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Centre for International  
Governance Innovation



British Institute of  
International and  
Comparative Law

Brexit: The International Legal Implications | Paper No. 9 – January 2018

# Brexit, Brexatom, the Environment and Future International Relations

Stephen Tromans





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Centre for International  
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67 Erb Street West  
Waterloo, ON, Canada N2L 6C2  
[www.cigionline.org](http://www.cigionline.org)



British Institute of  
International and  
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Charles Clore House  
17 Russell Square, London WC1B 5JP  
[www.biicl.org](http://www.biicl.org)

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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 of the 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 Author

**Stephen Tromans** is a barrister specializing in environmental, energy and infrastructure law. He practises from 39 Essex Chambers in London, England. He was previously a lecturer at the University of Cambridge and has practised as a solicitor. He is the author of a number of leading textbooks on topics such as contaminated land, nuclear law and environmental impact assessment, and was for many years the author and editor-in-chief of the *Encyclopedia of Environmental Law*. At the Bar, he has been involved in some of the leading cases over the past decade and a half, appearing in the UK courts and in the European Court of Justice. He was a founder of the UK Environmental Law Association in 1986 and is a former chair of the association. He has acted as a parliamentary adviser to various committee inquiries in both Houses of Parliament, and currently sits on the Committee on Radioactive Waste Management, which advises the UK government.

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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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## Executive Summary

The terms of the United Kingdom's exit from the European Union remain vague and fluid at the time of writing. However, it is clear that the prospect has given rise to concern as to the future shape and effectiveness of environmental law following Brexit. EU environmental law, as it has evolved and expanded since the early 1970s, has exerted a profound influence over the law of the United Kingdom, and has in many areas resulted in entrenched environmental problems being tackled and environmental standards being improved. As discussed in this paper, it would be naive to suggest that the United Kingdom will abandon the existing body of EU environmental law; indeed, under the terms of the proposed legislation on exit, it will be preserved. However, there will be some serious and complex issues to be resolved because much of the law is predicated upon the involvement of EU institutions. There will also be difficult issues relating to international relations, both in respect of treaties to which the United Kingdom is a party in its capacity as an EU member state, and in respect of the implications of any future bilateral trade arrangements for environmental regulation. Further, EU law has provided both political and legal accountability to successive UK governments, and a means for concerned or affected citizens to obtain redress, either by way of complaint to the European Commission, or by legal challenges in the courts. There will need to be effective replacement mechanisms if the environment is to be properly protected. How these issues are worked out will be an important task for environmental lawyers over the next decade.

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## Introduction

As in so many areas, in the field of environmental protection, views differ strongly as to the benefits of EU membership. EU membership could be seen as the European Commission and the Court of Justice of the European Union (CJEU) sticking their noses into matters of policy and practice that are the business of the United Kingdom. There could be allegations of hypocrisy in other European Union states, castigating the United Kingdom as "the dirty man of Europe," while they pursue their

own environmentally detrimental activities. EU environmental legislation could be portrayed as overly complex, bureaucratic and impractical, and the CJEU as handing down impenetrable judgments divorced from reality. On the other hand, it could be argued that the European Union has forced or cajoled the United Kingdom into dealing with some serious environmental problems that might otherwise have gone unaddressed, that EU law remains a vital tool and source of protection for citizens affected by environmental issues and that the United Kingdom has benefited from some far-sighted legislative initiatives promoted by the European Union over the last 40 years.

What is clear is that the environment played a very minor role in the debates that preceded the referendum.<sup>1</sup> Leave campaigners did not formulate a serious attack on EU environmental law, although Member of Parliament George Eustice reportedly described EU environmental directives as "spirit-crushing"<sup>2</sup> and as "a straitjacket that stifles innovation in environmental management."<sup>3</sup> As well, Member of Parliament Boris Johnson is reported to have said that "[t]he more the EU does, the less room there is for national decision-making. Sometimes these EU rules sound simply ludicrous, like the rule that you can't recycle a teabag, or that children under eight cannot blow up balloons, or the limits on the power of vacuum cleaners."<sup>4</sup>

Regrettably, the key politicians on the Remain side failed to present the case as to the environmental benefits of EU membership. It was left to environmental groups such as Friends of the

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1 Loughborough University's Centre for Research in Communication and Culture analyzed all TV and news coverage of the referendum campaign and found the environment to be an issue that "barely registered." See Loughborough University, "Media coverage of the EU Referendum (report 1)" (23 May 2016), Centre for Research in Communication and Culture (blog), online: <<http://blog.lboro.ac.uk/crcc/eu-referendum/media-coverage-eu-referendum-report-1/>>.

2 "EU Referendum: The environmental arguments FOR and AGAINST Brexit", online: edie.net <[www.edie.net/news/11/EU-Referendum-The-environmental-arguments-FOR-and-AGAINST-Brexit/](http://www.edie.net/news/11/EU-Referendum-The-environmental-arguments-FOR-and-AGAINST-Brexit/)>.

3 Fiona Harvey, "MPs warn vote to leave EU would threaten UK environmental policy", *The Guardian* (19 April 2016), online: <[www.theguardian.com/environment/2016/apr/19/vote-leave-eu-threaten-uk-environmental-policy-common-select-committee](http://www.theguardian.com/environment/2016/apr/19/vote-leave-eu-threaten-uk-environmental-policy-common-select-committee)>.

4 Boris Johnson, "Boris Johnson exclusive: There is only one way to get the change we want – vote to leave the EU", *The Telegraph* (16 March 2016), online: <[www.telegraph.co.uk/opinion/2016/03/16/boris-johnson-exclusive-there-is-only-one-way-to-get-the-change/](http://www.telegraph.co.uk/opinion/2016/03/16/boris-johnson-exclusive-there-is-only-one-way-to-get-the-change/)>.

Earth,<sup>5</sup> the World Wide Fund for Nature (WWF)<sup>6</sup> and the Green Alliance<sup>7</sup> to make that case, which they did strongly. The narrow majority in favour of the Leave outcome has set the United Kingdom on a course that represents an unprecedented experiment in environmental law. What will be the outcome of releasing the UK government — or, more accurately, the governments of England, Northern Ireland, Scotland and Wales (environment being largely a devolved issue) — from the controlling influence of EU law, after a period of 40 years during which EU law has decisively shaped UK policy and law on the environment?

This paper will, first, consider the impact of EU law on UK environmental law and policy. It will then look at the possible implications of the United Kingdom's exit from the European Union, and what this means for the environment. It will also consider the question of future relations between the United Kingdom, the European Union and the wider international community, in terms of any limits on the United Kingdom's autonomy to set its own environmental standards. It should be clear at the outset that this paper is not intended as a detailed treatise on environmental law: much of the content will be quite familiar to environmental lawyers. Rather, it is intended to allow a reader with no particular knowledge of UK or EU environmental law to gain an understanding of the broad legal issues. There is still relatively little published in mainstream journals on the issue of Brexit and environmental law,<sup>8</sup> and it is therefore necessary, and indeed useful, to refer to other sources. In particular, there is a growing body of material from parliamentary committees, and the UK Environmental Law Association (UKELA) is a very helpful resource, with a series of discussion papers on relevant topics.<sup>9</sup>

It was a trite observation from the early days following the referendum that “Brexit means

Brexit.” However, what was not clear at the time of the referendum — and indeed not until much later — was that Brexit also means leaving membership in the European Atomic Energy Community (Euratom), a separate legal entity, which, however, shares institutional features with the European Union. The implications of cessation of membership in Euratom were simply never explained or discussed, and arguably are still far from fully understood. The paper will conclude with a discussion on this issue.

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## The Impact of EU Environmental Law in the United Kingdom

To fully understand the impact of EU environmental law in the United Kingdom, it is necessary to go back in time to the 1970s. The United Kingdom confirmed its membership in the common market in the 1975 referendum, but the role and implications of European Community law were far from understood. As a law student at Cambridge in 1977, the author evinced interest in taking the short optional course that had recently become available on EC law, but was discouraged by being told that it was “all to do with regulating the size of beetroots.” That was somewhat ironic, given the amount of time spent during the author's professional career as an environmental lawyer in advising on and arguing about EU law. However, the advice was understandable because, in the 1970s, EC environmental law was in its infancy, and, at times, it was a pretty sickly and unpromising infancy at that. As the Institute for European Environmental Policy (IEEP) has pointed out, the European Community had, for many years, no environmental policy at all, and it was only in 1973 that the European Community issued its first environmental action program and began to formulate the first environmental directives. The Community lacked a clear and unequivocal treaty

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5 Charlotte Burns, “The EU Referendum and the Environment” (July 2015), online: Friends of the Earth <<https://cdn.foe.co.uk/sites/default/files/downloads/eu-referendum-environment-81600.pdf>>.

6 WWF, “EU Referendum: Think Environment”, online: <<http://assets.wwf.org.uk/custom/stories/euthinkenvironment/>>.

7 Green Alliance, “The environmental case for staying in the EU”, online: Inside Track <[www.green-alliance.org.uk/resources/Inside\\_Track\\_36.pdf](http://www.green-alliance.org.uk/resources/Inside_Track_36.pdf)>.

8 For an exception, see Robert G Lee, “Always Keep a Hold of Nurse: British Environmental Law and Exit from the EU” (2017) 29:1 J Envtl L 155.

9 UKELA, “UKELA's Work on Brexit”, online: <[www.ukela.org/brexitactivity](http://www.ukela.org/brexitactivity)>.

base for such legislation, leading to criticism from states such as Germany and the United Kingdom.<sup>10</sup>

Since then, EU environmental law has burgeoned and has had a profound influence on UK law. A useful short summary of the development of EU environmental law and its impact is provided by the House of Lords European Union Committee in its February 2017 report, “Brexit: environment and climate change.”<sup>11</sup> In evidence to that committee, the Department for Environment, Food and Rural Affairs indicated that more than 1,100 “core pieces of directly applicable EU legislation and national implementing legislation” had been identified as relating to policy areas falling within the remit of the department. That left aside legislation in areas such as energy falling within the ownership of other departments. It is hard, if not impossible,<sup>12</sup> to find examples of UK environmental legislation that do not have some EU connection.

It is obviously impossible within the constraints of this paper to examine every aspect of environmental law that has been affected by the development of EU law over the period in question. Rather, the paper proposes to deal with a number of selected areas to illustrate the point that the influence has been substantial and widespread. The paper will focus on a limited number of areas that have been selected to provide an overall perspective on the different areas of EU law that have shaped the law on environmental protection in the United Kingdom, and that will provide the context for the discussion that follows on the implications of the United Kingdom’s exit from the European Union. The paper will

provide, first, a quick overview of each of these areas, followed by a more detailed discussion.

#### → **Environmental Impact Assessment**

Environmental impact assessment (EIA) legislation is an example of overarching legislation that cuts across many areas of environmental protection and provides a framework to ensure that the environmental effects of projects are understood, that the public and relevant regulatory authorities have an opportunity to comment on those effects and that the resulting environmental information is taken into account in deciding whether to permit the project, and what mitigating measures are required.

#### → **Ambient Environmental Standards**

The European Union has, over the years, enacted important minimum standards to protect the environment and the public. Examples include drinking water quality, the quality of water suitable for freshwater fish and shellfish, the quality of bathing waters, and air quality in respect of pollutants such as nitrogen dioxide and particulate matter. This paper will focus on the areas of bathing water quality and urban air quality for more detailed examination.

#### → **Emissions Standards**

Much of the legislation of the European Union is concerned with standards for emissions, whether from stationary installations, equipment or vehicles. In the case of equipment and vehicles, such standards obviously have important implications for trade and the free movement of goods. In the case of fixed plants, in some areas, the existence of such standards has produced significant shifts in UK practice, requiring massive investment or the closure of certain types of installation. The paper will focus on two examples: the urban waste water treatment directive (waste water directive),<sup>13</sup> which has led to huge improvements in the treatment of waste water, and what is now the industrial emissions directive,<sup>14</sup> which

10 See AM Farmer, *Manual of European Environmental Policy: Environment in the Treaties* (London, UK: Routledge, 2012), online: <[https://ieep.eu/uploads/articles/attachments/74389e41-868c-4906-9bdc-3f04add0bf0/1.5\\_Environment\\_in\\_the\\_treaties\\_-\\_final.pdf?v=63664509873](https://ieep.eu/uploads/articles/attachments/74389e41-868c-4906-9bdc-3f04add0bf0/1.5_Environment_in_the_treaties_-_final.pdf?v=63664509873)>.

11 UK, HL, European Union Committee, *Brexit: environment and climate change* (HL Paper 109) (London, UK: House of Lords, 2017) [HL Paper 109].

12 The prime example is probably the legislation dealing with contaminated land, in part IIA of the *Environmental Protection Act 1990* (UK), c 43, on which there is no specific EU law. However, even there the EU directive on environmental liability has some bearing in that its ambit includes damage to soil, at least where this presents a risk to human health. EC, *Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage*, [2004] OJ, L 143/56. See Ugo Salanitro, “Directive 2004/35/EC on Environmental Liability” (Catania, Italy: European Union Action to Fight Environmental Crime, 2015), online: <[www.ecologic.eu/sites/files/news/2015/efface\\_directive\\_2004\\_35\\_ec\\_on\\_environmental\\_liability.pdf](http://www.ecologic.eu/sites/files/news/2015/efface_directive_2004_35_ec_on_environmental_liability.pdf)>.

13 UK, Department for Environment, Food and Rural Affairs, *Waste Water Treatment in the UK – 2012: Implementation of the EU Urban Waste Water Treatment Directive* (London, UK: 2012) [Waste Water Directive], online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69592/pb13811-waste-water-2012.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69592/pb13811-waste-water-2012.pdf)>.

14 EC, *Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)*, [2010] OJ, L 334/17 [Industrial Emissions Directive].

has led to the virtual cessation of electricity generation by coal-fired power stations.

→ **Waste**

Waste management was an early focus of EU environmental law, with the waste framework directive,<sup>15</sup> followed by directives dealing with specific types of waste management, such as landfill and incineration, seeking to raise standards. A further development has been what is now called “the circular economy,” encouraging waste minimization, reuse, recycling and resource recovery.<sup>16</sup> All of these have played an important part in shaping UK law and practice. Particularly striking examples are the landfill directive<sup>17</sup> and directives imposing producer responsibility for waste materials such as packaging, electrical and electronic equipment, and batteries.

→ **Protection of Wildlife and its Habitats**

The approach of the European Union is to regard its wildlife and important areas of natural habitat as a common resource to be strictly protected from disturbance, damage and deterioration. The habitats directive<sup>18</sup> imposes stringent obligations and restrictions on activities, including projects, that may adversely affect such areas. As such, it has proven controversial throughout Europe,<sup>19</sup> the United Kingdom being no exception.

→ **Renewable Energy**

EU energy policy and law is, of course, a vast and complex area in its own right and well beyond the modest scope of this paper. However, it needs to be observed

that legislation regarding renewable energy has had some impact on law in the United Kingdom, although the majority of the United Kingdom’s energy policy and regulation remains determined at the domestic level.<sup>20</sup>

## EIA

In assessing the impact of EU law on the United Kingdom, it is perhaps apt to start with the subject of EIA. This is so for a number of reasons. EIA has been one of the cornerstones of EU law<sup>21</sup> on the protection of the environment since the 1980s, and it encapsulates much of the EU philosophy and many of the principles on the environment, such as the principle of prevention. It has undoubtedly generated more case law in the UK courts than any other piece of EU environmental legislation, and continues to do so. It is probably the most potent legal weapon available to citizens concerned about the environmental implications of new projects, and its progeny, strategic environmental assessment, is becoming a worthy successor in that regard, when applied at the earlier stage of plans and program.<sup>22</sup> EIA is much more powerful than the Aarhus convention<sup>23</sup> on public participation, for the simple reason that it creates rights and duties that are directly enforceable in the UK courts in a way that the Aarhus convention does not.

In the 1980s, when the European Commission was contemplating the introduction of EIA legislation, the United States was the world leader in the field. The United Kingdom had no legislation on EIA, and such rare and sporadic EIA as took place was done as a matter of practice. Despite this, the United Kingdom resisted the proposals on the baseless assertion that it would add little to UK practice, but the government did not wish to add procedural or legislative burdens to hard-pressed

15 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.

16 EC, “Closing the loop – An EU action plan for the Circular Economy”, COM(2015) 614 final, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0614>>.

17 EC, *Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste*, [1999] OJ, L 182/1 [Landfill Directive].

18 EC, *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].

19 See e.g. Mw M van Keulen, *The Habitats Directive: A Case of Contested Europeanization* (The Hague: WRR Scientific Council for Government Policy, 2007), online: <[www.oopen.org/download?type=document&docid=439862](http://www.oopen.org/download?type=document&docid=439862)>, referring to the perception in the Netherlands by some stakeholders of the directive as “undesired EU involvement into matters considered primarily a national or local competence” and its contribution to the “ridiculation” of the European Union and its policies.

20 Gareth Baker & Gus Wood, “State of the Nation: The UK Renewables Sector” (2016) 6 *Intl Energy L Rev* 235.

21 Described as such by WR Sheate, “Amending the EC Directive on Environmental Impact Assessment” (1995) 4:3 *Eur Energy & Envtl L Rev* 77, online: <[www.kluwerlawonline.com/abstract.php?area=Journals&id=EELR1995018](http://www.kluwerlawonline.com/abstract.php?area=Journals&id=EELR1995018)>.

22 Gregory Jones & Eloise Scotford, eds, *The Strategic Environmental Assessment Directive: A Plan for Success?* (London, UK: Hart Publishing, 2017). See especially the discussion by Elizabeth Fisher in chapter 8 on strategic environmental assessment as “hot” law in terms of its structure and implications.

23 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 28 June 1998, 2161 UNTS 447, 38 ILM 517 (entered into force 30 October 2001) [Aarhus Convention].



local authorities.<sup>24</sup> This was entirely wrong: while EIA applies only to a relatively small proportion of development projects, where it does apply, it has imposed a rigour in procedure on both promoters of development and authorities determining applications for development that would otherwise have been lacking. Indeed, it is strongly arguable that the process has become somewhat “gold-plated” and over-inflated in the United Kingdom, with environmental statements in some cases running to many thousands of pages.<sup>25</sup> Also, the law in the United Kingdom has become ludicrously complex. This is due to two factors. First, the EIA directive<sup>26</sup> has been back-fitted into pre-existing legislation, so that numerous consenting regimes each have their own set of regulations. Second, as a result of constitutional reform and devolution, England, Northern Ireland, Scotland and Wales each have their own separate EIA legislation, now with subtle — and in some cases substantial — divergences. The process of development of EIA law continues and, at the time of writing, the United Kingdom is in the course of transposing a further amendment of the directive, which will have significant implications for how EIA is undertaken.

Another important point is that the EIA regime has become one of the best illustrations in the environmental sphere of how the UK courts have embraced EU law as an integral part of the process of interpreting and applying the UK law that transposes it. A seminal early case was the decision of the House of Lords in *R v North Yorkshire County Council, ex p Brown*,<sup>27</sup> a case in which the relevant domestic law had failed to transpose adequately the requirements of the EIA directive to the procedures for updating the conditions attached to old mining permissions. The court had to determine whether the relevant UK procedures should be categorized as a “development consent” in the language of the directive and, hence, subject

to EIA procedures. Lord Hoffmann, with whom the other members of the House of Lords agreed, emphasized that development consent was a concept of European law, and that to ascertain its meaning, it was necessary to “examine the language and in particular the purpose of the Directive.”<sup>28</sup> Such examination involved consideration of, and deferral to, the seminal decisions of the CJEU, and EIA is almost certainly the leading area in environmental law in which CJEU decisions have influenced the UK courts.<sup>29</sup>

This raises the important general question of the continued status of current and future CJEU case law within the UK court system. Another facet of the EIA regime is the impact of EU law on the approach of the UK courts to remedies. EIA law is essentially procedural in nature — that is to say, it mandates a procedure, but not a specific outcome. Despite this, it has become a fertile basis for challenges — not always meritorious and not always successful — to decisions of local or central governments to grant planning permission for environmentally controversial schemes, such as wind farms and waste facilities. In some cases, the courts have reacted against this by stressing that litigants should not adopt an unduly legalistic approach to the requirements of the directive and domestic regulations, which should be interpreted in a “common sense way.”<sup>30</sup>

The House of Lords established in *Berkeley v Secretary of State for the Environment*<sup>31</sup> that the normal discretion of the courts as to the granting or withholding of remedies in public law cases is severely curtailed by the obligation of the courts to provide cooperation in ensuring the fulfilment of the purposes of EU law. Subsequent decisions of the courts have in some cases queried this and have suggested a less absolutist and more characteristically UK pragmatic approach.<sup>32</sup> Once the Leave process is complete, and the courts are no longer bound by that ongoing obligation, it will be interesting to see how the important area of remedies develops, as discussed below.

24 Stephen Tromans, *Environmental Impact Assessment*, 2nd ed (London, UK: Bloomsbury Professional, 2012) at paras 2.19–2.20.

25 Institute of Environmental Management and Assessment, “Environmental Statements – unfriendly giants” (2012), online: <<http://transform.iema.net/article/environmental-statements-%E2%80%93-unfriendly-giants>>.

26 The original directive was EC, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, [1985] OJ, L 175/40 (no longer in force). This has been replaced by EC, Council Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, [2014] OJ, L 124 at 1–18.

27 *R v North Yorkshire County Council, ex p Brown*, [2000] 1 AC 397.

28 *Ibid* at 401D.

29 Paul Stookes, “Environmental Judicial Review”, online: <[www.publiclawproject.org.uk/data/resources/151/Stookes\\_P\\_Env\\_JR\\_14\\_10\\_13.pdf](http://www.publiclawproject.org.uk/data/resources/151/Stookes_P_Env_JR_14_10_13.pdf)>.

30 See e.g. *R (Blewett) v Derbyshire County Council*, [2003] EWHC 2775 (Admin).

31 *Berkeley v Secretary of State for the Environment*, [2001] 2 AC 603 at 608.

32 See e.g. *Walton v Scottish Ministers*, [2013] PTSR 51.

## Ambient Environmental Standards

It is not an unfair observation that before the United Kingdom's accession to the European Commission, the state of the United Kingdom's environment left much to be desired. During the 1970s and 1980s, the Royal Commission on Environmental Pollution, in a series of hard-hitting reports, was critical of the degraded and polluted condition of much of Britain's seas, coastline, waterways and air.<sup>33</sup> Serious water pollution had occurred from both industrial and domestic sewage; industrial and other emissions badly affected the air quality both of the United Kingdom and parts of the European continent. The quality of regulation, and indeed of public transparency as to the state of the environment and the polluting inputs to it, was poor. As one commentator put it, the closeness of the relationship between regulators and industry in many cases led to a "voluntaristic" approach: "policies were...implemented but targets were pitifully low, or where targets were breached legal action was rare."<sup>34</sup>

Beaches used for bathing and recreation were an example of such problems. Sewage was discharged, essentially untreated, through short sea outfalls or, in some cases, directly across the beach in the case of storm overflow sewers. The results were both aesthetically disgusting and hazardous to public health, as photographs shown in the Royal Commission's report demonstrate.<sup>35</sup> Numerous popular British beaches spectacularly failed to meet EC standards for maximum fecal coliforms in bathing water. The United Kingdom took an obstinately resistant approach to these requirements, to the extraordinary extent of seeking to argue before the CJEU that the archetypical pleasure resort of Blackpool need not be regarded as bathing waters.<sup>36</sup> However, the United Kingdom has gradually made efforts to come into compliance through enhanced sewage treatment and the

provision of long sea outfalls, and its beaches and their users have benefited correspondingly.<sup>37</sup>

Air quality is another intractable area, and one where the United Kingdom remains in breach of what EU law requires (in fairness, so do many other member states).<sup>38</sup> Well before its membership in the European Union, the United Kingdom had taken steps to improve the most egregious impacts of coal burning in its cities, through the clean air acts,<sup>39</sup> prompted by the notorious London smog, such as in 1952. However, other problems — most notably the effects of emissions from vehicles in cities — have come to dominate the air quality agenda. Progress in compliance with EU legislation on ambient air quality has undoubtedly been made, but many urban areas remain in breach of requirements on nitrogen dioxide, a pollutant whose serious health impacts are gradually being understood. A series of cases brought against the UK government by the environmental non-governmental organization (NGO) ClientEarth have illustrated the inadequacy and unlawfulness of the government's plans to bring the situation into compliance.<sup>40</sup> Without that impetus, the government seems unlikely to display the requisite degree of urgency, no doubt because measures to restrict, or charge for, car use in cities would be unpopular with parts of the electorate, and, indeed, at the time of writing, further proceedings by ClientEarth are being threatened. In addition, an important and unresolved question is how far such non-compliance could affect approval of major infrastructure projects that impact air quality: the key current example is expansion at Heathrow Airport, where an application for expansion will almost certainly be met by an air quality challenge.<sup>41</sup> In fact, a fresh consultation has been opened regarding the draft national policy

33 See, in particular, UK, Royal Commission on Environmental Pollution, *Tackling Pollution – Experience and Prospects*, Cmnd 9149 (London, UK: Her Majesty's Stationery Office, 1984), which drew together much of its previous 12 years' work.

34 Burns, *supra* note 5.

35 UK, Royal Commission on Environmental Pollution, *supra* note 33 at 133 ("Pellet of fat and faecal matter washed up on a Merseyside Beach").

36 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, C-56/90, [1993] ECR I-04109.

37 To the extent that Blackpool was, in 2016, awarded a Blue Flag in recognition of its bathing water quality. See the report and photographs at Greenpeace UK, "Shifting sands: How EU membership helped transform Blackpool beach", online: Medium <<https://medium.com/@GreenpeaceUK/shifting-sands-how-eu-membership-helped-transform-blackpool-beach-fa718f84d9d1>>.

38 For a discussion of litigation in Germany raising issues very similar to those in the United Kingdom on compliance with limit values, see C Douhaire & R Klinger, "The breach of limit values under the Ambient Air Quality Directive: what is 'as short as possible'" (2016) 2 *Env'tl Liability* 52.

39 *Clean Air Act, 1956* (UK), 4 & 5 Eliz II, c 52; *Clean Air Act 1968* (UK), c 62.

40 See e.g. *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs*, [2015] UKSC 28 [ClientEarth 2015]; *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs*, (No 2) [2016] EWHC 2740.

41 See e.g. the work of the Aviation Environment Federation, "Air Pollution", online: <[www.aef.org.uk/issues/air-pollution/](http://www.aef.org.uk/issues/air-pollution/)>.



statement on airports, in light of new evidence on air quality and noise at Heathrow.<sup>42</sup> The updated work on air quality now suggests that while an expansion at Gatwick Airport by a second runway would present a low risk of impacting compliance with EU limit values, the proposed new runway at Heathrow presents a risk of delaying compliance.<sup>43</sup>

## Emissions Standards

A significant body of EU law is concerned with the regulation of emissions from industrial and other installations, originally through directives dealing with specific issues such as large combustion plants and waste incinerators, and, subsequently, through the directive on integrated pollution prevention and control (IPPC directive),<sup>44</sup> now consolidated in the industrial emissions directive.<sup>45</sup> These operate in part by imposing quantitative limits on emissions of specified pollutants, such as sulphur dioxide or dioxins, and by requiring the application of best available techniques (whether by using particular abatement equipment or by modifying processes) to prevent or minimize pollution. Interestingly, this is an area where the United Kingdom led the way and where the European Union enthusiastically adopted the United Kingdom's approach.

During the 1980s, there was increasing awareness in the United Kingdom of the need to take an integrated approach to the control of pollution: a major industrial facility might be controlled by different regulators in respect of its emissions of gaseous waste to air, liquid effluent to water and solid waste to land. Decisions made in isolation on any of these could lead to adverse unintended consequences for other environmental media. Hence, the Royal Commission promoted the creation of an integrated system of pollution

control,<sup>46</sup> which ultimately became embodied in part I of the Environmental Protection Act 1990.<sup>47</sup> The European Commission largely lifted the concept into the IPPC directive in 1996. However, the Commission has taken it to a new level with the creation of a sophisticated bureaucracy in which a European bureau based in Seville produces what are known as best available techniques reference documents (BREFs) for the various regulated industry sectors. It is relevant to consider, as this paper will below, the implications of the United Kingdom no longer being involved in the Seville process of BREFs.

The practical implications of this body of law have been significant for many sectors of UK industry, but have nowhere been more profound than for the power generation sector. At the time of privatization of the Central Electricity Generating Board in 1989, huge coal-fired power stations (largely located in the major coal mining areas of the North Midlands and Yorkshire) formed the backbone of the United Kingdom's power generation capacity. The increasingly stringent requirements of EU law on emissions have meant that decisions have been taken to close these installations, engendering a long-term shift from coal to other sources of fuel, or to renewables.<sup>48</sup> The first working day since the Industrial Revolution when coal-fired generation made a nil contribution to the national energy sources occurred in 2017,<sup>49</sup> a situation that would have been unthinkable in 1989.

Another area where EU law has had a major impact on utilities is that of the waste water directive.<sup>50</sup>

42 Mattha Busby, "Heathrow third runway consultation reopened after new evidence", *The Guardian* (25 October 2017), online: <[www.theguardian.com/environment/2017/oct/25/heathrow-third-runway-consultation-reopened-following-new-evidence](http://www.theguardian.com/environment/2017/oct/25/heathrow-third-runway-consultation-reopened-following-new-evidence)>. See the consultation paper at UK, Department for Transport, "Open consultation: Heathrow expansion: revised draft Airports National Policy Statement", online: <[www.gov.uk/government/consultations/heathrow-expansion-revised-draft-airports-national-policy-statement](http://www.gov.uk/government/consultations/heathrow-expansion-revised-draft-airports-national-policy-statement)>.

43 UK, Department for Transport, "2017 Plan Update to Air Quality Re-Analysis", online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/653775/2017-plan-update-to-air-quality-re-analysis.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/653775/2017-plan-update-to-air-quality-re-analysis.pdf)>.

44 EC, Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version), [2008] OJ, L 24/8 (no longer in force).

45 Industrial Emissions Directive, *supra* note 14.

46 UK, Royal Commission on Environmental Pollution, "Air Pollution Control: An Integrated Approach", Cmnd 6371 (London, UK: Her Majesty's Stationery Office, 1976).

47 *Environmental Protection Act 1990* (UK), c 43. See Stephen Tromans, *The Environmental Protection Act 1990: Text and Commentary* (London, UK: Sweet & Maxwell, 1990).

48 See the consultation paper, UK, Department for Business, Energy and Industrial Strategy, "Coal Generation in Great Britain: the pathway to a low-carbon future" (November 2016), online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/577080/With\\_SIG\\_Unabated\\_coal\\_closure\\_consultation\\_FINAL\\_v6.1\\_.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577080/With_SIG_Unabated_coal_closure_consultation_FINAL_v6.1_.pdf)>. See also the summary of responses to the consultation, UK, Department for Business, Energy and Industrial Strategy, "Coal Generation in Great Britain: Summary of responses to consultation" (October 2017), online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/650476/unabated-coal-consultation-summary-of-responses.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/650476/unabated-coal-consultation-summary-of-responses.pdf)>.

49 Georgia Brown, "British power generation achieves first ever coal-free day", *The Guardian* (22 April 2017), online: <[www.theguardian.com/environment/2017/apr/21/britain-set-for-first-coal-free-day-since-the-industrial-revolution](http://www.theguardian.com/environment/2017/apr/21/britain-set-for-first-coal-free-day-since-the-industrial-revolution)>.

50 Waste Water Directive, *supra* note 13.

In cities such as London, dependence has been placed on the well-engineered, but increasingly inadequate, network of sewers, pumping stations, treatment works and other infrastructure built by the Victorians. The waste water directive has required massive investment in more sophisticated forms of treatment and in increased capacity for sewers to contain their contents during episodes of heavy rain without discharging diluted raw sewage to rivers such as the Thames. The most striking example of improvement brought about by these requirements is the massive Thames Tideway project to intercept sewage outflows into the river, one of the largest and costliest engineering projects of the century so far.<sup>51</sup>

## Waste

The United Kingdom's waste management practices have been heavily influenced by EU legislation. The United Kingdom had its own system for licensing the deposit of waste on land under the Control of Pollution Act 1974,<sup>52</sup> but licensing did little to raise standards significantly, as shown by the substantial number of closed landfills from that period and previously, which have presented serious problems in terms of generating hazardous landfill gas and polluting groundwater.<sup>53</sup> The European Union began by producing a framework directive on waste<sup>54</sup> (framework directive), addressing its disposal and recovery. The approach of the framework directive and the CJEU to defining waste by reference to the somewhat meaningless concept of "discard" has been a source of bemusement for UK judges and lawyers,<sup>55</sup> but it has meant that a wider approach to regulating materials has been taken than would have been the case without EU legislation.

It is probably in the field of the landfill of waste that EU law has had the greatest practical impact on UK waste management. Landfill was the United Kingdom's favoured method for disposal

of both municipal and commercial waste for several reasons: the United Kingdom's geology in many areas was conducive to such disposal; mining and quarrying left many suitable voids to be filled; and it was a very cheap method of disposal. The landfill directive<sup>56</sup> not only imposed tough technical standards on landfill operators for gas control and groundwater protection, but also was an important first step in requiring the diversion of waste away from landfill into recycling and recovery — so much so that the House of Commons Select Committee on the Environment, in reporting on the proposed directive, noted a strong antipathy to landfill "seeping through the text."<sup>57</sup> EU law has reduced the quantity of waste landfilled, with local authorities under duties to achieve diversion targets. While landfill continues to play an important role for residual waste, it must be operated to strict standards, and is no longer the cheap and environmentally risky option that it once was. It seems most unlikely that such changes would have come about, to the extent they have, without the driving impetus of EU law. The House of Commons Environment, Food and Rural Affairs Committee expressed concern in its 2014 report, "Waste Management in England,"<sup>58</sup> as to a possible "stepping back" by the government from continued efforts toward a "zero waste" economy.

## Protection of Wildlife and its Habitats

The habitats directive<sup>59</sup> is one of those pieces of EU legislation that have tended to attract adverse popular comment, which is often misguided. For example, there is the "scourge of the building industry," the great crested newt, which can allegedly "halt a development in its tracks and add tens of thousands of pounds in costs."<sup>60</sup> This is perhaps not surprising, given the impact that the directive can have on preventing development

51 Tideway, "The Tunnel", online: <[www.tideway.london/the-tunnel/](http://www.tideway.london/the-tunnel/)>.

52 Control of Pollution Act 1974 (UK), c 40.

53 Stephen Tromans & Robert Turrall-Clarke, *Contaminated Land*, 2nd ed (London, UK: Sweet & Maxwell, 2007) at para 8.28. Many such landfills still provide a serious legacy problem, in particular, for water quality: see Rachel Salvidge, "Landfill: What Lurks Beneath" (2016) 500 ENDS Rep 41.

54 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.

55 See e.g. *R (OSS Group Ltd) v Environment Agency*, [2007] EWCA Civ 611 [OSS Group], online: <[www.bailii.org/ew/cases/EWCA/Civ/2007/611.html](http://www.bailii.org/ew/cases/EWCA/Civ/2007/611.html)>.

56 Landfill Directive, *supra* note 17.

57 UK, HC, Select Committee on the Environment, *The EC Draft Directive on the Landfill of Waste* (7th Report of Session 1990–1991) (London, UK: Her Majesty's Stationery Office, 1991).

58 UK, HC, Environment, Food and Rural Affairs Committee, *Waste Management in England* (4th Report of Session 2014–15) (London, UK: Her Majesty's Stationery Office, 2014), online: <<https://publications.parliament.uk/pa/cm201415/cmselect/cmenvfru/241/241.pdf>>.

59 Habitats Directive, *supra* note 18.

60 Emily Gosden, "Great crested newts will no longer block housing", *The Telegraph* (20 September 2015), online: <[www.telegraph.co.uk/news/earth/11878624/Great-crested-newts-will-no-longer-block-housing.html](http://www.telegraph.co.uk/news/earth/11878624/Great-crested-newts-will-no-longer-block-housing.html)>.

of projects that may be important locally (such as roads or housing) or even nationally (such as ports or airports). Demonstrating that the habitats directive's high test of "imperative reasons of overriding public importance"<sup>61</sup> under article 6(4) is satisfied is notoriously difficult (no doubt as the legislation intends).<sup>62</sup> Traditional activities such as peat extraction have also been made subject to review under the directive and have been curtailed.<sup>63</sup> This may seem particularly objectionable where the habitat is designated because it is rare in the EU territory as a whole, but is relatively commonplace in the United Kingdom. As discussed below, the directive may, after the United Kingdom has left the European Union, be one of the prime areas where the government will be tempted to roll back the frontiers of EU regulation. As with EIA, the EU law on the protection of habitats has in recent years proved a fertile ground for legal challenges to controversial projects, and has sometimes been the subject of judicial comment that it should not be seen as an "obstacle course" for developers.<sup>64</sup>

## Renewable Energy

EU law has consistently sought to promote the uptake of renewable energy through directives setting national targets. The United Kingdom has embraced these with relative enthusiasm, and the pace of development of wind, solar and biomass power has steadily increased. This is, however, perhaps an area where it can be said that EU law has not provided the sole impetus and that, even in the absence of EU law, the UK government would have acted to promote renewable energy for reasons of wider international obligations on climate change and for reasons of energy security. Nevertheless, while UK and EU objectives on energy

policy are generally closely aligned, it is possible to find a number of areas of actual or potential tension in which EU law might be regarded as a constraint on the United Kingdom's freedom of action and on how the United Kingdom chooses to achieve its objectives, even when these are generally in line with the objectives of the European Union.<sup>65</sup>

## Summary

Pausing here after what has necessarily been a brief and selective summary, it can be asserted with a good degree of confidence that EU environmental law has had a major influence in the United Kingdom. Ludwig Krämer has listed its achievements as having made standards for environmental protection enforceable, having led to the creation of environmental structures in member states, having conferred a degree of oversight on implementation and application of the law to the European Commission and, finally, having achieved the gradual transmission of information to EU citizens, with concomitant rights.<sup>66</sup> EU environmental law is not perfect, and has had its failures too, but overall it has benefited the environment in the United Kingdom and, consequently, UK citizens. In some respects, EU environmental law has had lasting effects that will not easily be expunged — for example, the infrastructure of waste and waste water management facilities. But, in other areas, continued vigilance and commitment are required if environmental standards are to be improved or, at least, not to slip. This is the subject of the next section of this paper.

# The Environmental Implications of the United Kingdom's Exit from the European Union

This section focuses on the difference Brexit is likely to make on environmental protection

<sup>61</sup> *Habitats Directive*, *supra* note 18, art 6(4).

<sup>62</sup> See UK, Department for Environment, Food and Rural Affairs, "Habitats and Wild Birds Directives: guidance on the application of article 6(4)" (December 2012), online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69622/pb13840-habitats-wild-birds-directives-guidance-20121211.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69622/pb13840-habitats-wild-birds-directives-guidance-20121211.pdf)>.

<sup>63</sup> See the proceedings by the Commission against Ireland in respect of ongoing peat cutting in raised bog special areas of conservation, described by the National Trust for Ireland as a "political and environmental time bomb." National Trust for Ireland, Press Release, "EU Legal Action on Peat bogs a 'Political and environmental time bomb'" (16 June 2011), online: <[www.antisec.org/articles/eu-legal-action-peat-bogs-political-and-environmental-time-bomb](http://www.antisec.org/articles/eu-legal-action-peat-bogs-political-and-environmental-time-bomb)>.

<sup>64</sup> *Hart District Council v Secretary of State for Communities & Local Government*, [2008] EWHC 1204 (Admin). See also Gregory Jones, ed, *The Habitats Directive: A Developer's Obstacle Course* (London, UK: Hart Publishing, 2012).

<sup>65</sup> Adam Brown, "Energy Brexit — Initial Thoughts" (2016) 5 *Intl Envtl L Rev* 209.

<sup>66</sup> L Krämer, "EU environmental law and policy over the last 25 years — good or bad for the UK?" (2013) 25 *Envtl L & Mgmt* 48.

in the United Kingdom. There are three basic interconnected issues that provide a suitable framework. These are the substantive law, interpretation of that law by the courts and the accountability of government for adequate implementation. Together these are the central issues — there must be adequate law, the courts must interpret it in a way that is sympathetic to the underlying objectives of environmental protection and there must be adequate means to hold the government and decision makers to account.

## Substantive Law

It appears to be settled (insofar as anything can be regarded as settled within the current UK political framework) that EU legislation in force at the date of leaving will continue to have effect until such time as it is amended or repealed through UK legislative processes. This is the current effect of clauses 2 and 3 of the European Union (Withdrawal) Bill,<sup>67</sup> clause 2, dealing with EU-derived domestic legislation, and clause 3, dealing with incorporation of direct EU legislation. The principle of supremacy of EU law will, according to clause 4, continue to apply in respect of EU legislation as it applies immediately before “exit day,” but will not apply in respect of UK legislation enacted after exit day, which will therefore be able to trump EU law. Exit day, itself, is proposed as a moveable feast, being defined in the bill as such a day as ministers may appoint in regulations. This, of course, may be important if — as seems possible, but by no means certain — the negotiations result in the establishment of a transitional period.

In terms of environmental law, the EU law is in the form of directives, although there are limited exceptions such as regulations on transfrontier shipment of waste. This is in line with the general approach to approximation of environmental laws in which member states have discretion as to how they reflect their EU obligations in national law, subject to compliance with the general principles of EU law.<sup>68</sup> The United Kingdom’s approach to the transposition of environmental directives has moved away from the original technique of putting the EU law into British legislative drafting style and language, into an approach under which

the relevant EU directive requirements are either copied out or are incorporated by reference, so that the reader can only make sense of the UK law by reading it side by side with the directive. This is not a very user-friendly approach<sup>69</sup> and is one that will appear increasingly untenable as the relevant directive, itself, is amended after the exit day.<sup>70</sup>

Amendment of EU-derived law may be necessary at exit in order to make it work: some provisions will simply not work legally or will not make sense because they are predicated on continued membership in the European Union. An example is section 8 of the Climate Change Act 2008,<sup>71</sup> which requires the Secretary of State to set carbon budgets with a view to (among other things) complying with the European obligations of the United Kingdom; another example is the power of the Secretary of State under section 122 of the Environment Act 1995<sup>72</sup> to give varied directions to the national environmental enforcement agencies for the purpose of implementing obligations of the United Kingdom under the EU treaties. Accordingly, the bill provides a power at clause 7 to make regulations to deal with “deficiencies” that arise from withdrawal. This is a controversial proposed power, since it is of a “Henry VIII” nature, allowing ministers to amend primary legislation. The ability of ministers to make such amendments is an inevitability, given the vast amount of primary and secondary legislation that will need to be subject to detailed and often technical amendment to accommodate the Brexit process. However, such powers can be abused, and they raise general constitutional issues. It will be interesting to see how the provisions may be amended during the Parliamentary process

<sup>67</sup> Bill 5, *European Union (Withdrawal) Bill* [HL], 2017–2019 sess (1st reading 13 July 2017) [Withdrawal Bill].

<sup>68</sup> See EC, *Guide to the Approximation of European Union Environmental Legislation*, online: Europa <<http://ec.europa.eu/environment/archives/guide/part1.htm>>.

<sup>69</sup> A research project in 2011 found significant examples of UK environmental legislation that were problematic in lacking coherence, integration and/or transparency: see UKELA & King’s College, London, *The State of UK Environmental Legislation in 2011: an interim report by the UK Environmental Law Association and King’s College London* (2011), online: <[www.ukela.org/content/page/2957/Aim%205%20Interim%20report.pdf](http://www.ukela.org/content/page/2957/Aim%205%20Interim%20report.pdf)>.

<sup>70</sup> A prime example of such “referential drafting” is *The Environmental Permitting (England and Wales) Regulations 2016*, SI 2016/1154. See Peter Kellett, “Better regulation, deregulation and environmental law” (2015) 27:5 *Env’t Law & Mgmt* 200.

<sup>71</sup> *Climate Change Act 2008* (UK), c 27.

<sup>72</sup> *Environment Act 1995* (UK), c 25.



to provide safeguards against misuse.<sup>73</sup> The UKELA has produced a useful paper, “Brexit and Environmental Law: Brexit, Henry VIII Clauses and Environmental Law,”<sup>74</sup> that identifies provisions that may be necessary or advisable to amend.

For other areas of law, the problems may be less easy to resolve, for example, where there is a European mechanism that underpins the law, such as an agency, institution or interactive process. Good examples are the regulation on registration, evaluation and approval of chemicals (REACH)<sup>75</sup> and the Seville process mentioned above, by which industrial environmental emissions standards are clarified and given substance. REACH has been the subject of a parliamentary enquiry and a report by the Commons Environmental Audit Committee, “The Future of Chemicals Regulation after the EU Referendum.”<sup>76</sup>

The committee’s stated key findings were that the EU REACH framework would be difficult to transpose into UK law directly, that certainty was essential and that establishing a United Kingdom stand-alone system would be very expensive for the taxpayer and for industry. The UKELA left the committee in no doubt that the legal process of retaining REACH would not be simple: “The Environmental Law Association told us that, because of the way that REACH operates and the terminology used in the Regulation, writing the REACH regulations into UK law could not sensibly be done simply by having a line in the ‘Great Repeal Bill’ (or one of its resulting statutory instruments) deeming REACH to apply in the United Kingdom. REACH was written from the perspective of participants being within the European Union, with much of it also relating to Member State co-operation and mutual obligations, oversight and controls, and freedom

of movement of products.”<sup>77</sup> It is therefore a prime example of a regulatory system that is dependent on continued interaction with EU institutions.

This is an area of great concern not only for the UK chemicals industry, but also for other industries using chemicals downstream.<sup>78</sup> The outcome will depend on where negotiations end up between the United Kingdom and the European Union on access to the Single Market, but the stakes are high, and the scope for serious cost and disruption is significant. The practical issues are well set out in an excellent short article<sup>79</sup> written by experienced lawyers even before the results of the exit referendum were known. The article considered the various options open to the United Kingdom regarding continued participation in the REACH scheme and the disastrous implications of getting it wrong. As the authors put it: “Weighing the pros and cons of a possible exit from REACH, it would seem that the REACH implementation process is already far advanced and will continue at least in the near future, including in the UK. Any foreseeable benefit from the lessening of regulatory burden in the ‘out-of-REACH’ option would appear to be offset by the disadvantages of moving into a regulatory environment in the UK that would be partly compatible, and partly incompatible, with the EU single market.”<sup>80</sup>

Finally, there is the issue of whether the United Kingdom will diverge over time from the EU standards applicable at exit and forge its own path in the areas discussed above, or others. The policy paper “Legislating for the UK’s Withdrawal” indicated that over time, environmental legislation could become “outcome driven” and would deliver on the current Conservative party commitment to “becoming the first generation to leave the environment in a better state than we found it”<sup>81</sup> (whatever these concepts might mean). Change might take either the form of setting additional

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73 One concern is that there will be a lack of transparency if changes are made by a series of negative statutory instruments, and that it may be difficult to assess properly what is being retained, what is being lost and how this may affect the shape of environmental protection: see Isabella Kaminski, “Government ‘must offer’ green Brexit guarantees” (2017) 508 ENDS Rep 26.

74 UKELA, “Brexit and Environmental Law: Brexit, Henry VIII Clauses and Environmental Law” (September 2017), online: <[www.ukela.org/content/doclib/319.pdf](http://www.ukela.org/content/doclib/319.pdf)>.

75 EC, *Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)*, [2006] OJ, L 396/1.

76 UK, Parliament, *The Future of Chemicals Regulation after the EU Referendum* (27 April 2017), online: <<https://publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/912/91203.htm>>.

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77 *Ibid.*

78 See e.g. the concerns of the furniture industry: Furniture Industry Research Association, “UK REACH alignment after Brexit” (18 April 2017), online: <[www.fira.co.uk/news/article/uk-reach-alignment-after-brexit](http://www.fira.co.uk/news/article/uk-reach-alignment-after-brexit)>.

79 Riku Rinta-Jouppi & Keven Harlow, “Will Brexit mean avoiding the burden of REACH?” (May 2016), online: Chemical Watch <[www.reachlaw.fi/wp-content/uploads/2016/06/Brexit-Article\\_CW.pdf](http://www.reachlaw.fi/wp-content/uploads/2016/06/Brexit-Article_CW.pdf)>.

80 *Ibid.*

81 UK, Department for Exiting the European Union, “Legislating for the United Kingdom’s Withdrawal from the European Union” (May 2017), online: <[www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union](http://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union)>.

or more stringent requirements, or lowering standards, or dispensing with some areas entirely. The wholesale reform of environmental law post-Brexit would be a massive task, and therefore any reforms seem likely to occur piecemeal.

The extent to which the United Kingdom is free to depart from EU norms will obviously depend on whether the United Kingdom accepts continuing commitments to EU standards as part of any trade agreement with the European Union. It seems unlikely that the European Union would be content to accord such rights, while leaving the United Kingdom the ability to give its industry a competitive advantage by lowering domestic standards. Further, the process of setting standards is itself not without cost, at least if done properly and in a fully participative manner: the default position may be to adopt a policy to keep pace with EU standards, although it is not necessarily attractive to have to abide by standards that the United Kingdom has no means of influencing or contributing to.

Are there any areas of EU environmental law that may be soft targets for domestic repeal or amendment after Brexit? Those already mentioned as being perceived as burdensome or irritating for the government are the areas of air quality and habitats. Given the economic cost and political unpopularity of achieving full compliance in accordance with EU law with ambient air quality in UK cities, it might not be surprising if a future government is tempted to row back on these obligations. Such action would itself be immensely controversial and would almost certainly lead to even further litigation on the topic. This raises the question of accountability, which is discussed below.

Another area is habitats, which could be portrayed as presenting an undue burden on industry and development.<sup>82</sup> *The Telegraph*, in an article in March 2017, called for a “bonfire of EU red tape”<sup>83</sup> to “free the country from the

shackles of Brussels”<sup>84</sup> and cited the habitats directive as an example: “Builders have been frustrated by rules on preserving newts, which are classed as ‘endangered’ in Europe even though they are thriving in the UK.”<sup>85</sup> Such extreme populist sentiment could, of course, gain force in the event of a highly acrimonious and failed negotiation leading to a hard Brexit. However, again, an attempt to reduce the current level of protection would be highly controversial and hard fought. Indeed, various NGOs are already gearing up for the battle.<sup>86</sup>

## Interpretation by the Courts

As discussed above, the UK courts have become accustomed to the citation and application of EU law in the environmental field: if not entirely second nature, it is not controversial. This extends to reading UK legislation against the background of EU law and its purposes as an important aid to interpretation, applying EU law directly where necessary under the principle of supremacy, and using the case law of the CJEU while sometimes criticizing the perceived lack of clarity and rigour in the court’s reasoning, for example, in cases on the meaning of waste<sup>87</sup> and on the interpretation of concepts in the directive on strategic environmental assessment.<sup>88</sup> Also, the UK courts currently have the ability to refer questions to the European court: they have not always been keen to take this opportunity, but there have been some notable examples where this has been done and where the European court’s

82 See the helpful paper of the UKELA Nature Conservation Working Party, “Brexit and nature conservation fact sheet” (5 September 2017), which effectively debunks these “myths”, online: <[www.ukela.org/content/doclib/318.pdf](http://www.ukela.org/content/doclib/318.pdf)>.

83 Gordon Rayner & Christopher Hope, “Cut the EU red tape choking Britain after Brexit to set the country free from the shackles of Brussels”, *The Telegraph* (28 March 2017), online: <[www.telegraph.co.uk/news/2017/03/27/cut-eu-red-tape-choking-britain-brexit-set-country-free-shackles/](http://www.telegraph.co.uk/news/2017/03/27/cut-eu-red-tape-choking-britain-brexit-set-country-free-shackles/)>.

84 *Ibid.*

85 *Ibid.*

86 ClientEarth, “What happens to EU nature laws after Brexit?” (10 November 2016), online: <[www.clientearth.org/what-happens-to-eu-nature-laws-after-brexit/](http://www.clientearth.org/what-happens-to-eu-nature-laws-after-brexit/)>; Royal Society for the Protection of Birds, “The EU Nature Directives are safe – so what next for protection of UK wildlife?” (8 December 2016), online: <[www.rspb.org.uk/community/ourwork/b/martinharper/archive/2016/12/08/the-nature-directives-are-here-to-stay-so-what-next-for-protection-of-uk-wildlife.aspx](http://www.rspb.org.uk/community/ourwork/b/martinharper/archive/2016/12/08/the-nature-directives-are-here-to-stay-so-what-next-for-protection-of-uk-wildlife.aspx)>; Caroline Lucas, “Exiting the EU, Not the Environment” (2017), online: <[www.carolinelucas.com/sites/carolinelucas.com/files/Safe%20Guarding%20Environment%20after%20Brexit.pdf](http://www.carolinelucas.com/sites/carolinelucas.com/files/Safe%20Guarding%20Environment%20after%20Brexit.pdf)>.

87 *OSS Group*, *supra* note 56.

88 *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*, [2014] UKSC 3. For the strategic environmental assessment directive, see EC, Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, [2001] OJ, L 197/30.



ruling has had a dramatic and decisive effect.<sup>89</sup> As the exit bill is currently drafted, the defined exit day will mark an important watershed. Under clause 6,<sup>90</sup> previous EU case law will remain decisive, but later case law will only be taken into account if the court considers it appropriate to do so. The Supreme Court will have the power to depart from previous EU case law on the same basis that it may depart from its own decisions. Further, after exit day, there will no longer be the ability to refer questions to the CJEU.

It would be foolish and presumptuous to try to second guess how the courts will approach the formidable task of interpretation after exit. To take the example of EIA, the United Kingdom will, unless and until it chooses to change things, remain bound by the EIA directive, frozen in time as at the exit date. However, the CJEU will no doubt continue to generate relevant case law on the interpretation of the directive, which may well have a bearing on questions arising before UK courts. It seems unlikely that UK courts will simply choose to ignore that case law, and, unless they do so, they will have to develop principles as to the weight and deference they give to it.

One further problem arises from the fact that while EU law is underpinned by principles that may aid interpretation — the polluter pays, the precautionary principle and the principle of prevention — UK law is not. Such aims and objectives as are found in UK legislation, such as, for example, in respect of the Environment Agency in the Environment Act 1995 — are not really principles, but rather are akin to “operating instructions” for the agency.<sup>91</sup> This matters because principles have an important role to play in filling the interstices or plugging the gaps in law, which may be developing quickly or need to be applied to a changing factual context. In particular, the application of the precautionary principle — which is rarely explicitly formulated in UK legislation, but

is a basic tenet of EU law and policy<sup>92</sup> — may come under attack, either from those who argue that the principle results in over regulation, or because it might conflict with trading relations with states that do not apply it, notably the United States.<sup>93</sup>

## Accountability

In his book on the enforcement of EU environmental law, Martin Hedemann-Robinson points out that transposing and then implementing EU environmental law has been at times “a difficult legal and political pill to swallow,” leading to a “low key and minimalist” approach.<sup>94</sup> He suggests that the approach to enforcement is undergoing a stage of transition, moving from a position in which the European Commission has a dominant role to one in which the Commission is also influenced by member state competent authorities and the public.<sup>95</sup> That trend has continued since the publication of Hedemann-Robinson’s book in 2007. Currently, EU law imposes both political and legal accountability on the UK government. In many areas, systematic reporting to the European Commission on implementation is required. This will cease after Brexit (pending any arrangements made as part of trade agreements), and it will be important that the transparency and accountability provided by such reporting is not lost. Arrangements for reporting to Parliament and national devolved assemblies may have to be considered. Further, there will be a loss of the enforcement powers currently available to the European Commission and the important associated procedure in which citizens may make a complaint, informally and free of charge, to the Commission. This is a very valuable citizen’s right.<sup>96</sup>

As the UKELA pointed out in its July 2017 paper, “Brexit and Environmental Law: Enforcement

89 See *ClientEarth* 2015, *supra* note 40, where the CJEU took a completely different view from that of the Court of Appeal as to the United Kingdom’s obligations, leading in turn to further litigation, which shows no sign of abating.

90 *Withdrawal Bill*, *supra* note 67, s 6.

91 Jonathan Robinson, “Improving Environmental Law” (2009) 21:2 *Env’tl L & Mgmt* 120 at 122.

92 The precautionary principle is referred to in article 191(2) of the Treaty on the Functioning of the European Union (ex article 174 of the European Treaty) as one of the bases for European Union policy on the environment. It seeks to provide a proportionate and structured basis for addressing risks to human health and the environment in the face of scientific uncertainty. See further, Communication from the Commission on the precautionary principle, COM/2000/0001 final, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A132042>>.

93 “Precautionary Principle defended against Brexit cut” (2016) 502 *ENDS Report* at 16.

94 Martin Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (London, UK: Routledge, 2007) at 3–4.

95 *Ibid* at 5.

96 Its value to the citizen was noted by the Court of Appeal in *R (England) v Tower Hamlets London Borough Council*, [2006] *EWCA Civ* 1742 at para 10.

and Political Accountability Issues,”<sup>97</sup> the majority of infringement proceedings against the United Kingdom have been brought in the environmental field, and for good reason: the environment lacks the commercial imperatives for enforcement and supervision found in relation to intellectual property, employment rights or competition law, and is dependent upon the intervention of concerned citizens if it is not to be at risk of “dying in silence.”<sup>98</sup> Another significant paper by the IEEP and ClientEarth pointed out the worrying gap that will be created and calls both for new institutions in the United Kingdom that could replicate the role of the Commission and also for appropriate dispute resolution mechanisms in any future agreement between the United Kingdom and European Union, which would allow for the active participation of citizens and NGOs in monitoring compliance.<sup>99</sup> Whether a UK government would have any appetite for such mechanisms must be open to a degree of skepticism.

The government’s position is that citizens will remain able to vindicate such rights by way of judicial review in the national courts: this is, however, an utterly unrealistic view in light of the formality and cost of the judicial review process, which is plainly not a substitute for the EU complaints procedure. As the UKELA observes, the loss of the European Commission’s role as guardian of the treaty presents an opportunity to innovate and improve on domestic mechanisms for ensuring proper discharge of duties placed on government and public bodies.<sup>100</sup> The UKELA cites examples of environmental ombudsmen in jurisdictions such as Austria, Hungary, Kenya and Greece.<sup>101</sup> It is feared, however, that such reforms may be a low priority for a government preoccupied with the financial and economic implications of, and fallout from, the Brexit process. The House of Lords European

Communities Committee has expressed worry about the removal of EU enforcement mechanisms and the complacency of the government view that the government will be able to effectively regulate itself: the committee stated that evidence it had heard strongly suggested that an effective and independent domestic enforcement mechanism would be necessary to fill the vacuum.<sup>102</sup> It appears that the current Secretary of State for the Environment, MP Michael Gove, now shares that view, according to very recent press reports.<sup>103</sup> However, whether this ambition will translate into real government action remains to be seen.

## International Obligations

A number of important and problematic issues arise here. These are essentially, first, the implications and relevance of existing commitments by the United Kingdom under international law, and, second, the possible implications of any ongoing trade arrangements between the United Kingdom and the European Union.

The first is an extremely complicated area, which is dissected in some detail by the UKELA paper, “Brexit and Environmental Law: The UK and International Environmental Law after Brexit.”<sup>104</sup> Government policy — not surprisingly — is that, on withdrawal, the United Kingdom will continue to be bound by its existing international environmental obligations. These apply in important areas such as climate change, marine pollution, the transfrontier movement of waste, biodiversity and many others. Distinctions will need to be made between international agreements entered into by the European Union alone (which the United Kingdom will need to sign and/or ratify), mixed agreements entered into by both the United Kingdom and the European Union

97 UKELA, “Brexit and Environmental Law: Enforcement and Political Accountability Issues” (July 2017) [UKELA, “Brexit, Enforcement”], online: <[www.ukela.org/content/doclib/317.pdf](http://www.ukela.org/content/doclib/317.pdf)>.

98 Sandra Laville, “Lawyers plan to stop UK dropping EU rules on environment after Brexit”, *The Guardian* (3 July 2017), online: <[www.theguardian.com/environment/2017/jul/03/lawyers-plan-to-stop-uk-dropping-eu-rules-on-environment-after-brexit-taskforce-protections-law](http://www.theguardian.com/environment/2017/jul/03/lawyers-plan-to-stop-uk-dropping-eu-rules-on-environment-after-brexit-taskforce-protections-law)>.

99 Martin Nesbitt et al, *Ensuring compliance with environmental obligations through a future UK–EU relationship* (London, UK: IEEP, 2017), online: <<https://ieep.eu/uploads/articles/attachments/b6cdf2e-3292-49e1-993f-cd39b3b897a4/Ensuring%20compliance%20with%20environmental%20law%20post%20-%202004%20October.pdf?v=63674328709>>.

100 UKELA, “Brexit, Enforcement”, *supra* note 97 at 3.

101 *Ibid* at 15.

102 HL Paper 109, *supra* note 11.

103 Michael Gove, “Outside the EU we will become the world-leading curator of the most precious asset of all: our planet”, *The Telegraph* (11 November 2017), online: <[www.telegraph.co.uk/news/2017/11/11/outside-eu-will-become-world-leading-curator-precious-asset/?WT.mc\\_id=tmg\\_share\\_em](http://www.telegraph.co.uk/news/2017/11/11/outside-eu-will-become-world-leading-curator-precious-asset/?WT.mc_id=tmg_share_em)>.

104 UKELA, “Brexit and Environmental Law: The UK and International Environmental Law after Brexit” (September 2017), online: <[www.ukela.org/content/doclib/320.pdf](http://www.ukela.org/content/doclib/320.pdf)>.

(where the legal position on whether the United Kingdom will remain bound in whole or in part may be obscure and will need to be clarified) and agreements entered into by the United Kingdom alone, where the position is relatively simple. This is a major exercise for government, yet to be undertaken. It is important because, after Brexit, such agreements may provide the only backstop against diminished standards of environmental protection. For example, in areas such as wildlife protection, the Ramsar convention<sup>105</sup> on wetlands may represent an ongoing obligation. Similarly, the Aarhus convention<sup>106</sup> on access to information, public participation and access to justice in environmental matters will be an important protection of the rights of citizens. The Aarhus convention currently acquires much of its force in the UK legal system through the relevant EU secondary legislation implementing it, for example, on EIA.

Another important legal issue relating to international agreements is enforcement. Compared to the position under EU law, enforcement mechanisms in international agreements are generally weak, often relying on peer pressure rather than hard sanctions. As it has been put, “the implementation of treaty obligations is hampered by the fact that the vertical command and control structure governing domestic politics within states is conspicuously absent within the international legal order,” and, in international environmental law, there is “no overarching pyramid of authority consisting of law-making, law-interpreting, law-implementing, or law-enforcing institutions.”<sup>107</sup> The continued adherence of the UK courts to the dualist doctrine means that international agreements that have not been incorporated into UK law have very little value in judicial proceedings, other than as providing interpretative presumptions and in being a factor to be taken into account in the exercise of judicial discretion. This will be a question of huge importance in the future of UK environmental law after exit from the European Union.

The possibility of ongoing trade arrangements between the United Kingdom and the European Union after Brexit is, at the time of writing, entirely speculative, and, accordingly, difficult to discuss meaningfully. It would be possible to devote enormous effort to considering scenarios that never come about, given the current chaotic nature of the negotiations. There are, of course, various possible options ranging from Single Market access or the European Economic Area model, to membership in the European Free Trade Agreement, arrangements such as between Switzerland and the European Union, or some bespoke arrangement.<sup>108</sup> Compliance with EU environmental law seems likely to figure to some extent in any of these options, as the European Union’s negotiating position is unlikely to countenance a complete exemption from requirements that apply to EU companies.

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## Brexit and Euratom

At the time of the referendum, no mention was made of the European Atomic Energy Community (Euratom) and no thought was given to the implications of a Leave decision on the United Kingdom’s membership in that community. Euratom and the European Union are linked through common institutions, but are constitutionally and juridically separate entities, and the leaving processes are also separate, notwithstanding the fact that the UK government chose to combine both notifications in a single letter to the president of the European Council. The implications of “Brexatom” have been most thoroughly considered in the UKELA paper, “Brexit and Environmental Law: Exit from the Euratom Treaty and its Environmental Implications.”<sup>109</sup> The existence of underlying international instruments on nuclear safety and on the safety of spent fuel management and radioactive waste mean that little change to UK standards and regulation is likely to result. However, in the longer term, there

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<sup>105</sup> *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, 2 February 1971, 996 UNTS 245, TIAS 11084, 11 ILM 963 (entered into force 21 December 1975).

<sup>106</sup> *Aarhus Convention*, *supra* note 23.

<sup>107</sup> Lakshman Guruswamy & Mariah Leach, *International Environmental Law in a Nutshell*, 5th ed (St Paul, MN: West Academic, 2017) at 91.

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<sup>108</sup> Some of the best current analyses are to be found in the summer 2017 journal of the Bar European Group, *European Advocate*, in particular, the articles by Michael-James Clifton, “Road Map for Brexit,” Ben Rayment, “Back from the Edge” and Evanna Fruithof, “Brexit Futures.”

<sup>109</sup> Stephen Tromans & Paul Bowden, “Brexit and Environmental Law: Exit from the Euratom Treaty and its Environmental Implications” (UK: UKELA, 2017), online: <[www.ukela.org/content/doclib/316.pdf](http://www.ukela.org/content/doclib/316.pdf)>.

may be the possibility for divergence between the United Kingdom and Euratom in terms of radiological protection standards, although, again, the existence of wider underpinning international standards reduces the possibility of this occurring. There is, however, a need for informed and timely action, in particular, in the areas of the movement of radioactive substances and in external relations on nuclear cooperation. The arrangements for the supervision and control of shipments of radioactive waste and spent fuel, now covered by Directive 2006/117/Euratom,<sup>110</sup> will need to be given careful thought.

More urgently, a means will have to be found to avoid the interruption of shipments of radioactive sources, such as medical isotopes, currently undertaken under relatively light-touch arrangements within Euratom. Another potentially fraught area is that of international nuclear cooperation agreements that have been entered into by Euratom under article 101 of the Euratom treaty<sup>111</sup> and in respect of which replacement agreements will have to be made by the United Kingdom with the other parties, such as Brazil, Argentina, Canada and Japan. The ability to obtain vital nuclear services, material and know-how will depend on the continuity of such arrangements, and, for countries such as the United States, it will be a precondition that the United Kingdom has in place an acceptable system of safeguards, which are currently provided by Euratom. The UKELA paper's fundamental recommendation was that there was the need for a full "gap analysis"<sup>112</sup> of the United Kingdom's ability, post-withdrawal, to meet its international obligations in the nuclear safety field without interruption.

Whatever the ultimate position on the Brexit negotiations, it is clear that, in any event, the United Kingdom will need to retain a close and open future relationship with Euratom and its member states in order to be able to satisfy the wider international community and the public that the United Kingdom has the technical resources to continue to deliver nuclear safety. Such a relationship will need to apply in the

areas of nuclear safety, waste management, radiological protection and emergency preparedness. The issue will be important if the United Kingdom is to realize its ambitions for substantial investment in nuclear power.

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## Summary and Conclusions

It is now possible to try to draw some of these threads together. EU environmental law is not perfect by any means, but it has achieved much in many important respects. These include measures to ensure that the environmental impact of projects and plans are properly assessed, that the public is informed and enabled to participate, that minimum standards are observed in respect of air and water, that the environmental safety of chemicals is assessed before they can be marketed, that industry observes consistent standards to abate harmful emissions, that products are designed with their environmental implications in mind, that waste is prevented or beneficially used — or where not so used, that it is disposed of in a responsible and environmentally sound manner — and that important wildlife habitats are protected from environmentally damaging activities.

All of these measures, as described above, have fed into and become embedded in UK law over the past decades. Governmental freedom of action has been constrained accordingly. Equally, citizens and NGOs have been able to use EU law as an effective tool in respect of non-compliance, whether in the courts or in the procedure for complaints to the European Commission.

With Brexit, the United Kingdom is moving into uncharted waters, or, to use another metaphor, embarking on a long-term experiment as to how a country (or, more accurately, four devolved countries) will develop its own distinctive body of environmental law when freed from the constraints of a legal regime imposed on a multilateral basis. This has caused concern among some environmental bodies; the concern is that Brexit may amount to a threat to environmental standards. This, of course, could potentially be the case, in particular if Brexit involves a harsher economic climate for the United Kingdom and international competitiveness becomes an important issue

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<sup>110</sup> EC, Council Directive 2006/117/Euratom of 20 November 2006 on the supervision and control of shipments of radioactive waste and spent fuel, [2006] OJ, L 337/21.

<sup>111</sup> Consolidated version of the Treaty establishing the European Atomic Energy Community, [2012] OJ, C 327/1, art 101.

<sup>112</sup> Tromans & Bowden, *supra* note 109 at 8.

for future governments. However, there will also be long-term opportunities to improve environmental law and to achieve a system that benefits the UK environment, specifically. The risk is that the United Kingdom will lack the impetus provided by an energetic European Commission to continue to develop and improve environmental measures. There are precedents for the flourishing of domestic environmental law, but the last comprehensive review was in 1990 with the environment white paper of Margaret Thatcher's government,<sup>113</sup> and the Environmental Protection Act 1990, which was intended to provide the basic framework for pollution control well into the twenty-first century.<sup>114</sup>

The United Kingdom has, since then, essentially been a “taker” of EU law, which it has superimposed onto its domestic system, rather than an initiator of its own law — the Climate Change Act 2008 is one example to the contrary. The last major reform in 1990, as this paper pointed out,<sup>115</sup> was the product of many years of policy development by bodies such as the Royal Commission on Environmental Pollution, and some particularly proactive parliamentary committees such as the House of Lords Committee on Science and Technology and the House of Commons Environment Select Committee. The challenge is going to be the recreation of such bodies that have the vision and political influence to direct future law along sound lines. The fact that the environment is a devolved competence will add another important layer of difficulty, which was not present in 1990.

To imagine that Brexit will mean that the United Kingdom disengages entirely from EU environmental standards is naïve. Companies based in the United Kingdom that wish to supply their goods and products to the EU market, in many cases, will still need to comply with such standards in practice, whatever the UK law may say. A good example is the ecodesign directive,<sup>116</sup>

which provides consistent EU-wide rules for improving the environmental performance of products such as household appliances, and which sets out minimum mandatory requirements for the energy efficiency of these products. Companies selling energy-using products within the European Union must comply with the ecodesign directive's requirements and, consequently, with the standards and specifications set by the European Committee for Standardization (CEN), which are part of the EU system. For the European Union to disengage from the CEN process, which includes non-EU countries such as Norway, Switzerland and Turkey, would be plainly disadvantageous.<sup>117</sup> Similarly, as pointed out above, UK engagement is likely to be desirable in the processes of the registration of chemicals under the Seville process for setting standards relating to industrial emissions, and in areas such as nuclear safety and the movement of radioactive sources and other nuclear materials.

In cases where there is no clear business or economic imperative to continue to play by EU rules, the position is less clear. There will still be constraints presented by international environmental law, through treaties such as the Aarhus and Ramsar conventions to which the United Kingdom is a party, and possibly through any ongoing trade arrangements with the European Union or indeed other countries (although these cannot be guaranteed and, in any event, may be a long way off). Such obligations are, however, not going to be a substitute for the legally enforceable obligations arising from EU law, certainly unless there is some sort of sea change in the attitude of the UK courts.

The ability of citizens to challenge the government on environmental matters may well be affected by Brexit, with the loss of supremacy of EU law, but it seems probable that litigants will continue to attempt to rely on the future development of EU law as it emerges from the CJEU. What is much less clear is how the domestic courts will view the citation of such cases and the use of basic EU principles. This will be played out in the courts in the coming years.

These questions, and how the United Kingdom's environmental law will look a decade after it

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113 UK, Department of the Environment, “This Common Inheritance: Britain's Environmental Strategy”, Cm 1200 (London, UK: Her Majesty's Stationery Office, 1990).

114 See the comment by Secretary of State Chris Patten introducing the bill: UK, HC, *Parliamentary Debates*, vol 165, col 6 (Chris Patten).

115 Tromans, *supra* note 47.

116 EC, *Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products*, [2009] OJ, L 285/10.

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117 See Isabella Kaminski, “High Standards: A Better way to Regulate?” (2017) 509 *ENDS Rep* 21.



leaves the European Union, can only be matters for speculation. It is clear, however, that the United Kingdom is moving away from a situation that had become well understood, if not always well liked, and had, at least, to some extent provided UK businesses with certainty as to their environmental obligations, into a potentially quite new territory. It will be up to politicians, lawyers and the public to ensure that the best features of EU environmental law are not lost or eroded and that, in time, the United Kingdom develops its own environmental laws that are fit for purpose in a post-Brexit Britain.





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