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The Future Relationship between the EU and the UK: Key Outstanding Issues and Precedents from other Regional Integration and Free Trade Agreements

Beyond Brexit – Part of the Horizon Scanning series

September 2020

On 21 August 2020 the seventh round of the negotiations on a new partnership between the EU and UK concluded. As had been expected, there was no breakthrough, and both chief negotiators, Michel Barnier for the EU, and David Frost for the UK, confirmed that substantial differences remain, with the former emphasising that he was disappointed by the lack of progress. Michel Barnier also stressed that the UK negotiators had not been willing to make progress on subjects that were fundamental to the EU repeating:

- our trade agreement must be accompanied by standards of fair competition – economic and commercial "fair play";
- our agreement must guarantee an equitable long-term solution for EU fishermen; and
- finally, there will be no "cherry-picking", or selective access to the Single Market, as the UK refuses to accept the rules and obligations of that market.

Barnier added "too often this week, it felt as if we were going backwards more than forwards", concluding "[t]oday, at this stage, an agreement between the United Kingdom and the European Union seems unlikely. I simply do not understand why we are wasting valuable time".

David Frost, unsurprisingly, rejected this stating "[w]e have been clear from the outset about the principles underlying the UK approach. We are seeking a relationship which ensures we regain sovereign control of our own laws, borders, and waters, and centred upon a trading relationship based on an FTA like those the EU has concluded with a range of other international partners, together with practical arrangements for cooperation in areas such as aviation, scientific programmes, and law enforcement. When the EU accepts this reality in all areas of the negotiation, it will be much easier to make progress".

The purpose of this briefing is two-fold. Firstly, to take stock of the current state of negotiations, and secondly to consider how such areas of disagreement have been addressed in other free trade agreements (FTAs), principally between close geographical partners. A specific focus will be placed on "deep" regional integration agreements where the purpose is to address issues other than tariffs on goods, including so-called "behind-the-border" non-tariff barriers such as differing regulatory standards, authorisation requirements, and labour and environmental obligations.

The EU is the prime example of a deep geographically proximate customs union. However, as the UK has left the EU no purpose would be served in describing EU law on this point. Therefore, the focus of this briefing will be on key EU agreements with its neighbours, the North American Free Trade Agreement (NAFTA) and the United States-Mexico-Canada Agreement (USMCA) that replaced NAFTA on 1 July 2020. Coverage is necessarily selective and agreements between developing countries, such as those encompassing the Association of South East Asian Nations (ASEAN), the Common

Market of the Southern Cone (MERCOSUR), the Andean Community and various trade agreements encompassing African, Caribbean and Middle Eastern countries will not be considered as they offer little by way of precedent for the future relationship between the UK and the EU, which in essential aspects will be sui generis. With the partial exception of MERCOSUR such agreements offer considerably less integration than the FTAs this briefing focuses on.

Consideration will also be given to the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, representing a "state of the art" FTA between the EU and a third country that goes beyond the previous EU-Korea FTA, then considered a new EU model trade agreement, as it tackled services and non-tariff barriers, as well as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) – the successor to the Trans-Pacific Partnership (TPP) following the US decision to withdraw from the negotiations in 2016. CETA is the stated principle model for the future relationship with the EU adopted by the UK Government. CPTPP demonstrates that deep integration is possible across non-geographically proximate parties. Other mega-regional trade agreements – such as the Trans-Atlantic Trade and Investment Partnership (TTIP) and the WTO plurilateral agreement on Trade in Services (TiSA) will not be considered as negotiations on these agreements have been moribund since 2016, and the EU offer in the TTIP negotiations on mutual recognition of regulatory standards and access to financial services, which represented the most novel aspect, was not accepted by the US.

The current state of the EU-UK trade negotiations

No new legal texts have been published by either the EU or UK since May, although the UK is reported to have provided the EU with an unpublished consolidated text on areas of agreement. Therefore any assessment of the current state of play – and key areas of difference – has to rely on the published remarks of the chief negotiators on 21 August and 23 July 2020 when the last two negotiating rounds ended in deadlock. Off-the-record press briefings by the parties cannot be relied on as representing official positions.

Firstly, we briefly summarise areas of progress before turning to the more significant points of difference between the parties. According to Michel Barnier in July:

- useful discussions were held on some issues in goods and services;
- there were good discussions on police and judicial co-operation (although it is unclear whether the EU will accede to the UK's request to join the Lugano Convention on recognition and enforcement of judgments in civil and commercial matters – or if this would even be beneficial to the UK);
- progress was made "towards the objective of a comprehensive and single institutional framework" meaning that the UK has made concessions on its original proposal for a suite of agreements on separate topics. This is potentially significant as a "single agreement", or a very limited number of separate agreements, increases the ability of a party to withdraw trade concessions in the case of a breach by the other party across unrelated areas, increasing possible EU leverage in trade disputes with the UK. It also reflects the EU's dissatisfaction with the over one hundred separate bilateral agreements it has with Switzerland (even though most of them are interlinked), and the lack of effective dispute settlement under those agreements.

In August, Michel Barnier added that there had been progress on technical issues relating to energy, UK participation in EU programmes, and anti-money laundering, among others.

It also appeared from David Frost's published July remarks that the EU has made concessions on the role of the Court of Justice of the European Union (CJEU) as interpreter of those sections of the

agreement that incorporate, or are concepts of EU law, as originally proposed under the published EU text (although see below for Michel Barnier's recent comments on governance of the agreement).

The two key issues remaining, and have been since the start of the negotiations, are EU demands for "**level playing field**" guarantees on post-Brexit UK law and regulation, and **fisheries**. Further, according to the EU chief negotiator there was a lack of progress in August on:

- **governance**, where he said the parties were far from agreeing on dispute settlement;
- **law enforcement**, where the parties have not agreed on guarantees to protect citizens' fundamental rights (see below) and personal data (meaning continuing UK compliance with the EU General Data Protection Regulation – which, in the future, the UK might wish to modify); and
- **mobility** and **social security** co-ordination, where he said the parties' positions remain far apart.

Road and air transport also emerged publicly as issues of disagreement in the August talks, although the difficulties appear more related to the details (important as they are) rather than the principle of continuing road and air access between the EU and UK.

According to Michel Barnier behind the words "level playing field" lie the protection of thousands of jobs in EU Member States, workers' rights, consumers' rights, health and environmental protection. The UK could probably make a similar claim for its position. On "level playing field" issues the EU considers that the "UK still refuses to commit to maintaining high standards in a meaningful way", instantiating state aid, climate, environment, labour and social law. In August the EU added "[t]he need for a Level Playing Field is not going to go away. Even if the UK continues to insist on a low-quality agreement on goods and services only" and that "[i]t is a non-negotiable pre-condition to grant access to our market of 450 million citizens, given the United Kingdom's geographic proximity and the intensity of our economic exchanges". On fisheries, Barnier said in July that "the UK is effectively asking for a near total exclusion of EU fishing vessels from UK waters". In August he added "we have made no progress whatsoever on the issues that matter".

Unsurprisingly, the UK disagrees with these statements. David Frost emphasised in his July speech that "[w]e have always been clear that our principles in these areas are not simple negotiating positions but expressions of the reality that we will be a fully independent country at the end of the transition period" and "[t]hat is why we continue to look for a deal with, at its core a free trade agreement similar to the one the EU already has with Canada".

The next negotiating round is scheduled to start on 7 September and the discussions are due to be concluded by 2 October 2020 to enable ratification by the EU Council of Ministers and the European Parliament (as well as the UK Parliament) by the end of the year.

It is not the purpose of this briefing to analyse the merits of the respective parties' negotiating positions, or to speculate on the likelihood of agreement being reached by October, or at all. Instead, this briefing will first summarise the EU's public position on "level playing field" measures and fisheries, before considering how the differences between the EU and the UK have been addressed in broadly comparable treaties. Of course, it is important to stress that the fact that a particular treaty addresses an issue in a specific way is no precedent for other agreements where different interests, negotiating power, and political objectives exist. Thus, the fact that the EU agreed to certain terms with Canada in no way binds it in negotiations with the UK. However, it is widely considered in Swiss governmental circles that the EU sees its future relationship with the UK as a model for Switzerland, and that the future relationship with the UK is not seen (from a Swiss

perspective) as being negotiated in a vacuum. Secondly, the parties' public statements may not reflect revealed or unrevealed behind-the-scenes negotiating positions.

"Level playing field" provisions

The "level playing field" provisions are found in chapter two of the published draft EU text. It is not known whether the current disagreement between the UK and EU extends to all or only to some of these provisions, or indeed whether other parts of the draft text – apart from those mentioned above – are seriously in dispute as well. We will therefore restrict this section to a brief summary of the original EU proposals, acknowledging that the EU position may have shifted since the text was published as a result of the successive rounds of negotiations.

The first point to make is that virtually none of these provisions – detailed below – have traditionally been considered to be part of international trade law, and that they are not (save in very limited respects) covered by the WTO Agreements (in particular, the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS)) that would govern EU-UK trade in the absence of an agreement.

Three main exceptions from the above statement may be noted: (1) Articles VI and XVI GATT and the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) provide a regime for the control of subsidies to industry, as well as prohibiting some subsidies e.g. to promote exports; (2) Article XX(a) GATT allows an exception from the GATT rules for measures necessary to protect "public morals" (the equivalent provision in Article XIV(a) of the GATS refers to "public morals" and "public order") and (3) Article XX(g) GATT provides an exception for measures relating to the conservation of exhaustible natural resources, which the WTO Appellate Body held in *US-Shrimp* extended to conservation of natural living organisms[1].

The reason for the exclusion of human rights, environmental, labour and sustainable development standards, as well as competition laws, from the WTO legal framework is that traditionally, and for many countries still, such matters are not viewed as trade-related but are seen as a question of domestic policy subject to state sovereignty (potentially constrained by applicable international treaties), as has been argued in many publications[2], as well as objections by developing countries that see the imposition of such standards on exported goods as a form of protectionism imposed by importing developed countries to protect their own industries[3]. The former appears to be the position of the UK Government, although the EU considers that it would be unacceptable – or perhaps simply against the EU's interests – for the UK to seek a competitive advantage through lower standards. Michel Barnier asked rhetorically "can the UK use this new regulatory autonomy to distort competition with us? … [T]he EU cannot and will not accept to foot the bill for the UK's political choices".

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[1] Public morals may cover serious human rights violations, and in EC - *Seal Products* the WTO Appellate Body held that animal welfare was also covered, although State practice has hitherto confined this GATT exception to egregious human rights violations, such as crimes against humanity or war crimes. Also, conservation of endangered species is clearly only a limited part of what is now understood to be environmental law. Notwithstanding, it should be noted that other remedies for trans-border harms (e.g. pollution) exist under general public international law (see the International Court of Justice (ICJ) judgment in the *Gabcíkovo-Nagymaros* case (1997)). In the earlier *Chorzów Factory* case (1927) it was established by the Permanent Court of International Justice (PCIJ) that states were liable for trans-border harm caused by violations of international law.

[2] See US professor J. Rabkin's *Why Sovereignty Matters* (1998), *The Case for Sovereignty* (2003) and *Law Without Nations* (2007).

[3] Historically, this argument has a lot of force, from 1930s Imperial Preference (grandfathered by the GATT) to the (now defunct) multi-fibre agreement. Opinions may differ on environmental standards, although the 2015 Paris Agreement allows each country to set its own targets, and the concept of "social" or "environmental" dumping has no clear legal meaning.

Given clear political commitments by the UK government to uphold high standards there appears to be a degree of posturing on both sides, although it is certainly true that the UK objectives outside of strict "trade" provisions go beyond the CETA (e.g. police and criminal justice co-operation, and participation in EU programmes), and the CETA does not provide a no tariff, no quota regime for all goods as sought by the UK. However, the UK aims are not wholly unprecedented. Iceland and Norway have negotiated "surrender" agreements with the EU based on, but different to, the EU arrest warrant (without CJEU jurisdiction), whilst Europol has operational arrangements with many non-EU European and non-European countries. Access to the Schengen Information Service (SIS II) police database is currently much more restricted and a bone of contention in the negotiations. Further, accepting the trade flows, integration and proximity factors it is unsurprising that the EU is more concerned by competition from UK firms than Canada, and therefore wishes to tie the UK closer to the EU regulatory framework in the future.

The EU Proposals

We now proceed to a summary of the published EU proposals.

Section 1: State Aid:

The UK is required to maintain a national system of pre-authorisation and control of state aid that is identical to that carried out in the EU by the European Commission. The UK is also required to remain in "dynamic alignment", accepting automatically all amendments to, or replacements of, existing EU legislation. Where a new EU act or provision neither amends nor replaces an existing measure the Specialised Committee on a Level Playing Field shall either adopt the measure or, failing agreement, the EU may take "appropriate interim measures" against the UK, i.e. withdrawal of trade concessions. There is no reciprocal right for the UK to impose trade sanctions on the EU if the EU doesn't accept proposed new UK standards.

Future UK domestic support for agriculture is tied to the EU Multi-annual Financial Framework (the EU budget), and changes to the EU budget will therefore affect the permitted level of agricultural subsidies allowed in the UK.

UK courts are also required to have powers to enforce the state aid provisions, with a mandatory reference to the CJEU in case of disputes. The EU may also take interim measures against the UK (but not vice versa) if consultations do not lead to a mutually agreed solution, or if the EU considers that an alleged breach by the UK leads to a risk of undue distortion of trade or competition. Regular dispute settlement is also permitted involving the CJEU.

Section 2: Competition:

The EU's competition law (as set out in Articles 101-102 TFEU) applies as articles of the proposed treaty with the UK, as is an article on merger control, and on public undertakings. These provisions are required to be enforced through domestic (i.e. UK) laws. Dispute settlement is restricted to the enforcement of competition law, although as the agreement incorporates provisions of EU treaty law, the arbitrators may be required to make a reference to the CJEU.

Section 3: State owned enterprises:

This section seeks to ensure that state owed enterprises (e.g. many rail franchises) act in accordance with commercial considerations and do not engage in discrimination against enterprises of the other party. Each party must respect and make best use of international standards.

Exceptions exist for procurement activities scheduled to the WTO Agreement on Government Procurement (GPA), and services supplied in the exercise of governmental authority (as defined in the GATS, which may exclude the NHS as there is a private health sector in the UK). Dispute settlement is available.

Section 4: Taxation:

The parties commit to implement the principles of good governance, including standards on transparency and exchange of information, fair taxation, and the OECD standards against Base Erosion and Profit Sharing. This article is not subject to dispute settlement. Parties may also not weaken or reduce the levels of protection against tax avoidance below common standards applicable at the end of the transition period.

Section 5: Labour and social protection:

Parties may not weaken or reduce the level of labour and social protection below the level of common standards applicable at the end of the transition period (which is not current Government policy). Each party shall seek to increase its level of labour and social protection and where both parties have done so, subsequent weakening is prohibited below the then common level. A system is required to be established for effective domestic enforcement of such standards. Labour and social protection means: (i) fundamental rights at work, (ii) health and safety, (iii) fair working conditions and employment standards, (iv) information and consultation, and (v) restructuring (which could impact on insolvency law). Dispute settlement applies to these provisions.

Section 6: Environment and health:

Environmental protections may not be weakened or reduced below the common level at the end of the transition period. Environmental protection is given a broad interpretation in the agreement. There is a similar provision in respect of future higher standards as applies to labour rules (see above). Public authorities and individuals must have the right to enforce environmental standards, and the UK must establish a system for effective monitoring of domestic enforcement, which the EU is deemed to satisfy. Dispute settlement applies.

Section 7: Climate change:

Each party reaffirms its objective of climate neutrality by 2050. There is a non-regression clause on the level of climate protection based on common commitments, and targets applicable at the end of the transition period, which is stated to include commitments and targets whose attainment is envisaged for a date subsequent to 31 December 2020.

The UK is required to implement a system of carbon pricing of, at least, the same scope and effectiveness as that provided by the EU Emissions Trading System (ETS). Each party shall seek to increase its level of climate protection, and where both parties do so, neither may subsequently lower it. Each party shall establish a system for the effective monitoring and enforcement of laws on climate protection (which the EU is deemed to comply with). Dispute resolution applies.

Section 8: Sustainable Development:

The parties affirm their commitment to promote international trade in a way conducive to decent work for all, as expressed in the International Labor Organization (ILO) Charter on Social Justice and the Council of Europe Social Charter. The parties are specifically required to comply with recognised

core labour standards, and must make continued and sustained efforts to ratify the "fundamental" ILO conventions if they have not done so already. Each party shall effectively implement the ILO conventions they have ratified, as well as the European Social Charter, and promote through its laws and practices the ILO Decent Work Agenda.

Parties are also required to implement multi-lateral environmental agreements they have ratified. The chapter requires effective implementation of the UN Framework Conventions on Climate Change, including the 2015 Paris Agreement, and co-operation on trade-related aspects of climate change in international fora. Additional provisions address enforcement of the CITES Convention (prohibiting trade in endangered species), combatting illegal logging, sustainable management of marine resources, promotion of renewable energy, and corporate social responsibility. This chapter is subject to consultations, which if they do not resolve the dispute, entitle a party to request the establishment of a panel of experts to make findings and issue recommendations. The parties shall then discuss appropriate measures, although no other system for dispute settlement is provided for.

Given that these provisions reflect the existing position in both the UK and EU, it may be instructive to consider the potential options open to the UK if the chapter were deleted in its entirety. As a counterfactual, the analysis will be brief:

State aid: The only restrictions on the UK subsidising industry would be provided by Article VI and XVI GATT, and the SCM Agreement. There would be no restrictions on subsidies given to service providers, no requirement for prior authorisation, and no obligation to repay unlawful aid. This currently seems to be a major stumbling block to agreement. COVID 19 might arguably be seen as a justification for reduced restrictions on subsidies unless they violate the GATT or constitute dumping. For example, the UK could choose to subsidise growing successful industries such as its tech sector, pharmaceuticals and military equipment.

Competition: Existing UK competition law set out in the Competition Act 1998 (prohibiting cartels and abuse of monopoly power based on EU law), criminalisation of certain cartel activity, and domestic merger control, would remain unchanged unless amended by Parliament, for example to promote an active industrial policy aimed at establishing "national champions" and/or restricting mergers on non-competition grounds, including national security (as was common practice in the UK in the 1970s and early 1980s). A more discretionary policy might be seen as justified given current geo-political concerns, as well as worries over the security of international supply chains.

State owned enterprises: As the UK intends to accede to the WTO GPA, discrimination against WTO members in government procurement would violate the most favoured nation (MFN) clauses of both the GATT and GATS so it is unlikely that there is much the UK would wish to accomplish that is contrary to this chapter.

Taxation: The UK could adopt an aggressive low corporate tax regime to attract foreign direct investment (FDI), although given that Ireland and Luxembourg have arguably done this within the EU it is unclear whether this chapter makes much difference for so long as unanimity is required on EU measures concerning tax harmonisation.

Labour standards: Although not current Government policy, the UK could in the future reduce labour protections, as was done in the 1980s, to enhance the competitiveness of the UK economy.

Environment: The UK could emulate the Trump and Bolsonaro administrations in cutting environmental standards and restricting enforcement. Again, this is not current Government policy.

Climate change: The UK is currently bound by the Climate Change Act 2008 (following 2019 amendments) to reduce specified greenhouse gas emissions by 100% by 2050 compared to 1990

levels. The UK is also a party to the UN Framework Conventions including the 2015 Paris Agreement. However, absent level playing field provisions, the UK could amend or repeal the Climate Change Act, leave (like the US) the Paris Agreement, or (subject to domestic law) not enforce its commitments under international environmental treaties, and provide no replacement to the existing EU emissions trading scheme.

Sustainable development: As there are arguably no hard obligations here – in the sense of being legally enforceable – this chapter could be said to add nothing. However, the UK would be free, absent agreement, not to co-operate with the EU in international fora, and ignore sustainable development issues in its trade policy should it so wish. According to Marise Cremona, based on the CJEU Opinion 2/17 on the EU-Singapore FTA, a breach of this chapter could entitle the EU to terminate the agreement under the Vienna Convention on the Law of Treaties (VCLT). Whether a contravention of a non-binding provision of a treaty is a "material breach" for the purposes of the VCLT may, however, be open to question, so the issue of whether the EU could actually exercise this option is unclear. Termination of treaties by notice is always possible where the treaty so provides (as here).

Human Rights

Chapter one states that "[t]he parties shall continue to uphold the shared values and principles of democracy, the rule of law, respect for human rights, which underpin their domestic and international policies. In this regard the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties, as well as their continued commitment to respect the European Convention on Human Rights and Protocols 1, 6 and 13 thereto". This is stated to be an essential element together with the "[f]ight against climate change". The intention would appear to be to give the EU the right to suspend or terminate the treaty in case of breach by the UK, which would restrict UK policy freedom, should it wish, in the future, to re-introduce the death penalty, or withdraw from international agreements on climate change.

Although not a "level playing field" requirement in chapter two, the draft EU text predicates all the provisions on law enforcement and judicial co-operation in criminal matters on continued adherence by the UK to the European Convention on Human Rights (ECHR) and Protocols 1, 6 and 13 (on protection of property rights, and the abolition of the death penalty, which e.g. Poland has not ratified) "as well as upon the United Kingdom giving continued effect to these instruments under its domestic law". It is unclear whether this requires interpretation of the ECHR as held by the European Court of Human Rights or by UK courts.

The text continues "in the event that the United Kingdom abrogates the domestic law giving effect to the instruments referred to in paragraph 1 [i.e. the Human Rights Act 1998] or makes amendments thereto to the effect of reducing the extent to which individuals can rely on them before domestic courts of the United Kingdom, this Title shall be suspended from the date such abrogation or amendment becomes effective".

It is not currently Government policy to repeal the Human Rights Act, or to withdraw from the European Convention on Human Rights, although the 2010 and 2015 Conservative Manifestos stated that the Human Rights Act 1998 would be repealed, and former Prime Minister Theresa May proposed, as Home Secretary, leaving the Convention.

A possible example of a difficulty presented by this provision is the Overseas Operations (Service Personnel and Veterans) Bill, which is currently before Parliament. Although the relevant Minister

has certified the Bill to be compatible with the ECHR, some commentators, including the Law Society of England and Wales, have expressed doubts as to whether this is the case.

In any case, is hard to see is why modifications or repeal of domestic law, or adherence to specific international treaties, should be grounds for the automatic – as opposed to discretionary – suspension of co-operation in law enforcement. Such co-operation is of benefit to the EU as well as the UK, while the European Convention does not require its incorporation in domestic law. It also seems surprising, given that the EU has not itself acceded to the ECHR (although the TEU provides for accession) and so is not bound by it.

Further, states regularly co-operate with, and/or extradite persons to, countries with differing levels of human rights protections (e.g. the death penalty in the US), although the UK Supreme Court recognised statutory limitations to this in *Elgizouli v. Secretary of State for the Home Department* [2020] UKSC 10. By opting for a mandatory provision the EU may end up suspending all co-operation with the UK simply because of a political decision in the UK to alter the level of human rights protection domestically. One may question if this is really in the EU's interests.

Fisheries

On fisheries, there is little to be said. The EU is unique in maintaining a common fisheries policy, although the EU has negotiated access to fishing waters in a number of its FTAs. For example, EU fishing rights with Iceland, the Faeroe Islands and Norway are co-ordinated through bilateral agreements, and the EU has negotiated eight agreements with African nations allowing the EU to fish tuna, and four additional agreements with Greenland, Morocco, Mauritania and Guinea Bissau covering a wider range of fish stocks. Each of these agreements is specific to the FTA partner, and the UK has proposed annual negotiations on EU access to UK fish stocks in its Exclusive Economic Zone (EEZ) based on the model currently employed between the EU and Norway. Given the tiny percentage of both UK and EU GDP and employment represented by fisheries it is hard to see this as other than a political disagreement, and it would seem surprising if alone this dispute would prevent agreement on a wider trading arrangement.

By way of background, most FTAs exclude agricultural products, including fisheries. This was the case until recently within EFTA. NAFTA had rules on trade in fish products, and restrictions on subsidies, which have been enhanced in the recent USMCA Agreement. Neither NAFTA nor its successor provide rights to fish in the other parties' waters. The same applies to the EU's Association Agreement and customs union with Turkey.

Treatment of "level playing field" issues in regional and free trade agreements

The failure to conclude the 2001 Doha Development Round has resulted in environmental concerns (raised by the EU in the WTO negotiations), and the other matters mentioned in the "level playing field" provisions not currently being on the WTO agenda, or part of WTO law save as aforesaid. However, the proliferation of free trade agreements (FTAs) and – to a lesser extent – customs unions, has enabled parties to introduce such concerns into the negotiations where desired, although the way in which this has been done, and the substance and enforceability of such provisions, varies markedly. Where included in FTAs a basic difference of approach has been taken between NAFTA (and agreements based on NAFTA, including the USMCA) and EU/EFTA FTAs.

NAFTA/USMCA

Side letters to NAFTA required parties to "ensure" high levels of environmental and labour protection, with the latter defined by reference to eleven labour principles. Secondly, parties were

required to enforce their domestic environmental and labour laws (which were not harmonised). Thirdly, there was a hortatory provision under which the parties agreed to strive continually to improve their existing laws. Citizen submissions concerning breaches were possible, that could ultimately result in inter-state arbitration, although not in respect of all obligations. Basically, dispute settlement was only available for a failure to enforce domestic laws in relation to occupational health and safety, child labour or minimum wages.

Further, the failure to enforce had to be trade-related and reflect a persistent pattern of behaviour. Monetary penalties could be imposed to be used to secure enforcement of labour or environmental laws, or their improvement. NAFTA did not address human rights, democracy, competition laws, or sustainable development, although there were restrictions on trade-related subsides. (This is not to say that other international agreements in the western hemisphere such as the agreement on the Organization of American States do not address some of these issues).

USMCA strengthened the content of the NAFTA provisions incorporating labour rights recognised by the ILO, increasing the minimum wage for Mexican automobile workers (which may have little practical effect as it is reported to be cheaper for Mexican automobile manufacturers to pay the MFN tariff on car exports to the US rather than raising wages), and improving enforcement. Environmental obligations, include prohibiting some fisheries subsidies, protections for certain marine species, and adoption/maintenance of specified environmental treaties exist. Human rights, democracy, state aids and climate change are (unsurprisingly, in the last case) unaddressed.

EU Policy

The EU internally provides for respect of human rights in Article 6 TEU and in the Charter on Fundamental Rights of the European Union. Specified common values are also set out in Article 2 TEU ("human dignity, freedom, democracy, equality, the rule of law and respect for human rights") and in the aims of the EU in Article 3 TEU. However, effective enforcement of Article 6 TEU requires unanimity (excepting the state alleged to be in breach) which has rendered difficult the application of this Article in respect of alleged violations of the rule of law in Hungary and Poland.

Since 1995 the EU has systematically included provisions in FTAs on human rights in general terms (see e.g. Articles 8 and 20 of the – now expired – Cotonou Agreement with African, Caribbean and Pacific Countries), and since 2008 on labour and environmental protection. The latter contain minimum obligations to implement listed ILO and environmental obligations as well as a set of obligations concerning domestic legislation. Some agreements (e.g. EU-CARIFORUM) contain a "standstill" provision prohibiting the other party lowering its standards of protection to encourage trade or FDI. However, these provisions are essentially hortatory in effect as they are excluded from dispute settlement and therefore the only remedy, if consultations or diplomatic pressure fail, is to suspend or terminate the agreement (which is effectively a nuclear option, although exercised in relation to the EU-Syria FTA following widespread evidence of crimes against humanity perpetrated by the regime). None of the EUs existing bilateral or multilateral FTAs contain equivalent provisions to those set out in the draft future relationship agreement with the UK, although it could be argued that the EU-UK relationship is unique.

The EFTA countries initially adopted a human rights clause in certain FTAs, and since 2010 EFTA FTAs contain a sustainable development provision, although weaker than that found in EU agreements, as existing protections can be weakened unless the sole intention is to encourage FDI or to secure a competitive trade advantage.

Deep Regional Integration

In terms of agreements on deep regional integration the most important are the Agreement on a European Economic Area (the EEA Agreement) and the Association Agreements with Georgia, Moldova and Ukraine. The Association Agreement with Turkey (1963) and the subsequent customs union (1995) contain no provisions on human rights, or a level playing field, and Turkey is only required to align its legislation on goods with the EU in respect of products able to be sold in the EU under the customs union, which is updated on a yearly basis.

EEA Agreement

The EEA Agreement was originally conceived of as a free trade agreement (but not a customs union) between EFTA and the EU, and it was anticipated that subsequently it would be a staging post for East European countries before, or as an alternative to, EU membership. In practice, while Austria, Finland and Sweden opted to join the EU; Iceland, Liechtenstein and Norway did not; and most East European states sought and obtained full EU membership in 2004, 2007 and 2013. Switzerland, although a member of EFTA, rejected both EEA and EU membership, and its relationship with the EU is unique being based on a smorgasbord of bilateral agreements which will not be considered here.

The EEA agreement (which replaced previous bilateral FTAs with the EFTA states) provides full access to the EU Single Market based on adoption and implementation of all relevant EU directives and regulations pertaining to that market (although the EU has alleged tardy implementation by EEA States). It follows that EU laws on environmental, labour and other matters relevant to the Single Market apply once incorporated into EEA law by the EEA Joint Committee (with or without amendments). State aid and competition policy are enforced by the independent EFTA Surveillance Authority (ESA) and are subject to oversight by the EFTA Court. ESA can also bring infringement proceedings against EFTA states alleged to have violated EEA law. There are no specific human rights provisions, although Article 6 EEA requires interpretation of EEA law in conformity with prior decisions of the then European Court of Justice (ECJ), and Article 3(2) of the ESA/EFTA Court Agreement states that the EFTA Court must pay due account to future ECJ/CJEU case law. In practice, the EFTA Court pays close regard to CJEU decisions but has not always reached the same outcome on similar legal arguments.

The ECJ/CJEU in a series of rulings, has recognised respect of human rights as a general principle of EU law binding on Member States in the implementation of EU law, as well as on the EU institutions, which would appear to be applicable to the EEA. The EFTA/EEA States are also parties to the Council of Europe and the ECHR. For these reasons the EEA Agreement can be considered practically to provide a “level playing field” based on access to the Single Market in the areas within its scope (the four freedoms of labour, capital, services and goods), and (to a limited extent) human rights.

In areas outside of the Single Market (e.g. agriculture) trade is regulated by bilateral arrangements) and some provisions of EEA Agreement, and trade remedies, such as anti-dumping duties, may still be imposed.

Association agreements comprising a deep and comprehensive FTA

The Association Agreement with Ukraine (replicated in similar agreements with Georgia and Moldova) is premised on a gradual harmonisation of national with EU legislation which, when accomplished, will allow (with EU consent) participation in selective parts of the Single Market

without free movement of persons. The purpose of the agreement(s) is expressly regulatory alignment with the EU over a wide range of issues, and its conclusion proved highly controversial in Ukraine when then President Yanukovych refused to sign the agreement (preferring closer relations with Russia), setting in train a course of events leading to the overthrow of Yanukovych, the annexation of Crimea by Russia, and war in the Donbass. Newly elected President Poroshenko signed the agreement which entered into force on 1 September 2017, representing a clear geo-political choice by Ukraine towards alignment with the EU and not Russia. It is therefore necessary to see this agreement, and the corresponding association agreement with Georgia, which under President Saakashvili aimed at EU and NATO membership, in its political context. None of the three countries concerned are currently existing or potential candidate members of the EU, and no negotiations have taken place on membership (although Ukraine and Georgia are candidates to join NATO).

Unsurprisingly, there are "level playing field" provisions, given the premise of harmonisation. Respect for democratic principles, human rights and fundamental freedoms, and respect for the rule of law are declared to be "essential elements" of the agreement. The agreement contains standard GATT- and GATS-based disciplines with selective judicial enforcement (though WTO dispute settlement remains possible at the choice of the complainant party) coupled with an obligation on Ukraine to approximate its laws to that of the EU.

On competition law Ukraine is required to approximate its competition laws and enforcement practices to EU law. The same is the case with state aid – although this is without prejudice to either party invoking the GATT disciplines on subsidies. There is a chapter on "sustainable development" which contains relatively soft constraints in respect of labour standards and multi-lateral environmental agreements. The parties are obliged to effectively enforce their domestic laws, and not to weaken protection in those areas in a manner affecting trade or investment.

Formal dispute settlement in such areas is excluded with recourse to consultations and the convening of a group of experts with a duty on the parties to make their best efforts to accommodate the advice or recommendations of the experts. Trade-related disputes, by contrast, are subject to binding arbitration, with provision for a reference to the CJEU where a dispute raises a question of interpretation of EU law (but not a concept of EU law as proposed in the draft EU text with the UK) – and this is without prejudice to either party invoking WTO dispute settlement instead, which, of course, would be restricted to WTO law, as the WTO dispute settlement organs cannot apply FTA law (or EU law).

Title V on economic cooperation requires gradual approximation of Ukrainian legislation with EU law and policy in a wide range of areas including taxation, climate change, employment, social policy and equal opportunities. These, and other provisions in the agreement not covered by trade-related binding arbitration, are subject to political settlement, failing which non-trade-related measures may be suspended. An exception applies to Article 2 – see above – on democracy, human rights and the rule of law. Whether the EU would be willing to invoke this provision given the geopolitical context, may be questioned.

Annex XVII provides for approximation of laws in financial services, telecommunications, postal and courier services, and international maritime transport. Following a request by Ukraine, and a determination by the EU that the conditions are met, Ukraine will be accorded access to the single market through the right of establishment and freedom to provide services (GATS modes 1 and 3) on the same basis as EU firms. Free movement of persons is explicitly excluded, although the EU is bound by commitments in the services schedule of the agreement itself as well as by the Member States' GATS commitments for mode 4 (temporary presence of natural persons).

These association agreements are clearly not standard regional integration agreements and reflect a decision by the three countries concerned to anchor themselves to the EU regulatory – and in two cases NATO security – orbit. This, rather than geographical proximity, as well as a desire to promote trade and investment with non-CIS states based on an established set of international norms, would appear to explain the terms of the three agreements. It should be noted that all three countries have been involved in conflict with Russia, or Russian-backed insurgents, although the territorial disputes over Transdniestria, Abkhazia and South Ossetia are currently "frozen".

It will be seen that both the EEA Agreement and the Association Agreements with Georgia, Moldova and Ukraine have very particular economic or geopolitical origins and cannot be seen as an appropriate comparator for a future EU-UK FTA. We therefore turn to a discussion of CETA as the UK's principal model (although, as the EU has correctly pointed out, the UK seeks co-operation in areas not covered by CETA, such as police and law enforcement, and participation in certain EU programmes currently only fully open to EEA States or accession countries). Moreover, economically, EU-Canadian trade is less important to both parties than EU-UK trade, and therefore the prospect of EU firms being economically disadvantaged by trade from Canadian firms is less than that from UK traders.

CETA

We will now examine how these "level playing field" issues are addressed in CETA – as the most advanced FTA agreed by the EU apart from the previous agreements discussed – and the UK's chosen "model". Human rights are mentioned in the EU – Canada Strategic Partnership Agreement, signed alongside the CETA. Article 2(1) of that agreement provides that respect for democratic principles, human rights and fundamental freedoms constitutes an essential element of that agreement. However, the only remedy in case of breach is termination of CETA. Moreover, the threshold for a violation is defined as follows: "its gravity and nature would have to be of an exceptional sort such as a coup d'état or grave crimes that threaten the peace, security and well-being of the international community". In fact, this provision is effectively redundant as the termination provisions operate without the need to give reasons on 180 days' notice, which is the provision referred to in the Partnership Agreement.

In terms of labour and environmental standards, CETA sets out a baseline for labour standards by reference to multilateral agreements but not for the environment. In the former case, this is defined by reference to various enumerated ILO standards. CETA also requires the promotion of (a) health and safety, (b) minimum employment standards and (c) non-discrimination. CETA also requires its parties to implement national labour and environmental laws. There is a hortatory provision under which the parties shall encourage high levels of labour and environmental standards and strive to continue to improve such standards. The normal dispute settlement regime does not apply to these provisions of CETA. Instead, there are diplomatic consultations that may lead to the appointment of a panel of experts. If the panel identifies a breach, the parties shall endeavour to identify appropriate measures based on a mutually satisfactory action plan.

CETA's provisions on competition law are thin requiring the parties to proscribe anti-competitive conduct and to co-operate in accordance with the 1999 Agreement regarding the Application of their Competition Laws. The chapter is excluded from dispute settlement. There are no provisions in CETA on state aid, although the agreement provides for consultations concerning subsidies which adversely affect or may adversely affect the interests of the other party. Dispute settlement is excluded, although the parties retain their rights under the GATT and the SCM Agreement.

CPTPP

CPTPP is the successor – following US withdrawal in 2016 – to TPP, which was itself a broadening of an earlier regional trade agreement called the Trans-Pacific Strategic Economic Partnership Agreement signed by Brunei, Chile, New Zealand and Singapore. As the TPP was renegotiated to form the CPTPP certain articles, mainly relating to intellectual property rights and investor-state dispute settlement requested by the US, were suspended. CPTPP contains provisions on labour and environmental standards, and competition policy. On labour standards the parties agree to adopt and maintain laws compatible with the ILO declaration of fundamental labour rights as well as laws on conditions of work, minimum wages, hours of work, and health and safety, although without harmonisation.

There is a prohibition on lowering labour standards to attract trade or investment. A mechanism for co-operation on labour issues is established, and in case of a dispute, where dialogue and consultations fail, a party can request the establishment of a panel under CPTPP's dispute settlement provisions, which can result in trade sanctions.

On the environment, CPTPP includes core commitments to uphold high standards of protection and to enforce national environmental laws. In principle, each party is able to set its own environmental priorities and reaffirms its commitments under those multi-lateral environmental agreements which they have ratified (which are not harmonised). Parties also commit to take action on protecting the ozone layer and marine pollution (but not climate change where the parties agree to co-operate only). The environmental chapter is enforceable under the CPTPP dispute settlement system, and private rights of action for violations are encouraged (but not mandated). There is also provision for co-operation. Dispute resolution is not available for the competition chapter.

Compared to CETA and standard EU FTAs, CPTPP falls into the NAFTA/USMCA model, which is unsurprising as it was originally promoted by the Obama administration.

Conclusions

Deep integration agreements originated in Europe in the 1950s – 1960s (European Coal and Steel Community, European Economic Community, EFTA) and were extended to North America with NAFTA in the 1990s. However, the impetus for greater regional integration – whether deep or shallow – came with the failure of the Doha Development Round. Since then, the EU has negotiated bilateral or multi-lateral free trade agreements with most of its neighbours. These vary from standard FTAs with Mediterranean countries, to a customs union with Turkey (seen at the time as a precursor to EU membership), and deep integration agreements with the EFTA\EEA States and the Association Agreements with Georgia, Moldova and Ukraine.

Subsequently the focus in trade negotiations moved towards mega-regional trade agreements, such as the completed CPTPP and the moribund Trans-Atlantic Trade and Investment Partnership (TTIP) between the EU and US, and the WTO plurilateral Trade in Services Agreement (TiSA), which was intended to extend the commitments made in the GATS. Whether they will be revived in the future is outside the scope of this briefing.

At the same time, although not considered here, there have been movements for greater regional integration in Africa, South East Asia, the Caribbean as well as the Greater Arab Free Trade Area and the Gulf Co-operation Council Free Trade Area. Such agreements have generally had a more traditional focus on tariffs and border measures, and have had limited effects on trade between

parties. However, they show that regional integration is neither necessary nor sufficient for deep integration, although deep integration agreements are more common between parties in the same region with NAFTA/USMCA proving that such agreements can be concluded between developed and developing countries. On the other hand, CPTPP proves that extensive trade liberalisation, going beyond tariffs to "behind-the-border" controls, can be effected amongst geographically distant parties, and the UK has expressed an interest in acceding to CPTPP. Should this happen, and a future US administration do the same, the UK and US would be linked by a trans-continental free trade agreement.

Coming back to the EU-UK negotiations, certain "level playing field" measures of the sort included in the EU draft text of 18 March 2020 are not wholly unprecedented in terms of scope as many deep or new FTAs contain provisions on labour, the environment and competition. Whether they are enforceable generally depends on whether the agreement follows an "EU" model (normally no) or NAFTA (yes, but…). General enforceability of very detailed provisions is unique outside of the EEA Agreement, and the proposed EU provisions for the future relationship with the UK are unprecedented for an FTA, as, it could be argued, is the nature of the future relationship.

As a general matter, human rights and state aid control seem to be mainly an EU preoccupation (like geographical origins), although FTAs almost invariably have disciplines on subsidies – whether by reaffirming the GATT and SCM Agreement or by seeking to extend it (e.g. to services). Only the EEA Agreement has detailed enforcement on the EU model of state aid and competition law, and human rights are not there expressly addressed. Moreover, in most EU FTAs "level playing field" provisions are subject to diplomatic settlement, sometimes aided by expert panel recommendations. CETA provides a good example in this regard. As Canada has accepted binding arbitration for labour and environmental standards in both NAFTA/USMCA and CPTPP, it might be expected to have agreed to an EU demand for binding settlement had this been an EU priority.

That "level playing field" provisions in their present form would be advantageous to the EU in keeping the UK within its regulatory orbit (like Ukraine), and preventing the UK from becoming more competitive through adopting different or lower standards is clear. Books have been written about the "Brussels effect" on how the EU seeks to export its regulatory norms to other countries as a global standard setter. Whether it is in the UK's interest to agree to such standards is an economic and political question. The economic issue is whether, if this is the price to be paid for an FTA, is it worth it compared with trading on WTO terms, or waiting for a potential change in the EU's approach if the UK walks away from discussions in October 2020. The political question is whether the UK wishes to accept such limits on its national sovereignty (and how it would wish to exercise such rights if secured). Given that the UK will continue to adhere to agreed international standards (e.g. on financial services), it will not be free to make its own rules in all areas as it sees fit, although the coverage of international standards tends to be patchy.

Thus it is not inconsistent to argue that the UK should remain a party to the 2015 Paris Agreement, or to the European Convention on Human Rights, but to reject such requirements as the price of a trade agreement. National policies and goals can change over time, as Australia, Brazil and the US recently prove, and a UK government may wish to keep policy space for its successors even if not wishing to exercise it now. On the other hand, a government may instead seek practically to bind its successors, as arguably President Salinas of Mexico did, with regard to his domestic reform agenda, by acceding to NAFTA. Whether it would be better for the UK to seek a closer relationship with the EU, accepting necessary compromises on regulatory autonomy, in return for greater market access is an open question, although politically it would seem foreclosed by Parliament's rejection of continued membership of the EEA Agreement and the outcome of the December 2019 General

Election[4]. A Switzerland-like deal has been rejected by the EU. Accordingly, is unclear if there exists an intermediate path between the current Government's strategy for the future relationship and full EU membership which was rejected in the 2016 referendum.

President Trump has stated that UK acceptance of the proffered EU terms would prevent a UK-US FTA, although what US trade policy will be in the future may depend on November's Presidential and Congressional elections. Regardless, the UK has articulated reasoned objections to the EU proposals on the basis of national sovereignty as described in our previous briefing [link]. At this stage it is impossible to know whether an agreement will be reached between the EU and UK and, if so, whether on terms closer to that proposed by the EU or UK. For the moment one can only await the outcome of developments in the autumn and businesses must prepare for all possible outcomes, including no deal, a last-minute deal leaving little time to prepare, or a period of trading on WTO terms before a future agreement can be reached.

If you would like further information about this topic, please speak to your usual Slaughter and May contact.

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[4] Whether the EFTA/EEA States would have agreed to UK membership of the EEA is a question that generated much political debate in Norway. Many Norwegian politicians expressed scepticism that it was in Norway's interests to allow the UK to become the dominant country in the EEA by virtue of population size and GDP, although whether Norway would have vetoed UK EEA membership will ultimately remain an open question. Parliament rejected EEA membership in 2018 as it would have entailed adoption (without a vote) of all EU Single Market legislation, and effective following of CJEU judgments. The UK would also have been bound to make significant contributions to the EU budget like Norway.