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## The UK and the World: Environmental Law

Ioanna Hadjiyianni

### 1. Introduction

'The important role that the EU plays in environmental law cannot be overstated'.<sup>1</sup> The EU has over the years engaged in extensive environmental policy action and developed considerable legislation addressing different kinds of environmental problems. The influence of EU environmental law is visible in the policies of both Member States and non-EU states and has often guided international developments in the field. Environmental law is thus a significant regulatory area in the debate on the exit of the UK from the EU because of the considerable influence of EU law on UK environmental policies and performance and because such influence will still largely occur even after a UK exit. This chapter examines the implications in the environmental legal field for the UK as a non-EU state – as a third country – both in relation to the EU and its Member States, and in relation to the rest of the world. It mainly focuses on environmental problems, which are either inherently transboundary, like climate change, or relate to cross-border activities, like trade.

Environmental problems are polycentric; involving different kinds of considerations and a multiplicity of actors. There are different characteristics of environmental problems that make them unique and complex to regulate. The analysis in this chapter is particularly guided by three characteristics. Firstly, many environmental problems are inherently transboundary, having effects beyond national borders and sometimes having global effects.<sup>2</sup> As such, they often require, or result in, international collective action that signifies cooperation among states and actors to address these problems as effectively as possible, particularly when a single state cannot seek to achieve environmental protection on its own.<sup>3</sup> Secondly, regulating environmental problems involves different kinds of market considerations as environmental standards often influence the functioning of markets and affect flows of trade. Thirdly, building on the previous characteristic, regulating environmental problems involves addressing

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1. Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials* 115 (Oxford U. Press 2013).

2. Günther Handl, *Transboundary Impacts*, in *The Oxford Handbook of International Environmental Law* (D. Bodansky, J. Brunnee & E. Hey, eds, Oxford U. Press 2007). Also see Fisher, Lange and Scotford *supra* n. 1, Chapter 2.

3. Ellen Hey, *Common Interests and the (Re)constitution of Public Space*, 39 *Env. Pol. & L.* 152 (2009).

competitiveness considerations. This is because imposing national environmental standards can expose national actors to competitive disadvantages in relation to international competitors that do not have to abide by similar standards. The combination of these three inter-related characteristics affects what a state can do unilaterally in addressing such problems and is particularly relevant when thinking about the UK's position in regulating environmental problems.

In relation to global environmental problems, like climate change, or inherently transboundary problems like air pollution, the need for coordinated international action is essential and widely recognised. This is even in relation to the UK, which does not have direct physical boundaries with other States, besides Ireland. However, given the shortcomings of international environmental law and the slow development of multilateral regimes, alternative forms of coordinated action have emerged at regional and bilateral levels. The EU's environmental action forms part of these efforts and represents one of the most elaborate regional attempts to address environmental problems by pooling the efforts of twenty-eight different countries to pursue environmental protection goals within their borders, and influence the environmental policies of other actors in the international arena.

Furthermore, even for those problems that are not inherently transboundary in the conventional sense, in an increasingly globalised world, the approach taken in regulating environmental issues is not necessarily limited within national boundaries but is often greatly affected by third-country policies and international trends. National environmental regulation is influenced by what other countries are doing and this influence often leads to regulatory convergence<sup>4</sup> and policy transfer,<sup>5</sup> the migration of legal norms through transnational legal processes,<sup>6</sup> or even the creation of global environmental law.<sup>7</sup> The EU's role within such processes is particularly important, as it is both an important regulator and market, which greatly affects the policies of non-EU Member States – third countries – in the environmental field. In this regard, this chapter exposes and examines a legal phenomenon, particularly

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4. Daniel W. Drezner, *Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence* 12 J. Eur. Pub. Pol. 841 (2005).

5. Alasdair R. Young, *Political Transfer and "Trading Up"? Transatlantic Trade in Genetically Modified Food and US Politics* 55 World Pol. 457 (2003).

6. Gregory Shaffer & Daniel Bodansky, *Transnationalism, Unilateralism and International Law* 1 Transnatl. Env. L. 31 (2012).

7. Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law* 36 Ecology L. Q. 615 (2009).

observed in EU environmental law, through which the EU's regulatory power extends beyond its borders, thus exhibiting an extraterritorial and potentially global reach.

These considerations inform the discussion of the implications and consequences of UK exit from the EU and explain why the UK would still be largely influenced and in some ways bound by EU environmental law following an exit. It should be noted that this chapter is not meant to give a comprehensive account of how UK environmental law would substantively change and how it would be redrafted and restructured following an exit from the EU. Rather, while recognising that there are localised environmental problems in relation to which the UK could possibly gain more regulatory control, it focuses on environmental issues with important external dimensions.

In discussing the implications of a UK exit for environmental law, the chapter adopts the following structure. It first provides a brief overview of the impact of EU environmental law on the UK, while setting out the current EU legal and regulatory framework within which environmental competences are allocated, exercised and enforced. This discussion sets the foundations for understanding the role of the UK within this regime and the implications of exit as regards the relationship between the UK and the EU. The focus then turns to the position of the UK in relation to EU environmental standards in light of significant trade elements of EU environmental regulation. In this respect, the chapter unveils the expansive regulatory clout of EU environmental law and its continuing, albeit more indirect, influence on UK regulatory choices as a third country engaged in trade with the EU following the UK's exit. With a continued focus on the EU's expansive environmental regulatory power, the following section then explores the UK's position in relation to the rest of the world if it is no longer associated with the EU's 'green leadership'. The UK's loss of leverage within Multilateral Environmental Agreements (MEAs) and its loss of regulatory influence over third-country practices and policies reveal important constraints to UK unilateral action on environmental issues.

## **2. The UK and the EU**

## 2.1 EU Environmental Law and the UK

'Because the protection of the environment may require more, rather than less, action on the EU level, it seems that on that front the United Kingdom both faces and presents a serious problem'.<sup>8</sup> This passage amply summarises the complexities of this field of EU law in relation to the delineation of competences given the need for EU action in relation to transboundary and market-related environmental problems and the resistance of the UK to give up more powers to the EU in this field. EU action has seen an important increase in environmental regulation, which substantially limits the regulatory autonomy of the UK. This section maps the current legal and regulatory landscape within which the UK's position will be portrayed. In this respect it highlights the legal complexities surrounding the choice of the appropriate level of action in environmental matters. While exit from the EU could provide flexibility and autonomy to UK environmental action, it is doubtful whether a unilateral path would always effectively address environmental protection goals.

EU environmental law is well embedded in UK environmental legislative frameworks, and even in UK environmental legal culture,<sup>9</sup> with much of UK environmental law now 'largely deriving' from EU law.<sup>10</sup> There is an overall recognition that the environment in the UK has mainly benefited from EU environmental action and the UK is no longer 'the dirty man of Europe'.<sup>11</sup> In certain areas in particular, the UK has made significant progress directly as a result of EU law, for example in relation to bathing and drinking water quality and cleaner power stations.<sup>12</sup> The overall beneficial relationship is dynamic and two-sided, with EU legislation often benefiting from UK input, especially in areas where UK action predated EU policies and in which the UK has set a good example to be followed, such as in the area of nature protection regulation<sup>13</sup> and climate change.<sup>14</sup>

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8. Francis Jacobs, *The Role of the European Court of Justice in the Protection of the Environment* 18 J. Env. L. 185, 205 (2006).

9. Fisher, Lange and Scotford *supra* n. 1, at 111.

10. Final Report Review of Balance of Competences: Environment and Climate Change, available at: <https://www.gov.uk/government/consultations/eu-and-uk-action-on-environment-and-climate-change-review>.

11. Chris Rose, *The Dirty Man of Europe: the Great British Pollution Scandal* (Simon & Schuster 1990). *See also* Catherine Burns, 'The Implications for UK Environmental Policy of a Vote to Exit the EU', available at: [http://www.foe.co.uk/sites/default/files/downloads/eu\\_referendum\\_environment.pdf](http://www.foe.co.uk/sites/default/files/downloads/eu_referendum_environment.pdf).

12. Burns *supra* n. 11.

13. The Habitats and Birds Directives were largely designed on the basis of the UK system. Stuart Bell, Donald McGillivray & Ole Pedersen, *Environmental Law*, Chapter 7 (8th edn OUP 2013).

14. The UK's ETS predated the EU ETS and provided important lessons for the creation of the EU ETS.

Despite an overall recognition of the benefits of EU environmental law on UK environmental performance, there is however controversy in the UK about how much EU action is warranted in certain areas. For example, the UK government would like less EU regulation in areas where national sovereignty is cherished, for instance in relation to land use planning, noise, flooding and in the regulation of its energy mix and especially shale gas.<sup>15</sup>

Legally, the main controversies from a Member State perspective around EU environmental regulation are embedded in the allocation of competences. Competence constitutes the legal formulation that demonstrates the tensions in demarcating powers between the Member States and the EU. The complex compromise reached in the environmental sphere is expressed in terms of shared competence.<sup>16</sup> In addition, the landscape gets even muddier in seeking to determine the nature of competence in specific situations in areas of shared competence. There are situations where 'supervening exclusivity' arises, thus effectively turning areas of shared competence into exclusive competence, both internally and externally.<sup>17</sup> Additionally, in the environmental context, there is provision for Member States to adopt stricter environmental standards as indicated in Article 193 of the Treaty on the Functioning of the European Union (TFEU).<sup>18</sup> However, this clause is not as straightforward and expansive as the wording might suggest and it is implicitly limited in various ways.<sup>19</sup> Furthermore, Member States are allowed to adopt or maintain national measures in relation to the protection of the environment alongside internal market harmonisation measures under certain conditions.<sup>20</sup> Although the framework for further action is unclear and relatively restrictive in areas of harmonisation, there are still possibilities for further action by Member States especially when the EU has not acted, or in

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15. Review of Balance of Competences: Environment and Climate Change *supra* n. 10.

16. Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ 115/47 (TFEU) Article 4(2). Article 2(2) TFEU defines shared competence areas and specifies that 'The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.'

17. Alan Dashwood, *Mixity in the Era of the Treaty of Lisbon*, in *Mixed Agreements Revisited: The EU and its Member States in the World* (Christophe Hillion & Panos Koutrakos (eds) Hart Publishing 2010).

18. TFEU *supra* n. 16 Article 193, 'The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.'

19. Such unilateral measures have to be based on Article 192 TFEU, respect free movement of goods principles and specifically Article 34 TFEU and are subject to the principle of loyal cooperation in Article 4(3) TEU. Fisher, Lange and Scotford *supra* n. 1, 130.

20. TFEU *supra* n. 16 Article 114. Fisher, Lange & Scotford *supra* n. 1.

maintaining pre-existing measures.<sup>21</sup> Overall, the legal landscape of the demarcation of competences raises complex questions when the UK prefers less EU action on certain issues<sup>22</sup> or when the UK seeks to pursue stricter action on others.<sup>23</sup>

Apart from controversies in the allocation of environmental competences, the internal functioning of the EU further complicates the legal and political framework in the environmental field. The multi-level nature of the structure and decision-making processes within the EU is especially perplexing in relation to the inter-sectoral and inter-institutional processes of environmental law.<sup>24</sup> The decision-making process relating to formulating environmental measures involves 'a range of venues'<sup>25</sup> including the different EU institutions and the multiple Directorates-General within those institutions. This process involves addressing diverse interests, particularly those of the different Member States as well as of other actors involved in the decision-making process at one stage or another, such as civil society, NGOs, lobby groups and industry. Within this process the UK's interests and preferences could be sidestepped or compromised, which explains why the UK would want to distance itself from this structure. Additionally, accommodating all the interests within the EU decision-making process is very difficult and often leads to political compromises that do not effectively address environmental problems.<sup>26</sup> This demonstrates how the EU may not always be well-placed to regulate such sensitive and complex issues, which are often linked to the UK's retained sovereignty, for example energy matters or other matters which the UK would have preferred to retain power in addressing local circumstances.

Nevertheless, despite the complexity of the EU's decision-making process and important legitimacy questions that may be raised about the EU's internal functioning in this area, the UK

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21. Fisher, Lange & Scotford *supra* n. 1.

22. Such issues include regulation on flooding, noise pollution and land use planning, Review of Balance of Competences: Environment and Climate Change *supra* n. 10.

23. The UK had adopted stricter regime for the energy efficiency of buildings prior to EU action requiring new buildings to meet the zero carbon target from 2016 compared to the EU's target of 'nearly zero energy buildings' for new buildings by 2020. See Review of the Balance of Competences between the United Kingdom and the European Union Energy Report, 37 available at: <https://www.gov.uk/government/consultations/energy-review-of-the-balance-of-competences>.

24. Sebastiaan Princen, *Agenda Setting*, in *Environmental Policy in the EU. Actors, Institutions and Processes* 197 (Andrew Jordan & Camilla Adelle eds, 3rd edn, Routledge 2012).

25. *Ibid.*

26. Christoph Knill, *Taking Stock: The Environmental Problem-Solving Capacity of the EU* in Christoph Knill & Duncan Liefferink, *Environmental Politics in the European Union: Policy-Making, Implementation and Patterns of Multi-Level Governance* (Manchester U. Press 2007).

has multiple opportunities through which its government, industry and civil society can be heard in the formulation of EU environmental regulation and its subsequent updating. The UK has influenced the formulation of environmental policies at EU level on many occasions, both by providing a template for regulation,<sup>27</sup> and by introducing more flexibility in policies.<sup>28</sup> Overall, even if the UK's voice might not always be upheld,<sup>29</sup> following an exit the UK would lose its voice in the formulation of important environmental legislation, which may indirectly affect it in various ways, as discussed below.

Given the increasing European integration of environmental law, the complicated internal functioning of the EU and the fact that the UK's priorities are sometimes compromised within the EU structure, the UK could benefit from leaving the EU in some respects. This would be largely due to the UK gaining more flexibility and autonomy in regulating environmental problems. In particular, more flexibility would allow the UK to take more stringent measures in areas where it feels that it is being held back from more decisive action. The UK has already sought to address inadequacies of EU environmental law in certain areas through unilateral action in areas like climate change and the energy efficiency of buildings. However, not all the UK's unilateral actions have been successful. The adoption of the unilateral carbon floor price adopted by the UK has shown that unilateral measures to improve the EU Emissions Trading System (EU ETS) do not necessarily yield desirable results, especially in terms of reducing emissions and making the EU ETS more effective. Rather, such action could instead expose UK industry to competitive disadvantage towards EU competitors.<sup>30</sup> Therefore, even if the flexibility gained following an exit could be used by the UK to reinforce certain areas of environmental law, the effectiveness of unilateral action can be problematic.

At the same time, more flexibility does not necessarily mean good news for the protection of the environment as the UK could use such flexibility to lower its environmental standards

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27. The Integrated Pollution and Prevention Control Directive was largely influenced by integrated pollution control law of the UK. Bell, McGillivray & Pedersen *supra* n. 12.

28. As seen in the recently adopted 2030 climate change targets, which do not enclose a binding target on renewable energy on the EU as a whole without being binding at the national level after opposition from the UK. See Henriette Jacobsen and James Crisp, 'EU leaders adopt "flexible" energy and climate targets for 2030' available at: <http://www.euractiv.com/sections/eu-priorities-2020/eu-leaders-adopt-flexible-energy-and-climate-targets-2030-309462>.

29. The UK has sought to resist a ban on neonicotinoids pesticides to protect bees. See Burns *supra* n. 10.

30. Sandbag, 'The UK Carbon Floor Price', available at: [http://www.sandbag.org.uk/site\\_media/pdfs/reports/Sandbag\\_Carbon\\_Floor\\_Price\\_190312.pdf](http://www.sandbag.org.uk/site_media/pdfs/reports/Sandbag_Carbon_Floor_Price_190312.pdf).

instead.<sup>31</sup> EU environmental action, whether in the form of binding legislation or general policy objectives, imposes external pressure on the UK in relation to environmental protection goals, whose priority can be variable on the national political agenda. Specifically in areas where the UK has consistently been in breach of EU environmental legislation such as air pollution standards, or where it has opposed stricter standards such as bans and strict labelling of GMOs, the EU has provided external pressure in engaging the UK to act on important environmental and health issues.

Additionally, apart from political and public external pressure, the EU legal system has also provided important avenues through which the UK can be held accountable for insufficient action. In particular, the EU provides important enforcement mechanisms, including Commission infringement actions against Member States,<sup>32</sup> and possibilities for private enforcement. In the environmental context in particular, the case law of the Court of Justice of the EU (CJEU) has been 'uniquely effective in terms of enforcement'<sup>33</sup> while the possibilities for private enforcement through directly effective legislation or the use of the duty of consistent interpretation of EU law have given both individuals and NGOs important enabling powers.<sup>34</sup> These possibilities have recently been employed in two cases – by an environmental NGO bringing a case against the UK before national courts,<sup>35</sup> and by the Commission initiating infringement proceedings in relation to the UK's persistent infringement of air pollution standards.<sup>36</sup> The national proceedings have now been concluded following a preliminary ruling by the CJEU, which left it to the national court to ensure compliance. To that effect, the Supreme Court has unanimously ordered the UK Government to draw up new air quality plans by 31 December 2015, in order to reduce NO<sub>2</sub> levels and comply with the Air Quality Directive limits.<sup>37</sup> As Lord Carnwath put it, 'the new Government, whatever its political complexion, should be left in no doubt as to the need for immediate action to address this issue. The only realistic way to achieve this is a mandatory order requiring new plans ... to be prepared within a

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31. Burns *supra* n. 11.

32. TFEU *supra* n. 16, Article 258.

33. Jacobs *supra* n. 8.

34. Daniel R. Kelemen, *Suing for Europe Adversarial Legalism and European Governance* (2006) 39(1) *Comparative Political Studies* 101.

35. *R (ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25.

36. [http://europa.eu/rapid/press-release\\_IP-14-154\\_en.htm](http://europa.eu/rapid/press-release_IP-14-154_en.htm).

37. European Parliament and Council Directive 2008/50/EC on Ambient Air Quality and Cleaner Air for Europe, [2008] OJ L152/1.

defined timetable.<sup>38</sup> The order made by the Supreme Court is of particular political significance especially given the time when it was granted – right before the general election – which ensures continuity of the obligation imposed on the government.

Although these EU judicial mechanisms may further limit the UK's autonomy, they reinforce effective implementation of UK commitments and require concrete action from the UK in relation to serious environmental and health problems. Furthermore, despite the fact that reception of EU environmental law within the UK judicial system was initially resisted, UK courts have gradually changed their approach and, as seen, are more willing to refer cases to the CJEU than in the early years of EU environmental law.<sup>39</sup> An important shift in approach can also be seen in terms of interpretation of EU environmental law by English courts, such as the Habitats Directive,<sup>40</sup> the Waste Framework Directive<sup>41</sup> and the Environmental Impact Assessment Directive,<sup>42</sup> which increasingly involves 'purposive interpretation' that enhances the rights derived from this legislation.<sup>43</sup> The combination of these enforcement mechanisms and the effects of EU legislation within the UK's legal and judicial system have yielded important steps forward in terms of public involvement and environmental integration.

Without the 'stick' elements provided by these enforcement mechanisms as well as external pressure from EU environmental laws, UK environmental policies could be more exposed to changing governmental positions and in relation to specific environmental problems would lack the necessary continuous commitment for long-term action. These governmental positions could be detrimental to the environment, the citizens and even in terms of providing certainty for investors in areas where it would be unclear what direction the UK might take.<sup>44</sup>

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38. *R (ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28, paragraph 31.

39. Bell, McGillivray & Pedersen *supra* n. 13. However judicial reluctance is still noted which may warrant reform of the preliminary reference procedure in order to ensure better protection of the environment and greater effectiveness of EU law. See Veerle Heyvaert, Justine Thornton and Richard Drabble, *With Reference to the Environment: The Preliminary Reference Procedure, Environmental Decisions and the Domestic Judiciary*, (2014) 130(3) *Law Quarterly Review* 413.

40. *R v. Secretary of State for Trade & Industry & ORS, ex parte Greenpeace Ltd* (2000) *Env L.R.* 221.

41. *R. v. Derbyshire County Council* [2001] *Env. L.R.* 26.

42. *Berkeley v. Secretary of State for the Environment* [2001] *Env L.R.* 16.

43. Bell, McGillivray & Pedersen *supra* n. 13.

44. For example, it is uncertain whether the UK would maintain a sustainable use approach to waste management, which could create uncertainty for industry and investors. See House of Commons Library Research Paper 13/42, 1 Jul. 2013, 61 available at: <http://www.parliament.uk/business/publications/research/briefing-papers/RP13-42/leaving-the-eu>.

Overall, the influence of EU environmental law on UK laws has been extensive and largely positive. However, this is not to suggest that EU environmental legal solutions are perfect. Rather that despite shortcomings, the EU's environmental legal action is important and the UK's role within it crucial. Even though the competence issue often tilts in favour of the EU, the UK's position is strong in influencing the formulation of EU environmental policies and laws. This position could be more important than the UK's desire for more flexibility and autonomy in light of the extensive external influence of EU environmental law to be considered below. Indeed, leaving the EU does not necessarily mean that the UK would be entirely dissociating itself from EU environmental regulation. This partly depends on the type of cooperation agreement to be concluded between the UK and EU after the UK's exit and partly on the external influence of EU environmental law even in the absence of binding obligations to which the UK might commit as discussed in the next section.

## **2.2 Relationship with the EU After Exit: The UK as a Third Country**

The discussion thus turns to the UK's position after exit vis-à-vis EU environmental legal obligations. Mainly due to trade considerations, the UK would directly or indirectly still be bound by some EU environmental standards. While much of EU environmental legislation would still substantially influence the UK industry and regulators, the UK would lose its direct voice in the EU's decision-making process within which such policies are formulated.

On the one hand, the extent and the ways in which EU environmental law would affect UK environmental regulation after exit depend on the kind of trade arrangement that would be concluded between the EU and the UK and any deriving obligations to be included in relation to other sectors such as the environment. The options of cooperation between the UK and the EU after exit are numerous,<sup>45</sup> with the UK most probably opting for preferential access to the EU market given that the EU is its largest trading partner.<sup>46</sup> The regulation of this access could take many forms, including some sort of bilateral free trade agreement similar to the one concluded by the EU with Switzerland, or an arrangement akin to the European Economic Area (EEA)

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45. See Jean-Claude Piris, 'Which Options would Be Available for the United Kingdom in the Case of a Withdrawal from the EU?' in A Biondi and P Birkinshaw (eds), *Britain Alone! The Implications and Consequences of the UK Exit from the EU* (Kluwer Law International 2016).

46. 46% of UK's goods and services exports and 51% of the UK's imports in 2012 were to the EU, House of Commons Research Paper *supra* n. 44.

Agreement.<sup>47</sup> Whatever the precise form and conditions of an EU-UK agreement, it would likely include obligations to abide by the 'acquis communautaire' in the environmental field with possible exceptions as in the case of the EEA Agreement.<sup>48</sup> Especially bearing in mind that the UK would be the first former Member State, which would seek to be closely attached to the single market, the EU Member States would probably attach extensive conditions beyond trade in other fields of EU law. Such an arrangement would essentially mean that the UK would still be bound by the majority of EU environmental standards in place while at the same time losing its voice in the formulation of such policies in the internal decision-making process of the EU. Whatever the role of EEA countries for example in shaping EU environmental legislation and whatever role would be given to the UK in that respect, it would not have as many opportunities as it would by being a Member State to make its opinion heard by participating in the decision-making processes within EU institutions. This would be a very significant limitation to the UK's autonomy whereby the UK would have to comply with important environmental laws directly without however being involved in their formulation even within the EU's complicated structure. Thus what might essentially appear as an increase in flexibility would in essence be a further limitation to its autonomy.

On the other hand, even in the unlikely scenario where the UK would not be directly bound by EU environmental legislation as part of a trade agreement, either because such obligations would not be included in a trade arrangement or because the UK would not conclude a market access agreement, EU domestic environmental measures would still have important implications for it. The need for cooperative action in addressing certain environmental problems, combined with the externalities of environmental regulations imply that even if the UK opts for a unilateral path in regulating environmental problems, this does not mean that it would be entirely detached from EU action in the field.

EU environmental law is increasingly characterised by a tendency of global reach.<sup>49</sup> In particular, this tendency is exhibited through the emerging legal phenomenon of internal environmental measures with extraterritorial implications (IEMEIs). IEMEIs consist of domestic measures unilaterally developed and adopted by the EU which are legally designed in such a way that their

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47. Burns *supra* n. 11.

48. *Ibid.*

49. Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law* 62 Am. J. Comp. L. 87 (2014).

legal impact explicitly extends beyond EU borders. These measures are applied to non-EU operators through trade-related restrictions that regulate access to the EU market. Their common premise is the extraterritorial reach of the standards they impose that aim to address environmental problems that originate outside the EU's territory or stipulate restrictions on the basis of conduct or circumstances that take place beyond EU borders. This legal phenomenon is particularly relevant in the discussion of a potential exit of the UK from the EU as it comprises a broad spectrum of regulatory techniques through which the EU is extending its own environmental standards beyond its territory and which could structurally affect the UK as a third country in the future.

These measures can have important legal and regulatory implications for third countries and external actors and this largely relates to the importance of the EU as a market and regulator. EU law, including EU environmental law, increasingly gives rise to a 'Brussels effect' or 'unilateral regulatory globalisation' through which the EU is able 'to externalise its laws and regulations outside its borders through market mechanisms...'<sup>50</sup> This may occur both in terms of passively affecting business practice with foreign companies adjusting their practices and applying EU standards across their business – de facto Brussels effect – and/or third countries correspondingly changing their national laws – de jure Brussels effect.<sup>51</sup> In particular, the EU's laws on hazardous substances<sup>52</sup> and chemicals<sup>53</sup> have had significant influence for both business practice and third-country laws with some countries tailoring their regulatory approach to reflect EU terms<sup>54</sup> and others using EU policy as positive mode for reform.<sup>55</sup> In relation to chemicals regulation in particular, the EU has developed a unique regime, which has had far-reaching implications for third-country policies with some countries like Norway voluntarily

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50. Anu Bradford, *The Brussels Effect* 107 Nw U. L. Rev. 1.

51. *Ibid.*

52. European Parliament and Council Directive 2002/95/EC on the restriction of the use of certain hazardous substances in electrical and electronic equipment [2003] OJ L37/19. Also see European Parliament and Council Directive 2011/65/EC on restriction of certain hazardous substances in electrical and electronic equipment OJ [2011] 174/88.

53. European Parliament and Council Regulation 1907/2006/EC concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals [2007] OJ L136/3 (REACH).

54. For example, the Directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment *supra* n. 52 has led to policy changes that largely mirrored EU policy in China and Korea, Yoshiko Naiki, *Assessing Policy Reach: Japan's Chemical Policy Reform in Response to the EU's REACH Regulation* 22 J. Env. L. 171, 182 (2012).

55. Japan adopted its own version of RoHS rather than mirroring it, see Naiki *supra* n. 54. See also Henrik Selin Stacy D. VanDeveer, *Raising Global Standards: Hazardous Substances and E-waste Management in the European Union* 48 Env.: Sci. & Pol. Sust. Dev. 6 (2006).

adopting REACH<sup>56</sup> and other countries adjusting their own practices and policies accordingly.<sup>57</sup> This shows how the UK would probably be forced to maintain such well-established standards and possibly similar far-reaching standards in the future.

Adding to the passive externalisation of EU environmental law in this way, the EU is also increasingly structurally designing its internal measures by explicitly promoting action on environmental matters by third countries.<sup>58</sup> In particular, the EU is expanding the ways of regulating trade relations with third countries through the adoption of measures which impose restrictions on processes or conduct that occur outside EU borders. For example, the EU imposes restrictions on how harvesting of timber and production of biofuels occurs in third countries in measures regulating imports of such products in the EU.<sup>59</sup> Through such measures, EU environmental law exhibits 'territorial extension' through which the EU takes into account activities or processes occurring in third countries in determining compliance with EU law and thus extending its regulatory clout to activities occurring abroad.<sup>60</sup> The EU also imposes its own or equivalent standards in facilities located in third countries when they receive ships for ship recycling flying the flag of a Member State<sup>61</sup> or when they receive electrical and electronic waste from the EU.<sup>62</sup> Through these mechanisms, the EU ensures that EU operators do not evade EU obligations by exporting waste to third countries for example, but at the same time influences and sometimes directly dictates the kinds of process standards that third-country operators have to abide by when doing business with the EU.

Provoking action by third countries is also pursued through another legal mechanism increasingly employed in IEMEs in the form of explicit links between the application of EU environmental law and legal developments that occur in third countries. These links are

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56. Regulation 1907/2006/EC *supra* n. 53.

57. Countries like Canada, Australia, China and Russia have adopted REACH-like legislation, Bradford *supra* n. 50, 28. Also see Joanne Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction* 57 Am. J. Comp. L. 897, 910 (2009).

58. Joanne Scott, *The Multi-Level Governance of Climate Change* 1 Carbon and Climate L. Rev. 25 (2011).

59. European Parliament and Council Regulation 995/2010/EC laying down the obligations of operators who place timber and timber products on the market (EUTR) [2010] OJ L295/23. European Parliament and Council Directive 2009/28/EC on the promotion of the use of energy from renewable sources, [2009] OJ L140/16 (RED) Article 17.

60. Scott, *Extraterritoriality and Territorial Extension in EU Law*, *supra* n. 49.

61. European Parliament and Council Regulation 1257/2013/EU on ship recycling [2013] OJ L330/1.

62. European Parliament and Council Directive 2012/19/EC on waste electrical and electronic equipment [2012] OJ L197/38, Article 10. However, it should be noted that third-country facilities have to operate in accordance with equivalent conditions for waste treatment to count towards the recovery targets set by the Directive.

formulated in conditional terms making the unilateral application of EU environmental law 'contingent' upon: the law of third countries; bilateral agreements agreed with the EU; or developments under international regimes.<sup>63</sup> These links can be explained in terms of 'escape routes'<sup>64</sup> either allowing third countries to 'escape' the obligations imposed by EU environmental law or to use alternative or supplementary routes to 'get to the destination' and comply with EU requirements. For example, the EU's inclusion of aviation emissions in the EU ETS was designed in conditional terms and provided for the non-application of the regime when third countries had a regime in place to address such emissions.<sup>65</sup> Additionally, the Renewable Energy Directive provides for the possibility of complying with the sustainability criteria on biofuels when a bilateral agreement is concluded with the EU containing provisions relating to issues covered by the sustainability criteria, or through the use of a private voluntary certification scheme, approved by the EU Commission.<sup>66</sup> At all stages, the EU retains a catalyst role in determining how compliance is to be achieved. Such action is often directed at specific issues and to specific countries, such as biofuels or timber producing countries, or aims to provoke action and enhance cooperation on specific controversial issues where multilateral action is weak. While the use of such measures is important in filling regulatory gaps in light of insufficient international environmental action, IEMELs raise significant legitimacy concerns especially because they are imposed on third-country actors that do not usually have a voice in their formulation.

Overall, the discussion of this legal phenomenon is informative both by showing the constraints for the UK to effectively distance itself from existing EU policies and by exposing the position of the UK with relation to future environmental policies adopted by the EU. If the EU's activity, passively gives rise to far-reaching implications in terms of a 'Brussels effect' to countries such as the United States and Japan, similar implications and regulatory restrictions would probably occur in relation to an ex-Member State such as the UK. More importantly, the EU's extensive

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63. Joanne Scott & Lavanya Rajamani, *EU Climate Change Unilateralism* 23 *Eur. J. Intl. L.* 469 (2012).

64. Joanne Scott, *EU Global Action on Climate Change: Contingent Unilateralism and Regulatory Penalty Defaults* 2 *SADC L. J.* 1 (2012).

65. European Parliament and Council Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L275/32, Article 25a(1).

66. Directive 2009/28/EC *supra* n. 59, Article 18. In a similar vein the EU's Regulation on organic farming requires importers to comply with the requirements set out in the Regulation. It also provides that organic products that do not comply with EU standards could be allowed in the EU if they meet equivalent standards including the possibility for recognising countries with equivalent standards. See Council Regulation 834/2007 on organic production and labelling of organic products and repealing Regulation (EEC) No. 2092/91, [2007] OJ L189/1, Articles 32 and 33.

IEMEI activity is also characterised by an active pursuit of green leadership beyond EU borders as a means of ‘incentivising regulatory engagement elsewhere’<sup>67</sup> and ‘achieving extraterritorial effects and affecting multilateral negotiations’.<sup>68</sup> The EU could potentially use such mechanisms in the future to influence the UK’s approach following an exit from the EU. This could occur in specific areas that might turn out to be problematic in the eyes of the EU when the UK is not a Member State thus influencing the content of UK environmental policies and promoting cooperation through the EU’s own measures. As these measures tend to address issues with important trade components, it is becoming clear that the UK would not necessarily be able to simply distance itself from the extensive environmental action of the EU at least in relation to activities with transboundary market elements.

UK private and public actors currently have an important role within EU internal environmental legal processes and multiple opportunities for raising their concerns at the stage of conceptualisation and development of such regimes within the decision-making processes of the EU. In this way, these extensive regimes are not imposed on them indirectly by way of extension of EU environmental standards or by being used as bargaining chips in bilateral and international developments without their input at the initial stage of formulation.

On the basis of important market considerations and assuming a UK desire to be associated with the single European market, it seems that the UK, as a third country, would have to either directly or indirectly comply with at least some EU environmental standards by being engaged in trade relations with the EU. The implications of this could be far-reaching with the EU having additional ways of indirectly influencing UK environmental policy and provoking UK action while at the same time the UK’s influence in formulating such extensive policies would be reduced.

### **3. The EU, the UK and the World**

Having examined how the extension of EU regulatory power outside the EU could affect the relationship between the UK and the EU after exit, this section explores how this power could also affect the UK’s relationship with the rest of the world. This section firstly sets out the

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67. Scott, *The Multi-Level Governance of Climate Change*, *supra* n. 58, at 31.

68. Gracia Marin-Duran & Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* 282 (Hart 2012).

benefits for the UK from EU membership in relation to external environmental action. It outlines the EU's important but often complex role in international environmental legal regimes while identifying benefits for the UK from being part of the EU bloc. It also highlights how the global reach of EU environmental law and its impact in third countries strengthens the UK's regulatory power and protects UK competitiveness. On the basis of these considerations, the section secondly identifies important limitations for UK unilateral action without the EU's external regulatory clout.

### **3.1 Relationship with the World: The UK as a Member State**

The EU's international environmental role is multifaceted. In the multilateral sphere, the EU is often portrayed as an important environmental actor whose action is at least 'influential' while also sometimes being presented as a 'green leader'.<sup>69</sup> The EU is an important environmental negotiator playing a crucial role in the negotiating process of important multilateral environmental agreements such as the Basel Convention, the Convention on Biological Diversity, the Kyoto Protocol and the Cartagena Protocol on Biosafety.<sup>70</sup> The EU's leadership role is usually associated with setting policy positions early in the negotiation process and inspiring policy change in third countries and under international regimes,<sup>71</sup> thus engaging in 'directional' leadership.<sup>72</sup>

Despite an overall good record as an international environmental negotiator however,<sup>73</sup> the EU has been criticised for lack of coherence and credibility in its leadership efforts.<sup>74</sup> As regards coherence in particular, vertical coherence between the EU and its Member States is often

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69. R. Daniel Kelemen, *Globalizing European Union Environmental Policy*, 17 J. Eur. Pub. Pol. 335 (2010).

70. R Daniel Kelemen & David Vogel, *Trading Places: the Role of the United States and the European Union in International Environmental Politics* 43 Comp. Pol. Stud. 427 (2010).

71. Anthony R Zito, *The European Union as an Environmental Leader in a Global Environment 2 Globalizations* 363 (2005).

72. Bertil Killian & Ole Elgström, *Still a Green Leader? The European Union's Role in International Climate Negotiations* 45 Cooperation & Conflict 225 (2010).

73. Sebastian Oberthür, *The Role of the EU in Global Environmental and Climate Governance*, in *The European Union and Global Governance* 192 (Mario Telò, Routledge 2009).

74. John Vogler & Hannes R Stephan, *The European Union in Global Environmental Governance: Leadership in the Making?* 7 Intl Env'tl Agreements: Pol. L. & Econ. 389 (2007).

viewed 'at least as problematic'.<sup>75</sup> The internal functioning of the EU combined with the need to accommodate the interests of the different Member States as well as its complicated negotiating structure present real difficulties in maintaining and coordinating common positions in international negotiations. Especially in situations where both the EU and the Member States are parties to an agreement, a 'mixed agreement', the complicating shared nature of competences creates legal ambiguity both in relation to the limits of unilateral Member State action<sup>76</sup> and in terms of representation of the EU.<sup>77</sup> Even after the Lisbon Treaty, there is uncertainty about 'who has to do what'<sup>78</sup> and this might lead to situations where the EU is left without a clear negotiator.<sup>79</sup> If the UK were to leave the EU and act on its own in international negotiations, the UK would be able to dissociate itself from this uncertain negotiating structure and burdensome internal negotiating processes as well as be able to present its own position without adjusting it to the EU's stand in mixed agreements.

Moreover, even in situations where the EU is not a party to an international agreement, EU law affects the action of the EU Member States both in the negotiating phase and after they have entered into such agreements. For example, in relation to the International Convention for the Regulation of Whaling, where the EU is merely an observer in the International Whaling Commission (IWC), EU law imposes strict requirements on what Member States can do,<sup>80</sup> not allowing them to commit to obligations that are less stringent than what EU law stipulates.<sup>81</sup>

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75. Hans Vedder, *The Formalities and Substance of EU External Environmental Competence: Stuck between Climate Change and Competitiveness*, in *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Elisa Morgera ed., Cambridge U. Press 2012).

76. Case C-246/07 *Commission v. Sweden* [2010] All E.R. (EC) 1198. EU Member States are precluded from adopting stricter standards within mixed agreements when an EU common strategy has been agreed on the basis of the operation of the duty of loyal cooperation in Article 4(3) TEU. See Geert De Baere, 'O, Where is Faith? O, Where is Loyalty?' *Some Thoughts on the Duty of Loyal Co-operation and the Union's External Environmental Competences in the light of the PFOS Case*, 36 Eur. L. Rev. 405 (2011).

77. Tom Delreux, *The EU as an Actor in Global Environmental Politics*, in *Environmental Policy in the EU, Actors, Institutions and Processes* 299 (A. Jordan & C. Adelle eds, 3d ed., Routledge 2012).

78. Sijbren de Jong & Simon Schunz, *Coherence in European Union External Policy before and after the Lisbon Treaty: The Cases of Energy Security and Climate Change* 17 Euro. For. Aff. Rev. 165, 175 (2012).

79. For example internal confusion on the representation of the EU resulted in the EU not having a voice at all at the first stage of negotiations on an international agreement on mercury, Geert De Baere, *International Negotiations Post Lisbon: A Case Study of the Union's External Environmental Policy*, in *The European Union's External Relations a Year After Lisbon* (Panos Koutrakos eds, Centre for the Law of EU External Relations 2011).

80. Ludwig Krämer, Sandy Luk & Rowan Ryrie, 'The IWC Proposed Consensus Decision and EU law duties regarding whales' available at: <http://www.clientearth.org/reports/marine-protection-clientearth-briefing-whaling-and-eu-law.pdf>.

81. At the same time, this means that Member States could potentially commit to stricter requirements if no common EU position has been reached on the issue. Pieter Jan Kuijper et al., *The law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* 812 (Oxford U. Press 2013).

Even within the IWC, the EU Member States have opted to act together and vote en bloc and usually adopt common positions. This may sometimes mean that the UK is not able to promote its anti-whaling position, as it is required to compromise to adapt to the EU position.<sup>82</sup> Nonetheless, being able to act and vote as a bloc, increases the leverage of EU Member States in influencing the international position of an IWC of eighty-nine Member States, both when it comes to a vote within the IWC, and in negotiations by affecting other IWC Member States' positions.<sup>83</sup>

Therefore, the complexities related to the EU's international environmental role should not be over emphasised at the expense of its leverage and strength when acting as a bloc. The mere size and negotiating strength of the EU bloc combined with its long-standing commitment to multilateralism demonstrate the capacity of the EU to concretely influence the content and development of multilateral environmental agreements. For the UK, acting under the 'team EU' in climate change negotiations for example has provided it with more leverage to promote its position and expertise in regulating such controversial and complicated issues.<sup>84</sup> If the EU's complicated internal decision-making processes means that multiple interests have to be represented and compromised within the EU as discussed in section 2, when a decision-making platform on environmental issues is replicated at the international level, the venues, interests and voices at stake are of a much greater scale and the UK's voice could become isolated if not part of the EU's far-reaching voice.

Overall, despite the fact that the EU may not always be successful in promoting environmental action in all areas and is sometimes seen as struggling to maintain its role as a 'green leader', it remains an important international environmental actor. For example, it is the largest player consisting of developed countries globally that has consistently shown commitment to addressing climate change. In particular, the EU Member States have recently managed to agree on new emission reductions targets, which although less demanding than was hoped by civil society, present a strong position compared to positions of other big players and may affect negotiations in the next Conference of the Parties to the UNFCCC in Paris. The UK has overall

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82. For example, in relation to voting on a quota for Greenland.

83. The EU has recently led a demarche against Iceland's whaling practices, in collaboration with the USA, Brazil, Australia, Israel, New Zealand, Mexico and Monaco. See [http://europa.eu/rapid/press-release\\_MEMO-14-529\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-529_en.htm).

84. Review on balance of Competences: Environment and Climate Change *supra* n. 10, at 45.

benefited from being part of the EU in gaining international leverage in the environmental domain specifically by increasing its leverage in international negotiations having a greater voice at the international plane and particularly in influencing third-country positions.

The EU's external environmental action also extends beyond its official position in multilateral regimes. Indeed, the EU employs different kinds of external relations tools to support environmental multilateralism.<sup>85</sup> The EU has an extensive network of cooperation with third countries in environmental matters as a result of bilateral and inter-regional agreements which either focus on environmental issues or incorporate environmental clauses within other types of agreements, such as association agreements, external assistance policies and in the generalised system of preferences.<sup>86</sup> After exit, the UK would be distancing itself from this extensive external environmental action undertaken and coordinated by the EU. Additionally, the UK as a non-Member State would not be involved in important bilateral negotiations undertaken by the EU, which can affect environmental standards, such as the controversial Transatlantic Trade and Investment Partnership (TTIP). The UK has shown its commitment to be more actively engaged in the process specifically for ensuring that the EU's stringent environmental standards are upheld especially in areas where US standards are not equivalent.<sup>87</sup> This demonstrates the two-sided, reciprocal benefits that both the EU and the UK can derive from UK membership in terms of environmental protection. In this way the UK can play an important role in keeping the EU 'in check' when it is tempted to sacrifice its commitment to 'high level of environmental protection' for the sake of economic interests.

The extraterritorial and global reach of EU environmental law, through which the EU increasingly exercises structural leadership, also affects the position of the UK in the world. In particular, it should be recalled that the EU, through its economic power and the importance of its market, incentivises environmental action by third countries through its own internal environmental measures that have various extraterritorial implications. At the international level, in certain areas such as climate change for example, the EU is increasingly adopting a 'sticks and carrots' approach in international negotiations through the formulation of its internal

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85. Marin-Duran & Morgera *supra* n. 68.

86. *Ibid.*

87. House of Commons Environmental Audit Committee: Environmental risks of the Trans-Atlantic Trade & Investment Partnership, available at: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmenvaud/857/857.pdf>.

policies in conditional terms and their employment as useful negotiating tools.<sup>88</sup> Several provisions within the EU ETS provide for revision of different aspects of the regime in case of an international agreement being reached on the issues.<sup>89</sup> Additionally, the inclusion of aviation emissions in the EU ETS<sup>90</sup> is explicitly linked to developments at the international level, providing the possibility for revision of the scheme in case an international agreement is reached on the issue.<sup>91</sup> The explicit structural reference to international developments contributed to triggering negotiations to address aviation emissions within the International Civil Aviation Organisation (ICAO). In response, the EU suspended the application of the Aviation Directive for the time being in light of on-going negotiations. Such techniques further increase the leverage and influence exerted by the EU Member States within multilateral regimes thus advancing action on internationally stagnant issues while ensuring that EU unilateral action does not expose Member States to onerous competitive disadvantages.

Beyond driving multilateral developments, the implications of IEMEIs extend to considerable influence on the policies of third countries and induce engagement of third countries with the EU in regulating controversial environmental problems. Two main elements of IEMEI action, already discussed in section 7.02 are particularly relevant in this regard. First, the extension of EU environmental standards to processes occurring outside EU borders, and second the explicit links to legal developments under multilateral forums and to bilateral agreements to be concluded with the EU. Through these two particular features the EU is protecting the competitive position of EU companies and creates additional avenues of cooperation with third countries. The combination of these legal mechanisms creates reciprocal dynamic interactions between the application of EU environmental standards and developments taking place in third countries as a way of achieving environmental outcomes beyond the EU.

The UK benefits from this form of extraterritorial reach of EU environmental law in influencing third-country policies. For example in areas such as biofuels and timber the UK supports and

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88. Hans Vedder, *Diplomacy by Directive? An Analysis of the International Context of the Emissions Trading Scheme Directive*, in *Beyond the Established Legal Orders* 105 (Malcolm Evans & Panos Koutrakos eds, Hart 2011).

89. *Ibid.* Also see Scott, *EU Global Action*, *supra* n. 64.

90. European Parliament and Council Directive 2008/101/EC amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, [2009] OJ L8/3.

91. European Parliament and Council Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L275/32, Article 25(a)(2).

benefits from such standards.<sup>92</sup> In relation to timber for example, the Timber Regulation is reinforcing the UK's efforts at tackling illegal and unsustainable timber by prohibiting the placing on the market of illegal timber, and imposing a due diligence obligation on traders who place timber on the market for the first time.<sup>93</sup> In this way, the Timber Regulation contributes at levelling the playing field with non-EU competitors. Additionally, it involves constructive ways of engaging producing countries, especially developing countries, in changing their regimes by founding the assessment of the legality of timber on the law of the third country and providing the possibility for the conclusion of Voluntary Partnership Agreements with the EU.<sup>94</sup>

As regards biofuels, the sustainability criteria for biofuels, which also apply to biofuels imported from third countries, and specifically those that determine the origin of biofuels, require third-country producers to comply with requirements that have been developed by the EU.<sup>95</sup> Given the absence of an international regime on the issue, the EU platform is crucial in setting standards that may extend to third countries, initiating cooperative dialogue and affecting international efforts. Being a large user, producer and importer itself, with UK companies investing in third countries to produce biofuels to be exported to the EU, the UK has multiple interests at stake in having a say and influencing third countries' policies. Despite EU biofuels policy being flawed in some respects, there exists a comprehensive framework providing for multiple possibilities that the UK could use and benefit from in influencing third-country policies.

Through the practice of 'action-forcing contingent unilateralism'<sup>96</sup> and 'territorial extension'<sup>97</sup> of EU environmental law, the EU and its Member States maximise their efforts at the international level by employing the leverage of the EU as a market and regulator at multiple fronts. Having considered the EU's extensive external environmental action and the position of the UK as a

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92. On the basis of the similar reasoning other EU measures include requirements on organic farming, which allow for imports of organic products when they comply with the same or equivalent standards, thus protecting domestic producers that have to comply with strict standards. See Regulation 834/2007 *supra* n. 64 Articles 32 and 33.

93. Regulation 995/2010 *supra* n. 59.

94. The UK has been actively involved in the procedure of VPAs. See WWF's EU Government Barometer on Illegal logging and Trade – 2014, available at:

[http://barometer.wwf.org.uk/what\\_we\\_do/government\\_barometer/scores\\_by\\_issues/question.cfm?issue=5](http://barometer.wwf.org.uk/what_we_do/government_barometer/scores_by_issues/question.cfm?issue=5).

95. Directive 2009/28/EC *supra* n. 57 Article 17(3), '...The Commission shall determine criteria and geographic ranges ...'. However, compliance with the sustainability criteria is not a compulsory condition for entry into the EU market. See Scott, 'The Multi-level Governance of Climate Change' *supra* n. 56.

96. Rajamani & Scott *supra* n. 63.

97. Scott, *Extraterritoriality and Territorial Extension in EU law*, *supra* n. 49.

Member State, the discussion shifts to the position of the UK vis-à-vis the rest of the world from outside the EU, starting from how the legal framework would look like after a UK exit.

### **3.2 The Relationship with the World after exit: the UK as an ex-Member State**

Leaving the EU would not free the UK from its obligations towards third countries within international environmental law regimes, as the UK is a party to multilateral environmental agreements alongside the EU. However, EU policies often advance international regimes and impose stricter obligations as well as create further avenues of cooperation with third countries. After exit, the UK would not be involved with these but would rather merely be bound by international instruments without the enforceable and judicable methods of the EU. Additionally, in areas where there is no international agreement the UK would not be bound by EU environmental standards and obligations in its relations with third countries. Therefore, after exit from the EU the UK would be able to embark on its own in cooperating with third countries and would probably have to conclude many bilateral agreements on a variety of issues to that regard. The UK would no longer benefit from the extensive external action undertaken by the EU, its leverage on the international scene would probably be reduced and it would not have as much regulatory power to influence and cooperate with third countries in the environmental field. This is linked both to the reduction of the UK's international leverage within environmental forums and to the UK losing its role in influencing the formulation of EU environmental legal measures that extend beyond EU borders and indirectly affect third-country policies.

As has already been stressed, an important reason why the extensive external clout of EU environmental law is important for the UK relates to addressing competitiveness concerns in regulating environmental problems. By promoting the same or equivalent environmental standards to its trading partners through different legal mechanisms and through the 'Brussels effect', the EU ensures that its companies would not be exposed to a competitive disadvantage by having to compete with companies that apply lower standards.<sup>98</sup> In this way, the UK has gained considerable standard-setting power by being part of the EU and its operators are not exposed to competitive disadvantages to which they would have been, if the UK were unilaterally adopting such standards. After exit, the UK's position in the world would be exposed

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98. Bradford *supra* n. 50, 39.

if the UK would unilaterally opt for strict environmental standards without the added 'protection' offered through the EU's external clout. On the other hand the UK could potentially take the opportunity to lower its environmental standards in order to attract more trade and investment. A closer examination of this reveals three important questions.

The first question relates to the *willingness* of the UK to lower its environmental standards. Even though the UK might be willing to lower its standards in relation to some controversial issues on which it has resisted strict EU regulation such as tar sands and shale gas, it would probably not be as eager to lower its standards in other areas. This is due to the long-standing commitment of the UK in certain areas like climate change, the likely public opposition that the UK would be exposed to and the existing industry investment in the UK in complying with EU environmental standards<sup>99</sup> and in promoting low-carbon technologies.

The second question raised concerns the *capacity* of the UK to attract trade and investment by lowering its environmental standards and in particular to deviate trade and investment from the EU in this way. Although the UK is very attractive for foreign investment, its attractiveness might be lowered if the UK would not grant access to the single market of the EU and lowering environmental standards would not necessarily outweigh the benefits of having access to the single market.<sup>100</sup> Furthermore, given the extensive implications of IEMEs for business practices and policies in third countries, it would be relatively difficult for third countries to deviate from the standards to which they have adapted in terms of ensuring compliance with EU standards. Bradford stresses that one of the reasons of occurrence of the 'Brussels effect' is that it makes sense, economically and practically, for non-EU operators to extend EU standards across the board even when not doing business with the EU.<sup>101</sup> If the UK adopts a different regime, would it be able to project such a regime outwards in such a way as to reduce the effect of EU environmental global reach? In this respect, an interesting area is the regulation of trade in GMOs. The UK would have the option to relax its regime and enhance its relationship with GMO producing countries outside the EU context. Even though this might potentially open more

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99. This argument is particularly made in relation to recent investments made in complying with REACH within the harmonised system, See House of Commons Research Paper *supra* n. 44, 62.

100. John Springford & Simon Tilford, *The Great British Trade off, The Impact of Leaving the EU on the UK's Trade and Investment*, Centre for European Reform, January 2014, available at: [http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/pb\\_britishtrade\\_16jan14-8285.pdf](http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/pb_britishtrade_16jan14-8285.pdf).

101. Bradford Identifies legal, technical and economic non-divisibility of such Standards, *supra* n. 50.

avenues of cooperation with GMO producing countries, it should be noted that even if the EU is not the largest GMO export market, its approach has led to a limited Brussels effect being felt by non-EU GMO producers and has restricted transatlantic trade in GMOs.<sup>102</sup> It is doubtful whether by relaxing its own regime the UK would be able to move away from this influence, as multinational companies might still be reluctant to purchase crops that would lead to liabilities under the EU regime.

The third question touches upon the discussion in section 2 and the *ability* of the UK to distance itself from EU policies in the first place. If the EU's environmental action through IEMEs continues to extensively influence third countries, not only would the UK lose its leverage in influencing its non-EU competitors, but there would also be added pressure for the UK to adapt to new EU standards. In any event, if by maintaining its trading relations with the EU, UK companies would have to comply with EU environmental obligations to a certain extent, this might then induce such companies to expand such standards across their business along similar lines of a 'Brussels effect'.

#### **4. Conclusion**

Overall, even though the environment might not be the first area that comes to mind when thinking about an exit of the UK from the EU, environmental law is an important regulatory field where non-membership of the EU would have real and visible impacts on the UK's legal and policy framework and in relation to which the UK has largely benefited from being a Member State. The global reach of much of EU environmental law and the far-reaching implications it has on third countries significantly affects the UK. Following exit, the UK would be directly or indirectly bound by extensive EU environmental legislative measures that would be adopted without its contribution. Additionally, the UK would significantly lose leverage in the environmental field internationally, both in influencing international negotiations and in terms of the standard-setting power the UK currently enjoys by being part of the EU's global environmental regulatory power from which both the EU and the UK benefit.

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102. Bradford, *supra* n. 50.

