The level playing-field for labour and environment in EU-UK relations

SUMMARY

The level playing-field (LPF) provisions of the Trade and Cooperation Agreement (TCA) between the European Union (EU) and the United Kingdom (UK) constitute a key part of the agreement, and are the product of some of the more challenging issues in the negotiations. The LPF provisions seek to safeguard fair competition between the parties. A notable component are the rules on social provisions, labour, environment and climate change, often referred to as the ‘trade and sustainable development’ (TSD) chapters in other free trade agreements.

The trading relationship between the EU and the UK is fundamentally different from that between the EU and other countries. Indeed, not only was the UK a Member State of the EU until 31 January 2021 and (almost all) EU laws applied to the UK until the end of the transition period on 31 December 2020, but the two economies are also close and strongly-interconnected neighbours. The TCA was therefore designed to ensure that a LPF continues post-Brexit. This could be achieved by maintaining levels of protection at the end of the transition period, as well as by either avoiding significant divergences in the future or by taking appropriate (rebalancing) measures.

To this end, the TCA requires that parties do not weaken or reduce their levels of social, labour and environmental protection below those in place at the end of 2020 (non-regression). Existing commitments and ambitions on climate change, in particular on climate neutrality by 2050, remain in place for both parties. In addition, the TCA introduces a mechanism whereby a party can take appropriate rebalancing measures to offset any (adverse) ‘material impacts on trade or investment’ arising from ‘significant divergences’ between parties. It also allows either party to request a review with a view to amending the agreement, and either party can opt to terminate the trade chapters if the envisaged amendment is not satisfactory.

The TCA LPF provisions on labour and environment, in view of the LPF focus, strengthen the enforcement of non-regression provisions by allowing for remedial measures in the event of non-compliance, and also reinforce the precautionary approach. The TCA also represents a notable innovation with its rebalancing and review provisions.

This Briefing updates an earlier one, published in April 2021.

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Introduction and background

The EU and the UK signed the Trade and Cooperation Agreement (TCA) on 30 December 2020. The TCA applied provisionally from 1 January 2021 to 1 May 2021, when it entered into force after ratification. Title XI of Part Two – Trade, Transport, Fisheries and other Arrangements (Title XI [LPF]) sets out the level playing-field (LPF) provisions. These are designed to safeguard fair competition and touch upon a range of areas: competition policy, subsidy control, state-owned enterprises, taxation, labour and social standards, environment and climate, and other instruments for trade and sustainable development.

While typical 'trade and sustainable development' (TSD) provisions aim to promote convergence of labour and social standards and environment and climate change policy, the objective of the LPF in the TCA is to avoid 'significant' divergence, because when the TCA came into (provisional) application, the EU and the UK already shared the same standards and the two economies are contiguous and substantially interconnected.1 To this end, the Political Declaration accompanying the 2019 Withdrawal Agreement, albeit not binding, set the course for the negotiations and indicated that the agreement on the future relationship should establish robust LPF provisions.

Nevertheless, there was concern, particularly on the UK side, that overly stringent provisions aiming at the continuous alignment of standards would constrain the ability of the parties to regulate independently. As a result, the negotiations on LPF provisions were intense and the negotiators repeatedly reported that the respective positions in the area were substantially different.

Eventually, LPF provisions were agreed on labour and the environment. These cover three areas: a) general principles and commitments to international treaties and conventions, b) non-regression and rebalancing measures, and c) dispute settlement mechanism.

Provisions on labour and environmental policy in the TCA

General provisions and commitments

Chapter one (General provisions) of Title XI – [LPF] introduces the provisions general to all LPF fields. It recognises the 'common understanding' of mutual benefits of the LPF in preventing distortion of 'trade or investment', and stresses that the objective is not to 'harmonise' standards. It explicitly declares the 'right to regulate' and acknowledges the 'precautionary approach' (principle) for the environment and human health. The parties commit to climate neutrality by 2050.
Chapter eight (Other instruments for TSD) of Title XI [LPF] makes general commitments and cites a relatively long list of political declarations in its Article 397 [Context and objectives]. These are:

- Agenda 21 and the Rio Declaration on Environment and Development (1992);
- Agenda 21 and the Rio Declaration on Environment and Development (1992);
- the Johannesburg Plan of Implementation of the World Summit on Sustainable Development (2002);
- the International Labour Organization (ILO) Declaration on Social Justice for a Fair Globalization (2008);
- the Outcome Document of the UN Conference on Sustainable Development entitled 'The Future We Want' (2012); and
- the UN 2030 Agenda for Sustainable Development (2015) and its sustainable development goals.

Title XI [LPF] Article 399 [multilateral labour standards and agreements] refers again to the 2008 ILO Declaration on Social Justice for a Fair Globalisation, but also to the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, all the ILO conventions already ratified, and the European Social Charter (Council of Europe).

The environmental agreements article (Article 400) requires implementation of ratified multilateral environmental agreements and commits the parties to work together on trade-related aspects of environmental policies in international forums (listed). The climate change article (Article 401) includes the UN Framework Convention for Climate Change (UNFCCC) and the Paris Agreement, and parties again commit to working together in international forums. Under the trade and biological diversity article (Article 402), the parties recognize the importance of conservation and sustainable use of biological diversity and the role of trade in pursuing these objectives, including by promoting sustainable trade and controlling or restricting trade in endangered species, in line with the relevant multilateral environmental agreements to which they are party, notably the Convention on Biological Diversity and its protocols and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). On responsible supply chains, Article 406 refers to the OECD Guidelines for Multilateral Enterprises, the ILO Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy, the UN Global Compact, and the UN Guiding Principles on Business and Human Rights. Other areas include forests (Article 403), sustainable management of marine biological resources and aquaculture (Article 404), and sustainable development (Article 405).

**Non-regression**

| Box 2 – The non-regression principle in the EU-UK Trade and Cooperation Agreement |
| Party shall not weaken or reduce, in a manner affecting trade or investment between Parties, its labour and social protection below the levels in place at the end of the transition period, including by failing to effectively enforce its laws and standards. |
| Source: Trade and Cooperation Agreement Article 387(2) – labour and social standards. |
| For the purposes of this Chapter, insofar as targets are provided for in a Party's environmental law in the areas listed in Article 390 [Definitions], they are included in a Party's environmental levels of protection at the end of the transition period. These targets include those whose attainment is envisaged for a date that is subsequent to the end of the transition period. This paragraph shall also apply to ozone depleting substances. |
| Source: Trade and Cooperation Agreement Article 391(4) – environment and climate. |

In Chapter six (Labour and social standards) and Chapter seven (Environment and climate), the parties agree to continue to strive to raise their respective standards. These chapters also include 'non-regression' provisions whereby parties agree not to weaken or reduce labour, social, and environment laws 'in a manner affecting trade or investment'. Importantly, the non-regression
article in Chapter seven, Article 391(4), specifies that the targets in place at the end of the transition period on 31 December 2020 should remain, even if those targets are to be met after this date.

**Dispute settlement**

As a general rule, dispute settlement under Title XI (LPF), Chapters six (Labour and social standards), seven (Environment and climate), and eight (Other instruments for TSD) is governed 'exclusively' by Articles 408 (Consultations), 409 (Panel of experts) and 410 (Panel of experts for non-regression areas), with elements incorporating aspects of the horizontal dispute settlement mechanism (HDSM).

Articles 408-410 outline a dispute settlement mechanism under which a party may request consultation with the other party regarding any 'matter arising' under Chapters six to eight, or the provision reaffirming the ambition of economy-wide climate neutrality by 2050 (Article 355(3)). If consultations are not satisfactory, a party may request the opinion of a panel of three experts (see discussion below). The panel is required to deliver an interim report no later than 125 days after the establishment of the panel of experts. Each party may make a reasoned request to review particular aspects of the interim report within 25 days, and the other party may comment on that request within 15 days. The panel of experts must deliver the final report within 195 days of the establishment of the panel at the latest, and the report must be made public by parties within 15 days of its delivery. The final report will determine if a party has not respected its obligations, and the parties will discuss the appropriate measures (Article 409(16)). Finally, the dispute settlement provisions under the LPF title of TCA cross-refer to and incorporate several aspects of the HDSM provisions, including the panel selection procedures (Articles 409(19) and 740).

**Linking LPF dispute settlement with HSDM**

In some specific instances, the TCA links dispute resolutions on labour and environment policy to the horizontal dispute settlement mechanism (HDSM) of Part six (Dispute settlement and horizontal provisions), Title I (Dispute settlement), instead of the dispute settlement mechanism in Part two (Trade), Title XI [LPF] (see Box 1).

First, the dispute settlement applicable to clause 356(2) acknowledging the precautionary approach regarding the environment and human health is governed by the HSDM (Article 357).

Second, Article 355(3) 'reaffirms' the ambition of climate neutrality by 2050 and is included in the scope of the HDSM (Article 735 (Scope)), even though the Title XI (LPF) dispute mechanism set out in Articles 408-409, i.e. the panel of experts, must apply.

Furthermore, pursuant to Title XI (LPF) Article 410, HDSM, Articles 749 (Temporary remedies) and 750 (Review of any measure taken), apply to non-regression in addition to Title XI (LPF) Article 409. These two articles state, inter alia, that when further disagreement remains as to compliance with the remedial measures, the panel may eventually be asked to decide.

**Rebalancing**

The TCA introduces an innovative rebalancing mechanism related to levels of environmental as well as labour and social protection. Title XI (LPF), Chapter nine (Horizontal and institutional provisions) makes provision for rebalancing measures in cases where 'significant divergences' arise in the areas of labour and social, environmental or climate protection, and which result in 'material impacts on trade or investment'.

In this case, the parties may enter into consultation upon notification by the party concerned. Should no mutually acceptable solution be reached, the party concerned may adopt those 'rebalancing measures' that are strictly necessary and proportionate to remedy the 'material impacts', unless the notified party requests the establishment of an arbitration tribunal in accordance with HDSM Article 739(2) (Arbitration procedure). The arbitration tribunal designed by
the HDSM determines whether the notified rebalancing measures are indeed proportionate to remedy the situation.

If an arbitration tribunal is established but does not deliver its final ruling within the 30-day deadline, the party concerned may adopt rebalancing measures until delivery of that ruling. In that case, the other party may take proportionate countermeasures until the tribunal issues its ruling. If the arbitration tribunal finds the rebalancing measures to be consistent with the material impacts, the party concerned may adopt the measures. Otherwise, the party concerned must notify the measures it intends to implement to comply with the ruling of the tribunal (withdraw or adjust).

Box 3 – Rebalancing provisions in the TCA

1. The Parties recognise the right of each Party to determine its future policies and priorities with respect to labour and social, environmental or climate protection, or with respect to subsidy control, in a manner consistent with each Party's international commitments, including those under this Agreement. At the same time, the Parties acknowledge that significant divergences in these areas can be capable of impacting trade or investment between the Parties in a manner that changes the circumstances that have formed the basis for the conclusion of this Agreement.

2. If material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate rebalancing measures to address the situation. Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement. A Party's assessment of these impacts shall be based on reliable evidence and not merely on conjecture or remote possibility.

Source: EU-UK Trade and Cooperation Agreement Article 411 (Rebalancing) (1) and (2).

Review

Title XI (LPF) Article 411 (Rebalancing) clauses 4-12 establish that either party may request a review of the operation of Heading 1 (Trade) (the parties may agree to add other headings to the review). The request should be formulated no sooner than four years after the entry into force of the agreement and can be repeated four years after the latest review, or sooner under specified circumstances, e.g. if a party considers that rebalancing measures are frequently taken by the other party. The review will address whether there is a need for an amendment of the TCA. If a party considers that following the review, an amendment is necessary, the parties should use their best endeavours to negotiate the modifications; if no amending agreement is concluded within one year of the date the negotiations began, either party may give notice to terminate Heading 1 (Trade) (or another heading in the review), and as a result Heading 3 (Road transport) will also be terminated. The paragraphs referring to review requests are excluded from the HDSM, except for the decision to terminate (Title XI (LPF) 411(12)).

A comparison with the EU's second-generation FTAs

EU trade strategy

Since 2006, the EU has moved from FTAs focusing on tariff cuts and trade in goods to a ‘second generation’ of FTAs that go beyond tariffs and aim to promote sustainable development. The EU has also increased efforts to ensure that its FTA counterparties fulfil the TSD commitments demanded by the FTAs. This is in line with the ‘trade for all’ strategy (2015) that aimed to include ‘strong provisions to promote the respect of labour rights around the world’, and prioritised that ‘partners implement provisions on core labour standards like the abolition of child labour, the rights of workers to organise and non-discrimination at work’. This objective was also set out in the Commission’s 2018 15-point TSD action plan and led to the appointment in July 2020 of the EU's
first chief trade enforcement officer. It also led to the November 2020 creation of the single entry point, where EU companies, trade organisations and non-governmental organisations can submit complaints about non-EU countries not meeting the commitments they have made in FTAs on workers’ rights, climate change, and the environment. Finally, the Commission’s Trade Policy Review (2021) emphasises the relevance of TSD chapters in FTAs and their enforcement (see Box 4).


Negotiating trade agreements has been an important tool to create economic opportunities and promote sustainability; implementing those agreements and enforcing the rights and obligations contained in them will be much more significant. This will include ensuring that the EU has the right tools at its disposal to protect workers and businesses from unfair practices. It also implies a greater effort to ensure the effective implementation and enforcement of sustainable development chapters in EU trade agreements, to level-up social, labour and environmental standards globally. By strengthening the implementation and enforcement of its agreements, the EU’s trade policy creates the conditions for businesses to develop, grow and innovate; and secure high-quality jobs in Europe and beyond.


The EU-Korea FTA (provisionally applied in 2011, and ratified in 2015) was the first of the EU’s ‘new generation’ FTAs. It includes TSD chapters, as do all the subsequent EU FTAs negotiated and/or signed, including the FTA with Canada (provisionally applied since 2017), Vietnam (in force since 2020), Singapore (in force since 2019), Japan (in force since 2019), Mexico (modernised) (2018, agreement in principle) and Mercosur 4 (2019, agreement in principle), which are reviewed in the next sections.

General provisions and commitments

All of the aforementioned second-generation FTAs include provisions affirming the right to regulate and parties can determine their own sustainable development policies and priorities, as well as their level of domestic environmental and labour protection, to the extent that this is consistent with the international agreements and labour standards listed in the respective agreements. Table 1 shows the political declarations, multilateral agreements and conventions present in the TCA and draws a comparison with the EU’s second-generation FTAs (not including the European Social Charter).3

It should be noted that some agreements are in the EU’s other FTAs, but not in the TCA. This is the case of the Ministerial Declaration of the UN Economic and Social ‘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), which is included in the FTAs with South Korea, Canada, Singapore, Japan and Mercosur. Finally, the EU-Singapore FTA adds the Preamble to the WTO Agreement and the Singapore Ministerial Declaration at the WTO (1996).

Table 1 – Comparison of the TCA with EU second-generation FTAs
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Non-regression

All of the FTAs considered here include a clause regarding commitments not to weaken levels of labour and environmental protection, although the related enforcement provisions vary. The non-regression provision typically refers to 'upholding levels of protection', and, while it recognises the right to regulate, it provides for non-regression in ways that can be divided into two categories of impact: a) 'to encourage' trade and/or investment, or b) 'in a manner affecting' trade and/or investment. The weakening of levels of protection could be a result of a) weakening laws, b) waiver or derogation, or c) failure to enforce. The TCA covers all of these scenarios, although it does not mention all of them explicitly. Each of these three categories may be associated with either the 'intention to affect' or 'in a manner affecting' trade and/or investment. Sometimes, these two formulations are found in the same agreement. Table 2 provides typical examples of the provision.

Table 2 – Selected wording of the non-regression in TSD provisions in recent EU FTAs

<table>
<thead>
<tr>
<th>Action taken</th>
<th>In a manner affecting trade and/or investment</th>
<th>(In order) to encourage trade and/or investment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Weakening</td>
<td>United Kingdom, Canada, Japan, Mercosur, Mexico, South Korea, Vietnam</td>
<td>Canada, Japan, Mercosur, Mexico, South Korea, Vietnam</td>
</tr>
<tr>
<td>Waiving or derogating from</td>
<td>Japan, Singapore, South Korea, Vietnam, United Kingdom</td>
<td>Canada, Mercosur, Mexico</td>
</tr>
<tr>
<td>Failing to enforce</td>
<td>United Kingdom, Japan, Singapore, South Korea</td>
<td>Canada, Mercosur, Mexico, Vietnam</td>
</tr>
</tbody>
</table>

Source: Author’s compilation.
Note the special case of the EU-Japan FTA, which combines the two types of impact as follows: ‘the parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulation. To that effect, the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them … in a manner affecting trade or investment between the Parties’.7

Box 5 – TSD provision in the EU-Mercosur FTA

1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labour protection it deems appropriate and to adopt or modify its law and policies. …

2. Each Party shall strive to improve its relevant laws and policies so as to ensure high and effective levels of environmental and labour protection.

3. A Party should not weaken the levels of protection afforded in domestic environmental or labour law with the intention of encouraging trade or investment.

4. A Party shall not waive or derogate from, or offer to waive or derogate from, its environmental or labour laws in order to encourage trade or investment.

5. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental or labour laws in order to encourage trade or investment.

Source: EU-Mercosur FTA TSD, Article 2 (Right to regulate and levels of protection) (extract).

Dispute settlement

Dispute settlement in the TCA is similar to that in recent EU FTAs reviewed here. All of them provide for consultations between parties for ‘any matter’ regarding the TSD chapter(s). Other formulations include any ‘disagreement on any matter covered under this chapter’ or ‘disagreement regarding the interpretation or application’ of the chapter. If, after consultation, no mutually satisfactory resolution is reached, a party may request the establishment of a panel of three experts. The panel may be agreed by the parties or extracted from a list established shortly after the agreement takes effect. Like the TCA, the list is composed of individuals willing to serve as experts, typically 15, equally split into 3 sub-lists agreed in a joint committee: one for each party, and one composed of non-nationals who serve as panel chairs.8 In all instances, experts should have knowledge or expertise in the relevant fields, including labour, environmental and trade law, or in the resolution of disputes under international agreements.

The panel must issue an interim and a final report, and parties may submit written comments on the interim report, which the panel will take into account for the final report.9 In all cases, the panel must issue its findings along with recommendations. The parties must then discuss ‘appropriate’ measures taking into account the final report, including the findings and the recommendations of the final report.10 In all instances, implementation is to be monitored by the committee responsible established by the agreement, typically the ‘committee on trade and sustainable development’.

While the TCA is similar to the EU’s recent FTAs in several respects, it includes further clarifications that set out the parties’ understanding of how the recommendations work. First, in the TCA, the panel is not expressly required to issue any recommendations as such; indeed it is indicated that ‘for greater certainty, the Parties share the understanding that if the Panel makes recommendations in its report, the responding Party does not need to follow these recommendations in ensuring conformity with the Agreement’. Second, Article 409(18) adds that, whenever the parties disagree on the consistency of measures taken by the responding party to address the non-conformity found by the panel of experts, the complaining party may request that the latter decide on the issue. Finally, under the TCA, the temporary remedy provisions provided by the horizontal dispute title are applicable to disputes regarding non-regression areas. Experts suggest that this may be a major difference (see discussion below).
Negotiating positions

The EU draft text included provisions regarding levels of labour and environmental protection, affirming non-regression of the level of protection existing at the end of the transition period, including targets such as achieving climate-neutrality by 2050. It also required future downward changes in levels to be at least as great as those initiated by the other party. For instance, provision LPF S.2.28 (Future levels of protection) stated that 'where both parties have increased the level of labour and social protection, neither party should weaken its level'.

The UK rejected future alignment provisions outright in a letter sent by Lord Frost, UK chief negotiator, in May 2020, which states that this would constitute a breach of UK sovereignty. In its draft text, the UK included provisions on labour and environmental protection whereby the parties would commit to multilateral standards, such as the ILO conventions, and emphasised the 'right to regulate', recognising the right of each party to set its labour priorities and adopt laws consistently with international labour commitments. On environmental protection legislation, although it recognised that the environment was a fundamental pillar of sustainable development (Article 28.2), it also reiterated each party's 'right to regulate', to set its own environmental priorities and to adopt its laws and policies in a manner consistent with 'multilateral environmental agreements'.

The TCA enshrines the principle whereby the labour and environmental standards to which the EU and UK have committed and had implemented at the end of the transition period will endure beyond this period, including targets such as climate-neutrality by 2050. It also set out a rebalancing mechanism that allows parties to 'diverge' in either direction (should that be in line with other commitments under the Agreement), and the material impacts resulting from this divergence may be offset by appropriate measures. This responds to the UK's desire for an option to diverge and to the EU's objective of avoiding LPF distortions arising from divergence.

Position of the European Parliament

In its recommendations on the EU-UK negotiations adopted on 18 June 2020, Parliament shared the position that the scope and ambition of the FTA was conditional on and had to have a direct link with the UK agreeing to comprehensive and enforceable provisions related to the LPF, due to the size and geographical proximity of the UK, as well as the economic interdependence and connectedness between the EU and the UK. Parliament recalled its determination to prevent any kind of 'dumping' in the framework of the future EU-UK relationship and the LPF should preserve competitiveness, high social and sustainability standards, including the fight against climate change through robust commitments, and non-regression clauses with a view to dynamic alignment. The agreement had to be conditional on respect for the Paris Agreement and the promotion of the UN’s sustainable development goals (SGDs), and should enshrine the precautionary principle.

Moreover, in its resolution of 7 October 2020 on the implementation of the common commercial policy – annual report 2018, Parliament supports the Commission’s strategy to enforce TSD chapters in FTAs, but calls on the Commission to put further effort into monitoring and enforcing TSD provisions. To this end, Parliament asks the Commission to ‘develop a precise and specific methodology for monitoring and evaluating the implementation of these chapters, given that such an evaluation cannot be made on the basis of quantitative data only’.

Expert views

According to the Institute for Government the commitments in the TCA on environment and climate go beyond what is found in other EU FTAs. There is greater detail on specific commitments and an attempt to ensure that there is a system of environmental protection with detailed common principles. The non-regression dispute settlement mechanism for labour and environment is also more robust than that in other EU FTAs. The same opinion is shared by Sussex University’s UK Trade
Policy Observatory (UKTPÓ), which stresses that it is unusual for an EU FTA to feature the precautionary approach as much, making it enforceable with sanctions for non-compliance. Also, to the authors, remedial measures in relation to non-regression provisions, which offer an avenue to the general arbitration process, permitting temporary retaliation, differ from standard EU practice, in which rulings, though considered binding, cannot be addressed through suspension of obligations. Indeed, according to Professor Steve Peers (University of Essex), the application of the HDSM Article on temporary remedies for non-regression allows for TCA cross-sectoral retaliation in the event of non-compliance, as provided for by the HDSM chapters. Sam Lowe (now at Flint Global) also suggests that the review clauses and dispute settlement mechanisms could result in parts of the TCA being suspended, e.g. with the re-introduction of tariffs.

Nevertheless, the non-regression and rebalancing provisions in the TCA are conditional on measures causing an impact on trade or investment, which, according to the above-mentioned Institute for Government report, implies that the agreement focuses on the 'outcome of any future rule changes'; this could limit how these provisions are used, since they will be subject to interpretation by the panel. In a briefing published by HerbertSmithHills, the authors state that commitments to international conventions are relatively common, but establishing whether the levels of protection are being undermined by a party’s actions and how to deal with the consequences is going to be a challenge.

In an oral debate, Professor Holger Hestermeyer (King’s College London) highlights that the only known decision as to the impact of labour-related actions on trade is that of the US-CAFTA legal case, where the arbitration panel concluded that, although the Guatemala government had failed to enforce its own labour laws, the impact on trade was not proven. In his assessment, Marley Morris (Institute for Public Policy Research) agrees that there is indeed the possibility of imposing sanctions where there has been a breach of the non-regression on labour and environmental protections, but demonstrating the effect on trade or investment sets a ‘very high bar for proof’. Similarly, the rebalancing measures will rely on ‘reliable evidence’ and not on ‘conjecture or remote possibility’ that divergence has an impact, and therefore are likely to be very rarely used.

In a paper published in the Journal of International Economic Law, Professors Marco Bronkers and Giovanni Gruni express similar concerns. The non-regression being associated with remedial clauses is certainly a step forward in strengthening enforcement, and trade-related sanctions mark a fundamental break with the EU’s traditional approach. Nevertheless, a party would have to demonstrate that divergence caused trade or investment effects, and the wording is similar to that in the CAFTA (‘in a manner affecting trade’).
Box 7 – US-CAFTA case

The United States filed a written submission on 3 November 2014 in a labour enforcement case against Guatemala under Article 16.2.1(a) of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), whereby each party commits not to fail to enforce its labour laws 'in a manner affecting trade between the Parties'. In its decision issued on 26 June 2017, the Arbitral Panel found that Guatemala had failed to enforce its labour laws, particularly by failing to 'enforce labour court orders for anti-union dismissals and to take enforcement actions in response to worker complaints'. However, the panel determined that evidence did not establish other required elements necessary to prove a violation of the CAFTA-DR. Indeed, the Panel decided in favour of Guatemala, arguing that Article 16.2.1(a) must be interpreted to mean that the disputed actions 'must change conditions of competition by conferring a competitive advantage upon an employer engaged in trade' and such competitive advantage has not been demonstrated.

FURTHER READING


ENDNOTES

1 In 2018, the EU-27 represented 52% of the UK’s total trade in goods (imports plus exports), and nearly 50% of its exports, a share greater than that of the United States (US) (11% total trade, 16% exports), the UK’s second trading partner. The UK is the EU’s third biggest trading partner (13%) and second export destination (15%).

2 Note that 749 and 750 refer to the arbitration tribunal that would be established for horizontal disputes.

3 The TCA specifies neither which measures the parties may adopt, nor what ‘reliable evidence’ would be.

4 The Southern Common Market (MERCOSUR) is a regional trade area established in 1991 by Argentina, Brazil, Paraguay and Uruguay, and later joined by Venezuela (suspended since 2017) and Bolivia (still complying with the accession procedure). The EU-MERCOSUR FTA was signed with the founding countries: Argentina, Brazil, Paraguay and Uruguay.

5 Since the partners concerned by these FTAs are not members of the Council of Europe, the commitment to the European Social Charter is clearly not taken into account. In addition, parties may have signed multilateral agreements not referred to in the FTAs.

6 The phrasing in the EU FTAs cited that uses ‘encouragement’ is either ‘to encourage’, ‘in order to encourage’, ‘with the intention to encourage’, or ‘as an encouragement for’. The EU-Japan FTA states that parties ‘shall not encourage trade or investment by weakening…’. The phrasing that refers to ‘effects’ include ‘in a manner affecting…’, except for the EU-Singapore: ‘…would affect trade or investment…’. Note that these phrasings may be combined in the same FTA.

7 The EU-Canada and EU-Vietnam FTAs diverge slightly as they use the term ‘inappropriate’: ‘The parties recognize that it is inappropriate to encourage trade or investment by weakening…’ (EU-Canada articles 23.4 and 24.5); ‘The Parties stress that (…) it is inappropriate to encourage trade and investment by weakening…’ (EU-Vietnam, Article 13.3).

8 The number of individuals is 12 in the EU-Singapore FTA and 10 in the EU-Canada FTA. In the latter case, each party proposes three names for their sub-lists, and two non-nationals for the list of experts serving as chairperson of the panel.

9 Note that the EU-Korea agreement does not specify that parties may submit comments on the interim report.

10 Note that none of the cited FTAs specify the type of measures, nor do they provide for ‘rebalancing’ measures.