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Brexit: The International Legal Implications | Paper No. 8 – December 2017

Brexit and International Environmental Law

Richard Macrory and Joe Newbigin



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CIGI Masthead

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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.

About the Authors

Richard Macrory is a barrister at Brick Court Chambers in London and emeritus professor of environmental law at University College London (UCL), where he set up and was the first director of the Centre for Law and the Environment. He established the Carbon Capture Legal Programme at UCL, and a second edition of his edited book *Carbon Capture and Storage: Emerging Legal and Regulatory Issues* will be published by Hart Publishing in early 2018.

Richard served as a board member of the Environment Agency in England and Wales between 1999 and 2004, and was a long-standing member of the Royal Commission on Environmental Pollution. He is a legal correspondent for the ENDS Report. In 2006, Richard led the Cabinet Office Review on Regulatory Sanctions, and his recommendations were reflected in part 3 of the Regulatory Enforcement and Sanctions Act 2008, which established the framework for civil sanctions in the regulatory field. More recently, he has been involved in reforming environmental statutory appeals procedures with the tribunal system. In 2016, Richard was appointed co-chair of the UK Environmental Law Association (UKELA) Brexit Task Force.

Joe Newbigin is a Brexit researcher at UKELA. He qualified as a barrister after completing pupillage at Francis Taylor Building, where he specialized in environmental and planning law. He has previously worked for Richard Buxton Environmental & Public Law, and he sits on the advisory board for Public Interest Environmental Law in the United Kingdom.

UKELA was neutral on the Brexit referendum but is committed to ensuring that whatever form of Brexit takes place, existing environmental law is not jeopardized and opportunities for enhancement are taken.

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.

Executive Summary

International environmental law is likely to assume increasing significance for the United Kingdom after Brexit. This paper considers the potential impact and importance raised by a number of key legal issues. The first section asks which international agreements will bind the United Kingdom after Brexit and what the extent of these obligations will be. Since the European Union has been party to many of these agreements, the legal position post-Brexit is not necessarily obvious. The next section considers how existing EU environmental law currently implements international environmental agreements, the implications this relationship may have for national environmental law going forward, and whether reliance on international environmental obligations will provide an equivalence in legal substance after Brexit. Finally, the question of compliance and enforcement is considered. The European Union has developed sophisticated mechanisms for the enforcement of EU obligations against member states, including those arising from international agreements, and it is questionable whether these will be replicated post-Brexit in relation to international agreements to which the United Kingdom is a party.

Introduction

The United Kingdom is party to more than 40 international environmental treaties (and more than 100 international environmental agreements when protocols and amendments, etc., are also considered).¹ These agreements cover a broad range of matters, such as climate change, transboundary movement of hazardous waste, access to environmental information and nuclear safety.² Government ministers have repeatedly said that post-Brexit, the United Kingdom intends to remain bound by its international environmental obligations. For example, in a written statement to the House of Commons in September 2017, it

was stated, "The UK will continue to be bound by international Multilateral Environmental Agreements (MEAs) to which it is party. We are committed to upholding our international obligations under these agreements and will continue to play an active role internationally following our departure from the EU."³ The current Brexit policy is to ensure as much as possible that existing EU environmental law is rolled over after the United Kingdom's withdrawal from the European Union in the interests of regulatory stability until the opportunity for revaluation is taken.⁴ The UK government's freedom to reshape national environmental law⁵ in the future will be constrained by the international environmental treaties to which the United Kingdom is a party,⁶ and in this sense, international environmental law could be seen to provide an important underpinning in terms of future national environmental obligations, rights and minimum standards.⁷

Post-Brexit international environmental law is therefore likely to assume increasing significance for the United Kingdom, but determining its potential impact and importance raises a number of issues,

³ Written statement to the House of Commons by Thérèse Coffey, Parliamentary Under Secretary of State for the Department for Environment, Food and Rural Affairs, in response to written questions from Caroline Lucas, MP, "Environment: Treaties: Written question – 9691", [asked on 8 September 2017, answered on 18 September 2017] ["Environment: Treaties"], online: <www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-09-08/9691/>; "Environment: EU External Relations: Written question – 9693", [asked on 8 September 2017, answered on 18 September 2017] ["Environment: EU External Relations"], online: <www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-09-08/9693/>; UK, House of Commons Hansard, vol 628 (5 September 2017) (during debate on the first day of the second reading of the Withdrawal Bill, Steve Baker, MP, Parliamentary Under Secretary for the Department for Exiting the European Union, stated he would "put on the record again that we [the government] will uphold all our commitments to international law in relation to the environment" c 289); UK, Department for Exiting the European Union, "The United Kingdom's exit from and new partnership with the European Union" (2 February 2017) [Brexit White Paper] ("We will of course continue to honour our international commitments and follow international law" at para 2.13), online: <www.gov.uk/government/publications/the-united-kingsdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>.

⁴ Brexit White Paper, *supra* note 3 at para 2.7.

⁵ In this context, "government" will include the devolved administrations to the extent that environmental policy is fully devolved.

⁶ Richard Macrory, "Brexit unlikely to give UK free rein over green laws" (2016) 499 ENDS Report (September 2016) at 22–23.

⁷ See evidence of Maria Lee, House of Lords Select Committee on the European Union, Energy and Environment Sub-Committee, *Brexit: environment and climate change* (London, UK: 2016) at 156 [House of Lords], online: <www.parliament.uk/business/committees/committees-a-zlords-select/eu-energy-environment-subcommittee/inquiries/parliament-2015/brexit-environment-and-climate-change/publications/>.

¹ UK Environmental Law Association (UKELA), *Brexit and Environmental Law: The UK and International Environmental Law* (London, UK: UKELA, 2017) at 5 [UKELA, *Brexit and Environmental Law*].

² *Ibid*, Annex.

which are considered in this paper. The first section addresses the question of which international agreements will bind the United Kingdom after Brexit. The UK government's statements that it will continue to honour its international environmental obligations raises the question of the extent of these obligations, since the European Union has been party to many of these agreements, and the legal position post-Brexit is not necessarily obvious. The next section considers how existing EU environmental law has implemented the international environmental agreements to which it is a party, the implications for national environmental law, and whether post-Brexit international environmental obligations will provide an equivalence in legal substance. Finally, the question of compliance and enforcement is considered. The EU has developed sophisticated mechanisms for the enforcement of EU obligations against member states, including those arising from international agreements, and it is questionable whether these will be replicated post-Brexit in relation to international agreements to which the United Kingdom is a party.

The United Kingdom's International Environmental Obligations after Brexit

Assessing the extent and nature of the UK's international environmental obligations post-Brexit is legally complex because of the distinct ways the European Union has been involved in the majority of environmental treaties to which the United Kingdom is currently bound. The European Union has legal personality⁸ and it may conclude international treaties "where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."⁹ But the exercise of these powers is critically dependent on considerations of the

legal competence the European Union possesses in the substantive area of the treaty in question.¹⁰ The provision in article 216 of the Treaty on the Functioning of the European Union (TFEU)¹¹ has been described as one that essentially codifies prior case law of the Court of Justice of the European Union (CJEU), which has played a critical role in defining and determining the extent of the Union's competence in the international field.¹² Even where no explicit external powers were provided under the treaty, the court in a series of cases, beginning in 1971 in *Commission of the European Communities v Council of the European Communities*,¹³ was prepared to imply such external treaty-making powers. More recently, the court has noted that:

[A] comprehensive and detailed analysis must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area covered by the Community rules and the provision of the agreement envisaged in so far as the latter are known, but also the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish.¹⁴

In broad terms, three types of international agreements can be identified:

- international agreements in which member states retain exclusive competence to negotiate and ratify without the involvement of the Union;

¹⁰ Geert De Baere, *Constitutional Principles of EU External Relations* (Oxford, UK: Oxford University Press, 2008) at 10.

¹¹ TFEU, *supra* note 9, art 216.

¹² Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law: Cases and Materials* (Cambridge, UK: Cambridge University Press, 2010) at 640.

¹³ *Commission of the European Communities v Council of the European Communities: European Agreement on Road Transport*, C-22/70, [1971] ECR at 263.

¹⁴ *Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention)*, 30 October 2007, OJ, L 339 at para 133 (entered into force 1 January 2010).

- international agreements that are within the Union's exclusive competence and that only the Union may ratify; and
- international agreements in which the subject matter straddles the competences of both the Union and member states, and where both the Union and member states will therefore be parties.¹⁵

These so-called mixed agreements are frequently used to ensure member state support even in areas where the EU strictly appears to have exclusive legal competence.¹⁶

When it comes to international environmental agreements, a recent study has identified 26 international environmental agreements where the European Union was not a party because it lacked competence, but which the United Kingdom had ratified.¹⁷ These include the International Whaling Convention 1946¹⁸ and the Convention on Wetlands of International Importance 1971 (the Ramsar Convention).¹⁹ The United Kingdom will continue to be bound by these agreements post-Brexit, although there may be complexities because domestic implementation of these agreements has sometimes been achieved under EU environmental legislation, and care will be needed to ensure these legal provisions are maintained under national law.

International environmental agreements falling within the exclusive competence of the European Union are less common, but form an important element of the United Kingdom's current international commitments.²⁰ Currently, the United

Kingdom is party to these agreements because article 216(2) TFEU states that international agreements entered into by the European Union alone bind the institutions of the Union and its member states. Such agreements may be implemented in the United Kingdom through a combination of directly applicable EU law and domestic law implementing EU directives.

Important subject areas include fisheries, where the United Kingdom's international obligations largely derive from agreements ratified by the European Union under exclusive competences.²¹ Consideration should also be given to individual treaties, such as the 1992 Water Convention, governing crucial transboundary cooperation in relation to the waterways and lakes spanning the boundary between Northern Ireland and the Republic of Ireland, which the United Kingdom has signed but not ratified.²² The 2013 Minamata Convention on Mercury, which recently came into force,²³ also falls into this category.

Upon leaving the European Union, the United Kingdom will no longer be bound by such treaties unless it decides to ratify them of its own accord. There are two main reasons for this. First, article 29 of the Vienna Convention sets out that a treaty is binding on a party in respect of its entire territory.²⁴ Therefore, where the European Union is the signatory to an international environmental agreement, the entire territory will most likely be interpreted as encompassing the combined territory of the European Union's member states; after Brexit, such an agreement will not encompass the territory of the United Kingdom.²⁵ Second, the inclusion of territorial application clauses in many EU external agreements restricts the agreement to territories where the EU treaties

¹⁵ See generally Piet Eekhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford, UK: Oxford University Press, 2004). For an early analysis relating to the environmental field, see Martin Hession & Richard Macrory, "The Legal Framework of European Community Participation in International Environmental Agreements" (1994) 2:1 *New Europe L Rev* at 59–136.

¹⁶ Joseph Weiler, *The Constitution of Europe* (Cambridge, UK: Cambridge University Press, 1999) at 177. See also Panos Kourakos & Christophe Hillion, eds, *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford, UK: Hart Publishing, 2010).

¹⁷ UKELA, *The UK and International Environmental Law after Brexit* (London, UK: UKELA, 2017), Annex [UKELA, The UK].

¹⁸ *International Convention for the Regulation of Whaling*, 2 December 1946, 2124 UNTS 164 (entered into force 10 November 1948).

¹⁹ *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, 2 February 1971, 14583 UNTS 996 (entered into force 21 December 1975) [Ramsar Convention].

²⁰ Twelve such agreements have been identified. See UKELA, *Brexit and Environmental Law*, *supra* note 1.

²¹ The European Union is expressly granted exclusive competence in relation to conservation of marine biological resources under the common fisheries policy under article 3(1) TFEU.

²² *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 17 March 1992, 1936 UNTS 269 (entered into force 6 October 1996) [Water Convention].

²³ *Minamata Convention on Mercury*, 10 October 2013 (entered into force 16 August 2017).

²⁴ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

²⁵ Jed Odermatt, "Brexit and International Law" (4 July 2016), *Blog of the European Journal of International Law* (blog), online: <www.ejiltalk.org/brexit-and-international-law>.

apply.²⁶ This will automatically end the United Kingdom's participation in such an agreement and preclude it from automatically becoming a party. After Brexit, the United Kingdom will no longer be bound by EU-only international environmental agreements and (to the extent that they are enforceable) the obligations and environmental protections contained within these agreements will no longer be effective in the United Kingdom.

The United Kingdom must decide which of these categories of international environmental agreements it will ratify, applying the procedure set out in section 20 of the Constitutional Reform and Governance Act 2010.²⁷ This provision requires that an agreement is laid before Parliament, alongside an explanatory memorandum, when it will be ratified if neither House resolves that it should not be ratified. The power proposed to be given to ministers by clause 8 of the Withdrawal Bill to remedy or prevent any breach of international obligations arising from Brexit does not appear (in its present form) to give the UK government power to displace or depart from the requirements of section 20.²⁸

As yet, the UK government has not clarified which of these EU-only international environmental agreements it intends to ratify post-Brexit, and its position may be affected by the nature of any relationship it establishes with the European Union in the future. Although the UK government recently said that it "will give due consideration to the ratification of MEAs in the future to which the UK is not currently party in its own right, (recognising that some risks have no relevance to the UK)," this ambiguity appears contrary to the spirit of a commitment to honouring the United Kingdom's international commitments.²⁹

The most common form of international environmental agreement is that which contains elements falling within both EU competence and member state competence. These mixed agreements, which both the United Kingdom and

the European Union have ratified, represent 45 of the 101 international environmental agreements to which the United Kingdom is a party.³⁰

What happens to these mixed agreements when the United Kingdom leaves the European Union? This question remains unresolved. A House of Commons Library briefing paper concluded that "[o]n balance, most analysts believe that both exclusive and mixed agreements will fall on exit day, and will have to be renegotiated after Brexit, or possibly in parallel with negotiations on the withdrawal agreement."³¹ Others have argued that "leaving the EU would mean that the UK ceases to be bound by the 'EU-only' elements of mixed agreements,"³² but this interpretation raises problems because, as Weiler notes, "most mixed agreements do not specify the demarcation between Community and Member States competences."³³

The authors of this paper favour the view that after withdrawing from the European Union, the United Kingdom will assume all the competences previously resting with the European Union and would be therefore bound automatically by all mixed agreements. This is also the view Thérèse Coffey held in 2016,³⁴ although her statements maintain an ambiguity as to both the extent of the United Kingdom's commitments after Brexit and the legal basis for her understanding.³⁵ The House of Lords Select Committee on the European Union, Energy and Environment Sub-Committee

30 UKELA, *The UK*, *supra* note 17.

31 Vaughne Miller, "Legislating for Brexit: EU external agreements" (2017) House of Commons Library Briefing Paper No 7850 at 3. The paper does not detail the analyses relied upon. See also Sarah Priestly & Louise Smith, "Brexit and the environment" (2017) House of Commons Library Briefing Paper No CBP8132 at 24.

32 Van der Loo & Blockmans, *supra* note 26.

33 Weiler, *supra* note 16 at 177.

34 House of Lords, *supra* note 7 (Coffey stated, "It is my understanding that as the UK is already a party in its own right it absolutely will stick to the commitments, and is obliged to, once we leave" at 198). Coffey later said in response to a written question from MP Anne Main that "[t]he UK is a Party to 35 Multilateral Environmental Agreements (MEAs) in its own right. These are mixed agreements and we are bound by the obligations they contain; this will not change on exit from the EU. We are committed to continuing to play an active role internationally and will continue to be bound by the obligations under these MEAs after leaving the EU." See "Environment: Treaties: Written question – 64664" (asked on 20 February 2017, answered on 27 February 2017), online: <www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-02-20/64664/>.

35 In response to a written question from MP Caroline Lucas, asking, "what the legal position will be of international environmental agreements ratified jointly by the EU and the UK after the UK leaves the EU," Coffey replied, "The UK will continue to be bound by international Multilateral Environmental Agreements (MEAs) to which it is party." See Environment: EU External Relations, *supra* note 3.

report on “Brexit: environment and climate change” acknowledged these “differing views within the legal community.”³⁶ The report noted the concurrence among Coffey, Richard Macrory and Maria Lee that the United Kingdom would probably continue to be bound by agreements that the United Kingdom had signed and ratified, but it did not give an opinion as to the correctness of this position.³⁷ Nevertheless, it is apparent that these are uncharted legal waters and that legal views differ.

The UK government’s statements to date contain ambiguities, and it would be welcomed if it published a more precise view of its understanding of the position and legal status of mixed agreements after Brexit, and whether it considers the United Kingdom to be automatically bound by the entirety of these mixed agreements, or would need to renegotiate with existing parties to ensure it was bound. As Macrory said very recently, in evidence before the House of Commons’ Environmental Audit Committee, “in an ideal world, one would have a joint statement from the Commission and the UK Government.”³⁸ At the same hearing, Panos Koutrakos, noting that this would be consistent with statements made by the European Council, said that in the current climate a joint statement was “not as eccentric as it might appear.”³⁹ Annalisa Savaresi concurred, suggesting such a joint statement may form the basis of a declaration issued with depositaries of mixed agreement, or be formalized in a future collateral arrangement.⁴⁰

³⁶ House of Lords Select Committee on the European Union, Energy and Environment Sub-Committee, *Brexit: environment and climate change* (London, UK: HL Paper 109, 2017) at para 48.

³⁷ *Ibid.*

³⁸ See Joe Newbiggin, “UKELA at Parliamentary Committee to Discuss Mixed Agreements” (5 December 2017), *UKELA Brexit Task Force Blog* (blog), online: <www.ukela.org/blog/Brexit-Task-Force/UKELA-at-Parliamentary-Committee-to-discuss-Mixed-Agreements> (oral evidence before the Environmental Audit Committee inquiry into UK progress on reducing fluorinated greenhouse gases [F-gas] emissions, Hansard unavailable at the time of writing).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

Maintaining the Procedure and Substance of the United Kingdom’s International Obligations

There are numerous areas of environmental law where EU legislation implementing international conventions has gone further than the actual terms of the treaty in question. Andy Jordan has noted that the European Union has not merely transposed international environmental agreements wholesale, but rather has added “hard edges” such as deadlines, timetables and defined standards.⁴¹ He gives the example of how the 1979 Bern Convention⁴² “gradually developed, evolved and transmogrified” into the nature conservation directives.⁴³

Another salient example is the comparison of key provisions between the 1971 Ramsar Convention on Wetlands⁴⁴ and the provisions of the Habitats Directive.⁴⁵ Article 4.2 of the Ramsar Convention states: “[w]here a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat.”

The Habitats Directive reflects these provisions, but elaborates on assessment and compensation procedures where a member state wishes to interfere with a protected site for reasons of

⁴¹ House of Lords, *supra* note 7 at 156.

⁴² Convention on the Conservation of European Wildlife and Natural Habitats, 19 September 1979, 1284 UNTS 209 (entered into force 1 June 1982).

⁴³ 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 [Habitats Directive]; EC, Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, [2009] OJ, L 20. The Habitats Directive was agreed some 13 years after the Bern Convention, but “takes it a step further, particularly by protecting certain types of habitats (often referred to in scientific terms as biotopes) for their own sake rather than because they harbor valued species.” See Institute of European Environmental Policy, *Manual of European Environmental Policy* (Abingdon, UK: Routledge, 2011) at 725.

⁴⁴ Ramsar Convention, *supra* note 19. The EU was not a party to the convention.

⁴⁵ Habitats Directive, *supra* note 43.

overriding public importance.⁴⁶ These are far more detailed, both in terms of substance and procedure, than the broad obligation under the convention.

The UK government intends that the existing provisions of EU law will be “rolled over” after Brexit in the interests of regulatory stability: “in order to achieve a stable and smooth transition, the Government’s overall approach is to convert the body of existing EU law into domestic law, after which Parliament (and where appropriate, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once we have left the EU.”⁴⁷ EU environmental law, such as the Habitats Directive, which has elaborated and extended international environmental treaties, will therefore continue to have legal force within the national system in the immediate future after Brexit. But when an opportunity is taken for reconsidering the substance of national law, the UK government will be faced with significant choices in respect of its international legal obligations. Taking the example of the Ramsar Convention, the United Kingdom could implement the broadly drawn obligations under article 4.2 with more elaborate procedural provisions equivalent to those in the Habitats Directive, or it could introduce a new domestic regime with different hard edges, while still remaining compliant with international environmental law.

In this context, it should be noted that the impact of the European Union is not only through the black letter of EU environmental legislation. The European Commission has published detailed guidance documents in a number of areas, such as habitat protection,⁴⁸ transfrontier shipment of waste⁴⁹ and environmental assessment,⁵⁰ designed to assist the interpretation and application of

⁴⁶ *Ibid*, article 6(4); this is domestically implemented by Habitats Regulation Assessment requirements of the *The Conservation of Habitats and Species Regulations 2010*, SI 2010/490.

⁴⁷ Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union*, Cm 9446 (London, UK: Williams Lea Group, 2017) at 1.12.

⁴⁸ European Commission, *Interpretation Manual of European Habitats – EUR 28* (Brussels, Belgium: 2013).

⁴⁹ See European Commission, “Waste shipments: Correspondents’ Guidelines and other guidance documents”, online: <<http://ec.europa.eu/environment/waste/shipments/guidance.htm>>.

⁵⁰ More than 15 guidance documents on environmental assessment have been published by the Commission. See European Commission, “Environmental Impact Assessment”, online: <<http://ec.europa.eu/environment/eia/eia-support.htm>>.

the legislation in question by member states. In respect of international environmental law, the United Kingdom will be reliant on guidance produced by secretariats or their equivalents to international conventions where, compared to the European Commission, practice as to the depth of guidance varies considerably.⁵¹

In the early days of EU environmental legislation, many countries (including Germany and the United Kingdom) transposed their EU obligations under environmental directives into their national system by means of government circular or similar administrative methods.⁵² The terms of directives appear to give this option in that they typically require member states to bring into force “the laws, regulations and administrative provisions” necessary to comply with the obligations under the directive in question. But in a series of well-known cases in the 1980s and 1990s, the CJEU held that that transposition must be in the form of binding legislative or regulatory provision “in order to secure full implementation of directives in law and not only in fact.”⁵³ The underlying argument of the CJEU was that individuals and businesses needed legal certainty as to their rights and obligations under EU law.

When it comes to the domestic implementation of international conventions, no equivalent jurisprudence has been developed at the international level. Only where EU legislation has implemented an international environmental convention will the requirements for transposition into national law come into play. After Brexit, the UK government will have a free hand and could revert to far more informal means of implementing

⁵¹ For instance, the Council of Europe guidance on the Bern Convention on the Conservation of European Wildlife and Natural Habitats is far less detailed than the European Commission guidance on the Habitats Directive: <www.coe.int/en/web/bern-convention/monitoring>. In contrast, in respect of the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, the United Nations Economic Commission for Europe (UNECE) has published fairly detailed guidance documents, agreed by the parties, on its implementation. See e.g. UNECE, *Good Practice Recommendations on Public Participation in Strategic Environmental Assessment* (Geneva, Switzerland: United Nations, 2016).

⁵² Ken Collins & David Earshaw, “The Implementation and Enforcement of European Community Environmental Legislation” in David Judge, ed, *A Green Dimension for the European Community: Political Issues and Processes* (Abingdon, UK: Routledge, 1993) at 219–220; EC, *Eighth annual report to the European Parliament on Commission monitoring of the application of Community law*, [1990] OJ, 388, at 210, 215.

⁵³ *Commission v Germany*, (1991) C-131/88, ECR I-825 at para 8. See also Ludwig Krämer, *EU Environmental Law*, 8th ed (London, UK: Sweet & Maxwell, 2015) at 12.03–12.07.

international obligations, such as circulars or policy statements. Examples can already be found in respect of conventions the United Kingdom has ratified without the participation of the European Union, where international obligations are currently implemented by administrative means rather than as legislative obligations. For instance, in respect of the Ramsar Convention, which was not ratified by the European Union, paragraph 118 of the National Planning Policy Framework⁵⁴ states that protection for wetland sites designated or proposed under the convention “should be given the same protection as European sites.” These non-legislative means of implementation can easily be changed without Parliamentary scrutiny, and if they become more common practice post-Brexit, could seriously weaken the effective implementation of international obligations within the domestic context.

An example of the sorts of legal uncertainties and difficulties that may arise can be found in a recent planning inspectorate appeal decision concerning a water abstraction licence, which potentially affected a site that was protected under both the Ramsar Convention and the Habitats Directive.⁵⁵ In respect to the Ramsar Convention, the inspector noted that the National Planning Policy Guidance applied only to planning decisions, and that previous guidance applying Ramsar protection to non-planning decisions had been withdrawn. The change was probably unintentional, and resulted from a policy of simplifying and reducing the amount of government planning guidance. The inspector concluded, “It has been Government’s policy for many years that Ramsar sites should be afforded the [same] amount of protection as European sites and it seems to me there is nothing to indicate that the Government intends to change the position in relation to Ramsar sites affected by non-planning decisions. Nevertheless, there remains some uncertainty about the issue.”⁵⁶

In that case, the Habitats Directive and implementing regulations also applied and provided the necessary legal protection for the

site in question. But it demonstrates the potential legal difficulties that can arise where reliance on solely administrative means of implementing legal obligations are employed. The UK government’s post-Brexit policy on the domestic transposition of international environmental conventions has yet to be elaborated. EU requirements on transposition methods will no longer apply, but in the interests of legal clarity and certainty, legal rather than administrative means should be encouraged.

Emerging Issues with Enforcement Mechanisms

The enforcement mechanisms of the European Commission are a distinctive feature of the European legal landscape. Under article 17(1) of the Treaty on European Union, the Commission has a duty to ensure that EU law is applied, and possesses powers under article 258 TFEU to bring infringement proceedings against member states for failure to comply with their obligations under EU law. Infringement proceedings can relate both to the failure to faithfully transpose EU directives into national law, but also to the failure to apply EU law in practice. Infringement proceedings can eventually lead to action by the Commission before the CJEU, although, in practice, the majority are resolved without the need to do so. The CJEU has the power to impose financial penalties on member states that fail to comply with its judgments.⁵⁷

These enforcement powers have applied to all sectors of EU law, but the environment field has consistently remained one of the areas in which the Commission has been especially active.⁵⁸ In relation

⁵⁴ Department for Communities and Local Government, *National Planning Policy Framework* (London, UK: Department for Communities and Local Government, 2012).

⁵⁵ Planning Inspectorate Appeal Decision, [2016] APP/WAT/15/316, online: <<http://1exagu1grkmq3k572418odooym-wpengine.netdna-ssl.com/wp-content/uploads/2016/09/GFQC-DM-DG-Inspectors-decision-Catfield.pdf>>.

⁵⁶ *Ibid* at para 131.

⁵⁷ Since the Maastricht Treaty, the CJEU has had the power to impose a financial penalty on a member state that does not comply with its judgments, a power that was promoted by the British government at the time. For a more general exploration of this theme, see the report published by the UKELA, *Brexit and Environmental Law: Enforcement and Political Accountability Issues* (London, UK: UKELA, 2017) [UKELA, “Enforcement”].

⁵⁸ At the end of 2016, there were 269 infringement cases open in the environment field, one less than the highest sector covering the internal market, entrepreneurship, and small and medium-sized enterprises. See EC, *Monitoring the application of European Union law: 2016 Annual Report*, (Brussels, Belgium: EC, 2017). See also Martin Hedemann-Robinson, *Enforcement of European Union Environmental Law* (Abingdon, UK: Routledge, 2007) part I; Pal Wenneras, *The Enforcement of EC Environmental Law* (Oxford, UK: Oxford University Press, 2007) ch 6.

to international environmental agreements, the Commission's practice is generally not to monitor the transposition and application by member states of international conventions that the European Union has ratified, whether on an exclusive or mixed-agreement basis. Only where an EU regulation or directive has implemented an international convention will the Commission use its enforcement powers against a member state in breach of its obligations to implement the EU law in question.

The view of the CJEU, however, is rather more expansive. It has held that mixed agreements concluded by the European Community, member states and non-member countries have the same status in the Community legal order as exclusive agreements concluded by the Community, so far as the provisions fall within Community competence,⁵⁹ and that as a result, member states have a duty to ensure compliance with those provisions.⁶⁰ In *Commission v France*,⁶¹ the CJEU held that it followed from this case law that the Commission was entitled to bring infringement proceedings against a member state for failure to implement elements of a mixed agreement, the 1976 Convention for the Protection of the Mediterranean Sea Against Pollution,⁶² even though there was as yet no Community legislation implementing those specific parts of the Convention:

Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments. The fact that discharges of fresh water and alluvia into the marine environment, which are at issue in the present action, have not yet been the subject of Community legislation is not capable of calling that finding into question.⁶³

59 *Demirel v Stadt Schwäbisch Gmünd*, [1987] C-12/86, ECR 3719 at para 9.

60 *Commission v Ireland*, [2002] C-13/00, ECR I-2943 at para 14.

61 *Commission v France*, [2004] C-239/03, ECR I-9325.

62 *Convention for the Protection of the Mediterranean Sea Against Pollution*, 16 February 1976, 1102 UNTS NI-16908 (entered into force 12 February 1978).

63 *Ibid* at paras 29, 30. Krämer has argued that it follows that the Commission's general practice of not monitoring the implementation of international agreements in the absence of Community legislation is contrary to its general enforcement duties. See Krämer, *supra* note 53 at 13.21.

This potential avenue for the supranational enforcement of international environmental conventions by the Commission will disappear after the United Kingdom withdraws from the European Union and any transition period expires. Modern international environmental agreements often contain fairly developed procedures for monitoring and reviewing non-implementation by parties, but ultimately, these supervision bodies generally rely upon the cooperation and acceptance of their findings by the parties involved.⁶⁴ While the CJEU possesses a general power to impose financial penalties on member states for non-compliance with its judgments,⁶⁵ there is little equivalent in relation to international environmental conventions. A small number do allow for penalties in the form of the suspension of rights (the Montreal Protocol⁶⁶ and the Convention on International Trade in Endangered Species of Wild Fauna and Flora [CITES]⁶⁷ allow for trade restriction measures and suspension of specific rights and privileges, respectively), but this sort of provision is the exception.⁶⁸

64 See e.g. the Aarhus Compliance Committee established under the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice. The recent decision of the European Commission and Council to reject in whole or in part the Compliance Committee's findings in case ACCC/C/2008/32 that the European Union was in breach of Aarhus will be a significant test of the effectiveness of the compliance machinery. See *Draft Council Decision on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/32*, [2017] 11150/17, online: <data.consilium.europa.eu/doc/document/ST-11150-2017-INIT/en/pdf>; *Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32*, [2017] 10791/17, online: <data.consilium.europa.eu/doc/document/ST-10791-2017-INIT/en/pdf>.

65 TFEU, *supra* note 9, art 260. In respect of EU environmental law, substantial penalties have been imposed on member states in about a dozen cases since 2000. See Krämer, *supra* note 53 at 12.29–12.30.

66 *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 UNTS 3, 26 ILM 1550 (entered into force 1 January 1989) [Montreal Protocol].

67 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 27 UST 1087 (entered into force 1 July 1975) [CITES].

68 CITES does not include specific enforcement provisions, sanctions or penalties. However, article XIII and guidelines adopted by the Conference of the Parties provide for escalation up to and including trade bans. Article 8 of the Montreal Protocol similarly provides for the development of a non-compliance procedure by the Meeting of the Parties. The procedure developed is based on a non-confrontational, conciliatory and cooperative mechanism designed to encourage and assist parties to achieve compliance. See Legal Response Initiative, "Sanctions and penalties in environmental treaties", (19 July 2010), online: <<http://legalresponseinitiative.org/legaladvice/sanctions-and-penalties-in-environmental-treaties>>.

The 1993 North American Agreement on Environmental Cooperation provides a distinctive model.⁶⁹ The agreement contains obligations on the countries (Canada, Mexico and the United States) to effectively enforce their environmental laws and established a Commission for Environmental Cooperation that can hear citizen complaints.⁷⁰ It also provides for the establishment of an independent “arbitral panel” to investigate persistent patterns of failure to enforce national environmental law,⁷¹ and can impose financial penalties of up to \$20 million where the matter has not been satisfactorily resolved.⁷² No such penalties have yet been imposed, and because of the political sensitivities involved, the provisions may be more symbolic than a reality.⁷³ It is doubtful whether the United Kingdom will press for similar external enforcement mechanisms in international environmental conventions generally.

These mechanisms concern the enforcement of international law by external bodies, and will continue post-Brexit in relation to those conventions that the United Kingdom has ratified. As to the national machinery for ensuring compliance, the Environment Agency and other national and local regulatory bodies continue their enforcement activities against private parties and industry, but the real question concerns the duties of government and other public bodies. This has been the focus of the enforcement activity concerns of the European Commission. The UK government has stated that judicial review is a sufficient mechanism to hold government and other public

bodies to legal account,⁷⁴ but let alone the question of costs and the availability of non-governmental organizations and individuals to bring cases, it is doubtful whether judicial review by itself can replicate the supervisory enforcement role of the European Commission. It may be a valuable long-stop, but the procedures are ill-suited to resolving issues in the way that the Commission has been able to do without bringing formal infringement proceedings. Other jurisdictions have recognized the peculiar vulnerability of the environment by establishing an environmental ombudsman to monitor public bodies or, in the case of New Zealand, a Commissioner for the Environment to review the implementation of environmental law and policy by central and local government, and report to Parliament.⁷⁵ Brexit provides an opportunity to consider the establishment of some similar independent body,⁷⁶ and the remit of such a body could include the international environmental obligations of the United Kingdom and whether there are failings in compliance.⁷⁷

Within the national court system, the dualist approach to international law is likely to continue. Provisions of international agreements that have

⁶⁹ *North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 32 ILM 1480 (entered into force 1 January 1994) [North American Agreement on Environmental Cooperation]; this is a parallel environmental agreement to the North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS 1994 No 2, 32 ILM 289, 605 (entered into force 1 January 1994).

⁷⁰ *North American Agreement on Environmental Cooperation*, *supra* note 69, arts 5–6.

⁷¹ *Ibid.*, art 24.

⁷² *Ibid.*, art 34, Annex 34. Note also that there is an unusual provision in Annex 36A, which allows the Commission to bring a panel determination and penalty before the Canadian courts as an enforceable order by the national courts. Although this has never been used to date, it is an interesting feature to consider for the future.

⁷³ See e.g. Joseph A McKinney, *Created from NAFTA: The Structure, Function, and Significance of the Treaty's Related Institutions* (Armonk, NY: ME Sharpe, 2000) at 223.

⁷⁴ Letter from Thérèse Coffey, MP, Parliamentary Under Secretary of State, Department for Environment, Food and Rural Affairs, to Lord Teverson, EU Energy and Environment Sub-Committee (16 April 2017) at 4, online: <www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-environment-climate-change/Gov-response-Brexit-env-climate.pdf>. In her letter, Coffey states, “The UK has always had a strong legal framework for environmental protection, and will continue to have a system of judicial review by UK judges after EU Exit. The judicial review mechanism enables any interested party to challenge the decisions of the Government of the day by taking action through the domestic courts.”

⁷⁵ UKELA, “Enforcement”, *supra* note 57 at paras 20–23.

⁷⁶ See e.g. Robert G Lee, “Always Keep a Hold of Nurse: British Environmental Law and Exit from the European Union” (2017) 29:1 J Envtl L at 155–164; Maria Lee, “Brexit: environmental accountability and EU governance” (17 October 2016), OUPblog (blog), online, <<https://blog.oup.com/2016/10/brexit-environment-eu-governance/>>. This option appears to be gaining traction. See Environmental Audit Committee, *Oral Evidence: The Government’s Environmental Policy*, HC 544, (1 November 2017), online: <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/the-governments-environmental-policy/oral/72503.html>>. Michael Gove, MP, Secretary of State, Department for Environment, Food and Rural Affairs, stated, “It is right we should take some time to reflect on what other countries provide for the appropriate level of protection to the environment and what the right balance is between ensuring people continue to have recourse to the courts through judicial review, continuing to ensure that bodies like this Select Committee can play a role, but also recognising that you may well need an agency, a body, a commission that has the power potentially to fine or otherwise hold Government to account and certainly to hold public bodies other than Government to account.”

⁷⁷ See UKELA, “Enforcement”, *supra* note 57, Appendix 1 for examples of similar functions performed by environmental courts and tribunals in other jurisdictions.

not been implemented by domestic legislation are effectively non-justiciable and cannot be given direct legal effect, as doing so would create rights and obligations that Parliament has not conferred. In *R (SG) v Secretary of State for Work and Pensions*,⁷⁸ Lord Kerr doubted whether this doctrine should continue to apply in an action against a government that had ratified a convention relating to human rights but not transposed its provisions into national law.⁷⁹ But this was a dissenting opinion not followed by the majority, and the constitutional orthodoxy of the status of international law within the national system was reaffirmed in *R (Miller) v Secretary of State for Exiting the European Union*.⁸⁰

Conclusion

Nevertheless, it is clear that international environmental law can have an influence within the domestic legal system in less direct ways, in particular in the interpretation of national legislation and the development of the common law.⁸¹ Post-Brexit, international environmental law will undoubtedly assume greater national legal and policy significance as being the only source of supranational legal obligations on the United Kingdom. But how its legal impact will be felt in the future — and the extent to which this will differ from current practice — remains to be seen.

78 *R (SG) v Secretary of State for Work and Pensions*, [2015] UKSC 16, [2015] 1 WLR 1449.

79 *Ibid* at para 255. Lord Kerr stated, “the justification for refusing to recognise the rights enshrined in an international convention relating to human rights and to which the UK has subscribed as directly enforceable in domestic law is not easy to find. Why should a convention which expresses the UK’s commitment to the protection of a particular human right for its citizens not be given effect as an enforceable right in domestic law?”

80 *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, [2017] 2 WLR 583 at paras 55–57.

81 See James Maurici, “International law in domestic practice: advice for practitioners on how international and comparative law arises in domestic case law” (2016) 28 Env'l L & Mgmt 155.

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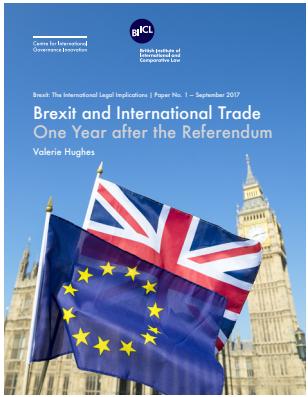
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