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Centre for International  
Governance Innovation



British Institute of  
International and  
Comparative Law

Brexit: The International Legal Implications | Paper No. 15 – February 2018

# Brexit and Environmental Law: The Rocky Road Ahead

Markus Gehring and Freedom-Kai Phillips





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## About the Series

*Brexit: The International Legal Implications* is a series examining the political, economic, social and legal storm that was unleashed by the United Kingdom's June 2016 referendum vote and the government's response to it. After decades of strengthening European integration and independence, the giving of notice under article 50 of the Treaty on European Union forces the UK government and the European Union to address the complex challenge of unravelling the many threads that bind them, and to chart a new course of separation and autonomy. A consequence of European integration is that aspects of UK foreign affairs have become largely the purview of Brussels, but Brexit necessitates a deep understanding of its international law implications on both sides of the English Channel, in order to chart the stormy seas of negotiating and advancing beyond separation. The paper series features international law practitioners and academics from the United Kingdom, Canada, the United States and Europe, explaining the challenges that need to be addressed in the diverse fields of trade, financial services, insolvency, intellectual property, environment and human rights.

The project leaders are Oonagh E. Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); and Eva Lein, a professor at the University of Lausanne and senior research fellow at the British Institute of International and Comparative Law (BIICL). The series will be published as a book entitled *Complexity's Embrace: The International Law Implications of Brexit* in spring 2018.

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## About the Authors

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## About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

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## Acronyms and Abbreviations

<b>CETA</b>	Comprehensive Economic and Trade Agreement
<b>CO<sub>2</sub></b>	carbon dioxide
<b>COP</b>	Conference of the Parties
<b>EAP</b>	Environmental Action Programme
<b>ECJ</b>	European Court of Justice
<b>EEA</b>	European Economic Area
<b>EEC</b>	European Economic Community
<b>ETS</b>	Emissions Trading System
<b>EU27</b>	remaining 27 member states of the European Union
<b>GHG</b>	greenhouse gas
<b>INDCs</b>	intended nationally determined contributions
<b>IPPC</b>	Integrated Pollution Prevention and Control Directive
<b>MtCO<sub>2</sub>e</b>	million tonnes carbon dioxide equivalent
<b>REACH</b>	Registration, Evaluation, Authorisation and Restriction of Chemicals
<b>SEA</b>	Single European Act
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change
<b>WTO</b>	World Trade Organization





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## Executive Summary

Brexit and environmental law constitutes one of the most challenging areas of the divorce negotiations by the United Kingdom. In many ways, EU environmental law developed organically in areas where EU member states felt that common standards would be useful because differing standards would have a direct effect on the internal market. It is also one of the areas that was decisively shaped by the United Kingdom through the introduction into environmental legislation of market mechanisms previously unknown to the administrative legal systems of civil law that governed continental Europe. As such, this area is perhaps more difficult to negotiate because the expectation would be that the United Kingdom will still trade with the European Union, but perhaps intends to lower its own environmental standards, which would in turn give the United Kingdom a competitive advantage. The paper analyzes the impact that the United Kingdom had on the development of EU environmental law.

While Brexit is considered a major challenge in most legal areas, there was initially an element of optimism concerning Brexit and environmental law. Unlike regimes in many other areas, some environmentalists have expressed the view that the United Kingdom could perhaps adopt higher and more appropriate standards of protection, in particular in the areas of agriculture and fisheries. However, of course, as the current government has announced a “hard” version of Brexit with no more than perhaps free trade ties to the rest of Europe, deregulatory pressure will be mounting significantly for the time post-Brexit.

While the recent sessions in the House of Lords sounded mildly more positive in outlook for environmental law than for many other areas of law, the current stated policy could make it nearly impossible for the government to resist the urge to radically lower environmental standards. This paper reviews the legal and policy considerations underpinning Brexit in light of international environmental commitments, in particular relating to climate change, arguing that deregulatory pressures could evaporate the dream of a greener post-Brexit Britain. On a more positive note, the external dimension of EU environmental standards — in other words, compliance with product standards — could, in most areas relevant for

trade in goods, determine UK environmental law for the foreseeable future if the United Kingdom wishes to trade with the European Union.

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## Introduction

Concern over the inevitable lowering of UK environmental standards, or even the demise of regulation in some areas, following the Brexit vote was immediate and not without reason.<sup>1</sup> While much remains in flux and will probably depend on the eventual article 50 of the Treaty on European Union<sup>2</sup> (TEU) deal between the United Kingdom and the remaining 27 member states of the European Union (EU27), climate change — an area most important for environmental progress and collective action — is most likely not where the United Kingdom will aim its potential deregulation efforts. In many ways, climate change as a crosscutting policy driver transcends EU membership, having broad impacts on trade, finance and product flows, and will heavily influence the post-Brexit environmental road map. This paper argues that Brexit will have a largely negative impact on environmental law. Regulatory pressures from the current government pursuing its worldwide trade liberalization agenda will incite backlash when exporters have to comply with EU standards, despite the lack of UK influence, and could make it harder within the United Kingdom to agree on new laws. A more optimistic view is that, if a continued trading relationship with the EU27 is wanted, the external dimension of EU environmental law could have a lasting impact

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1 Damian Carrington, “UK’s out vote is a ‘red alert’ for the environment”, *The Guardian* (24 June 2016), online: <[www.theguardian.com/environment/damian-carrington-blog/2016/jun/24/uks-out-vote-is-a-red-alert-for-the-environment](http://www.theguardian.com/environment/damian-carrington-blog/2016/jun/24/uks-out-vote-is-a-red-alert-for-the-environment)>; Fiona Harvey, “Brexit would damage UK environment, say experts”, *The Guardian* (27 January 2016), online: <[www.theguardian.com/politics/2016/jan/27/brexit-damage-uk-environment-rspb-national-trust](http://www.theguardian.com/politics/2016/jan/27/brexit-damage-uk-environment-rspb-national-trust)>; Daniel Boffey, “MEPs in bid to force UK to meet environmental regulations after Brexit”, *The Guardian* (31 January 2017), online: <[www.theguardian.com/politics/2017/jan/31/european-parliament-force-uk-meet-environmental-regulations-after-brexit](http://www.theguardian.com/politics/2017/jan/31/european-parliament-force-uk-meet-environmental-regulations-after-brexit)>.

2 *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, [2007] OJ, C 306/01, art 50 (entered into force 1 December 2009) [TEU].

in the United Kingdom.<sup>3</sup> On the other hand, the United Kingdom also had a significant positive impact on EU environmental law. From the earliest introduction of rules protecting songbirds to the Integrated Pollution Prevention and Control (IPPC) Directive and the EU Emissions Trading System (ETS), many of the more recent EU environmental rules, in particular those with a dynamic element, were first tested in the United Kingdom.<sup>4</sup>

First, this paper summarizes general considerations relating to trade and common socio-economic factors. Second, the EU legislative framework is outlined, highlighting the scope and basis of environmental governance. Third, the UK influence on EU environmental law is evaluated. Fourth, the breadth of EU influence on UK domestic environmental law is analyzed, and post-Brexit challenges are identified. Finally, the interface of climate change and UK environmental law is explored to illustrate key challenges.

Much as the early pillars of the common market were grounded in a recognition of the need to cooperate on issues of mutual interest, economic imperatives will heavily influence post-Brexit UK environmental law, invariably requiring policy stability, effective enforcement and continued influence in environmental reforms relating to shared natural resources.

## General Considerations

Environmental governance requires cooperation and cohesive legislative and policy action at the national, regional and international levels. Early overtures of cooperation underpinning the creation of the European Union were based on similar principles of economic integration, but

were initially silent on environmental policy.<sup>5</sup> The Treaty of Rome, which established the European Economic Community (EEC) in 1957, while lacking direct reference to environmental governance, provided flexibility through article 235 (now article 352 of the Treaty on the Functioning of the European Union [TFEU]) for the passage of “appropriate measures” to attain one of the objectives of the Community.<sup>6</sup> Early legislation, Directive 67/548 addressing the packaging and labelling of dangerous substances,<sup>7</sup> and Directive 70/157 pertaining to the exhaust systems of motorized vehicles,<sup>8</sup> was principally focused on economic integration and addressed environmental outcomes as a secondary, if not tertiary, aspect. Following the 1972 Stockholm Declaration on the Human Environment<sup>9</sup> and the growing recognition of the need for cooperative action to sustainably manage ecosystems, further efforts were made under provisions relating to the functions of the common market to address lead content in gasoline,<sup>10</sup> detergents,<sup>11</sup> exhaust systems,<sup>12</sup> aquatic

3 Elisa Morgera, ed, *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge, UK: Cambridge University Press, 2012). Also, more recently, Robert Lee, “Always Keep a Hold of Nurse: British Environmental Law and Exit from the European Union” (2017) 29 *J Envtl L* 155; Colin Reid, “Brexit and the Future of UK Environmental Law” (2016) 34 *J Energy & Nat Resources L* 407.

4 See the summary by Chris Hilson, “Brexit and the Environment: The European Union and UK as Both Good and Bad Influences” (9 March 2017), *British Academy* (blog), online: <[www.britac.ac.uk/blog/brexit-and-environment-eu-and-uk-both-good-and-bad-influences](http://www.britac.ac.uk/blog/brexit-and-environment-eu-and-uk-both-good-and-bad-influences)>.

5 Maria Lee, *EU Environmental Law, Governance and Decision-Making*, 2nd ed (London, UK: Hart, 2014) at 2; Jan H Jans & Hans HB Vedder, *European Environmental Law*, 3rd ed (Groningen, Netherlands: Europa Law, 2008) at 3.

6 Treaty Establishing the European Economic Community, 25 March 1957, art 235 (entered into force 1 January 1958), online: <[http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/rometreaty2.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf)>; TEU, supra note 2; Consolidated Version of the Treaty on the Functioning of the European Union, 13 December 2007, [2012] OJ, C 326/47, art 352 (entered into force 26 October 2012) [TFEU].

7 Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, [1967] OJ, L 196/1 (no longer in force), online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31967L0548:EN:HTML>>.

8 Council Directive 70/157/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the permissible sound level and the exhaust system of motor vehicles, [1970] OJ, L 42/16 [Directive 70/157], online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31970L0157>>.

9 UN, “Stockholm Declaration on the Human Environment” (16 June 1972), online: <[www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503](http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503)>.

10 Council Directive 85/210/EEC of 20 March 1985 on the approximation of the laws of the Member States concerning the lead content of petrol, [1985] OJ, L 96/25 (no longer in force), online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0210:EN:HTML>>.

11 Council Directive 73/404/EEC of 22 November 1973 on the approximation of the laws of the Member States relating to detergents, [1973] OJ, L 347/51 (no longer in force), online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31973L0404:EN:HTML>>.

12 Directive 70/157, supra note 8; Council Directive 78/1015/EEC of 23 November 1978 on the approximation of the laws of the Member States on the permissible sound level and exhaust system of motorcycles, [1978] OJ, L 349/21 (no longer in force), online: <<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31978L1015>>.

pollution,<sup>13</sup> air pollution and hazards relating to industrial facilities<sup>14</sup> and toxic waste.<sup>15</sup>

Adoption of the Single European Act<sup>16</sup> (SEA) in 1986 saw inclusion of an explicit legal basis for governance of environmental matters through a supranational approach.<sup>17</sup> While, previously, environmental legislation had been passed pursuant to powers relating to essential objectives of the Community and was subsequently confirmed by the court,<sup>18</sup> integration of article 130(r) to (t) of the SEA (now articles 191 and 192 of the TFEU) provided a clear legal basis for environmental governance and, most importantly, legislated guiding principles for the environmental action of the European Union. Subsequent developments under the Treaty of Maastricht (1992) and the Treaty of Amsterdam (1997) increased the prominence of environmental factors, positioning economic integration in the context of sustainable development and increased environmental protection.<sup>19</sup> The principle of subsidiarity provides for the development of Community-wide policy in cases where action by a single member state would be insufficient and concerted action by the Community is required.<sup>20</sup> Prioritization of

policy harmonization to address transnational issues — in the environmental context including transboundary environmental pollution (both air and water), global climate change and preservation of biodiversity — practically aimed to foster social cohesion, provides for balanced competition and minimizes market distortions on trade.<sup>21</sup> Jointly, the principle of integration calling for environmental protection to be incorporated into broader Community policies<sup>22</sup> and subsidiarity endeavour to balance policy development, recognizing the interconnection of the European environment and providing for cohesive frameworks governing, among others, agriculture, transport, energy, habitats and wild birds.<sup>23</sup>

The EU Environmental Action Programme (EAP), first established in 1972 following the Stockholm Declaration and now on its seventh iteration,<sup>24</sup> has developed cooperatively to actualize core treaty principles, including the precautionary principle, the concept of sustainable development and the prioritization of the environment in policy making. Even during the early stages of the program, cooperation was identified as an essential element, given global economic interdependence.<sup>25</sup> The resulting patchwork of laws relating to the environment developed over nearly five decades of experience and, enforced by a highly evolved system of EU institutions, presents a range of complexities for the repatriation and administration of environmental policy within the United Kingdom post-Brexit.<sup>26</sup> While the recent House of Lords EU committee report doubted that the United Kingdom would opt to lower its own environmental standards, the House of Lords, in

13 Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, [1976] OJ, L 129/23 (no longer in force), online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31976L0464>>.

14 Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants, [1984] OJ, L 188/20 (no longer in force), online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31984L0360>>; Council Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities, [1982] OJ, L 230/1 (no longer in force), online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31982L0501>>.

15 Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste, [1978] OJ, L 84/43 (no longer in force), online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31978L0319>>.

16 Single European Act, 17 February 1986, 1754 UNTS 3, 25 ILM 506, [1987] OJ, L 169/1 (entered into force 1 July 1987).

17 Lee, *supra* note 5 at 1, 3.

18 *Commission v Italy*, C-92/79, [1980] ECR I-1115; *Procureur de la République v Association de Défense des Brûleurs d'huiles Usagées*, C-240/83, [1985] ECR I-531 [ADBUH].

19 Treaty on European Union, signed at Maastricht on 7 February 1992, 29 July 1992, [1992] OJ, C 191/01, arts 2, 3, 130(r)–(t) (entered into force 1 November 1993) [Treaty of Maastricht], online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1992:191:FULL&from=EN>>; Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997, [1997] OJ, C 340/1, arts 2, 3 (entered into force 1 May 1999) [Treaty of Amsterdam], online: <[http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_1997.340.01.0001.01.ENG&toc=OJ:C:1997:340:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_1997.340.01.0001.01.ENG&toc=OJ:C:1997:340:TOC)>.

20 Treaty of Maastricht, *supra* note 19, art 3(b); TEU, *supra* note 2, art 5.

21 Jans & Vedder, *supra* note 5 at 10–13.

22 Treaty of Maastricht, *supra* note 19, art 130(r).

23 Jans & Vedder, *supra* note 5 at 16–17.

24 Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, [2012] OJ, C 112/1, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1973:112:FULL&from=EN>> [1st EAP]; Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 “Living well, within the limits of our planet”, [2013] OJ, L 354/171, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D1386&from=EN>>.

25 1st EAP, *supra* note 24 at para 8.

26 UK, HL, “Brexit: environment and climate change”, HL Paper 109, European Union Committee 12th Report of Session 2016–17 (14 February 2017) at 54 [HL Report], online: <[www.publications.parliament.uk/pa/ld201617/ldselect/lducom/109/109.pdf](http://www.publications.parliament.uk/pa/ld201617/ldselect/lducom/109/109.pdf)>.

this paper's view, rightly highlighted the impending enforcement deficit that will result if the United Kingdom does not rapidly establish significant regulatory and enforcement capacity.<sup>27</sup> The House of Lords highlighted the role of the European Court of Justice (ECJ) as a key institution, responsible for significant progress in the environmental field.<sup>28</sup>

Climate change, as a distinctly international challenge, similarly amplifies the complications inherent with a suggested disentanglement. The European Union has, since EAP 3 (1982 to 1986) and EAP 4 (1987 to 1992), stressed the need for policy integration and harmonization, in particular in fostering sustainable development and reductions in carbon dioxide (CO<sub>2</sub>) emissions.<sup>29</sup> It is hoped — although it remains to be seen — that continued efforts by the United Kingdom to address climate change post-Brexit, notwithstanding ongoing international obligations and access to the European market, will be pursued in order to maintain a high degree of policy stability and alignment with policy efforts at the supranational level.

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## Legislative Framework

Where early environmental legislation was grounded in achieving the objectives of the common market, the inclusion of explicit powers relating to environmental policy development in the SEA galvanized decision-making priorities. The legal basis for the coordination of environmental protection at the EU level maintained a level of stability following the 2007 signing of the Treaty of Lisbon, which entered into force in 2009 and established the TEU<sup>30</sup> and the TFEU.<sup>31</sup> Key environmental provisions found in article 130(r) to (t) of the SEA were

included in the TFEU, reinforcing the prominence of harmonized environmental governance.

Article 191 of the TFEU establishes the objectives and scope governing the environmental policy of the European Union. Environmental policy functions to preserve and improve environmental quality, protect human health, promote the rational use of natural resources and promote international measures to address environmental problems, including climate change.<sup>32</sup> Policy decisions are to foster a high level of environmental protection, consider national differences and be grounded in the precautionary and polluter-pays principles.<sup>33</sup> In establishing environmental policy, key factors include the use of available scientific data, the recognition of the environmental considerations of other regions in the European Union and the identification of the potential costs and benefits of both action and procrastination, as well as balanced economic and social development across the European Union.<sup>34</sup> Additionally, both the European Union and individual member states should cooperate with relevant jurisdictions and international organizations, subject to agreement, provided they comply with the EU treaties.<sup>35</sup> It must also be noted that the ECJ, in particular in the *Air Transport Association of America* decision,<sup>36</sup> has given EU legislators the competence to regulate environmental problems outside the application of the treaties, if these impact on the European Union itself.<sup>37</sup>

Any hope among commentators and scholars about an impending environmental paradise in Britain post-Brexit is largely tempered by the fact that, thus far, the United Kingdom has never adopted more stringent environmental measures. Article 193 authorizes member states to establish more stringent protective measures<sup>38</sup> when implementing environmental policy at the national level.<sup>39</sup> This domestic deference allowing

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27 *Ibid.*

28 Alec Stone Sweet & Markus Gehring, "Environmental Protection" in Alec Stone Sweet, ed, *The Judicial Construction of Europe* (Oxford, UK: Oxford University Press, 2004) at 228–32.

29 Christian Hey, "EU Environmental Policies: A short history of the policy strategies" in Stefan Scheuer, ed, *EU Environmental Policy Handbook: A Critical Analysis of EU Environmental Legislation* (Utrecht, Netherlands: European Environmental Bureau and International Books, 2005) at 19–22.

30 TEU, *supra* note 2.

31 TFEU, *supra* note 6.

32 *Ibid.*, art 191(1).

33 *Ibid.*, art 191(2).

34 *Ibid.*, art 191(3).

35 *Ibid.*, art 191(4).

36 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change*, C-366/10, [2011] ECR I-13755.

37 Markus Gehring, "Air Transport Association of America v. Energy Secretary: Clarifying Direct Effect and Providing Guidance for Future Instrument Design for a Green Economy in the European Union" (2012) 21:2 RECIEL 149.

38 TFEU, *supra* note 6, art 193.

39 *Ibid.*, art 258.



for higher levels of ambition is rarely used, and, arguably, the United Kingdom does not need Brexit to establish stricter environmental laws.

In addition, some of the most important norms, such as the protection of animal rights, integration of environmental concerns in economic decision making and all EU environmental law principles (article 191 of the TFEU), are contained only in the EU treaties. The concern is that the EU Withdrawal Bill,<sup>40</sup> as it currently stands, does not convert EU treaty norms into UK law unless the norms are directly effective. While this is the case (arguably) for all EU environmental law principles, it might not be the case for animal rights or other “newer” treaty norms. This has led to the suggestion that a failure to convert EU treaty norms might lessen environmental and animal rights protection post-Brexit.

Several prominent ECJ decisions have influenced and advanced EU environmental law, and, with Brexit, there will be a slow process of decoupling the direct influence of ECJ decisions on the UK version of EU environmental law, which could have profound impacts. EU environmental law has not been static over the last four decades, largely due to the ECJ. For example, the balancing of EU interests with the autonomy of member states has been a central theme of environmental jurisprudence. In *Danish Bottles*, the court considered a Danish beverage container preapproval process, which provided an exception for imported test products and a quantitative limitation on unapproved containers of 3,000 hectolitres per annum.<sup>41</sup> Following the holding in *ADBHU*, the court noted that environmental protection was an essential objective that could justify a trade-distorting bottle deposit and return system, but held that the preapproval process was discriminatory, as it disallowed otherwise reusable containers.<sup>42</sup> In effect, the decision placed a proportionality test on trade-distorting environmental measures. In *Commission v Belgium*, the court considered a Belgian prohibition on the dumping or storage of foreign or domestic waste in the region of Wallonia, other than waste originating in that region.<sup>43</sup> While the court noted the measure openly discriminated against imports, the

court upheld the measure as having a clear objective to protect human health and the environment;<sup>44</sup> this decision reinforces the prominence of domestic environmental protection measures.

With the expansion of EU environmental regulatory powers came an increased need for the court to interpret statutory purpose, scope and definitions. A wide range of cases, often bringing about submissions from multiple member states, focused on clarifying whether the definition of “waste” included reusable goods of economic value.<sup>45</sup> Illustrative of this trend, in *Commission v Germany*, the court reviewed the German legislation that exempted several categories of recyclable waste, finding this approach violated the EU-wide single definition of “waste.”<sup>46</sup> In *Lappel Bank*, the court had to strike a balance between ecological and economic interests in the context of the Birds Directive (79/409)<sup>47</sup> and the Habitats Directive (92/43)<sup>48</sup> when considering the permissibility of a dike and reservoir adjacent to a protected area.<sup>49</sup> Concluding the works were justified on public interests grounds, as they improved the ecological situation by effectively managing flooding, the court, following *Leybucht Dykes*, cautioned that while economic justification could not be utilized in the establishment of a protected area, it could be considered in exceptional circumstances in examining the degree of encroachment on the

44 *Ibid* at para 50.

45 *Criminal proceedings against Euro Tombesi and Adino Tombesi* (C-304/94), *Roberto Santella* (C-330/94), *Giovanni Muzi and others* (C-342/94) and *Anselmo Savini* (C-224/95) (joined), C-304/94, [1997] ECR I-03561; *Inter-Environnement Wallonie ASBL v Région wallonne*, C-129/96, [1997] ECR I-07411; *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (C-418/97) and *Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+ and Vereniging Stedelijk Leefmilieu Nijmegen v Directeur van de dienst Milieu en Water van de provincie Gelderland* (C-419/97) (joined), C-418/97, [2000] ECR I-04475; *The Queen, on the application of Mayer Parry Recycling Ltd, v Environment Agency and Secretary of State for the Environment, Transport and the Regions, and Corus (UK) Ltd and Allied Steel and Wire Ltd (ASW)*, C-444/00, [2003] ECR I-06163.

46 *Commission v Germany*, C-422/92, [1995] ECR I-01097 [*Commission v Germany*].

47 *Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds*, OJ L 103/1; *Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds*, OJ L 20/7, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0147&from=EN>> [Birds Directive].

48 *Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora*, [1992] OJ, L 206/7 [Habitats Directive], online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992L0043&from=EN>>.

49 *Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds*, C-44/95, [1996] ECR I-03805 [*Lappel Bank*].

40 Bill 5, *European Union (Withdrawal) Bill* [HL], 2017–2019 sess, (1st reading 13 July 2017).

41 *Commission v Denmark*, C-302/86, [1988] ECR I-04607 [*Danish Bottles*].

42 *Ibid* at paras 20–22.

43 *Commission v Belgium*, C-2/90, [1992] ECR I-04431 [*Commission v Belgium*].

ecosystem.<sup>50</sup> Similarly, in *Santoña Marshes*, the court noted that member states were under an obligation to treat waste in such a way as to ensure economic operations did not adversely impact protected areas,<sup>51</sup> clearly positioning environmental interests above economic interests. Overall, the court has supported EU environmental measures, favouring harmonization and supranational governance with exceptions grounded proportionally and economic influences positioned ancillary to the essential objective of environmental protection.

The current draft of the EU Withdrawal Bill is largely silent on the impact of ECJ jurisprudence post-Brexit. Most commentators assume that litigants will continue to use that body of law. Indeed, even the justice minister said publicly that the “UK will keep ‘half an eye’ on ECJ rulings.”<sup>52</sup> In other words, legal developments interpreting identical norms in the European Union will continue to influence UK courts.<sup>53</sup>

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## The United Kingdom’s Impact on EU Legislation

It is not easy to determine the positive or negative impact that the United Kingdom has had on EU environmental law. Some Brexit optimists have argued that the European Union has been so neo-liberal that its rules have neglected environmental values.<sup>54</sup> Many of the most strident neo-liberal EU reforms were driven by the United Kingdom, and one of the reasons many voted for Brexit was the argument that more economic dynamism could be developed outside the “ordo-liberal” reach of the European Union.

To be fair, the United Kingdom has been a driver behind some of the most sweeping environmental legal reforms in the European Union. Chris Hilson, the lifelong commentator on EU and UK environmental law and former editor of the *Journal of Environmental Law*, highlights five areas where the United Kingdom has had a distinctly positive impact on EU environmental policy: climate change targets and ETS, the common agricultural policy, fisheries, the IPPC Directive and early on with the Habitats Directive.<sup>55</sup> These are important contributions and, certainly, with one of four member states having a common law system leaving the European Union, overall, common law thinking will be less influential in the European Union. In other words, the United Kingdom will continue to develop its environmental laws post-Brexit and might well develop legal innovations that will have a significant impact on the European Union. However, if Switzerland and Norway are good examples, the situation may be different, as many of those countries’ most progressive environmental rules were actually inspired by EU rules.<sup>56</sup>

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## Brexit and EU Environmental Legislation

While deference is given to member states relating to the method of implementation of EU environmental legislation, nearly five decades of EU law has had a profound influence on the substantive and procedural evolution of domestic law in the United Kingdom. Crucial legislation relating to habitats,<sup>57</sup> migratory birds,<sup>58</sup> air quality,<sup>59</sup>

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50 *Ibid* at paras 41–42.

51 *Commission v Spain*, C-355/90, [1993] ECR I-04221 at paras 53–56 [*Santoña Marshes*].

52 Jamie Grierson, Heather Stewart & Rowena Mason, “UK will keep ‘half an eye’ on ECJ rulings after Brexit, says justice minister”, *The Guardian* (23 August 2017), online: <[www.theguardian.com/law/2017/aug/23/uk-will-keep-half-an-eye-on-ecj-rulings-after-brexit-says-justice-minister](http://www.theguardian.com/law/2017/aug/23/uk-will-keep-half-an-eye-on-ecj-rulings-after-brexit-says-justice-minister)>.

53 This will be different in other areas, such as citizenship rights. The UK courts will retain the right to make preliminary references to the ECJ for eight years and will be bound by ECJ interpretation as long as the rules exist.

54 Lee, *supra* note 3.

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55 Hilson, *supra* note 4.

56 EC, Commission, “EU and Switzerland join forces on emissions trading” (16 August 2017), online: <[https://ec.europa.eu/clima/news/eu-and-switzerland-join-forces-emissions-trading\\_en](https://ec.europa.eu/clima/news/eu-and-switzerland-join-forces-emissions-trading_en)>.

57 *Habitats Directive*, *supra* note 48.

58 *Birds Directive*, *supra* note 47.

59 EC, *Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe*, [2008] OJ, L 152/1.



water resources and waste management,<sup>60</sup> commercial trade in chemicals<sup>61</sup> and emissions trading,<sup>62</sup> along with common sectoral policies (in other words, agriculture and fisheries),<sup>63</sup> are cornerstones of both supranational and domestic environmental action. The full breadth and depth of the EU environmental *acquis* is difficult to fully ascertain, as there are more than 200 purely environmental instruments in place at the EU level, excluding internal market aspects — such as product standards and labelling, and governance of the agriculture, fisheries and energy sectors — where member states have shared

competency; when areas of shared competency are included, more than 1,100 pieces of directly applicable legislation can be identified as falling under the remit of the UK Department for Environment, Food and Rural Affairs.<sup>64</sup> Overall, EU environmental and climate legislation, policies and jurisprudence are deeply embedded into the corpus of UK environmental law, which makes the task of directly transposing the entirety of the framework into domestic law a daunting and complex affair. It is, thus, not surprising that under the previous coalition government, the United Kingdom concluded, in a balance of competence review, that, by and large, the European Union possessed the right competences in this field and, if anything, was perhaps lacking further competences in the field of climate change.<sup>65</sup>

A crucial aspect of the common and harmonized environmental framework is to maintain a level playing field for intra-EU trade, while balancing the costs and benefits of administration. The EU market, accounting for 23.8 percent of the €58.7 trillion global GDP in 2014,<sup>66</sup> has benefited from the stability, continuity and climate-focused long-term perspective of regulations that drive innovation and create sufficient critical mass to allow for the broad development and deployment of low-carbon technologies.<sup>67</sup>

Rather than resulting in a higher level of environmental protection, Brexit is seen by some as an easy way to lower the administrative burden of compliance — in particular organizational protocols, permitting, reporting and data sharing — with EU environmental and climate legislation.<sup>68</sup>

Following the Brexit vote, UK Prime Minister Theresa May announced plans to introduce a “Great Repeal Bill” that would repeal the European

- 60 EC, Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, [2000] OJ, L 327/1, online: <[http://eur-lex.europa.eu/resource.html?uri=cellar:5c835afb-2ec6-4577-bdf8-756d3d694eeb.0004.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:5c835afb-2ec6-4577-bdf8-756d3d694eeb.0004.02/DOC_1&format=PDF)>; EC, Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, [2008] OJ, L 312/3 [Waste Directive], online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0098&from=EN>>.
- 61 EC, Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, [2006] OJ, L 396/1 [REACH].
- 62 EC, Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] OJ, L 275/32 [ETS Directive], online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0087&from=EN>>.
- 63 EC, Regulation (EU) 2015/812 of the European Parliament and of the Council of 20 May 2015 amending Council Regulations (EC) No 850/98, (EC) No 2187/2005, (EC) No 1967/2006, (EC) No 1098/2007, (EC) No 254/2002, (EC) No 2347/2002 and (EC) No 1224/2009, and Regulations (EU) No 1379/2013 and (EU) No 1380/2013 of the European Parliament and of the Council, as regards the landing obligation, and repealing Council Regulation (EC) No 1434/98, [2015] OJ, L 133/1, online: <[http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2015.133.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.133.01.0001.01.ENG)>; EC, Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005, [2013] OJ, L 347/487, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1305&from=en>>; See also EC, Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008, [2013] OJ, L 347/549; EC, Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009, [2013] OJ, L 347/608; EC, Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, [2013] OJ, L 347/671.

64 HL Report, *supra* note 26 at 9–10.

65 UK, “Review of the Balance of Competences between the United Kingdom and the European Union: Environment and Climate Change” (February 2014) at paras 2.13–2.18 [UK, “Balance of Competences”], online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284500/environment-climate-change-documents-final-report.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284500/environment-climate-change-documents-final-report.pdf)>.

66 Eurostat, *The EU in the World: 2016 Edition* (Luxembourg: Publications Office of the European Union, 2016) at 79, online: <<http://ec.europa.eu/eurostat/documents/3217494/7589036/KS-EX-16-001-EN-N.pdf/bcacb30c-0be9-4c2e-a06d-4b1dae4d493e>>.

67 UK, “Balance of Competences”, *supra* note 65.

68 Some Brexit supporters are also climate-change deniers, according to James Crisp, “Brexit campaign leadership dominated by climate-sceptics”, *EurActiv* (24 May 2016), online: <[www.euractiv.com/section/uk-europe/news/brexit-campaign-leadership-dominated-by-climate-sceptics/](http://www.euractiv.com/section/uk-europe/news/brexit-campaign-leadership-dominated-by-climate-sceptics/)>.

Communities Act 1972<sup>69</sup> and transpose EU law into the domestic law of the United Kingdom in accordance with bilateral and multilateral agreements.<sup>70</sup> The bill is currently being discussed in Parliament as the EU Withdrawal Bill, as mentioned above, and several environmentally inspired amendments have been tabled, notably by MP Caroline Lucas. The suggestion of such a “continuance,” while desirable to foster continued market stability, also raises several challenges. First, decisions and regulations as direct-effect legislation are more direct to transpose than directives that require enabling legislation. For instance, the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) framework<sup>71</sup> would be directly applicable, while conservation measures under the Habitats Directive would need legislative implementation, leaving potential room to manoeuvre. Second, wide use of “legislation by reference,” or legislation that utilizes a definition or mechanism from another piece of legislation through direct integration, provides a range of unique complexities. For example, section 75 of the Environmental Protection Act 1990 incorporates definitions of “waste” and “hazardous waste” from the Waste Framework Directive and the Hazardous Waste Directive, respectively.<sup>72</sup> Third, core obligations and definitions have evolved through the interpretation and application of the ECJ. Admittedly, uncertainty remains as to the specific way past-ECJ jurisprudence will be incorporated into the common law on Brexit day with the UK Supreme Court in *Miller* concluding that judgments would be no more than “persuasive.”<sup>73</sup> One commentator noted the potential for an interpretive approach that would allow UK courts to interpret and develop domestic law in accordance with the law of the

European Union.<sup>74</sup> Moving forward, as the corpus of EU law would no longer be supreme, yet would continue to evolve, divergence poses a risk to compliance terms for continued market access.<sup>75</sup>

Fourth, where previously the ECJ and EU institutions played integral roles in maintaining the compliance of member states and domestic actors, Brexit leaves a gap in access to forms for accountability for national measures; this is a void that UK courts will struggle to fill adequately. The United Kingdom aims to establish an independent environmental watchdog to replace the European Commission’s role. Many countries create environmental agencies that can effectively supervise governmental failings, or even establish separate environmental courts with special knowledge and experience in handling scientific advice. Perhaps the government should review whether special environmental courts will be necessary. Fifth, the departure from the European Union will include restrictions on access to funding programs supporting legislative implementation, research and innovation. Finally, any potential trade agreement with the European Union will include compliance with many environmental and market standards, such as REACH, utilized by partners in Asia and North America. The Comprehensive Economic and Trade Agreement<sup>76</sup> (CETA) between Canada and the European Union, for example, contemplates regulatory cooperation, but contains no precise rules on specific products. At the moment, Canadian chemical producers have to comply with the much stricter REACH standard if they wish to export to the European Union, despite CETA. In the future, there could be an agreement to accept the equivalent Canadian standard, but that is not currently the case, nor is it enshrined in the treaty itself. The United Kingdom may practically be required to comply with the EU environmental framework to maintain trade flows without having the ability to influence legal development, going forward. Finally, the government has made the comment that ministers will be allowed to unilaterally change or rescind

69 *European Communities Act 1972* (UK), c 68.

70 Jack Simson Caird, “Legislating for Brexit: The Great Repeal Bill” (2017), House of Commons Briefing Paper 7793 at 8–9, online: <<http://researchbriefings.files.parliament.uk/documents/CBP-7793/CBP-7793.pdf>>.

71 REACH, *supra* note 61.

72 Caird, *supra* note 70 at 33; *Waste Directive*, *supra* note 60; *Environmental Protection Act 1990* (UK), c 43, s 75; EC, *Council Directive 91/689/EEC of 12 December 1991 on hazardous waste*, [1991] OJ, L 377/20 (no longer in force).

73 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, [2017] UKSC 5 at para 80.

74 Thomas Horsley, “UK Courts and the Great Repeal Bill: Awaiting Fresh Instruction” (28 February 2017), *UK Constitutional Law Association* (blog), online: <<https://ukconstitutionallaw.org/2017/02/28/thomas-horsley-uk-courts-and-the-great-repeal-bill-awaiting-fresh-instruction/>>.

75 Caird, *supra* note 70 at 62–63.

76 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union [and its Member States...]*, 29 February 2016 [CETA], online: <[http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf)>.

EU laws under the EU Withdrawal Bill. While it is constitutionally doubtful whether such far-reaching authorizations could be given, it is clear that, while some continuity is intended, many parts of EU environmental law not currently transposed into UK law could face governmental repeal.

It should be noted that vast differences in environmental standards would not be acceptable to UK trading partners in the future. While the World Trade Organization (WTO) allows for certain variants in this regard, its aim remains a level playing field for international trade. Under the Agreement on the Application of Sanitary and Phytosanitary Measures<sup>77</sup> and the Agreement on Technical Barriers to Trade,<sup>78</sup> many international standards become de facto binding, and, if there is scientific proof for higher EU standards, those could also be justified, further increasing the regulatory pressure on the post-Brexit United Kingdom to comply with EU environmental law.<sup>79</sup> It is also likely that any EU-UK withdrawal agreement would contain an obligation, similar to that of CETA, not to lower environmental standards to attract investment or create business opportunities. This provision on “Upholding levels of protection” in article 24.5(1) of CETA reads, “The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.”<sup>80</sup>

## Climate Change and Brexit

Where overtures around the EU Withdrawal Bill raise concerns about the complexity of such an undertaking and about its potential ramifications for the domestic UK market, existing climate change obligations, both internationally and domestically, perhaps show a slight silver lining in Brexit. Commitments established by the United Kingdom — not only the European Union — under the 2015 Paris Agreement,<sup>81</sup> the continued practical role of the EU ETS in providing a market measure for climate change mitigation and adaptation and domestic measures, including a carbon budget and long-term reduction targets, provide cornerstones for post-Brexit environmental priorities. Provided that climate deniers do not assume more power in the UK government, it is most likely that the United Kingdom will remain in the EU ETS.

Grounded in international obligations under the UNFCCC and the Kyoto Protocol,<sup>82</sup> the United Kingdom has progressively reduced its domestic basket of greenhouse gas (GHG) emissions, which, in 2015, totalled 495.7 million tonnes carbon dioxide equivalent (MtCO<sub>2</sub>e), representing a 38 percent reduction below the 1990 baseline.<sup>83</sup> The Paris Agreement, which entered into force less than a year following the twenty-first Meeting of the Conference of the Parties of the UNFCCC (COP 21) and includes intended nationally determined contributions (INDCs) submitted from 162 jurisdictions, covering 190 parties,<sup>84</sup> establishes a global goal to reduce global temperature rise to

77 Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, UNTS Volume 1867, No 31874, Annex 1A: Agreement on the Application of Sanitary and Phytosanitary Measures, online: <[www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm)>.

78 Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, UNTS Volume 1867, No 31874, Annex 1A: Agreement on Technical Barriers to Trade, online: <[www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm)>. Marie-Claire Cordonier Segger & Markus W Gehring, *Sustainable Development in World Trade Law*, vol 9 (The Hague: Wolter Kluwer, 2005).

79 Cordonier Segger & Gehring, *supra* note 78. Markus W Gehring, Jarrod Hepburn & Marie-Claire Cordonier Segger, *World Trade Law in Practice* (London, UK: Globe Business Law and Business, 2006) at 164.

80 CETA, *supra* note 76, art 24.5(1).

81 United Nations Framework Convention on Climate Change (UNFCCC), *Adoption of the Paris Agreement*, 12 December 2015, Dec CP.21, 21st Sess, UN Doc FCCC/CP/2015/L.9 (entered into force 4 November 2016) [Paris Agreement].

82 United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, 31 ILM 849 (entered into force 21 March 1994); *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 148, 37 ILM 22 (1998) (entered into force 16 February 2005).

83 UK, Department for Business, Energy and Industrial Strategy, “2015 UK Greenhouse Gas Emission, Final Figures: Statistical Release: National Statistics” (7 February 2017) at 8, online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/589825/2015\\_Final\\_Emissions\\_statistics.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589825/2015_Final_Emissions_statistics.pdf)> [UK Statistics 2017]. The Kyoto Protocol provides for a basket of GHGs: CO<sub>2</sub>, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride and nitrogen trifluoride.

84 Paris Agreement, *supra* note 81.

“well below 2°C.”<sup>85</sup> EU member states collectively submitted an INDC committing to a minimum reduction of GHG emissions to 40 percent below 1990 levels by 2030.<sup>86</sup> Climate adaptation and mitigation measures in the European Union are guided by the EU strategy, which aims to promote member-state action, better informed decision making and adaptation in vulnerable sectors.<sup>87</sup> Eight core actions underpin the EU strategy, including encouraging the development of domestic adaptation strategies; providing funding for adaptation action; localizing climate actions through the Covenant of Mayors framework; overcoming knowledge gaps; further development of web resources (Climate-ADAPT);<sup>88</sup> adapting common policies relating to agriculture and fisheries to climate pressures; prioritizing climate-resilient infrastructure; and promoting insurance and financial products that foster climate-resilient investment and business decisions.<sup>89</sup> The House of Lords committee rightly expressed a concern that the level of ambition regarding climate change might be lowered, and that some of the most integrated climate policies with the European Union might be repealed. The United Kingdom would probably have to submit its own INDC post-Brexit under the Paris Agreement and orientate action in accordance with the Marrakech Action Proclamation agreed to at COP 22.<sup>90</sup> The ratification of the Paris Agreement by the United Kingdom provides prospects for hope. Such a submission could be the first litmus test as to the international environmental credibility of post-Brexit Britain.

A pillar of the EU climate change framework, Directive 2003/87/EC establishes a scheme for GHG emission allowance trading, providing a market-based mechanism to positively incentivize

decarbonization efforts.<sup>91</sup> The EU ETS covers CO<sub>2</sub>, nitrous oxide and perfluorocarbons and includes power generation, energy intensive sectors — such as oil refineries, production of various metals, cement, glass, pulp and paper, cardboard, acids and bulk organic chemicals — and commercial aviation originating and arriving within the European Economic Area (EEA).<sup>92</sup> Carbon allowances are provided annually by auction under a single EU-wide target, with a total of 2,084 MtCO<sub>2</sub>e available for fixed installations over Phase III (2013 to 2020) and caps decreasing by 1.74 percent annually.<sup>93</sup> An additional 210 MtCO<sub>2</sub>e are provided for the aviation sector.<sup>94</sup> Article 6 of the Paris Agreement recognizes the importance of carbon markets, with the EU ETS exploring steps to link with other carbon markets within the EEA (Switzerland) and internationally (South Korea, Canada, California and China). The globalization of emissions trading increases the total percentage of global GDP generated under ETS-compliant jurisdictions. In early 2017, the European Parliament endorsed the expansion of the ETS to shipping.<sup>95</sup> The UK government has been critical of this move, potentially calling into question the United Kingdom’s continued participation in the system. Of course, the United Kingdom has joined the coalition for the phase-out of coal,<sup>96</sup> while key EU member states, such as Germany, have not, so it is not entirely inconceivable that the United Kingdom might adopt stricter climate rules post-Brexit.

91 ETS Directive, *supra* note 62, Preamble.

92 *Ibid*, Annex I–II.

93 *Ibid*, art 10; EC, Commission, “Factsheet: The EU Emissions Trading System (EU ETS)” (September 2016), online: <[https://ec.europa.eu/clima/sites/clima/files/factsheet\\_ets\\_en.pdf](https://ec.europa.eu/clima/sites/clima/files/factsheet_ets_en.pdf)>; EC, Commission, “Emissions cap and allowances” [EC, “Emissions cap and allowances”], online: <[https://ec.europa.eu/clima/policies/ets/cap\\_en](https://ec.europa.eu/clima/policies/ets/cap_en)>; The Carbon Budgets Order 2009 (UK), No 1259, art 2, online: <[www.legislation.gov.uk/uksi/2009/1259/pdfs/uksi\\_20091259\\_en.pdf](http://www.legislation.gov.uk/uksi/2009/1259/pdfs/uksi_20091259_en.pdf)>.

94 EC, “Emissions cap and allowances”, *supra* note 93.

95 EC, Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC, [2015] OJ, L 123/55, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02015R0757-20161216&from=EN>>; Amendments adopted by the European Parliament on 15 February 2017 on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, COM(2015)0337 – C8-0190/2015 – 2015/0148(COD), P8\_TA(2017)0035, amendment 5, online: <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0035+0+DOC+PDF+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0035+0+DOC+PDF+V0//EN)>.

96 Powering Past Coal Alliance, “Powering Past Coal Alliance: Declaration” (16 November 2017), online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/660041/powering-past-coal-alliance.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/660041/powering-past-coal-alliance.pdf)>.

85 *Ibid*, art 2(1).

86 EU, “Intended Nationally Determined Contribution of the EU and its Member States” (6 March 2015), online: <[www4.unfccc.int/Submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf](http://www4.unfccc.int/Submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf)>.

87 EU, “An EU Strategy on adaptation to climate change”, COM(2013) 216 final at 5–9, online: <<http://ec.europa.eu/transparency/regdoc/rep/1/2013/EN/1-2013-216-EN-F1-1.Pdf>>.

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89 *Ibid*.

90 UNFCCC, “Marrakech Action Proclamation for Our Climate and Sustainable Development” (COP 22), online: <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/marrakech\\_action\\_proclamation.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/marrakech_action_proclamation.pdf)>.



In 2008, the United Kingdom passed the Climate Change Act with the ambitious goal of reducing domestic GHG emissions by 80 percent below the 1990 baseline levels.<sup>97</sup> The scheme, which covers all six Kyoto GHGs,<sup>98</sup> establishes a carbon budget for each phase (2008 to 2012; 2013 to 2017; and 2018 to 2022), which began at 26 percent below 1990 levels.<sup>99</sup> Calculation of the carbon budget comes from emission allowances under the EU ETS, emissions not covered by the EU ETS (non-traded GHGs) and emissions credits from other jurisdictions, with the current carbon budget sitting at 2,782 MtCO<sub>2</sub>e and moving to 1,725 MtCO<sub>2</sub>e for the fifth phase (2028 to 2032).<sup>100</sup> More than half of the emissions in the United Kingdom come from two sectors: energy supply (29 percent) and transportation (24 percent).<sup>101</sup> Sustainably focused legislative frameworks from the European Union in land use and waste management and the incorporation of renewable energy sources have supported continued GHG emission reductions in those sectors in the United Kingdom.<sup>102</sup> During this time, the UK economy has shown continued resilience despite global economic slow-downs in parallel with expanding climate legislation. Over the period of 2008 to 2016, the UK GDP has grown steadily, annually, an average of 0.18 percent, demonstrating the second largest per capita income in comparison to population size within the European Union.<sup>103</sup>

97 Climate Change Act 2008 (UK), c 27, s 1, online: <[www.legislation.gov.uk/ukpga/2008/27/pdfs/ukpga\\_20080027\\_en.pdf](http://www.legislation.gov.uk/ukpga/2008/27/pdfs/ukpga_20080027_en.pdf)>.

98 *Ibid.*, s 24.

99 *Ibid.*, ss 4–5.

100 UK Statistics 2017, *supra* note 83 at 9–10.

101 *Ibid.* at 19–24.

102 *Ibid.* at 5, 19, 30, 36.

103 UK, Office for National Statistics, “Gross Domestic Product: chained volume measures: Seasonally adjusted £m (1955-2016)” (Dataset: Second Estimate of GDP time series dataset, 2017), online: <[www.ons.gov.uk/economy/grossdomesticproductgdp/timeseries/abmi/pn2](http://www.ons.gov.uk/economy/grossdomesticproductgdp/timeseries/abmi/pn2)>; UK, Office for National Statistics, “UK Perspectives 2016: The UK in a European context” (26 May 2016), online: <<http://visual.ons.gov.uk/uk-perspectives-2016-the-uk-in-an-european-context/>>; UK, Office for National Statistics, “Second estimate of GDP: Quarter 4 (Oct to Dec) 2016”, Statistical Bulletin (22 February 2017), online: <[www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/secondestimateofgdp/quarter4octdec2016](http://www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/secondestimateofgdp/quarter4octdec2016)>.

## Brexit and the Rocky Road Ahead

Global efforts to combat anthropogenic climate change achieved a crucial milestone at COP 21, not simply with the setting of global temperature increase goals (well below 2°C and striving for 1.5°C) and the rapid entry into force of the Paris Agreement, but also through the establishment of the Breakthrough Energy Coalition, a project spearheaded by Bill Gates to mobilize investment in clean energy technologies.<sup>104</sup> Apart from a promising trend in green business, the coalition marks a watershed moment in which private sector leaders recognized the strategic imperative of climate change adaptation on a global stage. The 2017 report *Better Business Better World*, published by the Business and Sustainable Development Commission, identifies the UN Sustainable Development Goals as providing a transformative framework for business to foster sustainable development imperatives in our current and evolving economic system.<sup>105</sup> It is hoped that continued climate-conscious leadership, internationally and nationally, could be an imperative for the United Kingdom to foster economic growth and innovation through its first-mover advantage in GHG reductions.

International capital markets have also begun to respond to climate-related risk exposure. In December 2016, the Task Force on Climate-related Financial Disclosures — a 32-member task force established by Group of Twenty finance ministers and central bank governors under the Financial Stability Board and chaired by Michael Bloomberg — put forward guidelines for large-assets owners (banks, insurance companies and asset managers/owners) for publication of climate-related financial

104 Breakthrough Energy Coalition, “Who we are”, online: <[www.b4.energy/coalition/](http://www.b4.energy/coalition/)>; David Goldman, “The 30 rich and powerful people Bill Gates signed on to save the Earth”, CNN (30 November 2015), online: <<http://money.cnn.com/2015/11/30/technology/bill-gates-climate-change/>>.

105 Business and Sustainable Development Commission, *Better Business Better World* (London, UK: Business and Sustainable Development Commission, 2017), online: <<http://report.businesscommission.org/uploads/BetterBiz-BetterWorld.pdf>>; *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UNGAOR, 70th Sess, UN Doc A/RES/70/1 (2015), online: <[www.un.org/ga/search/view\\_doc.asp?symbol=A/70/L.1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/70/L.1&Lang=E)>.

disclosure in public filings.<sup>106</sup> Coincidentally, in February 2017, Deutsche Bank announced it would halt all financing to coal-fired power plant construction as part of its commitments under the Paris Agreement and building on a 2014 step to pull financing from a proposed coal port that had impacts on the Great Barrier Reef.<sup>107</sup> This move mirrors an increasing trend in investment funds to divest fossil-fuel-intensive assets, with Arabella Advisors noting a committed divestment asset value of US\$5.2 trillion in December 2016.<sup>108</sup> Prior to Brexit, the Bank of England issued the first comprehensive climate report, requesting that companies disclose their climate exposure.<sup>109</sup> It is doubtful whether the Bank of England would still trailblaze with the same vigour post-Brexit when the United Kingdom is seeking alignment with the current US administration to forge a comprehensive trade deal.

While Brexit uncertainty remains, climate change policy imperatives transcend EU membership and should inform plausible legal reforms to maintain economic growth. International responses to climate change are reaching an inflection point of mutual supportiveness, with a 2015 Grantham Research Institute study finding more than 850 climate laws and policies at the national level; by 2017, the database had increased to include 1,360 legislative or policy instruments.<sup>110</sup> This strong global

commitment promotes the continued prioritization of lower-carbon policies and appropriate legal and governance institutions to support innovation. Observers hope that climate change will remain a policy driver, if not because it is an environmental imperative but because to deviate from the global economic shift will leave UK-based organizations open to unfavourable exposure to otherwise avoidable climate-related risk. If the UK carbon budget continues to inform and prioritize policy decisions post-Brexit, the United Kingdom can maintain international influence and drive a domestic environmental agenda, emphasizing innovation in the green economy; this could mean that enhanced climate action could be an economic win for the United Kingdom post-Brexit.

In many areas, the United Kingdom, either through the EU Withdrawal Bill or because of export pressure, will continue to be a participant (perhaps spectator) in EU environmental law. While domestic pressure will aim to deregulate, exporters, traders, service providers and even the financial industry will try to keep environmental standards as close to the EU level as possible. While changes in the areas of agriculture and fisheries were sold to the electorate as the great prospect of Brexit, in February 2017, the UK government announced that it will continue to comply with EU fisheries policies and quotas for the foreseeable future,<sup>111</sup> prioritizing trade within the European market as a Brexit imperative.<sup>112</sup> As such, it is fair to conclude that Brexit does not solve a single significant environmental problem, but rather makes the solution of those problems more complicated.

## Authors' Note

We would like to thank our anonymous reviewer.

106 Task Force on Climate-related Financial Disclosures, "Recommendations of the Task Force on Climate-related Financial Disclosures" (14 December 2016), online: <[www.fsb-tcfd.org/wp-content/uploads/2016/12/16\\_1221\\_TCFD\\_Report\\_Letter.pdf](http://www.fsb-tcfd.org/wp-content/uploads/2016/12/16_1221_TCFD_Report_Letter.pdf)>.

107 Agence France-Presse, "Deutsche Bank pulls out of coal projects to meet Paris climate pledge", *The Guardian* (1 February 2017), online: <[www.theguardian.com/business/2017/feb/01/deutsche-bank-pulls-out-of-coal-projects-to-meet-paris-climate-pledge](http://www.theguardian.com/business/2017/feb/01/deutsche-bank-pulls-out-of-coal-projects-to-meet-paris-climate-pledge)>; Australian Associated Press, "Germany's biggest bank pulls funding for Abbot Point coal terminal", *The Guardian* (23 May 2014), online: <[www.theguardian.com/environment/2014/may/23/germanys-biggest-bank-pulls-funding-for-abbot-point-coal-terminal](http://www.theguardian.com/environment/2014/may/23/germanys-biggest-bank-pulls-funding-for-abbot-point-coal-terminal)>.

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109 Bank of England, *The impact of climate change on the UK insurance sector – A Climate Change Adaptation Report by the Prudential Regulation Authority*, September 2015, online: <[www.bankofengland.co.uk/pru/Documents/supervision/activities/pradefra0915.pdf](http://www.bankofengland.co.uk/pru/Documents/supervision/activities/pradefra0915.pdf)>.

110 Michal Nachmany et al, "The 2015 Global Climate Legislation Study: A Review of Climate Change Legislation in 99 Countries" (Grantham Research Institute on Climate Change and the Environment, 2015), online: <[www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/05/Global\\_climate\\_legislation\\_study\\_20151.pdf](http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/05/Global_climate_legislation_study_20151.pdf)>; Grantham Research Institute on Climate Change and the Environment & Sabin Center for Climate Change Law, *Climate Change Laws of the World*, online: <[www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/](http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/)>.

111 Daniel Boffey, "UK fishermen may not win waters back after Brexit, EU memo reveals", *The Guardian* (15 February 2017), online: <[www.theguardian.com/environment/2017/feb/15/uk-fishermen-may-not-win-waters-back-after-brexit-eu-memo-reveals](http://www.theguardian.com/environment/2017/feb/15/uk-fishermen-may-not-win-waters-back-after-brexit-eu-memo-reveals)>.

112 UK, "The United Kingdom's exit from and new partnership with the European Union" (February 2017) at paras 35–40, online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/589191/The\\_United\\_Kingdoms\\_exit\\_from\\_and\\_partnership\\_with\\_the\\_EU\\_Web.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf)>.



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