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*ANGSHUMAN HAZARIKA, UNIVERSITY OF SAARLAND*

**Sustainable Development as a part of a post- Brexit trade agreement between UK and the European Union: Lessons from the Opinion of the CJEU on the EU-Singapore FTA**

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# Sustainable Development as a part of a post- Brexit trade agreement between UK and the European Union: Lessons from the Opinion of the CJEU on the EU-Singapore FTA

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*Angshuman Hazarika\**

## A. SUSTAINABLE DEVELOPMENT AND THE EUROPEAN UNION

### I. Background for EU policy on sustainable development

Sustainable development has been described as a 'fundamental and overarching objective of the European Union (EU)'<sup>1</sup> and as a legally binding objective that should be pursued by the Union.<sup>2</sup> The EU in its political and legal initiatives seeks to comply with sustainable development frameworks as laid down under the Charter of Fundamental Rights of the EU (CFREU); the EU Strategic Framework on Human Rights and Democracy; the United Nations (UN) Human Rights Conventions; the fundamental International Labour Organisation's (ILO) Conventions and the core labour standards in addition the UN 2030 Agenda for Sustainable Development and other regional human rights instruments and customary international law.<sup>3</sup>

The EU launched its first sustainable development strategy in 2001<sup>4</sup>. This was followed by a review of the EU sustainable development strategy in 2005<sup>5</sup> and a renewal of the strategy in 2006<sup>6</sup>. The Europe 2020 strategy which was adopted in 2010 integrated the EU development strategies under one umbrella and sustainable development was a core component of the document.<sup>7</sup>

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\* This paper has been prepared under the supervision of Prof. Dr. Marc Bungenberg, LL.M who is the Director of the Europa-Institut and a Professor of Public law, European law and Public International law at University of Saarland in Germany and a permanent visiting professor at the University of Lausanne/Switzerland.

Any errors and omissions are the Author's own and are not attributed to anyone else.

<sup>1</sup> Eurostat, Sustainable development in the European Union: 2009 monitoring report of the EU sustainable development strategy, Eurostat, 2009, DOI 10.2785/2901, p. 29.

<sup>2</sup> Kenig-Witkowska, Maria, The Concept of Sustainable Development in the European Union Policy and Law, Journal of Comparative Urban Law and Policy, 1(1), 2017, 64-80, 67.

<sup>3</sup> European Commission, Commission Staff Working Document: Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement, Doc No. SWD(2016) 21 final, Brussels, 26.1.2016, p. 2

<sup>4</sup> Communication from The Commission: A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, COM(2001)264 final, Brussels, 15.5.2001

<sup>5</sup> Communication from The Commission to The Council and The European Parliament on the review of the Sustainable Development Strategy: A platform for action, COM(2005) 658 final, Brussels, 13.12.2005

<sup>6</sup> Council of the European Union, Review of the EU Sustainable Development Strategy (EU SDS) - Renewed Strategy adopted by the European Council on 15/16 June 2006, Doc No. 10917/06, 26 June 2006

<sup>7</sup> Communication from the Commission: Europe 2020 A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, Brussels, 3.3.2010

The EU has placed special emphasis on sustainable development as a part of its trade policy and relevant provisions for the same have been included in its trade agreements. It has also adopted a specialised sustainable development strategy, which guides its policy actions and trade policy.<sup>8</sup> The EU Treaties serve as the backbone for the EU push for sustainable development. Article 3(3) of the Treaty on European Union (TEU) calls for sustainable development in the EU with Art. 3(5) TEU calling for EU's contribution towards sustainable development of the Earth.

The principle of sustainable development is also a part of the Union's external actions as stated through Art. 21(2)(d) and (f) TEU. Art. 11 TFEU also makes environmental protection and sustainable development a core part of the EU's policy. Carrying forward the essence of sustainable development, Art. 37 of the CFREU also calls for a high level of environmental protection and its integration into the policies of the Union as a part of the principle of sustainable development. However, only a single definition of 'sustainable development' has been found in secondary EU law.<sup>9</sup> The term 'sustainable development' was defined as : *"the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations"*<sup>10</sup> in the two regulations in a context relevant to the regulations.

The 'Trade for All' strategy<sup>11</sup> which was released in October, 2015 contained a special reference to the 2030 UN Agenda for Sustainable Development<sup>12</sup> and stated EU's commitment to sustainable development in trade policies.<sup>13</sup> The strategy also mentions a 'trade agenda to promote sustainable development, human rights and good governance' keeping in line with the policies prescribe in the EU treaties.<sup>14</sup> The Trade for All document was followed by a Commission Communication -Next steps for a sustainable European future<sup>15</sup> in November, 2016. The Communication laid down Europe's response to the 2030 Agenda and how it would be implemented. This communication also stated that the EU trade agreements such as Economic Partnership Agreements and Generalised system of preferences

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<sup>8</sup> Review of the EU Sustainable Development Strategy (EU SDS) Renewed EU Sustainable Development Strategy as adopted by the European Council on 15/16 June 2006, Council of the European Union, Document No. 10917/06, dated 26 June 2006.

<sup>9</sup> Kenig-Witkowska, Maria, The Concept of Sustainable Development in the European Union Policy and Law, Journal of Comparative Urban Law and Policy, 1(1), 2017, 64-80, 69.

<sup>10</sup> Article 2 (4), Council Regulation (EC) No 3062/95 of 20 December 1995 on operations to promote tropical forests, OJ L 327, 30.12.95, p. 10, Article 2, Regulation (EC) No 2493/2000 of The European Parliament and of The Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, OJ L 288, 15.11.2000, p. 2.

<sup>11</sup> European Commission Communication COM(2015)497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy."

<sup>12</sup> UNGA Resolution No. 70/1 of 25 September, 2015. UN Doc No. A/RES/70/1 dated 21 October, 2015.

<sup>13</sup> European Commission Communication COM(2015)497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy.", p. 3

<sup>14</sup> European Commission Communication COM(2015)497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy.", p. 15

<sup>15</sup> COM(2016) 739 final, Strasbourg, 22.11.2016

(GSP+)<sup>16</sup> would continue to provide ‘strong support to sustainable development by linking trade with development and good governance.’<sup>17</sup>

Specific elements on the subject of sustainable development such as the ‘Precautionary Principle’ have received special focus. The Commission Communication “on the precautionary principle”<sup>18</sup> emphasised that the principle must be duly addressed in the international level through agreements.<sup>19</sup> The Precautionary principle which was included in Principle 15 of the Rio Declaration was subsequently included in Article 191 Treaty on the Functioning of the European Union (TFEU) and has subsequently been included in the trade negotiations for the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP). In the CETA, it has been included through a chapter on trade and sustainability where Article 22.1<sup>20</sup>, paragraph 1 refers to the Rio Declaration on Environment and Development.<sup>21</sup>

The EU has worked to include globally accepted principles of sustainable development including EU Free Trade Agreements (FTA(s)) also generally include a Framework Agreement or a Political Cooperation Agreement as a part of the package which enables the EU to push forward with EU’s policies on rule of law, sustainable development or human rights.<sup>22</sup> It also works closely with the International Labour Organisation to promote improved labour standards through its trade policy.<sup>23</sup> The EU has also worked for promotion of sustainable development through its new Generalised system of preferences (GSP+)<sup>24</sup> which provides special incentive for sustainable development and good governance.<sup>25</sup> This scheme is targeted at developing countries as an incentive for promotion of sustainable development measures.

A few days after the release of Opinion 2/15 by the Court of Justice of the European Union (CJEU), the Council of the EU released a response to the 2030 Agenda for Sustainable Development in the form of Council conclusions titled “A sustainable European future: The EU response to the 2030 Agenda for

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<sup>16</sup> Regulation (EU) No 978/2012 of The European Parliament and of The Council of 25 October 2012 applying a scheme of generalised tariff preference, OJ L 303, 31.10.2012, p. 1

<sup>17</sup> COM(2016) 739 final, Strasbourg, 22.11.2016, p. 14.

<sup>18</sup> Communication from the Commission on the precautionary principle COM(2000) 1 final, 2.2.2000

<sup>19</sup> Communication from the Commission on the precautionary principle COM(2000) 1 final, 2.2.2000, Page 12.

<sup>20</sup> OJ L 11, 14.1.2017, p. 158

<sup>21</sup> Report of The United Nations Conference on Environment and Development, Annex I- Rio Declaration on Environment and Development, UN Doc No. A/CONF.151/26 (Vol. I), 12 August, 1992.

<sup>22</sup> European Commission, Commission Staff Working Document: Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement, Doc No. SWD(2016) 21 final, Brussels, 26.1.2016, p. 3, Also see: Garcia M., EU Trade Policy at the Crossroads: between Economic Liberalism and Democratic Challenges, Paper presented at OFSE Workshop, Vienna, 4-6 February 2016, accessible at

[http://www.oefse.at/fileadmin/content/Downloads/tradeconference/Garcia\\_Trade\\_and\\_Social\\_Impacts\\_Are\\_the\\_EUs\\_new\\_Trade\\_and\\_Sustainability\\_Chapters\\_fit\\_for\\_purpose.pdf](http://www.oefse.at/fileadmin/content/Downloads/tradeconference/Garcia_Trade_and_Social_Impacts_Are_the_EUs_new_Trade_and_Sustainability_Chapters_fit_for_purpose.pdf) (last visited on 5 October 2017), p. 3

<sup>23</sup> European Commission, Sustainable Development, accessible at <http://ec.europa.eu/trade/policy/policy-making/sustainable-development/> (last visited on 5 October, 2017).

<sup>24</sup> Regulation (EU) No 978/2012 of The European Parliament and of The Council of 25 October 2012 applying a scheme of generalised tariff preference, OJ L 303, 31.10.2012, p. 1

<sup>25</sup> Chapter III, Regulation (EU) No 978/2012 of The European Parliament and Of The Council of 25 October 2012 applying a scheme of generalised tariff preference, OJ L 303, 31.10.2012, p. 1

Sustainable Development.”<sup>26</sup> The document highlighted that EU member states had taken the responsibility of promoting sustainable development at all levels, domestically, regionally and globally. It also referred to the Commission Communication “Next steps for a sustainable European future.”<sup>27</sup> It urged the Commission to bring about an implementation strategy in all EU internal and external policies to comply with the 2030 Agenda.<sup>28</sup>

## II. EU Trade Agreements and Sustainable Development

The EU has led in the use of trade policy for promotion of sustainable development, particularly the social and environmental areas.<sup>29</sup> EU maintains that it is done ‘without any hidden protectionist agenda.’<sup>30</sup> ‘Sustainability’<sup>31</sup> has been described as a key principle of EU trade policy and the EU has included provisions on sustainable development in recent FTAs. In fact, the commission proposes to ‘promote’ a chapter on sustainable development in all trade and investment agreements.<sup>32</sup> The Commission also stated that it is ‘committed’ to include chapters on trade and sustainable development in FTAs<sup>33</sup> and seeks to promote sustainable development in investment agreements under negotiation including those with Japan, China and Myanmar.<sup>34</sup>

The EU-Korea FTA<sup>35</sup> was the first<sup>36</sup> EU FTA with a chapter on sustainable development and this was followed up with FTAs with Central America<sup>37</sup>, Colombia-Peru<sup>38</sup> and Association Agreements with

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<sup>26</sup> A sustainable European future: The EU response to the 2030 Agenda for Sustainable Development

- Council conclusions (20 June 2017), Doc No. 10370/17

<sup>27</sup> COM(2016) 739 final, Strasbourg, 22.11.2016

<sup>28</sup> Para 19, A sustainable European future: The EU response to the 2030 Agenda for Sustainable Development

- Council conclusions (20 June 2017), Doc No. 10370/17

<sup>29</sup> European Commission Communication COM(2015)497 of 14 October 2015 “Trade for All: Towards a more responsible trade and investment policy”, p. 16.

<sup>30</sup> European Commission Communication COM(2015)497 of 14 October 2015 “Trade for All: Towards a more responsible trade and investment policy”, p. 16.

<sup>31</sup> European Commission, “A Balanced and Progressive Trade Policy to Harness Globalisation”, COM(2017) 492 final, 13.9.2017, p. 2

<sup>32</sup> European Commission Communication COM(2015)497 of 14 October 2015 “Trade for All: Towards a more responsible trade and investment policy”, p. 17.

<sup>33</sup> Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), Non-paper of the Commission services, 11.07.2017, p.2

<sup>34</sup> European Commission, “A Balanced and Progressive Trade Policy to Harness Globalisation”, COM(2017) 492 final, 13.9.2017, p. 6

<sup>35</sup> OJ L 127, 14.5.2011, p. 6

<sup>36</sup> Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), Non-paper of the Commission services, 11.07.2017, p.2

<sup>37</sup> OJ L 346, 15.12.2012, p. 3

<sup>38</sup> OJ L 354, 21.12.2012, p. 3

Georgia<sup>39</sup>, Moldova<sup>40</sup> and Ukraine<sup>41</sup> which also had chapters on sustainable development. The upcoming EU-New Zealand and EU-Australia FTA's are also expected to have chapters on sustainable development.<sup>42</sup>

The exact scope of sustainable development as covered by this new generation of agreements can be understood through an example- Article 13(6)<sup>43</sup> of the EU-South Korea FTA<sup>44</sup> on "Trade favouring sustainable development" which states:

- 1. The Parties reconfirm that trade should promote sustainable development in all its dimensions. The Parties recognize the beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity, and they highlight the value of greater policy coherence between trade policies, on the one hand, and employment and labour policies on the other.*
- 2. The Parties shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods, including through addressing related non-tariff barriers. The Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability.*

The FTA's are not the only agreements signed by the EU which focus on sustainable development. In fact, the Framework Cooperation Agreements (FCAs) and Partnership and Cooperation Agreements (PCAs) also contain explicit provisions which promote sustainable development and in line with EU's trade policy, the commission has planned to focus on implementation of sustainable development principles, which were provided in the FTAs.<sup>45</sup> In fact, the FTAs act as a 'tool' for compelling third country compliance of principles such as rule of law, democracy and protection of human rights.<sup>46</sup>

An evaluation of the Cooperation Agreements, FCAs and PCAs show that sustainable development or 'sustainable economic development' as a part of agreements extends beyond trade agreements and can be seen as a part of articles or can even be a specific chapter as seen in the FTA with Korea and all other Deep and Comprehensive Free Trade Agreements.<sup>47</sup>

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<sup>39</sup> OJ L 261, 30.8.2014, p. 4

<sup>40</sup> OJ L 260, 30.8.2014, p. 4

<sup>41</sup> OJ L 161, 29.5.2014, p. 3

<sup>42</sup> European Commission, "A Balanced and Progressive Trade Policy to Harness Globalisation", COM(2017) 492 final, 13.9.2017, p. 6

<sup>43</sup> OJ L 127, 14.05.2011, p. 63

<sup>44</sup> OJ L 127, 14.05.2011, p. 6

<sup>45</sup> European Commission Communication COM(2015)497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy", p. 17.

<sup>46</sup> Araujo B.A.M., The EU Deep Trade Agenda, Oxford University Press, Oxford, 2016, p. 68.

<sup>47</sup> Araujo B.A.M., The EU Deep Trade Agenda, Oxford University Press, Oxford, 2016, p. 70.

For example, in case of Vietnam, the principle of sustainable development already formed a part of the 1995 EC-Vietnam Cooperation Agreement<sup>48</sup> where one of the supporting 'sustainable economic development' of Vietnam has been stated as one of the principal objectives of the Agreement.<sup>49</sup> Article 11 of the Agreement states that the parties are aware of the importance of sustainable development. The new Framework Agreement on Comprehensive Partnership and Cooperation between EU and Vietnam<sup>50</sup> which came into force recently had elevated sustainable development as one of the general principles which the parties confirm their commitment to.<sup>51</sup> The term also finds mention in numerous other sections of the agreement including environmental protection, urban and regional planning, scientific cooperation, tourism and energy to name a few.

The agreement with Vietnam is not an exception and Cooperation agreements with countries such as Afghanistan<sup>52</sup>, Bangladesh<sup>53</sup> or Partnership agreements with countries such as New Zealand<sup>54</sup> or FCA's with Mongolia<sup>55</sup>, Korea<sup>56</sup>, Indonesia<sup>57</sup> and PCA's with Iraq<sup>58</sup>, Tajikistan<sup>59</sup> and Azerbaijan<sup>60</sup> mention sustainable development as one of the key policy concerns. In fact, in the new round of Deep and Comprehensive Free Trade Agreements (DCFTAs), the EU has combined the requirement of not lowering environmental or labour protection standards for gaining a comparative advantage with the need for adoption of international standards.<sup>61</sup> Through this approach, the EU has ensured that its objective of promoting sustainable development does not conflict with its obligation of trade liberalisation under the CCP.<sup>62</sup>

The EU Regional Trade Agreements (RTA(s)) are frequently under scrutiny for a lack of enforcement measures as they normally leave the compliance measures for RTAs to judicial mechanisms and they

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<sup>48</sup> Cooperation Agreement between the European Community and the Socialist Republic of Vietnam, OJ L 136, 7.6.96, p. 28

<sup>49</sup> Art. 2(2), Cooperation Agreement between the European Community and the Socialist Republic of Vietnam, OJ L 136, 7.6.96, p. 28

<sup>50</sup> OJ L 329, 3.12.2016, p. 8

<sup>51</sup> Art. 1 and 5, OJ L 329, 3.12.2016, p. 8

<sup>52</sup> OJ L 67, 14.3.2017, p. 3

<sup>53</sup> OJ L 118, 27.4.2001, p. 48

<sup>54</sup> OJ L 321, 29.11.2016, p.3

<sup>55</sup> European Union No. 6 (2013), Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the One Part, and Mongolia, of the Other Part, Ulaanbaatar, 30 April 2013, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, October 2013.

<sup>56</sup> OJ L 20, 23.1.2013, p. 2

<sup>57</sup> OJ L 125, 26.4.2014, p. 17

<sup>58</sup> OJ L 204, 31.7.2012, p. 20

<sup>59</sup> OJ L 350, 29.12.2009, p. 3

<sup>60</sup> OJ L 246, 17.9.1999, p. 3

<sup>61</sup> Araujo B.A.M., *The EU Deep Trade Agenda*, Oxford University Press, Oxford, 2016, p. 71.

<sup>62</sup> Araujo B.A.M., *The EU Deep Trade Agenda*, Oxford University Press, Oxford, 2016, p. 71.

generally include monetary compensation but normally no suspension of concessions.<sup>63</sup> The CARIFORUM-EU Partnership Agreement<sup>64</sup> is one of the agreements which shows the strong emphasis that EU places on sustainable development in trade. Part I of the Agreement<sup>65</sup> is titled “Trade Partnership for Sustainable Development” and Article 3 of the Agreement reaffirms sustainable development and the target to eradicate poverty in a way consistent with sustainable development. It is one of a rare group of agreements which focuses on sustainable development as a core feature of the agreement.

The Commission has considered use of a model which involves sanctions like the USA or Canada to ensure compliance and to prevent lowering of environmental and labour standards by the other parties.<sup>66</sup> In the latest communication by the Commission, it has stated that it is involved in a comprehensive discussion with stakeholders to improve the effectiveness and enforcement of trade and sustainable development provisions.<sup>67</sup>

## B. OPINION 2/15 AND SUSTAINABLE DEVELOPMENT

### I. Background

The Common Commercial Policy (CCP) is a dynamic part of the field of EU external relations and its scope has changed several times since the EEC treaty of 1958.<sup>68</sup> The Lisbon Treaty merged the three pillars introduced by the Maastricht treaty (EC, CFSP and JHA) and ‘*all matters concerning external commercial policy*’ were declared ‘*as an exclusive competence of the European Union*’.<sup>69</sup> Krajewski expresses that after Lisbon, ‘the entire area of *multilateral commercial policy* is now the exclusive competence of the EU’.<sup>70</sup> The Lisbon treaty also extended the scope of the CCP to include trade in services and intellectual property rights.<sup>71</sup> Post Lisbon, the integration of the three-

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<sup>63</sup> The World Bank, Environment Provisions in Regional Trade Agreements: Lessons for China Policy Note 2, The World Bank, 2009, p. 5

<sup>64</sup> OJ L 289/I, 30.10.2008, p. 3

<sup>65</sup> OJ L 289/I, 30.10.2008, p. 7

<sup>66</sup> Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), Non-paper of the Commission services, 11.07.2017, p. 7

<sup>67</sup> European Commission, “A Balanced and Progressive Trade Policy to Harness Globalisation”, COM(2017) 492 final, 13.9.2017, p. 4

<sup>68</sup> Bungenberg M. (2010) Going Global? The EU Common Commercial Policy After Lisbon. In: Herrmann C., Terhechte J.P. (eds) European Yearbook of International Economic Law 2010. European Yearbook of International Economic Law, Vol 1. Springer, Berlin, Heidelberg, p. 124.

<sup>69</sup> Bungenberg M. (2010) Going Global? The EU Common Commercial Policy After Lisbon. In: Herrmann C., Terhechte J.P. (eds) European Yearbook of International Economic Law 2010. European Yearbook of International Economic Law, Vol 1. Springer, Berlin, Heidelberg, p. 127

<sup>70</sup> Krajewski M., New Functions and Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the perspective of Democratic Legitimacy, in: Bungenberg M., Hermann C. (eds.), Common Commercial Policy after Lisbon, European Yearbook of International Economic Law, Springer, Heidelberg, 2013, 67-87, p. 82.

<sup>71</sup> Bungenberg M. (2010) Going Global? The EU Common Commercial Policy After Lisbon. In: Herrmann C., Terhechte J.P. (eds) European Yearbook of International Economic Law 2010. European Yearbook of International Economic Law, Vol 1. Springer, Berlin, Heidelberg, 2010, p. 131



pillar model also meant that the CCP was no longer limited to aims of liberalising trade and investments.<sup>72</sup> It meant that trade policy would now be used to carry forward the general objectives of the Union objectives such as support for democracy, rule of law and sustainable development in its trade policy.<sup>73</sup> In simple terms, CCP became an integral part of the Union's external action.<sup>74</sup>

Over time, the principle of sustainable development found a key place in EU external relations and trade policy and was included among others in the 2016 Communication on 'Next steps for a sustainable European Future'<sup>75</sup> and the 'Trade for all'<sup>76</sup> communication.

In 2015, the position of sustainable development as a part of Common Commercial Policy came into question in a request for opinion pursuant to Article 218(11) TFEU by the European Commission regarding the EU-Singapore FTA. The request for Opinion submitted by the EC asked the CJEU to determine which parts of the proposed agreement falls within the exclusive competence of the Union, the shared Competence of the Union or the exclusive competence of the Member states.<sup>77</sup> Chapter 13 of the Agreement- Trade and Sustainable Development<sup>78</sup> also came under scrutiny as a part of this request for opinion and for the first time allowed a definitive interpretation of the competence on sustainable development which saw varied interpretations by the Commission and some member states till then.<sup>79</sup>

## II. Opinion 2/15 and its impact on sustainable development provisions in EU trade agreements

In its Opinion released on 16 May 2017, the CJEU has stated that the chapter on sustainable development falls clearly within the exclusive competence of the EU. While emphasising that "*the objective of sustainable development forms an integral part of the common commercial policy*"<sup>80</sup>, the CJEU also determined that it is an 'obligation' of the EU to integrate sustainable development into its common commercial policy<sup>81</sup> and in its international agenda.<sup>82</sup>

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<sup>72</sup> Krajewski M., New Functions and Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the perspective of Democratic Legitimacy, in: Bungenberg M., Hermann C. (eds.), Common Commercial Policy after Lisbon, European Yearbook of International Economic Law, Springer, Heidelberg, 2013, 67-87, p. 83.

<sup>73</sup> Horvathy B., Sustainable Development and Common Commercial Policy, Acta Jurica Hungarica, Vol. 53, No.4 (2012), 334-344, 334.

<sup>74</sup> Horvathy B., Sustainable Development and Common Commercial Policy, Acta Jurica Hungarica, Vol. 53, No.4 (2012), 334-344, 338.

<sup>75</sup> COM(2016) 739 final, Strasbourg, 22.11.2016

<sup>76</sup> European Commission Communication COM(2015)497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy.", p. 3

<sup>77</sup> Para 1, Opinion 2/15 (EU-Singapore Free Trade Agreement), ECLI:EU:C:2017:376

<sup>78</sup> A copy of Chapter 13: Trade and Sustainable Development of the EU-Singapore FTA is available for download at [http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc\\_151766.pdf](http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151766.pdf) (last accessed 4 October 2017).

<sup>79</sup> European Commission, The Opinion of the European Court of Justice on the EU-Singapore Trade Agreement and the Division of Competences in Trade Policy, Factsheet, September 2017, p. 1.

<sup>80</sup> Para 147, Opinion 2/15 (EU-Singapore Free Trade Agreement), ECLI:EU:C:2017:376

<sup>81</sup> Para 143, Opinion 2/15 (EU-Singapore Free Trade Agreement), ECLI:EU:C:2017:376

<sup>82</sup> Para 145, Opinion 2/15 (EU-Singapore Free Trade Agreement), ECLI:EU:C:2017:376

This in turn cements sustainable development as a key part of EU trade negotiations in the future with the Commission and the Parliament working closely on the subject as already seen in the TTIP negotiations. The CJEU also states that there is an obligation emanating from Art. 3(5) TEU on the EU to contribute to ‘free and fair’ trade in its relation to the ‘wider world’.<sup>83</sup> It has also recognised that the parties need to be in compliance with the obligations arising from the international agreements on protection of workers and environmental concerns during trade between them.<sup>84</sup>

The explicit determination of the CJEU that ‘sustainable development’ is an integral part of the Common commercial policy has the potential to bring a number of changes in the negotiation strategy of the Commission in relation to EU Free Trade agreements in the future. This determination paves the path for fulfilling the EU’s targets for more ambitious sustainable development provisions in future trade agreements.

Steps in this direction are already seen as the EU-Japan EPA became the first international trade agreement to contain explicit provisions to support the Paris Climate Agreement.<sup>85</sup> The EU has underlined that while sustainable development provisions are a part of all FTAs, it is committed to improve the monitoring and enforcement of sustainable development provisions.<sup>86</sup> The Commission also released a Non-paper shortly after the release of the opinion to evaluate the loopholes in the sustainable development chapters of the EU trade agreements and suggesting measures for strengthening the implementation of commitments laid down in the trade agreements<sup>87</sup> and is also involved with discussions with the European Parliament, the Council and stakeholders on the same issues.<sup>88</sup> With its newfound clarity on competence, the EU has further moved ahead and expressed that it is willing to use the negotiation clauses in the FTAs and has stated that it will launch a *review of the sustainable development provisions in CETA*.<sup>89</sup>

These developments show that sustainable development will be a key issue in any future EU trade negotiations and if the recommendations to open negotiations with Australia and New Zealand are any indication<sup>90</sup>, the Commission is expected to push for an ambitious sustainable development chapter in a potential Brexit Trade agreement.

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<sup>83</sup> Para 146, Opinion 2/15 (EU-Singapore Free Trade Agreement), ECLI:EU:C:2017:376

<sup>84</sup> Para 152, Opinion 2/15 (EU-Singapore Free Trade Agreement), ECLI:EU:C:2017:376

<sup>85</sup> European Commission, “A Balanced and Progressive Trade Policy to Harness Globalisation”, COM(2017) 492 final, 13.9.2017, p. 4

<sup>86</sup> European Commission Communication COM(2017) 491 final of 13 September 2017 “Report on the Implementation of the Trade Policy Strategy Trade for All Delivering a Progressive Trade Policy to Harness Globalisation”, p. 9.

<sup>87</sup> Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), Non-paper of the Commission services, 11.07.2017, p.5

<sup>88</sup> European Commission, “A Balanced and Progressive Trade Policy to Harness Globalisation”, COM(2017) 492 final, 13.9.2017, p. 4

<sup>89</sup> European Commission Communication COM(2017) 491 final of 13 September 2017 “Report on the Implementation of the Trade Policy Strategy Trade for All Delivering a Progressive Trade Policy to Harness Globalisation”, p. 9.

<sup>90</sup> European Commission, “A Balanced and Progressive Trade Policy to Harness Globalisation”, COM(2017) 492 final, 13.9.2017, p. 6

## C. BREXIT NEGOTIATIONS, TRADE AGREEMENTS AND SUSTAINABLE DEVELOPMENT

The subject of sustainable development in Brexit negotiations and ultimately the possibility for inclusion of sustainable development commitments in a future UK-EU trade agreement is still dependent on the progress of trade negotiations.

The only indications on the future course of negotiations and structure of law can be taken from the official statements and documents released by both parties to the negotiations. So at first the documents released till date which cover the subject are evaluated and answers on the contours of a post Brexit trade agreement are sought.

### I. Whether UK wants a Free Trade Agreement with the EU?

Before proceeding with the discussion on the possible contents of a Trade deal between UK and the EU, it is essential to understand the background behind such a deal and the progress made till date.

Although, there were predictions made about the possibility of a Free Trade Agreement between the UK and EU, the official declaration that the governments will seek such a deal was made much later.

On 17 January 2017 when the Prime Minister of UK laid down the twelve negotiating objectives for exiting the EU, she made it clear that the UK does not 'seek membership of the single market' but 'greatest possible access to it through a new, comprehensive, bold and ambitious free trade agreement.'<sup>91</sup> She also stated that the new strategic partnership which is sought with the EU will involve 'the pursuit of the greatest possible access to the single market, on a fully reciprocal basis, through a comprehensive free trade agreement.'<sup>92</sup> The EU on its part has also expressed that it expected a free trade deal with UK.<sup>93</sup>

The situation has however changed recently. The Prime Minister of the UK in her speech on 22 September, 2017 at Florence stated that UK would not be a member of the single market or the customs union. She also stated that neither European Economic Area membership or a traditional Free Trade Agreement was the best option for the UK or the EU.<sup>94</sup> She also expressed that a new dispute resolution procedure will have to be created for the new agreement. Interestingly, Prime Minister May also called for a time limited transition period

Irrespective of the statements, clear indications on the nature of the future agreement have not been provided until date. The Terms of Reference for the Article 50 TEU negotiations have not provided any

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<sup>91</sup> Speech by Prime Minister Theresa May, 17 January, 2017. The transcript of the Speech is available at <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

<sup>92</sup> Speech by Prime Minister Theresa May, 17 January, 2017. The transcript of the Speech is available at <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

<sup>93</sup> Reuters Staff, 'EU will 'for sure' reach post-Brexit free trade deal with Britain', Available at <https://uk.reuters.com/article/uk-eu-trade-britain/eu-will-for-sure-reach-post-brexit-free-trade-deal-with-britain-idUKKBN17T1HN> (last accessed on 27 September, 2017).

<sup>94</sup> Speech by Prime Minister Theresa May, 22 September, 2017. The transcript of the Speech is available at <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>

clarity on whether the mandate of the negotiations also covers a future trade deal.<sup>95</sup> The recent statement by Michel Barnier, the Chief Negotiator on behalf of the European Union indicated that EU is not willing to provide the benefits of membership in exchange for fewer obligations on part of the UK.<sup>96</sup>

## II. Contours of a Free Trade Agreement with the EU according to the UK

### 1. UK Government Whitepaper on new partnership with the EU

The only official document which underlines the possible contours of a free trade agreement between the EU and UK is the white paper released by the UK Government in February, 2017 titled *'The United Kingdom's exit from and new partnership with the European Union'*.<sup>97</sup>

The UK has expressed that it will not be seeking membership of the Single market but will look for a *comprehensive Free Trade Agreement and a new customs agreement*.<sup>98</sup> It was stated that since the UK already had a common regulatory framework with EU, the new agreement will be expected to continue providing EU and UK businesses to continue trading with each other. According to the UK, the agreement it seeks is not a model already seen in agreements with other countries<sup>99</sup>, but it will look at precedents from other customs agreements.<sup>100</sup>

The UK has stated that it seeks to have free movement of goods through mutual recognition of standards, harmonisation of product rules or compliance with voluntary standards for the goods.<sup>101</sup> In case of agriculture, the UK admits the importance of the Common Agricultural Policy (CAP) and Common Fisheries Policy (CFP) which sets high standards for environmental protection and animal welfare. However, it seeks to design a 'new' and 'better' agricultural policy for the UK.<sup>102</sup> No clarity has been provided for the fishing sector other than the statement that the UK will want a "sustainable and profitable seafood sector and deliver a cleaner, healthier and more productive marine environment."<sup>103</sup>

In terms of customs arrangements, the UK has expressed that it does not want to be bound by Common External Tariff (CET) and Common Commercial Policy (CCP), but wants frictionless trade with the

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<sup>95</sup> Terms of Reference for the Article 50 TEU negotiations, 19 June 2017. Available for download from [https://ec.europa.eu/commission/sites/beta-political/files/eu-uk-art-50-terms-reference\\_agreed\\_amends\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/eu-uk-art-50-terms-reference_agreed_amends_en.pdf)

<sup>96</sup> Statement by Michel Barnier, Brussels, 22 September 2017, STATEMENT/17/3427. Available at [http://europa.eu/rapid/press-release\\_STATEMENT-17-3427\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-17-3427_en.htm) (last accessed 7 October 2017).

<sup>97</sup> HM Government, The United Kingdom's exit from and new partnership with the European Union, Presented to the Parliament by the Prime Minister, February, 2017.

<sup>98</sup> HM Government, The United Kingdom's exit from and new partnership with the European Union, Presented to the Parliament by the Prime Minister, February, 2017, p. 35

<sup>99</sup> HM Government, The United Kingdom's exit from and new partnership with the European Union, Presented to the Parliament by the Prime Minister, February, 2017, p. 35

<sup>100</sup> HM Government, The United Kingdom's exit from and new partnership with the European Union, Presented to the Parliament by the Prime Minister, February, 2017, p. 48

<sup>101</sup> HM Government, The United Kingdom's exit from and new partnership with the European Union, Presented to the Parliament by the Prime Minister, February, 2017, p. 40

<sup>102</sup> HM Government, The United Kingdom's exit from and new partnership with the European Union, Presented to the Parliament by the Prime Minister, February, 2017, p. 41

<sup>103</sup> HM Government, The United Kingdom's exit from and new partnership with the European Union, Presented to the Parliament by the Prime Minister, February, 2017, p. 41

European Union.<sup>104</sup> The White Paper states that UK was looking for a number of options including a completely new agreement or as a signatory to a few elements of an existing agreement, but it was still left to negotiations.<sup>105</sup>

## **2. The Repeal Bill**

The Repeal Bill is amongst the most prominent documents, which have been put up for discussion before the Parliament. A discussion will be made later about how the Repeal Bill contradicts the statements made by the Prime Minister and the progress of negotiations.

### **a) Status of EU law in the United Kingdom after Brexit- The Repeal Bill**

The European Union (Withdrawal) Bill ('Bill') also commonly known as the 'Repeal Bill' which has been put forward in the parliament has managed to provide a certain degree of clarity on the status of EU Law in the United Kingdom which will ultimately affect all areas of discussion including provisions on sustainable development. The Government of UK expects that the Bill will provide a clear basis for negotiations.<sup>106</sup> Considering the importance of the Bill, the important provisions from the Bill are evaluated.

The Bill states that any 'direct EU legislation' which is operative before exit day will form a part of domestic law on and after exit day.<sup>107</sup> The Directives which have already been implemented under domestic law<sup>108</sup> will also continue to remain under force.<sup>109</sup> This would effectively mean that any EU legislations which came into force before 'exit day' including legislations which set in force EU commitments on areas related to sustainable development will form a part of UK law.

The status of judgments of the Court of Justice of the European Union (CJEU) has also been cleared to a certain extent and it has been provided that any decisions of the CJEU after the 'exit day' will not have any binding effect on the courts of the UK.<sup>110</sup> The UK courts will however decide questions of EU law in accordance with the case law of the CJEU in case there was a decision of CJEU on the subject.<sup>111</sup> The Supreme Court of the UK and to a certain extent the High Court of Justiciary has however been provided to depart from CJEU case law in the manner it departs from its own case law.<sup>112</sup> However, it

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<sup>104</sup> HM Government, The United Kingdom's exit from and new partnership with the European Union, Presented to the Parliament by the Prime Minister, February, 2017, p. 46

<sup>105</sup> HM Government, The United Kingdom's exit from and new partnership with the European Union, Presented to the Parliament by the Prime Minister, February, 2017, p. 48

<sup>106</sup> Speech by Rt Hon David Davis MP, David Davis' opening statement at the second reading of the Repeal Bill, September 7, 2017.

<sup>107</sup> Section 3(1) European Union (Withdrawal Bill), Bill 57/1

<sup>108</sup> Factsheet 2: Converting and preserving Law, Department for Exiting the European Union, p. 2

<sup>109</sup> Section 2(1) and 25, European Union (Withdrawal Bill), Bill 57/1

<sup>110</sup> Section 6(1)(a), European Union (Withdrawal Bill), Bill 57/1

<sup>111</sup> Section 6(3), European Union (Withdrawal Bill), Bill 57/1

<sup>112</sup> Section 6(5), European Union (Withdrawal Bill), Bill 57/1

has been stated that instances of departure from its own decisions is very rare for the Supreme Court and such a situation is expected to continue in the future.<sup>113</sup>

The UK Government has however clarified that “*where a conflict arises between EU-derived law and new primary legislation passed by Parliament after our exit from the EU, then newer legislation will take precedence over the EU-derived law we have preserved. In this way, the Great Repeal Bill will end the general supremacy of EU law.*”<sup>114</sup>

The decision to continue with the decisions of the CJEU can be very significant as this would also mean that decisions for upholding the principle of sustainable development as stated by the CJEU would also continue to hold effect unless a contrary decision is expressed by the Supreme Court.

The bill however does not recognise General principle of EU laws as a part of domestic law unless it has been recognised as such by the CJEU in a decided case.<sup>115</sup> The decision of the UK Government to not respect *Franckovich* damages is also likely to reduce remedies available with persons to claim damages for violation of EU law.<sup>116</sup> It has been argued that this provision will allow the government to avoid liabilities from violations of EU law.<sup>117</sup> The scope of such claims may possibly extend to claims for violation of commitments made environmental law and workers rights which are included in the scope of sustainable development.<sup>118</sup>

### **b) Status of the Charter of Fundamental Rights under the Repeal Bill**

It has been made clear that the Charter of Fundamental Rights of the European Union (CFREU)<sup>119</sup> will not be converted into domestic law.<sup>120</sup> The Department for Exiting the European Union in its *Factsheet 6: Charter of Fundamental Rights* has stated that the Charter itself will not be converted into Domestic law, but the “*substantive law and the principles which underpin the Charter will be converted into domestic law.*” The CFREU in its preamble calls for balanced and sustainable development and also for environmental protection in accordance with principle of sustainable development.<sup>121</sup>

### **c) The Repeal Bill and UK’s commitments to issues related to sustainable development**

The Repeal Bill does not directly mention sustainable development. However, the provisions of the Bill indirectly affect sustainable development policies. As per the Repeal Bill, the Government of the

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<sup>113</sup> Para 2.16, Department for Exiting the European Union, Legislating for the United Kingdom’s withdrawal from the European Union, Government of United Kingdom, p. 16

<sup>114</sup> Para 2.19, Department for Exiting the European Union, Legislating for the United Kingdom’s withdrawal from the European Union, Government of United Kingdom, p. 16

<sup>115</sup> Schedule 1, Clause 2, European Union (Withdrawal Bill), Bill 57/1

<sup>116</sup> Schedule 1, Clause 4, European Union (Withdrawal Bill), Bill 57/1

<sup>117</sup> Agerholm, Brexit repeal bill will remove UK citizens’ right to sue Government over policies, <http://www.independent.co.uk/news/uk/home-news/brexit-bill-uk-citizens-right-government-break-law-sue-high-court-eu-human-a7887506.html>

<sup>118</sup> Caird J.S., Miller V. and Lang A., European Union (Withdrawal) Bill, Briefing Paper Number 8079- 1 September, 2017, House of Commons Library, Parliament of the UK.

<sup>119</sup> Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000, p. 1

<sup>120</sup> Section 5(4), European Union (Withdrawal Bill), Bill 57/1

<sup>121</sup> Article 37, Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000, p. 17

United Kingdom states that the workers rights which were available under EU law will continue to be available under UK law.<sup>122</sup> The Government of UK also expresses that UK goes beyond EU minimum standards in many areas of worker protection including annual leave and parental leave and hence domestic protection is sufficient.<sup>123</sup>

On the other hand regarding environmental protections, the Government has expressed that the Repeal Bill will “ensure that the whole body of existing EU environmental law continues to have effect in UK law.”<sup>124</sup> The Government has also committed to continue meeting its international commitments under the Paris Agreement on Climate Change, the Montreal and Gothenburg Protocols, the Stockholm Convention, the Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species (CITES).<sup>125</sup>

In case the Repeal Bill is accepted in the present form, it would mean that the UK would have accepted the commitments to sustainable development as stated in the EU regulations and directives which have been put in place as on the day of Brexit. In that scenario, UK would commence any negotiations for a possible free trade agreement with basically the same domestic legislative background as the European Union.

### III. Predicting the structure of a UK- EU trade agreement

The statements by the PM of UK on 22 September, 2017 at Florence have made the exact structure a trade agreement sought by the UK unclear. In such a situation, the only option available is to evaluate all the known forms of agreement which may possibly be used by the UK and the EU while moving for a trade deal. The Parliament of the UK had outlined that any future EU-UK FTA will be influenced by three main factors:

- *Jurisprudence of CJEU*
- *Political will of the member states*
- *Legal limits set out in the EU treaties*<sup>126</sup>

The UK and the EU are both members of the WTO and are also parties to General Agreement on Tariffs and Trade (GATT), 1994<sup>127</sup> and General Agreement on Trade in Services (GATS), 1994<sup>128</sup>. This in turn also means that any trade agreement which is signed by the EU and UK have to be in compliance with the exceptions for Regional Trade Agreements provided in the form of Customs Union and Free Trade

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<sup>122</sup> Department for Exiting the European Union, Legislating for the United Kingdom’s withdrawal from the European Union, Government of United Kingdom, p. 16

<sup>123</sup> Factsheet 7: Workers’ rights, Department for Exiting the European Union, p. 2

<sup>124</sup> Department for Exiting the European Union, Legislating for the United Kingdom’s withdrawal from the European Union, Government of United Kingdom, p. 17

<sup>125</sup> Factsheet 8: Environmental protections, Department for Exiting the European Union, p. 2

<sup>126</sup> Parliament of the United Kingdom, European Union Committee Brexit: the options for trade 5th Report of Session 2016-17 - published 13 December 2016 - HL Paper 72, para. 132.

<sup>127</sup> General Agreement on Tariffs and Trade, 1994, 1867 UNTS 187

<sup>128</sup> General Agreement on Trade in Services, 1994, 1869 UNTS 183

Areas under Art. XXIV GATT and Art. V (Economic Integrations) and Art. VI (Labour market integration) of GATS respectively.

As discussed before, the EU has over time has entered into a variety of free trade, economic integration and association agreements. Prominent among them are:

- (a) Free Trade Agreements (ex. Central America<sup>129</sup>, Colombia-Peru<sup>130</sup>)
- (b) Association Agreements ('AA') (ex. Georgia<sup>131</sup>, Moldova<sup>132</sup> and Ukraine<sup>133</sup>)
- (c) Stabilisation and Association Agreements ('SAA') (ex. Albania, Kosovo)
- (d) Customs Union (ex. Turkey, Andorra)
- (e) Agreement on the European Economic Area ('EEA') (Norway, Liechtenstein, Iceland)
- (f) Trade, Development and Cooperation Agreement (South Africa)
- (g) Special Agreements with Switzerland
- (h) Comprehensive Economic and Trade Agreement (CETA) (Canada)
- (i) Economic Partnership Agreement (ex. CARIFORUM, South African Development Community)

From the statement of the UK that it does not wish to be a part of the European Union in the future, the probability of signing an Association Agreement is minimal. The UK also does not wish to be a part of the EEA and also does not want a pure FTA but a new type of agreement. As the UK Parliament states *"Even the most advanced FTAs do not provide the level of market access for goods that the UK currently enjoys by virtue of membership of the Single Market. We also note that providing equivalent liberal market access for services in a FTA with the EU would be unprecedented."*<sup>134</sup>

In this situation, keeping in view the available options, a free trade agreement or a customs union with greater integration than before may be expected. The structure of such a Customs Union may be highly influenced by the fact that UK does not wish to be under the jurisdiction of the CJEU, so it is expected to be unlike the Customs Union Agreement with Turkey<sup>135</sup>, which provides jurisdiction to the CJEU in limited matters.

The CETA, Vietnam –EU FTA and Singapore FTA can probably provide the closest sketch in terms of a future EU-UK trade agreement, which may in fact be a deeper agreement with newer provisions for maintaining integration, but is unlikely to be radically different keeping in mind the provisions of the GATT and GATS.

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<sup>129</sup> OJ L 346, 15.12.2012, p. 3

<sup>130</sup> OJ L 354, 21.12.2012, p. 3

<sup>131</sup> OJ L 261, 30.8.2014, p. 4

<sup>132</sup> OJ L 260, 30.8.2014, p. 4

<sup>133</sup> OJ L 161, 29.5.2014, p. 3

<sup>134</sup> Parliament of the United Kingdom, European Union Committee Brexit: the options for trade 5th Report of Session 2016-17 - published 13 December 2016 - HL Paper 72, para. 163

<sup>135</sup> OJ L 35, 13.2.96, p. 1



Sustainable development is expected to be key feature of a future EU-UK trade agreement in lines with the policy laid down in the 'Trade for All' agenda as discussed before.<sup>136</sup> The EU has also specifically laid down that it will focus on a sustainable development chapter in every trade and investment agreement.<sup>137</sup> This plan is already under implementation and the EU has stated that 'binding sustainable development provisions' are now a part of every FTA negotiation.<sup>138</sup> The Commission has committed to take into account considerations for sustainable development in all areas of FTAs such as energy, raw materials and public procurement.<sup>139</sup> In line with the commitments, the recently negotiated CETA already contains binding commitments on protection of the environment and workers rights<sup>140</sup> which are also subject to binding assessment and review mechanisms.<sup>141</sup>

Keeping in view the Commission agenda, recent trade negotiations and structure of recent trade agreements negotiated by the Commission, sustainable development in a future EU-UK trade agreement is likely to take centre stage and will possibly be included through the following modes:

- (a) *As a part of the preambulatory statement*<sup>142</sup>
- (b) *As a part of specific articles on energy, workers rights and other subject areas*<sup>143</sup>
- (c) *Separate Chapter on Trade and Sustainable Development*<sup>144</sup>
- (d) *Dispute resolution provisions for ensuring compliance with sustainable development goals*<sup>145</sup>
- (e) *Preservation or minimum harmonisation of standards*<sup>146</sup>

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<sup>136</sup> European Commission Communication COM (2015) 497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy."

<sup>137</sup> European Commission Communication COM(2015)497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy", p.17

<sup>138</sup> European Commission Communication COM(2017) 491 final of 13 September 2017 "Report on the Implementation of the Trade Policy Strategy Trade for All Delivering a Progressive Trade Policy to Harness Globalisation", p. 9

<sup>139</sup> European Commission Communication COM(2015)497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy", p.17

<sup>140</sup> Council of the European Union, Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, Doc No. 13541/16 LIMITE WTO 300 SERVICES 28 FDI 23 CDN 24, 27 October, 2016, p. 7

<sup>141</sup> Council of the European Union, Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, Doc No. 13541/16 LIMITE WTO 300 SERVICES 28 FDI 23 CDN 24, 27 October, 2016, p. 9

<sup>142</sup> A common feature of all EU trade agreements including the most recent agreements

<sup>143</sup> As part of the commitment laid down in 'Trade for all' communication to take into account sustainable development considerations in all relevant areas of FTA's, European Commission Communication COM(2015)497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy", p.17

<sup>144</sup> European Commission Communication COM(2015)497 of 14 October 2015 "Trade for All: Towards a more responsible trade and investment policy", p.17

<sup>145</sup> Recent EU FTA's and Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), Non-paper of the Commission services, 11.07.2017, p.6

<sup>146</sup> Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), Non-paper of the Commission services, 11.07.2017, p.2 and EU- Korea FTA, Article 13.7

If the negotiations for the recent EU- New Zealand and EU- Australia FTAs are any indication, then it is almost certain that any upcoming EU-UK trade deal will almost certainly be guided by the commitments in the “Trade for All” Communication and the new Communication: “A Balanced and Progressive Trade Policy to Harness Globalisation” which focus on sustainable growth and is also projected to have ambitious chapters on sustainable development. This is expected to continue in any future EU-UK trade agreement without even considering its ultimate structure which is still unclear.

#### **IV. Outlines of a possible Chapter of sustainable development in a future UK-EU trade agreement based on CETA and EU- Singapore FTA**

The EU has provided a simplified version of the scope of its trade and sustainable development approach in its Non-paper<sup>147</sup> where it stated that the EU Chapters on Trade and Sustainable Development seek to promote:

- (a) ‘Effective implementation’ of labour conventions and multilateral environmental agreements
- (b) Promotion of a ‘level playing field’ by not ensuring that labour and environmental standards are not lowered for promoting trade and investment
- (c) Ensuring ‘sustainable management of natural resources’ and focus on issues such as low carbon development, biodiversity and promotion of corporate social responsibility and fair and ethical trade initiatives.

The Commission’s focus on these areas is expected to continue in future trade agreements while it is also waiting for the completion of the debate on best architecture for EU trade agreements and investment protection agreements.<sup>148</sup>

Considering that the CJEU has already approved the sustainable development chapter of the EU- Singapore FTA in Opinion 2/15, it is compared with the CETA<sup>149</sup> to understand the possible differences between them. This will help us understand if the negotiation of a CETA style sustainable development chapter that is considered as the “most ambitious sustainable development chapter ever negotiated”<sup>150</sup>, may be possible in an EU-UK post Brexit trade agreement if the EC decides to move forward for an agreement based on its exclusive competence on common commercial policy.

#### *Comparison between the CETA and EU- Singapore Chapters on sustainable development*

The Prime Minister of UK has expressed that although the CETA is the ‘most advanced free trade agreement the EU has yet concluded’, but it would still represent a restriction on market access. CETA was considered as a possible model for an FTA by the Parliament of the UK in the Report of the European Union Committee.<sup>151</sup> However, in the absence of a closer alternative, an attempt has been made to

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<sup>147</sup> Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), Non-paper of the Commission services, 11.07.2017, p.2

<sup>148</sup> European Commission, “A Balanced and Progressive Trade Policy to Harness Globalisation”, COM(2017) 492 final, 13.9.2017, p. 6

<sup>149</sup> OJ L 11, 14.1.2017, p. 23

<sup>150</sup> Malmström Cecilia, Signing our trade agreement with Canada,

[https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/signing-our-trade-agreement-canada\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/signing-our-trade-agreement-canada_en) (last accessed 4 October, 2017).

<sup>151</sup> Parliament of the United Kingdom, European Union Committee Brexit: the options for trade 5th Report of Session 2016-

evaluate the CETA<sup>152</sup> since it has been considered as the ‘most extensive EU free trade agreement to date’ by the United Kingdom<sup>153</sup> and the proposed EU- Singapore FTA (‘ESFTA’) as it has been evaluated by the CJEU<sup>154</sup>.

Since, the entire Chapter 13 of the ESFTA has been declared to be ‘*within the common commercial policy and, therefore, within the exclusive competence of the European Union referred to in Article 3(1)(e) TFEU*’<sup>155</sup>, the clauses which are present in both the ESFTA and are hence approved to be a part of an agreement negotiated by the EU under its exclusive competence on CCP are enumerated first. This will be followed up with a study of the variations between CETA and ESFTA, to try and understand if those variances might also be covered under the CCP, and hence be a possible inclusion in a future EU-UK trade agreement.

The Articles of the chapter on Sustainable Development (Chapter 13) which were a part of the ESFTA and were found to be within the CCP and hence within the competence of the EU are:

- (a) Article 13.2.1: *Right to Regulate and levels of protection*, which covers the right of the parties to establish their own levels of environmental and labour protection and modify them in according to international standards.
- (b) Article 13.3: *Commitment to Multilateral Labour standards and Agreements* and compliance with the principles concerning fundamental rights at work.
- (c) Article 13.4 and 13.10: *Cooperation on Labour and Environmental Aspects in the Context of Trade and Sustainable Development*: The article on labour covers the exchange of information and good practices in labour laws, sustainability impact assessments and cooperation on trade-related aspects of the ILO Decent Work Agenda. On the other hand, the article on environmental aspects covers international environmental agreements and their ratification, green public procurement and sustainable forest management.
- (d) Article 13.5 and Article 13.9: *Scientific information* places an obligation on the parties to comply with international standards and the precautionary principle during implementation of measures related to health and safety.
- (e) Article 13.6: The parties reiterate their commitment to *multilateral environmental standards and agreements* and provides the parties to implement their commitments in a matter, which may not be a disguised restriction on trade.
- (f) Article 13.7 and 13.8 relate to the commitment of the parties to regulate *trade in timber and fish products* while upholding international agreements in this area.
- (g) Article 13.11 is a general commitment to *trade and investment promoting sustainable development* and reiterates the commitment of the parties to remove obstacles to trade or investment

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17 - published 13 December 2016 - HL Paper 72, para. 134.

152 OJ L 11, 14.1.2017, p. 23

153 Department for International Trade, EU-Canada Comprehensive Economic and Trade Agreement: guidance for UK exporters, Government of the United Kingdom, <https://www.gov.uk/government/publications/eu-canada-comprehensive-economic-and-trade-agreement-guidance-for-uk-exporters/eu-canada-comprehensive-economic-and-trade-agreement-guidance-for-uk-exporters> (last accessed on 5 October, 2017).

154 Opinion 2/15 (EU-Singapore Free Trade Agreement), ECLI:EU:C:2017:376

155 Para 167, Opinion 2/15 (EU-Singapore Free Trade Agreement), ECLI:EU:C:2017:376

and promotion of sustainable renewable energy goods, progressively reduce subsidies for fossil fuels and promote development of a safe, low-carbon economy.

- (h) Article 13.12 calls for the commitment of the parties to not derogate from environmental or labour laws and not fail to effectively enforce them in a 'manner affecting trade or investment between the Parties.'
- (i) Article 13.13 deals with *transparency* requirements and ensuring that all interested persons are allowed to put forward their views before promulgating any laws on this subject.
- (j) Article 13.14 is a commitment of the parties to *review the impact of the ESFTA* on sustainable development.
- (k) Article 13.15 deals with *monitoring mechanisms* and the formation or designation of a specified body in the country for implementation of the Chapter.
- (l) Article 13.16 and 13.17 deal with dispute resolution and also states that the general dispute resolution provisions in the agreements will not cover disputes arising under this chapter. A special mode for dispute resolution consisting of a 'Panel of experts' has been proposed for this Chapter.

The chapters on trade and sustainable development in the CETA and the proposed ESFTA are significantly different in scope and structure. While, the CETA has covered the core issues of trade and sustainable development in three different chapters (Chapter 22, 23, 24 of CETA), the ESFTA has covered them all in a single chapter (Chapter 13, ESFTA) under different sections. Moving beyond the arrangement of articles, CETA has a few additional provisions, which are not found in the ESFTA.

The CETA calls for the formation of a *civil society forum* 'composed of representatives of civil society organisations'.<sup>156</sup> This is however not a new development and a number of EU trade agreements including the EU- Korea FTA<sup>157</sup>, the Columbia- Peru Trade Agreement<sup>158</sup> and the EU-Moldova Association Agreement<sup>159</sup> also contains provisions for dialogue with the civil society through arrangements such as a 'Joint civil society dialogue forum.'

A new development in the CETA was the inclusion of a clause on 'Public information and Awareness (Article 23.6<sup>160</sup> and Article 24.7<sup>161</sup>) which places an obligation on the parties to promote public awareness on labour law standards and environmental law standards respectively and take steps to further their knowledge on the subject. CETA also moves a step forward from the ESFTA by introducing a system of labour inspection to ensure that the labour provisions are secured.<sup>162</sup> The same article also calls upon the parties to provide a mechanism for judicial or administrative remedy for labour law violations to persons with a legally recognised interest. These articles are expected to be compliant

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<sup>156</sup> Article 22.5, OJ L 11, 14.1.2017, p. 160.

<sup>157</sup> Article 13.13, OJ L 127, 14.5.2011, p. 64

<sup>158</sup> Article 282, OJ L 354, 21.12.2012, p. 83

<sup>159</sup> Article 377, OJ L 260, 30.8.2014, p. 125

<sup>160</sup> Article 23.6, OJ L 11, 14.1.2017, p. 163

<sup>161</sup> Article 24.7, OJ L 11, 14.1.2017, p. 169

<sup>162</sup> Article 23.5, OJ L 11, 14.1.2017, p. 162

with the CJEU's determination of competences in Opinion 2/15 as it had highlighted the Union commitments to 'guarantee of social protection' and 'environmental protection requirements' into EU's policies and activities to promote sustainable development.<sup>163</sup>

Among other variations, the CETA also does not contain an article which calls specifically for the review of the impact of the agreement on sustainable development as is seen in the ESFTA<sup>164</sup>, the EU-Vietnam FTA<sup>165</sup> and the EU-Korea FTA<sup>166</sup>.

Although not directly relevant for the chapter on sustainable development, the final determination of the fact as to whether the negotiation of these additional provisions on dispute resolution is still within the competence of the EU will possibly be made by the CJEU as the Belgian Government has submitted a request with the CJEU for determination of its compatibility with EU treaties.<sup>167</sup> This will determine whether a future UK-EU FTA will have to be mixed agreement or can be negotiated solely by the EU, since the provisions are expected to result in a much deeper level of integration than seen ever before.

## D. CONCLUSION

The ongoing EU-UK trade negotiations seem to be moving towards a critical phase with no clear structure of a trade agreement yet in sight. Irrespective of this situation, a future EU-UK trade agreement can be expected to have an ambitious chapter on sustainable development as discussed earlier owing to the common commitments of the UK to delivering on the sustainable development goals for 2030<sup>168</sup> and the EU's commitment to fulfilling the same goals.<sup>169</sup>

A EU-UK trade agreement however is expected to be a very complicated issue with many ideas being put forward including joining the EEA (European Economic Area).<sup>170</sup> But, as Mr. Barnier has stated, *"After 44 years of integration, I would recommend that nobody underestimates the complexity and the legal, human, social, economic, and financial difficulties of this decision."*<sup>171</sup> Untangling the integration acquired through the years of integration would possibly involve a number of rounds of discussions. It is however expected that certain issues (including subjects closely related to sustainable development)

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<sup>163</sup> Para 146, Opinion 2/15 (EU-Singapore Free Trade Agreement), ECLI:EU:C:2017:376

<sup>164</sup> Article 13.14, EU-Singapore FTA

<sup>165</sup> Article 13, Chapter on Trade and Sustainable Development, EU- Vietnam FTA.

<sup>166</sup> Article 13.10, OJ L 127, 14.5.2011, p. 64

<sup>167</sup> The official press release by the Belgian Government can be found at [https://diplomatie.belgium.be/sites/default/files/downloads/ceta\\_summary.pdf](https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf) (last accessed 5 October, 2017).

<sup>168</sup> Department for International Development, Agenda 2030 The UK Government's approach to delivering the Global Goals for Sustainable Development - at home and around the world, London, 2017, p. 1.

<sup>169</sup> A sustainable European future: The EU response to the 2030 Agenda for Sustainable Development - Council conclusions (20 June 2017), Doc No. 10370/17

<sup>170</sup> Cooper, C. and Burchard, Hans Von Der, UK drifts closer to a Norway-style Brexit transition, Available at <http://www.politico.eu/article/brexit-eea-negotiation-transition-uk-drifts-closer-to-norway-style/> (last accessed on 9 October 2017).

<sup>171</sup> Closing statement by Michel Barnier at the Plenary Session of the European Parliament on the state of play of the negotiations with the United Kingdom, Strasbourg, 3 October 2017, SPEECH/17/3681, Available at [http://europa.eu/rapid/press-release\\_SPEECH-17-3681\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-17-3681_en.htm) (last accessed 9 October, 2017).

will be more complicated than others including rights of workers from other EU countries after Brexit.<sup>172</sup>

In all, the negotiations for a UK-EU trade agreement presents an excellent opportunity for designing a trade agreement with ambitious sustainable development provisions after the criticism put forward on the CETA sustainable development provisions.<sup>173</sup> This is expected to be possible owing to the existing similarity of legislations on the subject and a common existing trade policy in the form of the present Common Commercial Policy. EU has traditionally been the front runner in sustainable development issues such as for protection of labour rights with higher standards than some other developed economies and this presents a unique opportunity to replicate this progress through a EU-UK trade agreement in the future.<sup>174</sup>

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<sup>172</sup> Comparison Of EU/UK Positions On Citizens' Rights - 28/09/2017, TF50 (2017) 17 - Commission to EU 27, Available at [https://ec.europa.eu/commission/sites/beta-political/files/table\\_-\\_citizens\\_rights.pdf](https://ec.europa.eu/commission/sites/beta-political/files/table_-_citizens_rights.pdf) (last accessed on 9 October, 2017).

<sup>173</sup> Puccio L, Binder, K., Trade and sustainable development chapters in CETA, European Parliamentary Research Service, Brussels, 2017, p. 10.

<sup>174</sup> Directorate General for Internal Policies, European Parliament, TTIP and Labour Standards, IP/A/EMPL/2015-07, PE 578.992, June, 2016, p. 44.

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