental protection set for protectionist purposes, while affirming the impropriety of encouraging trade and investment by relaxing environmental measures.¹⁴ Furthermore, some agreements include provisions on technical assistance¹⁵ as a means to support disaster relief and promote technology transfer and capacity building, with the additional explicit recognition of sovereignty over hydrobiological and fishery resources.¹⁶ Other general provisions refer to the implementation of the agreement, focusing on the creation of intergovernmental committees and joint environmental assessments, for example the New Zealand-Korea FTA. Concerning enforcement of these measures, some agreements include the elaboration of environmental reports in State-State dispute over trade provisions. Others, such as the Trans-Pacific Partnership, include a three-step consultation process within environment chapters and, if parties fail to resolve a dispute, they may use the procedures in the Dispute Settlement Chapter.¹⁷

⁵ Benjamin Wehmann, 'Climate after corona: green stimulus package could boost the economic recovery', Clean Energy Wire, April 8th, 2020, online <<https://www.cleanenergywire.org/news/climate-after-corona-green-stimulus-package-could-boost-economic-recovery>>

⁶ IMF, 'Policy Responses to COVID-19: Lithuania', online <<https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>>

⁷ Emily Pontecorvo, 'The Only Thing Green About the COVID-19 Stimulus Bill Is the Money', Mother Jones, March 28th, 2020, online <<https://www.motherjones.com/environment/2020/03/the-only-thing-green-about-the-covid-19-stimulus-bill-is-the-money/>>

⁸ IMF, 'Policy Responses to COVID-19: Egypt', online <<https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>>

⁹ Government of Norway, 'Economic measures in Norway in response to COVID-19', March 20th, 2020, online <<https://www.regjeringen.no/en/aktuelt/economic-measures-in-norway-in-response-to-covid-19/id2694274/>>

¹⁰ Rafael Leal-Arcas, 'International Trade for Climate Action and Inclusive Green Growth', Green Growth Knowledge Platform, February 1st, 2018, online <<https://www.greengrowthknowledge.org/blog/international-trade-climate-action-and-inclusive-green-growth>>

¹¹ Singapore-Turkey FTA, (2015).

¹² Chile – Argentina FTA (2017), Chapter 13.

¹³ New Zealand – Korea Free Trade Agreement (2015), Chapter 16.

¹⁴ Chile – Argentina FTA (2017), Chapter 13. New Zealand – Korea Free Trade Agreement (2015), Chapter 16.

¹⁵ Chile – Argentina FTA (2017), Chapter 13. New Zealand – Korea Free Trade Agreement (2015), Chapter 16.

¹⁶ New Zealand – Korea Free Trade Agreement (2015).

¹⁷ Australian Government, Department of Foreign Affairs and Trade, 'CPTPP outcomes: Environment', February 2019, online <<https://www.dfat.gov.au/trade/agreements/in-force/cptpp/outcomes-documents/Pages/cptpp-environment>>. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 2018. Chapter 20.

Looking at provisions aimed at enforcing and expanding multilateral environmental agreements (MEAs), FTAs refer to the Paris Agreement¹⁸ and the implementation of the whole UNFCCC,¹⁹ among other MEAs. Meanwhile, environmental protection provisions consider the conservation of natural resources and issues of sustainable use. For example, agreements between Chile-Argentina and New Zealand-Korea contain commitments to enhance, strengthen, and improve the levels of environmental protection, the promotion of renewable energy, environmental education, reduction of GHG emissions, conservation of fishery resources, and cooperation on climate change.²⁰ The New Zealand-Korea FTA also contains provisions on nuclear safety and radiation.²¹ Since 2009, the EU has incorporated trade and sustainable development chapters in its FTAs, committing Parties to maintain standards contained in, for instance, the Paris Agreement.²² Also, CETA contains three specific chapters covering trade and sustainable development, trade and labour, and trade and environment.²³

International Investment Agreements (IIAs)

Adoption of regulatory policies is needed given international investment obligations contained in the Paris Agreement, as well as those toward promotion of green private investment to unlock sustainable growth.²⁴ Provisions within IIAs have evolved from general descriptions to the explicit inclusion of sustainable considerations at different stages,²⁵ with objectives such as climate change mitigation, investment and industrial policy integration, and the promotion of responsible corporate behaviour.²⁶ IIAs' preamble and objectives have become instrumental for green objective achievement as they are a vehicle for presentation of negotiating goals. These are also critical when guiding interpretation of specific provisions, including dispute settlements.²⁷ For example, PACER PLUS refers to the links between economic and social development with environmental protection.²⁸ CETA²⁹ and the BIT between Canada and Mongolia (2016)³⁰ recognise and reaffirm their commitment to promote sustainable development.

Some IIAs have evolved in their inclusion of investor obligations regarding environmental protection. For example, Morocco-Nigeria included the obligation of investors to comply with environmental assessment and screening processes.³¹

The inclusion of safeguarding policy space becomes critical to ensure States' right to regulate, and hence, reconcile investment objectives with environmental and social priorities.³² These provisions have evolved from general exception clauses to become more refined texts exclusively addressing environment, safety and public health concerns. For example the BIT between EU – Vietnam (2019) and Canada – Korea (2014) reaffirm the right to regulate to achieve legitimate policy objectives, such as the protection of the

¹⁸ Chile – Argentina FTA (2017), Chapter 13. New Zealand – Korea Free Trade Agreement (2015), Chapter 16.

¹⁹ EU-Vietnam FTA 2019, Chapter 13.

²⁰ Chile – Argentina FTA (2017), Chapter 13. New Zealand – Korea Free Trade Agreement (2015), Chapter 16.

²¹ New Zealand – Korea Free Trade Agreement (2015), Chapter 16.

²² Sam Lowe, 'The EU should reconsider its approach to trade and sustainable development', October 31st, 2019, online <<https://www.cer.eu/insights/eu-should-reconsider-its-approach-trade-and-sustainable-development>>. See the Japan-EU Economic Partnership Agreement (JEPA).

²³ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union [And Its Member States] 2016. Chapters 22, 23 and 24.

²⁴ Daniel B. Magraw and Sergio Puig, 'Greening Investor-State Dispute Settlement' (2018) B.C. L. Rev. 2717, online <<https://heinonline.org/HOL/P?h=hein.journals/bclr59&i=2759>>

²⁵ UNEP and IISD, 'A Sustainability Toolkit for Trade Negotiators: Trade and investment as vehicles for achieving the 2030 Sustainable Development Agenda' (2016), online <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/1-why-is-sustainable-development-important-for-trade-and-investment-agreements/#jump>. Stages may be defined as Preamble and Objectives, Definition of Investment, Investor Obligations, Safeguarding Policy Space, and Preventing and Resolving Investment-Related Disputes.

²⁶ Wolfgang Alschner and Elisabeth Tuerk, 'The Role of International Investment Agreements in Fostering Sustainable Development' (2013). Baetens, F., (Ed.), *Investment Law Within International Law: Integrationist Perspectives*, online <<http://dx.doi.org/10.2139/ssrn.2295440>>

²⁷ UNEP and IISD (n 25).

²⁸ Pacific Agreement on Closer Economic Relations PLUS Agreement 2017. Preamble.

²⁹ CETA (n 23). Preamble.

³⁰ Agreement between Canada and Mongolia for the Promotion and Protection of Investments 2016. Preamble.

³¹ Morocco-Nigeria Reciprocal Investment Promotion and Protection Agreement 2016, Article 18.1.

³² UNEP and IISD (n 25).

environment.³³ CPTPP added further clarity to concepts of “like circumstances” under the national treatment and most-favoured nation obligations in regard to public welfare objectives.³⁴ Regarding the prohibition of performance requirements, Canadian agreements with Moldova (2018) and Mongolia (2016) explicitly exclude technology transfer to meet generally applicable health, safety, or environmental requirements.³⁵ Recently, an important discussion regarding the State’s regulatory autonomy due to umbrella clauses has arisen; agreements such as CPTPP, CETA and Canada-China BIT have excluded this provision.³⁶

Finally, preventing and resolving investment-related disputes with regard to green and sustainable investments has gained attention. Indeed, in order to limit exposure to litigation, States are increasingly redefining and limiting investors’ access to dispute settlement mechanisms.³⁷

Conclusions

While declarations pursuing the reduction of green regulations to accelerate economic growth have increased, COVID-19 represents an opportunity to implement stronger global climate policies. The UK commitments within its economic recovery packages set standards that foster sustainable development in sectors where green alternatives are already in place. These standards may be included in the negotiations of upcoming trade and investment agreements. In this context, governments should sustain and advance their commitments towards a green transition both at national and international levels. As such, commitments to harmonize and preserve environmental standards, the enforcement of environmental commitments through State-to-State Dispute settlement (or other similar-less legalistic- procedures), the inclusion of investor obligations towards environmental protection, and international cooperation within instruments could be pivotal in the process of operationalizing and advancing green transition commitments.

³³ UNEP and IISD (n 25). EU–Vietnam FTA 2019, Chapter 8, Chapter II (Investment), Article 13bis(1). Canada – Korea FTA 2014, Chapter 17, Article 17.2.

³⁴ CPTPP, Chapter 9 footnote 14.

³⁵ Canada – Moldova BIT, Article 9. Canada – Mongolia (n 30), Article 9.

³⁶ Tang Sisi, ‘The Endangered Umbrella Clause: To Save It or to Leave It’, (2019) *J. WTO & China*, vol. 9, online <<https://heinonline.org/HOL/P?h=hein.journals/jwtoch9&i=92>>; Aniruddha Rajput, ‘Safeguarding India’s Regulatory Autonomy: Analysis of the New Model Bilateral Investment Treaty’, (2017) *Manchester J. Int’l Econ. L.* 14: 279, online <https://heinonline.org/HOL/P?h=hein.journals/mjle14&i=301>; CPTPP, Chapter 9 (n 17); CETA, Chapter 8 (n 23); Canada China BIT (2012).

³⁷ Maria Chochorelou and Carlos Espaliu Berdud. ‘Sustainable development in new generation FTAs: Could arbitrators further the principle through ISDS?’, (2018) *Review of European, Comparative & International Environmental Law* 27.2: 176-186; UNEP and IISD (n 25).