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Analysis of Environmental Dispute Resolution Mechanisms in the EU-UK Trade Deal

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In December 2020, the EU and UK concluded the negotiations of the Trade and Cooperation Agreement (TCA). This Agreement is a crucial step towards maintaining a long-standing relationship between the EU and the UK. One of the principal goals of the TCA is to achieve climate neutrality by 2050; with this objective, the treaty establishes environmental protection standards. These include non-regression provisions, rebalancing mechanisms, and dispute settlement mechanisms, among others. While the inclusion of such provisions is to be celebrated, several loopholes in the TCA may prevent them from achieving the desired results. This post analyses the loopholes in the enforcement mechanism, the requirement that any measure impacts on trade and investment for it to constitute a violation of the environmental rules, and the possibility of third-party participation in environmental disputes.

Enforcement Mechanisms

In the TCA, environmental matters are included in Chapter 7 and are categorized as essential elements. If a party infringes them, it may lead to suspension of the treaty regime; thus, implying that the States have given substantial weight to environmental concerns.

In case of potentially serious environmental damage, the agreement provides for safeguard measures, which can be unilaterally applied by the parties (Article 773), after initial consultations between them. Where the applied safeguard creates an imbalance, the counterparty can adopt appropriate rebalancing measures, and if there is any issue regarding safeguard measures, that party may then resort to arbitration procedures. However, there is no provision for an expedited proceeding to prevent imminent damage to the environment. Rather, the standard six-month arbitration procedure will be applied (Article 739).

In this regard, in comparison to the provisions of the TCA, other treaties such as UNCLOS or the PCA Environmental Rules, expressly empower the arbitral tribunal to take provisional measures in ongoing proceedings. These measures are an expeditious remedy to restrict the infringing party from causing irreparable harm to the environment.

In addition, the EU has recognized that the lack of evidence and data, and the insufficient powers vested in enforcement bodies are factors holding back the implementation and compliance of environmental standards. The TCA could have bridged these gaps by vesting arbitrators and/or panels of experts with the power to subpoena. The ability to subpoena is essential for verifying

party disclosures and validating the accuracy of information and evidence. Had this power been vested in dispute resolution bodies under the TCA, they could access essential scientific information and achieve a full discovery of facts, which is crucial for dispute resolution bodies to rule in environmental cases and, in this sense, to further environmental protection.

The Requirement that a Measure Impact "Trade and Investment" as a Pre-requisite for Violation of the TCA's Environmental Rules

Article 391 of the TCA contains the so-called, "non-regression clause", which determines that parties can refer disputes to expert panels only in cases where the non-compliance of environmental standards *"affect trade or investment."* Environmentalists have observed that adducing evidence which meets this threshold of "affecting trade" is difficult to prove. For instance, Professor Barnard explains that "*single changes in the legislation may not impact trade, which will make difficult to trigger the threshold of violation."* This also leaves uncertainty and ambiguity as to what is considered a grave enough impact on trade for a party to be able to raise a dispute under the TCA.

Additionally, while the TCA mostly regulates trade among the parties, there is a strong environmental cooperation component as outlined in section 7 of the Preamble. However, the treaty contains no remedial procedure for a panel of experts to settle environmental disputes which are unrelated to trade and investment, and thus a vital area has been left uncovered from an adjudicatory mechanism. The narrow scope of the regression clause, limited to disputes that "affect trade", has also been criticised by the Institute for Public Policy Research, which suggests that the non-regression principle should apply to all circumstances and that the contravention of environmental legislation should be sufficient to hold a party liable, regardless of whether a measure affects trade and investment.

Similarly, Article 411 on rebalancing measures allows parties to take countermeasures in response to acts of the other party that have a "material impact on trade and investment", where such measures can cause "significant divergences". The phrase "material impact" is defined as a threshold entailing "reliable evidence [of impact] and not a remote possibility", which means that the party is required to present well-grounded, convincing evidence of the alleged "material impact". Further, the requirement of "significant divergences" implies that the party must evince more than one severe discrepancy. This criterion leaves room only for grievous breaches, and the parties will often be unable to meet such a high standard of proof. This also allows member states to deviate from furthering environmental protection while only complying with the bare minimum standards.

This position is analogous to that in the Trail Smelter judgment, where the party had to show "materialized damage" and follow a "de minimis" rule. Such approaches discourage legal actions where the impact of the breach is negligible. Thus, parties can only apply rebalancing measures where there is clear and significant evidence of environmental damage and not mere minor damages.

Contrary to the above, jurists such as Medes Malaihollo have noted that it is difficult for parties to present evidence of actual materialized damage. In the same line, in *Ireland v UK and New Zeeland v Japan*, both adjudicative bodies held that the potential or foreseeable risk of harm, rather than material damage, was sufficient to hold a party liable for the breach of their duty of care under the precautionary principle. This is a reasonable threshold that does not defer to the tribunal to

decide which measures are appropriate in the absence of material evidence, thus, preventing environmental degradation.

Finally, it is essential to adopt the precautionary principle for broadening the bar to accommodate non-trade environmental disputes under the TCA. This approach is crucial as the rebalancing mechanism only allows parties to seek arbitration proceedings due to *significant deviations* in environmental standards, which are extremely limited. A study conducted by IPPR indicates that arbitral tribunals will settle environmental issues in rare cases under the current threshold. Adopting the precautionary principle will provide parties standing to raise environmental disputes under the TCA as both potential risks and materialized evidence will be actionable under this threshold.

Civil Society Participation in Environmental Disputes

It is widely known that civil society actors play a pivotal role in ensuring transparency, protecting public interests, and efficiency in environmental disputes. Their participation in dispute resolution mechanisms is quintessential. On this matter, the TCA allows arbitral tribunals (not expert panels) to accept amicus curiae submissions but only permits limited participation through written submissions. Further, the parties are permitted to receive information through expert advice or domestic advisory groups (DAGs).

Under the current provisions, amicus curiae submissions do not ensure the active participation of third parties, such as might be achieved by providing them with access to documents or oral arguments. Additionally, studies have shown that DAGs are not entirely representative of all the interests in environmental disputes. The disadvantaged and regional minorities are not part of these groups most of the time. In this vein, states should adopt internal legislation to ensure the meaningful participation of all groups.

On the contrary, the Trans-Pacific Partnership Agreement vests substantive powers to civil society by allowing access to documents and making oral arguments in initial and appeal proceedings. Further, UNCITRAL's Working Group III has acknowledged that several actors who have direct interests in investor-State disputes should be included through joinder or intervention to have an opportunity to protect their rights. In this respect, States could adopt similar policies for DAGs to represent the interests of all the actors of civil society in TCA disputes.

Finally, under the TCA, arbitral tribunals are vested with plenary powers to accept or reject submissions from third parties. This makes it necessary to establish a detailed standard to carry out this process to avoid consistency and transparency concerns. For instance, the TCA could incorporate similar criteria to the ones outlined in Article 37 of the ICSID Convention, where tribunals are able to consider whether a submission brings any novel perspective to the existing arguments or consider the inclination of submitted amicus curiae.

Conclusion

The TCA has endeavored to create a stringent dispute resolution mechanism for resolving environmental disputes. However, some loopholes still need to be addressed to achieve the desired goal of environmental protection. Primarily, it is significant that parties have standing to resolve environmental disputes that are not restricted by the narrow interpretation of the non-regression and rebalancing clauses. This will deter the parties from deviating from protection standards and will provide room for adequate legal review. Secondly, third-party oral intervention and joinder of

third parties should be permitted to provide transparency and to ensure a broad representation of all interests. Finally, tribunals should have powers to subpoena and to order interim measures to ensure that the treaty has effective enforcement mechanisms.

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