

# TAKING STOCK OF THE UK-EU TRADE AND COOPERATION AGREEMENT: GOVERNANCE, STATE SUBSIDIES AND THE LEVEL PLAYING FIELD

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## KEY POINTS

- The UK-EU Trade and Cooperation Agreement (TCA) has a complex bureaucratic structure, at the apex of which is a Partnership Council.
- The Partnership Council has powers to amend most of the TCA by mutual agreement, and there will be five-yearly reviews of the operation of the TCA.
- The UK regime for managing subsidies will be very similar to the EU system; the TCA will allow the UK and EU to challenge each other's subsidies, ultimately referring disputes to arbitration.
- On labour standards and the environment, the EU and UK have committed not to weaken standards in ways that affect trade or investment and there is a fairly rigorous procedure for addressing violations.
- In addition, there are highly innovative procedures for rebalancing the trade elements of the TCA (and ultimately cancelling them) if one side changes its standards in ways that materially affect trade.
  - Such rebalancing can be triggered in several circumstances, including via periodic reviews of the whole trade relationship.
  - While these last provisions create scope for the relationship to develop, they also create considerable uncertainty and could cause almost constant negotiation and tension between the EU and the UK.

## INTRODUCTION

This Briefing Paper continues the discussion of the UK-EU Trade and Cooperation Agreement (TCA) 2020, started in two companion pieces, Briefing Papers 52 and 53. It is primarily concerned with the so-called level playing field provisions, which were so contentious during the negotiation and are innovative in outcome. The issues are essentially those of governance and enforcement/dispute settlement, so we start by discussing the overall governance structure of the TCA and its main dispute settlement provisions.

The paper then focuses on four specific issues within Part Two, Heading One, Title XI 'Level playing field for open and fair competition and sustainable development': subsidies; labour and social standards; environment and climate; and the rebalancing provisions. We argue that, unless great political delicacy is exhibited, these areas contain the seeds of perpetual negotiation and dispute.

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## THE CONSTITUTIONAL STRUCTURE OF THE TCA

Structurally the TCA takes the form of an Association Agreement (similar to agreements the EU has with a number of third countries).<sup>1</sup> It contains a Partnership Council, with a system of twenty Specialised Committees and four Working Groups, plus discussion procedures to deal with specific elements. The Partnership Council can make amendments to the TCA and to any supplementing agreements ‘in the cases provided for’ in the agreement. The TCA contains provision for periodic updates and for five-yearly reviews of “the implementation of this Agreement and supplementing agreements and *any matters related*” (emphasis added). Following these reviews, with one year’s notice, either side can terminate the agreement (Art FINPROV.8).

Changes to the TCA in the Partnership Council are to be taken by mutual consent. On the one hand, this could open up a pathway for permanent friction and ongoing disputes and negotiations with the EU. On the other hand, it offers protection to each side that in making adjustments to the Agreement (which are likely to be necessary or desirable as trading conditions change), its current level of net benefits need not be eroded. In the absence of major concessions towards the EU negotiating positions, it will be hard for the UK to improve trading conditions in future, for instance, to introduce mutual recognition of conformity assessment, diagonal cumulation, or market access in important services sectors (see Briefing Papers 52 and 53 on these issues).

## DISPUTE SETTLEMENT

In any Free Trade Agreement (FTA), the arrangements which govern the Agreement are of central importance, especially in the event of non-compliance: how does one party seek redress if the other party ‘transgresses’? For the UK, it was politically unacceptable for jurisdiction to be given to the European Court of Justice, so a formal arbitration process was developed which kicks in if disputes cannot be resolved more amicably. In the negotiations, the EU wanted a unified governance structure which would enable robust enforcement, including cross-sectoral retaliation, whilst the UK advocated multiple governance structures which would prevent the latter from happening. The final

<sup>1</sup> An ‘association agreement’ is defined in Art 217 of the TFEU as “an association involving reciprocal rights and obligations, common action and special procedures.” This implies a closer relationship between Parties than those negotiations conducted under Art 218, the basis for the negotiations with Canada and Singapore.

outcome is a compromise, but one that leans more towards the EU position than towards that of the UK. As we show below, it is unclear whether the compromise offers the best of both worlds or the worst.

The top level of dispute settlement (Part Six, Title I) applies to the whole agreement except for ten specified areas which either have no procedures for settling dispute (but which, like everything else, can be taken to the Partnership Council) or have alternative arrangements (Art INST.10). Broadly, it foresees confidential consultations between the Parties, allows for a request for an independent arbitration procedure, and compliance review (Part 6, Title I; ANNEX INST-X). In the event of non-compliance, the respondent party may offer ‘temporary compensation’ (Part Six, Title I, Art INST.24.1, Temporary remedies) and/or the complaining party may notify the other party of any intended suspension of obligations (Art INST.24.2), subject to certain conditions. The decisions and rulings of the arbitration tribunal are binding on both Parties (Art INST.29).

## LEVEL PLAYING FIELD

The level playing field refers to regulations governing business that are not specific to any particular production sector. The TCA deals with these in Title XI of Part Two, Heading One, Level Playing Field for Open and Fair Competition and Sustainable Development (LPFS), and includes: Competition policy (Ch 2), Subsidies (Ch 3), State-owned enterprises (Ch 4), Taxation (Ch 5), Labour and Social Standards (not including social security and pensions) (Ch 6), Environment and Climate (Ch 7) and Other Instruments for trade and Sustainable Development (Ch 8). Here we focus on subsidies, labour and social standards, environment and climate, and also on ‘rebalancing’ (Ch 9), each of which were particularly contentious negotiating areas. We detail the provisions as well as their potential for far-reaching consequences.

## SUBSIDIES

The question of how the future regulation of public subsidies in the UK would sit with the wide-ranging EU state aid provisions was one of the final battles fought in the negotiations leading to the TCA. Provisions relating to state regulation are not normally found in international trade treaties, and while the regulation of the use of subsidies is found in WTO law, the provisions lack the robustness of historical evolution deriving from the day-to-day practice and enforcement that the European Commission and the

European Courts have witnessed with EU provisions. The concession of the negotiators in the TCA is to use the language of the WTO Agreement on Subsidies and Countervailing Measures 1995 to avoid the semblance that the UK was adopting the EU state aid regime. Realistically, it is inconceivable that the UK could break away from the principles and procedures underpinning EU law and, indeed, we discover that the UK has agreed, in different words, to adopt many of the tried and tested rules of EU state aid law and policy. It has also committed to creating a new national subsidy control body to ensure adherence to a set of rules very similar to the law and policy of the EU.

The subsidy control rules are found in Title XI, Chapter Three. The provisions set out a number of definitions. Most importantly, defining a subsidy (Art 3.1): a subsidy must confer an advantage and be specific. The latter phrase is adopted from WTO law and is designed to play the same role as “selective” in EU law, used to denote the illegality of measures that favour certain firms or individuals. The subsidy must have actual or potential effects on trade and investment between the parties. Article 3.2 sets out the situations where public money may be used without infringing the TCA, e.g. to compensate damage caused by natural disasters, or other exceptional non-economic events. Subsidies to consumers are also exempted. There is a de minimis provision (EUR 380,000, over three years).

There are also specific exclusions. Subsidies to the audio-visual sector are excluded from the scope of the TCA, which frees the UK from some complicated EU rules. The TCA does not apply to subsidies granted on a temporary basis to respond to a national or global economic emergency, provided such subsidies are targeted, proportionate and effective. Article 3.3 excludes subsidies granted to providers of services of “public economic interest” if the application of the rules would obstruct providers from performing their tasks. This again attempts to create a different language from merely transposing EU law, but finds its basis in Article 106 TFEU which refers to Services of General Economic Interest. Article 3.3.2 requires the avoidance of over-compensation and cross-subsidy, principles derived from European Commission policy and soft law, as well as the Court of Justice of the European Union case law. Article 3.3.4 fixes a higher de minimis threshold for such subsidies.

The TCA sets out general principles to be applied to all subsidies in Article 3.4.1 and guidance in applying the principles is found in a Joint Declaration on Subsidy Control Policies. Articles 3.4.2 and 3.5 identify subsidies that have an actual or potential “material” effect on trade or investment between the parties and which must be avoided. Article 3.5

creates special rules for assistance for secure and sustainable energy and environmental sustainability, and large cross border or international cooperation projects.

Article 3 does not mention Article 10 of the Ireland/Northern Ireland Protocol. This provision in the Protocol applies the EU state aid rules to measures that have an actual or potential effect on trade in goods between Northern Ireland and the EU. Thus, both provisions apply alongside each other, but with no explanation as to how any issues or conflicts will be resolved.

Unlike the EU state aid regime, the UK has not committed to an ex-ante notification process for new subsidies. There is a commitment to transparency in Article 3.7, whereby all subsidies must be published within six months. If an interested party raises concerns about a subsidy, Article 3.7.5 states that the party must be provided with all relevant information within 28 days.

Other new aspects of subsidy enforcement include the creation of an independent authority or body that will play “an appropriate role” in the governance of state aid. So far this has not occurred, but BEIS issued guidance on compliance with international subsidy laws on 31 December 2020.<sup>2</sup>

The residual power of the courts to hear applications for judicial review is recognised, as well as the power to review compliance with the new subsidy principles by subsidy-granting authorities and the power to review decisions of the independent authority. Challenges may be brought by interested parties with standing. The courts have the power to grant remedies, including injunctions, and orders to recover illegal subsidies. Under Article 3.10.2 the EU can appear as an intervening party in any court action in the UK concerning the subsidy rules (and vice versa). Also, either party can seek information and consultations (Art 3.12).

If there is evidence that a UK subsidy will cause, or runs a serious risk of causing a significant negative effect on trade and investment between the UK and the EU, then the EU may take remedial action. Any remedial action must be limited to what is strictly necessary and proportionate to remedy the significant effect. The UK may challenge the EU action if it considers the action to be excessive by taking the case to an arbitration panel. A failure to comply with any arbitration panel ruling allows the UK to take

<sup>2</sup> BEIS, 'Complying with the UK's international obligations on subsidy control: guidance for public authorities' (31.12.20): <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities>

remedial action.

There is also a provision stating that any failure to comply with the general subsidy rules (except Arts 3.9 and 3.10) may be referred to a dispute settlement procedure under the general dispute settlement rules in Part Six, Title I.

The UK has achieved a degree of independence from the EU state aid rules. It has negotiated for higher *de minimis* and public service subsidy thresholds, for special provisions to allow for a post-COVID19 special recovery programme to level up regions and to be able to keep a check on how the Member States of the EU use public money to stimulate their economies. It has also ensured that general provisions relating to tax and infrastructure projects will not be caught by the subsidy rules and that the dispute mechanisms that address problems with EU state aid and UK subsidies are independent of the European Commission and the European Courts. Inevitably the application of Article 10 of the Northern Ireland Protocol will create legal and practical issues in the future, but for an eleventh-hour compromise, the UK and the EU would seem to have achieved a workable compromise on one of the thorniest parts of the Brexit negotiations.

## LABOUR AND ENVIRONMENTAL STANDARDS

Going into the negotiation, the EU proposed an obligation for both sides to uphold common environmental standards in a broad range of areas. These standards could be raised by mutual agreement, the so-called 'ratchet clause'. The UK advocated a weaker, 'Canada-style' approach that required each side to uphold its own domestic standards.<sup>3</sup> In the EU proposal, any lowering of common standards constituted regression, making it look less like preserving EU competitiveness and more like a general environmental protection agreement. In the UK's Canada-style proposal, the weakening of protections is challengeable under the TCA if it takes place 'in a manner affecting' trade and investment, which narrows the scope and focuses it back toward ensuring that neither side competitively undercuts the other.

At first glance, the UK has won the battle. The cores of the labour and environmental provisions embrace the non-regression language from a 'Canada-style' Agreement, mirroring the UK's proposal. On closer inspection, however, the UK has made significant

concessions. These mostly take the form of enforcement mechanisms that are much stronger than those the UK proposed, which we address below. There are also some novel elements that go beyond the UK's traditionalist approach<sup>4</sup>, notably on precaution and climate change.

## PRECAUTION

Unusually for an EU FTA, the precautionary approach features heavily in the TCA. Article 1.2.2 upholds the precautionary approach<sup>5</sup>, and is enforceable with sanctions for non-compliance, suggesting its likely strategic importance to the EU. Article 7.4.1(c) further affirms its application to both parties. Alongside these more general affirmations of the principle, the TCA specifies that non-regression requirements apply to antibiotics/decontaminants and chemicals.

So, what does this mean in practice, and in particular for food standards deregulation? The TCA Sanitary and Phytosanitary (SPS) chapter, which addresses the product-related regulatory standards at the core of current controversies about food standards, does not mention precaution. But its inclusion in the general provisions for the LPFS means that either side can complain that the other has not adhered to the precautionary approach. More specifically, if the UK started to produce chlorinated chicken, the EU could initiate a dispute alleging that it had regressed in the area of decontaminants, and failed to uphold the precautionary approach. This could ultimately result in the EU imposing tariffs on UK products. The EU already bans the import of chlorinated chicken – indeed, all UK food products being exported to the EU are subject to EU regulatory requirements. This means that theoretically, the EU could not only maintain the ban but also subject the UK to additional tariffs for failing to uphold the precautionary principle. In practice, however, it is hard to see why the EU would be motivated to pursue such a complaint – it seems more likely that its concerns would focus on wider production conditions, a point which we explain further below.

<sup>4</sup> In its draft EU-UK FTA for negotiations, the UK did not simply model its position after a 'Canada-style' FTA, it copy-pasted the Trade and Environment chapter of the EU-Canada FTA (CETA) (see link above).

<sup>5</sup> Title XI, Art 1.2.2: "The Parties acknowledge that, in accordance with the precautionary approach, where there are reasonable grounds for concern that there are potential threats of serious or irreversible damage to the environment or human health, the lack of full scientific certainty shall not be used as a reason for preventing a Party from adopting appropriate measures to prevent such damage."

<sup>3</sup> E Lydgate, 'Environment and climate change in the EU-UK negotiations: Arguing the toss over nothing' (UKTPO blog, 26.05.20) <https://blogs.sussex.ac.uk/uktpo/2020/05/26/environment-and-climate-change-in-the-eu-uk-negotiations-arguing-the-toss-over-nothing/>

The definition of precaution explicitly derives from the Rio Declaration,<sup>6</sup> which uses the word ‘approach’ rather than ‘principle’ precisely due to historical US objections to giving precaution too much legal weight. The footnote to Article 1.2 states that in the EU ‘precautionary approach’ means the application of the ‘precautionary principle’, which in turn implies that the UK has ensured that the domestic requirement for it to uphold precaution is relatively weaker than that applied in the EU. In the event of a disagreement or dispute, this seems to offer the EU protection in its use of the ‘principle’, whilst making it more difficult for the EU to argue that the UK is not upholding the ‘approach’.

## CLIMATE

There are a number of commitments on climate not found in previous EU FTAs. These include the reaffirmation of both sides’ net-zero targets, which is covered under the standard dispute settlement. The TCA addresses carbon pricing, making clear that flights between the UK and EU will be subject to charges, and obliging the EU and UK to cooperate and work toward linking their schemes. This is novel for an FTA, and represents an interesting EU precedent for post-net-zero FTAs; it may also be significant in that it may well form the basis for exempting the UK from any EU border carbon adjustments (BCAs). The progress on climate shows how much can be achieved when the two sides agree on the fundamental objectives.

## REMEDIAL MEASURES

The TCA features a number of mechanisms by which either side can apply remedial measures against the other, resulting in a complex web of dispute settlement processes. In addition to the overall arbitration procedures discussed above, there are bespoke measures for the non-regression elements of labour and environmental standards (see Annex). As in a ‘Canada-style’ FTA, there are specialist panels of experts dedicated to environment and labour provisions. Article 9 details a standard ladder-style escalation of disputes from consultation to arbitration. The decision as to what to do about the recommendations of an expert panel’s report is unilateral (Art 9.2.16), but Article 9.2.19 then opens

it up to various elements of the general arbitration process which permit temporary retaliation (Part Six, Title I, Art. INST. 24-25). This departs from standard EU practice, in which rulings, though considered binding, cannot be redressed through tariffs. It is also a significant concession on the UK side.

## REBALANCING: DYNAMIC ALIGNMENT IN DISGUISE?

The most innovative elements of dispute settlement in the TCA are the mechanisms outlined in Article 9.4 for so-called ‘rebalancing’. The Article defines two processes, one dealing only with the areas of subsidy control, labour and social standards and environment and climate, and a second dealing with any issue arising from any trade provision. The former states in Article 9.4.2: “If material impacts on trade or investment between the Parties *are arising* as a result of *significant divergences* between the Parties [in these areas], either Party may take appropriate rebalancing measures to address the situation”, where appropriate means “what is strictly necessary and proportionate in order to *remedy the situation*” (emphasis added). Notable in this are the phrases ‘are arising’ (i.e. they actually have to be happening at the point of taking action?), ‘significant divergences’ (you need more than one to raise a complaint?) and ‘remedy the situation’ (what situation?). All this is subject to arbitration but on a very accelerated time scale and with trade measures applied in the meantime.

In clauses 4-9 Article 9.4 provides for reviews of the whole of the trade provision in the TCA that could end in its termination. These can be triggered by either party every four years if it feels the arrangement has become unbalanced or more frequently if “measures [on subsidies, labour or environment] ... have been taken frequently by either or both Parties, or if a measure that has a material impact on the trade or investment between the Parties has been applied for a period of 12 months.” The latter clause appears to refer to any measure.

Article 9.4 is forward-looking: whilst the non-regression requirements focus on preventing the deregulation of current environment and labour standards, rebalancing addresses divergence in future policies and priorities. It constitutes a defensive version of dynamic alignment: defensive in that rather than ongoing cooperation and harmonisation, it provides another means for each side to coerce the other.

<sup>6</sup> Report of the United Nations Conference on Environment and Development (‘Rio Declaration’), Rio de Janeiro, 3-14 June 1992, UN General Assembly, A/CONF.151/26 (Vol. I): [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf)

## SIGNIFICANT UNCERTAINTY

There is significant uncertainty about how these provisions will work, and how often each side will actually use them. The emphasis on future divergence suggests that one side may be tasked with proving that the other side is not keeping pace with its own regulation and that the resultant lack of change is giving its partner a trade and investment advantage. Presumably, although this is not guaranteed, the EU will be less concerned about imbalances from tightening its product standards because the UK already has to meet EU requirements to export to the EU.

Instead, the EU interest in rebalancing seems more concerned with environmental or labour standards regulations that tend to raise its industrial costs in the name of other objectives and which the UK fails to emulate. An example would be the UK's failure to keep pace with EU requirements for industrial emissions, which the European Commission raised in Brexit negotiations,<sup>7</sup> or the forthcoming Directive on transparent and predictable working conditions.<sup>8</sup>

Assuming the EU wanted to 'rebalance', it would need to prove that the UK's failure to keep pace had a 'material impact on trade and investment based on reliable evidence and not merely on conjecture or remote possibility.' Creating a clear causal link between a change to regulation and an impact on trade and investment may well prove challenging. The EU's measures would be subject to review by an arbitral tribunal, but there is uncertainty about how these novel mechanisms would be applied.

'Material impact' might be interpreted as a hybrid between the concept of 'material injury' applied when calculating anti-dumping duties and the concept of 'in a manner affecting trade' in the non-regression requirement, which focuses on deregulation of poor enforcement of domestic laws, and its competitive impacts on FTA partners. A panel would not be bound by precedents, if there were any, but if it wanted for guidance it could look to a dispute under the non-regression requirements for labour standards in the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR). The US argued that Guatemala had failed to enforce its own labour laws, giving it a competitive advantage over US workers. The Panel concluded that there was insufficient

evidence of cost savings as a result of enforcement failures, and no way of knowing if these would in turn have been sufficient to confer a competitive advantage.<sup>9</sup>

This suggests that a cost-based approach to evaluating a 'material impact' would likely make it difficult for the EU to hold the UK's feet to the fire, though the EU could potentially have an easier time proving that prices had risen relative to the Parties' shared starting point. These common standards provide a baseline at the start of 2021. The tribunal might also adopt a more expansive interpretation of material impact. The concept of material injury in anti-dumping investigations, which may also form a source of inspiration, includes *threat* of injury, a more expansive basis for countermeasures, although the Article prevents reliance on 'conjecture'.

The EU would also need to show that its proposed response was 'strictly necessary and proportionate in order to remedy the situation'. The tribunal would also need to decide what the situation was that required 'remedy'. If the perceived 'remedy' were to force the UK to follow the EU to a higher standard, targeted and swingeing trade barriers by the EU would be the presumptive solution and hence might well be ruled acceptable. If, on the other hand, the remedy was seen to be to try to offset the UK's competitive advantage from not adopting the new measures, the proportionate measures would be smaller tariffs on selected, or even, many UK exports to the EU.

It is also noteworthy that rebalancing measures are not defined. It is unclear whether they are limited to the usual suspension of parts of the Agreement, ie the application of tariffs, or could blend into unrelated areas of policy cooperation.

## WHAT DOES THIS IMPLY FOR THE LONG RUN?

Whilst these granular issues of interpretation are significant, the rebalancing process ultimately provides more avenues for the EU and UK to override adverse third-party rulings and call the entire Agreement into question. Thus, the overriding implication of rebalancing is to build more uncertainty and volatility into the TCA.

This is exacerbated by the fast-track nature of the arbitration mechanism: the Agreement provides two weeks for consultations and rebalancing measures can be applied if they fail, and only 30 days for

<sup>7</sup> European Commission, 'Internal EU27 preparatory discussions on the framework for the future relationship: Level playing field' (TF50 (2018) 27, 31.01.18): [https://ec.europa.eu/commission/sites/beta-political/files/level\\_playing\\_field.pdf](https://ec.europa.eu/commission/sites/beta-political/files/level_playing_field.pdf)

<sup>8</sup> Highlighted here: D Chalmer, 'British sovereignty run by Europe' (UK in a Changing Europe blog, 29.12.20): <https://ukandeu.ac.uk/british-sovereignty-run-by-europe/>

<sup>9</sup> Dominican Republic – Central America – United States of America, In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Final Report of the Panel, circulated June 14 2017, paras. 462-465.

the arbitral tribunal to rule on their legality of the latter. This gives no time for considered evaluations or mediation and therefore merely amounts to authorised action by one party or the other.

Both the extended 'Panel of Experts' procedure for non-regression and the break-neck arbitration of rebalancing potentially sow the seeds of political strife. Panel proceedings may be confidential, but the basic issues they deal with could not be kept out of the public domain. The danger is particularly acute for the rebalancing question, which, as we noted above, could easily be seen as dynamic adjustment in disguise: the EU tightens some standards and if this eventually appears to be affecting EU-UK trade, proposes to impose restrictions on UK exports to rebalance the trade-offs in the TCA. While it may be in the UK's overall interests to accept the higher standards and keep trade flowing, it would not be entirely unreasonable to characterise this chain of events as coercive and an affront to UK sovereignty. Given the rhetoric surrounding Brexit and the subsequent trade negotiations, it is difficult to see either the UK popular press or the Conservative benches in the House of Commons not raising a storm.

What are the solutions? First, the EU could curtail its push towards higher labour and environmental standards: that is, because pursuing this policy would lead to the loss of trade with the UK, it could judge the cost too great. Second, the EU could just accept that higher standards may lead to competitive disadvantage. Third, UK politicians could work to dampen the ardour of 'sovereign-istas' by explaining that, unfortunate though it is, the (relatively small) UK would be better off to accept either the change in standards or the introduction of trade barriers than to endanger the whole TCA. Finally, UK governments could work proactively with the EU to evolve joint views about necessary standards and introduce changes together. We cannot predict how this will turn out. Much depends on political leadership in the UK and the EU. But the possibility of continuing friction and bad feeling is undeniable.

Moreover, if there is a series of rebalancing episodes, if either party triggers the review provided for in Art 9.4, or anyway in the standard five-yearly review, there are likely to be high feelings on both sides of the table. That is, far from smoothing the path to cooperation, stability and certainty, the dispute settlement processes of the LPFS Title could have exactly the opposite effect. That, inevitably, will discourage investment in anything that depends on the smooth flow of UK-EU trade.

A final question is the significance of this novel mechanism for EU trade strategy more broadly. The idea of unilaterally imposing tariffs to 'countervail' harmful subsidies is hardly new. Indeed, the TCA outlines parallel procedures that allow for this under Article 3.12, giving rise to the question of why we need two mechanisms to achieve this. But applying unilateral remedies to offset labour and environmental deregulation, or the failure to keep pace, is a new and interesting trend. In fact, the US has just put forward a proposal to classify poor environmental protection as a subsidy that can be countered with unilateral retaliation.<sup>10</sup> It is unclear whether the EU's proposal in this area is specific to the UK, or whether it will be applying similar logic in future FTAs, or in the WTO.

<sup>10</sup> WTO, 'Advancing sustainability goals through trade rules to level the playing field' WT/GC/W/814 (17.12.20): <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W814.pdf&Open=True>

## CONCLUSION

The provisions for level playing field issues in the TCA were contentious in negotiation and complex in outcome. Much of the area lies outside the normal dispute settlement procedure and in some cases bespoke procedures replace or supplement it. The management of subsidy control and non-regressions in the areas of labour and social standards and environment and climate are of a traditional kind, although in each case with rather more precision and bite than elsewhere, and in the case of subsidies the TCA comes with institutional requirements. The greater innovations concern procedures to deal with imbalances arising from future labour and environmental policies and the potential for review of the balance of the entire trade heading, which are additional to the more normal five-yearly reviews of the whole agreement. The innovative clauses are quite unknown quantities but unless there is great political self-control and forbearance, they have a capacity to create perpetual wrangling and bad feeling between the UK and the EU.

The Annex presents a table summarising the dispute settlement procedures applicable to the level playing field areas.

## ANNEX

### Dispute mechanisms for the Level Playing Field

Title XI LPFS	LPFS Art 9.1 Consultations	LPFS Art 9.2 Panel of experts (including arbitration)	LPFS Art 9.3 Panel of experts for non-regression (including temporary measures)	LPFS Art 9.4.1-3 Rebalancing	Main TCA Dispute settlement mechanism (Part Six, Title I)
Affirming net-zero targets (Art 1.1.3)	x	x			x <sup>11</sup>
Affirming precautionary approach (Art 1.2.2)					x
Competition policy (Ch 2)					
Subsidy control (Ch 3) (note additional provisions for consultations and remedial measures are set out in 3.8 and 3.12)				x	x (with exception of provision on independent body and cooperation (Art 3.9) courts (Art 3.10))
State-owned enterprises, enterprises with special rights, designated monopolies (Ch 4)					x
Taxation (Ch 5)					
Labour and social standards (Ch 6) (not including social security and pensions)	x	x	x	x	
Environment and climate (Ch 7)	x	x	x	x	
Other (international and multilateral) instruments for trade and sustainable development (with emphasis on labour and environment) (Ch 8)	<b>x</b>	<b>x</b>			

<sup>11</sup> Note that under LPFS Art 1.3 net-zero targets appears to be excluded from the main dispute settlement mechanism; however, it does not appear in the list of exclusions from the main dispute mechanism under Art INST.10.2(e). This significant discrepancy should be clarified.

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## FURTHER INFORMATION

The UK Trade Policy Observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that:

- 1) initiates, comments on and analyses trade policy proposals for the UK; and
- 2) trains British policy makers, negotiators and other interested parties through tailored training packages.

The UKTPO is committed to engaging with a wide variety of stakeholders to ensure that the UK's international trading environment is reconstructed in a manner that benefits all in Britain and is fair to Britain, the EU and the world. The Observatory offers a wide range of expertise and services to help support government departments, international organisations and businesses to strategise and develop new trade policies in the post-Brexit era.

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