

Priorities for trade and the environment through Brexit

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1. Introduction

The UK is devising its own approach to international trade for the first time in 46 years. An important part of this is the nature, design and content of the free trade agreements (FTAs) made with other countries. How international trade is designed and conducted can have significant implications for the environment, from the quality of the products we import to our global environmental footprint. It is critical that the UK's new trade policy delivers for both people and planet.

Brexit creates a rare opportunity to think differently about the purpose and practice of trade. The UK should develop a fresh approach consistent with the action needed to respond to the environmental crisis, promoting high standards and dramatically reducing the UK's environmental impact, both domestically and overseas.

Future UK trade policy depends on the nature of the future relationship agreed with the EU. The UK has a critical choice. It could stay closely aligned to the EU, which may necessitate following EU standards in some important areas, for example in relation to the pesticides used in growing food. Or it could pivot away from the EU and towards a different regulatory approach, for example forming closer links with the US.

The sequencing of agreements is significant. A comprehensive deal with the EU, with continued environmental co-operation and both sides signing up to high standards, would constrain the potential for signing deals with other parties that have weaker standards. A no deal Brexit might increase the likelihood of the UK rushing to conclude an agreement with the US, which has indicated a desire for some of the UK's existing environmental protections to be dismantled.¹ The US Trade Representative has described EU measures on food standards as "unnecessarily restrict[ing] trade".²

This risk must not be underestimated. The former director general of the WTO, Pascal Lamy, has warned that "without new safeguards to ensure there is strong continued co-operation and alignment [with the EU], Brexit could destroy environmental protections".³ It is clear that a US trade deal poses considerable threat for the environment.

To protect and enhance the environment, both in the UK and globally, the UK government must ensure that its trade agreements put the environment and democracy first. This requires meaningful environmental commitments in the provisions of the agreements, as well as more transparent and participatory processes for the development, adoption and functioning of trade agreements at both the domestic and international levels.

This briefing outlines what the UK should include in new trade agreements to protect the environment and how these agreements should be developed.

2. Trade relations matter for the environment

Wildlife is struggling, the planet is heating up and the UK parliament has declared a climate and environmental emergency.⁴ We need new and stronger environmental laws to respond to these challenges, and these must not be undermined by new international agreements on trade.

For example, **promoting the import of food produced to lower environmental standards could create downward pressure on standards at home**, with consequent detrimental impacts for nature.⁵ Once outside the EU, British farmers say they want to maintain high standards and compete on quality, but this may not be possible if the economics shift radically. The NFU president Minette Batters has said that a no deal exit, combined with a US trade deal, would necessitate deregulation.⁶

The UK government has legislated for net zero carbon emissions by 2050 and is now legally bound to deliver this goal. **If future FTAs are designed poorly, they could increase fossil fuel use and undermine international efforts to curb carbon emissions.** Trade agreements typically promote trade in fossil fuels, which incentivises their production.⁷ International trade can have benefits but increased trade in goods also normally entails an increase in the use of fossil fuel reliant transportation from freight, international flights and shipping, and this should be taken into account in the design of new FTAs.⁸

The impact of trade on the environment is indirect as well as direct. For example, **the inclusion of procedures such as Investor State Dispute Settlement (ISDS) threatens environmental law** (see overleaf). These provisions can result in regulatory chill, where states are discouraged from introducing, or are encouraged to revoke, public interest regulations which can include environmental protections. This occurs because of the risk or actuality of legal action by a foreign investor on the basis that the regulation impedes the investor's ability to operate in the state.

The UK government acknowledges that trade can have a significant impact on the environment. In its 25 year environment plan, the government pledged to embed environmental sustainability “at the very heart of global production and trade” and committed to developing “a trading framework that supports ... environmental ... goals”.⁹ In October 2017, a white paper from the Department for International Trade (DIT) committed to maintain a high level of protection for the environment.¹⁰

Investor State Dispute Settlement

Investor State Dispute Settlement (ISDS) is a mechanism often found in international trade and investment agreements. It enables foreign investors to challenge states where state action has, or potentially will, negatively impact the profitability of an investment. The natural world can suffer where investors challenge domestic law and regulation that protects the environment.

ISDS in practice: Vattenfall AB vs Germany

In 2007, the Swedish energy corporation, Vattenfall AB, was granted a provisional permit to build a coal-fired power plant near the city of Hamburg. In an effort to protect the river Elbe from the wastewaters dumped from the plant and prospective carbon emissions, the government imposed environmental restrictions before the final approval of its construction. Rather than complying with the environmental requirements, Vattenfall launched an ISDS claim against Germany, stating that the environmental rules amounted to expropriation and violated Germany's obligation under the Energy Charter Treaty to give foreign investors 'fair and equitable treatment'.

To halt further uncertainty and prevent a large sum of compensation, the German government settled the case with Vattenfall in 2010. The settlement included a commitment by Germany to drop its additional environmental requirements and issue the permits required by Vattenfall to proceed. Moreover, the settlement resulted in a waiver of Vattenfall's obligation to mitigate the coal plant's impact on the river Elbe. This led in turn to Germany being found in breach of the EU Habitats Directive by the Court of Justice of the European Union.¹¹

3. Designing trade agreements with the environment at their core

To maintain a high level of protection for the environment during future trade negotiations, the UK government must, as a minimum, ensure that the UK's future trade agreements:

1. guarantee the maintenance and enhancement of environmental standards, minimising the environmental footprint of trade;
2. are developed with proper public participation, democracy, accountability and scrutiny.

These recommendations apply to all future FTAs. This includes the trade elements of the future UK-EU relationship, agreements the EU has with third countries that the UK government intends to 'roll-over' post-Brexit and any other FTAs the UK seeks to negotiate.

Maintaining and enhancing environmental standards

The government has promised to maintain high environmental and food production standards as the UK leaves the EU. It is crucial that standards applied by UK producers are not undercut by cheaper imports produced to lower standards.

As such, the government's trade policy must promote high environmental standards, both in the UK and with its future trading partners, in areas including chemicals, land use, energy efficiency and plastics.

UK trade policy must reinforce existing international environmental commitments including multilateral environmental agreements – such as the Paris Climate Agreement and Convention on Biological Diversity – and the UN Sustainable Development Goals. Future FTAs must include provisions requiring imports to meet high animal welfare and environmental standards and must not create downward pressure on domestic standards.

The UK's new **trade policy must guarantee that meaningful and enforceable commitments to non-regression are included in new FTAs**, to prohibit any weakening of environmental laws. In addition, **parties to FTAs must be guaranteed the freedom to develop and implement domestic law** and policy which enhance environmental protection, even if they have the effect of restricting international trade.

Trade should not be allowed to undermine environmental protection. Given this, the UK's **future trade policy must clarify that domestic and international environmental law and regulation take precedence over and above FTAs**.

All future FTAs, and the activities conducted under them, must be guided by a core list of environmental principles. FTAs should include explicit reference to these principles and require that they are enshrined within each of the parties' domestic legislation.

UK trade policy (and where appropriate FTAs themselves) should require that environmental impact assessments take place during the negotiating process, prior to the final agreement of the FTA and at regular intervals throughout the life of the FTA. This should cover the environmental impacts of the agreement both within the UK and the other party to ensure the global environmental impacts are fully understood. If impact assessments show negative effects and adequate mitigation measures are not implemented, FTAs (or certain chapters or provisions of them) must be subject to suspension or termination.

FTAs must exclude ISDS mechanisms and similar investor protection mechanisms. ISDS is an asymmetric and outdated procedure which unjustifiably prioritises the rights of investors above those of all other stakeholders. As noted above, the mere existence of ISDS clauses can have a chilling effect on regulation intended to protect the environment.

It is crucial that FTAs support and strengthen environmental governance. All future **FTAs must include robust, transparent and reliable procedures for monitoring the implementation of the parties' domestic environmental law** and the environmental terms of the FTA itself.

In addition, **the environmental provisions of FTAs must be enforceable through procedures that properly involve civil society and environmental expertise.** Appropriate and dissuasive remedies and sanctions must be available. To facilitate this, FTAs must include obligations on all parties to ensure that these processes are well resourced at the domestic and international level.

Public participation, democracy, accountability and scrutiny

The UK needs a trade policy that sets the core content of, and approach to, future FTAs, as well as how they will be negotiated and approved. This should be established via primary legislation outlining how environmental considerations will be addressed in the negotiations process.

There must be early opportunities for engagement and, throughout the process of negotiation, there should be continuing transparency as far as is commercially possible. Civil society across the four countries of the UK, including environmental representatives, must be able to participate meaningfully in this process, including through timely consultations, engagement with specifically tasked parliamentary committees and proper and deliberative dialogue with DIT.

Trade agreements have the potential to have a significant impact, both positively or negatively, on the people and environment of the UK. Given this, parliament (and, where relevant, the devolved legislatures) must be involved fully in the development of new agreements. This process should learn from and improve upon international best practice. As a minimum, parliament must have a clear role in setting and voting on the terms of initial negotiating mandates; it must be required to approve any changes to initial mandates and relevant committees should be given the opportunity to scrutinise, comment and feedback on regular updates as negotiations progress. Parliament must also have a final vote on whether to approve or reject a negotiated FTA.

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Endnotes

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