

Briefing 4: The UK's Draft Position

Exploring the basis for negotiation with the EU

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Executive Summary

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

Introduction

As the Brexit process advances greater technical clarity is gained, in particular through exchange of draft withdrawal agreements. While each provides a stand-alone picture of negotiation positions, comparative insights can be drawn on points of convergence and divergence. This paper offers an initial tentative review of the UK² and EU draft agreement texts³ on matters relating to the environment with the aim to identify constructive ways forward.

Preambles

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

Across EU FTA practice, there are only small divergences in the relevant preambular texts.⁴ Notably, the EU-Japan, EU-Singapore and EU-Vietnam FTAs all highlight the importance of pursuing environmental objectives relevant for achieving sustainable development within the Contracting Parties' 'economic, trade and investment relationships'. Recent FTAs, however, ascribe varying weight to the importance of a 'social' dimension, which may include the role of society in achieving environmental objectives. For instance, preambles may be restricted the scope to merely allude to the importance of labour rights as a separate

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² UK Government, *Draft UK-EU Comprehensive Free Trade Agreement*, online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886010/DRAFT_UK-EU_Comprehensive_Free_Trade_Agreement.pdf>.

³ EU Commission, *Draft text of the Agreement on the New Partnership with the United Kingdom*, online: <<https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf>>.

⁴ See recent comparison of the environmental obligations found in EU FTA chapters on sustainable development and the environment in the EU-Japan Economic Partnership Agreement, CETA (which contains two separate chapters), EU-Japan FTA, EU-Singapore FTA, and EU-South Korea FTA by Markus W. Gehring, Christian Delev & Freedom Kai Phillips, *Assessing EU FTA Environmental Obligations: Putting The Draft EU-Mercosur Trade Agreement Into Perspective* (CISDL Working Paper, 2020).

sustainable development objective. Only the EU-South Korea FTA makes reference to the protection of natural resources.

Environment and Sustainable Development

The UK draft provides in Article 26.1:

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

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

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

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

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

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

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

The Chapter on Sustainable Development in the EU Draft is also much more comprehensive including provisions on forests, biodiversity and climate change. Neither draft subjects its sustainable development chapter to normal dispute settlement procedures. However, while the EU Draft contains recourse to dispute settlement through an expert panel process, the UK Draft merely proposes diplomatic means by way of a Committee on Trade and Sustainable Development.

Implementation of Multilateral Environmental Obligations

General Provisions on Multilateral Environmental Obligations

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

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

Outlined Areas of Specific Focus

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

Climate Change

On climate change, the UK Draft seems to relegate the issue to a future Agreement on Energy, as mentioned in the Services trade chapter. Accordingly, the Draft does not contain any substantive climate provisions or proposals drawing on previous EU FTAs, or even other FTA language.⁵ Yet, the lack of such provisions in the UK Draft is hard to explain because the economic drivers of climate change extend far beyond the contours of the energy sector. Indeed, as the EU Draft notes, “[climate change] covers emissions and, where applicable, removals of greenhouse gases and ozone depleting substances. This includes emissions and removals from, in particular, industrial installations, transport, land use and forestry, and agriculture” (Art. 2.34 EU Draft).

In this regard, we note that the EU has signed FTAs that include provisions on climate change such as Article 65(2D) of the EU-Central America FTA (2012) which provides, among else, cooperation on promoting “*effective risk management in the agribusiness chains aiming to incorporate measures for adaptation and mitigation of climate change and variability*”. Similarly, the EU-Andean Communities FTA (2012) in Article 270 reaffirms the commitment of the Parties to effectively implement in their laws and practices the Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted on 11 December 1997 and provides that “*Nothing in this Agreement shall limit the right of a Party to adopt or maintain measures to implement the agreements referred to in paragraph 2 [including the Kyoto Protocol]*”.

Similar language can be found in the EU-Ukraine Association Agreement which provides in Article 338 that Parties should cooperate to promote the Joint Implementation Mechanism under the Kyoto Protocol to the UN Framework Convention on Climate Change of 1997 to reduce emissions of greenhouse gases through energy efficiency and renewable energy projects, while obliging Ukraine in Annex XXXI to Chapter 6 to implement the Kyoto Protocol including all eligibility criteria for fully using the Kyoto mechanisms, develop a long-term action plan for mitigation and adaptation to climate change, and develop and implement long-term measure to reduce greenhouse gases emissions.

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

“The Parties consider that climate change represents an existential threat to humanity and reiterate their commitment to strengthening the global response to this threat. The fight against man-made climate change as elaborated in the United Nations Framework Convention on Climate Change (UNFCCC) process, and in particular in the Paris Agreement, inspires the domestic and external policies of the Union and the United Kingdom.”

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

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

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

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

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

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

Express MEA references

The UK Draft refers to and recalls commitments toward a number of international agreements, including the Rio Declaration on Environment and Development (1992); Agenda 21 on Environment and Development (1992); the Johannesburg Declaration on Sustainable Development (2002); the Plan of Implementation of the World Summit on Sustainable Development (2002); the Ministerial Declaration of the United Nations Economic and Social Council on creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development (2006); and the ILO Declaration on Social Justice for a Fair Globalisation (2008). This should be considered as generally helpful as it can aid in the interpretation but it should be noted that all these documents are considered non-binding international declarations, without a clear reference for example to the Sustainable Development Goals (SDGs).

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

In addition, the EU Draft recognizes Agenda 21 (1992); the Johannesburg Plan of Implementation of the World Summit on Sustainable Development (2002); the ILO Declaration on Social Justice for a Fair

Globalisation (2008); the Outcome Document of the UN Conference on Sustainable Development of 2012 entitled "The Future We Want"; and the UN 2030 Agenda for Sustainable Development.

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

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

Obligations not to Weaken Standards

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

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

“Upholding levels of protection

1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.

2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.”

(Article 28.5)

It should be clarified that these provisions introduced “soft” and “conditional” non-regression obligations since Article 28.3 does not introduce a clearly operable hard-law obligation while 28.5(2) links the obligation of non-regression to a specific action or inaction related to the promotion of trade or a particular investment.

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

Conclusions

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

In contrast, the EU Draft contains firm non-regression provisions, though with a tendency only to commit the UK to non-regression, and much more detailed provisions on all aspects of sustainable development. The Draft establishes a legally binding connection between to MEAs and their domestic implementation

as pre-conditions for trade liberalisation. It also introduces a series of specific obligations in relation to various aspects of sustainable development such as forests, biodiversity, climate change and the low carbon economy.