

Brexit and the nature Treaty Negotiations and withdrawal in International Law

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ABSTRACT:

The separation of the United Kingdom (UK) from the European Union (EU) famously known as the 'BEXIT' is very possibly going to have a significant impact on the environmental situation in the UK mostly because most of the UK governance w.r.t the environment stem from the EU treaties and policies. This research paper aims to study the Impact Brexit can and will possibly have on the Environment and how the UK may potentially deal with the issues related to environment protection the law of which stem from the EU which UK is a member of till Brexit actually happens. In conclusion the researcher finds that leaving the EU will not do away with the need for pooling its' sovereignty at an international level to ensure that Brexit does not end up having an adverse effect on environment. I.e. UK will have to seek of international assistance in order to maintain the standards of environment protection as is held by it now.

I. INTRODUCTION

The European Union has 28 Member States that form part of the union. What is special about this union of counties is that they are all sovereign, independent nations that have chosen to pool their 'sovereignty' with the objective of having mutual benefits of trade, commerce, governance etc. Pooling sovereignty in practicality, means the delegation of decision-making powers to the union that has been created by them, this is done to ensure that where matters of shared interest are in question all the parties involved get the best of their interests taken care of in a democratic manner at the European level. The EU thus forms a separate system of governance altogether that lies somewhere between the fully federal system in the United States and the rather loose, system of governance seen in the United Nations.

How does EU Law work?; The European Union runs on the single most integral principle, i.e. the rule of law. What this means is that all decisions and rules the member states follow are founded on EU treaties which are further approved voluntarily and democratically by the EU member countries. These treaties are all agreed upon and then negotiated by the EU member countries and then their respective parliaments ratify the same. The objective of these treaties is to lay down the ground principles and rules European Union has to function by. Every European law is based on a specific treaty article, referred to as the 'legal basis' of the legislation. This determines which legislative procedure must be followed. Following are the things these treaties set out; (a) the decision-making process, (b) including Commission proposals, (c) successive readings by the Council and Parliament, and (d) how to deal with the opinions of the advisory bodies. It also sets out situations wherein a

unanimous decision is mandatory and where mere majority is sufficient for the council to take-up any legislation.

Brexit; Brexit, as also discussed, above is the proposed withdrawal of the United Kingdom (UK) from the European Union (EU). On 23 June 2016 in a referendum, 51.9% of the UK electorate voted to leave the EU (out of the ones who participated); only 72.2% of the total registered voters turned up. On 29 March 2017, as a result of the above the government of UK invoked Article 50 of the Treaty on European Union.¹ Theresa May, the now prime minister was the one who invoked Article 50 through a letter on 28 March 2017, which was delivered on 29 March by Tim Barrow to European Council President Donald Tusk.² The most recent development in this regard is the passing of the European Union (Withdrawal) Act, 2018. The said Act repeals the European Communities Act 1972 and make other provision in connection with the withdrawal of the UK from the EU.

The European Union boasts some of the world's highest environmental standards³ and it has also been at the forefront of the fight against climate change and its consequences; The trend dictates that the EU plans to keep growing, and to achieve the same it helps neighboring countries prepare themselves for EU membership; and it is actively involved in formulating a common foreign policy with hopes to extend European values around the world. The success of these plans revolve greatly around it's' ability to take decisions in a timely manner and then further implementing them efficiently as well.⁴ The objective of this research is to figure out broadly whether or not Brexit would potentially have any adverse effect on environmental issues and also, in light of the same how the negotiations w.r.t the agreement of the Union with UK are likely to turn out as the treaties UK was bound by as a member of the Union will cease to apply to UK from the day the withdrawal agreement is put into force.⁵

II. BREXIT NEGOTIATIONS AND LEGISLATIVE IMPLICATION OF ENVIRONMENTAL ISSUES

The Brexit negotiations are the ones that are taking place in between the United Kingdom and the EU which is to come to an end by 29th of March 2019 that is the date by which UK is scheduled to leave the Union,

¹ Daniel Dunford&Ashley Kirk, *How did turnout affect the EU referendum result?*at The Telegraph, July 1, 2016,<https://www.telegraph.co.uk/politics/2016/06/24/how-did-turnout-affect-the-eu-referendum-result/>.

²*Text of PM May's letter to EU's Tusk triggering Brexit process*, at Reuters, Mar. 29, 2017,<https://uk.reuters.com/article/uk-britain-eu-letter-text/text-of-pm-mays-letter-to-eus-tusk-triggering-brexit-process-idUKKBN1701JH>.

³*Environment, European Union (2016)*,https://europa.eu/european-union/topics/environment_en.

⁴*How the European Union works*,

https://eeas.europa.eu/archives/delegations/singapore/documents/more_info/eu_publications/how_the_european_union_works_en.pdf.

⁵Consolidated Version of the Treaty on the Functioning of the European Union art.218, Official Journal of the European Union, Dec. 26, 2012, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>.

following the UK's referendum on EU membership in June 2016. The British Secretary of State, David Davis (For Exiting the European Union) on June 19, 2017, was in Brussels to initiate the negotiation of the terms of the Brexit with the Michel Barnier who is the Chief Negotiator appointed on behalf of the European Commission.⁶

According to the European parliament (from the European Parliamentary Research Service brief), "For the moment, it appears that the two sides have different views on the sequencing and scope of the negotiations, and notably the cross-over between the withdrawal agreement and the structure of future relations, and this divergence itself may be one of the first major challenges to overcome."⁷ Irrespective of that however one of the biggest issues that have been of significant concern during this is regarding the implications of the United Kingdom leaving the European Union will have on the environment. This has therefore seen a number of excellent and comprehensive studies on this subject.⁸ Before coming to a conclusion of whether Brexit is likely to be good or bad impact on the environment in policy terms, it is integral to notice that any such evaluation is inevitably going to be based some presupposed acceptance of a particular set of values.⁹ It is too early for anyone to at the present stage be sure of what the government's approach will be post-Brexit, ideologically speaking. However, politics only forms part of the equation when it comes to contemplating the impact of Brexit on the environment. In practice, any kind of significant change w.r.t. environmental policies and laws seems improbable for two reasons. First, the historical literature tells us that a relationship built over several decades puts a significant amount of inclination towards maintaining the status quo.¹⁰ Second, even if hypothetically historically maintained practices were easily undone-able at the best of times (which path dependence or the first pointer tells us is not the case), Brexit cannot any way be classified as the best of times. The procedure of Brexit has put an overwhelming amount of work pressure on the UK government, the civil services in handling all the procedural requirements of Brexit which means that it is highly unlikely for them to indulge in any kind of head-to-toe overhaul of environmental policies and laws, in the least in the short run. However, this in no way mean that there will be no change seen as A) The govt. has gone on record to state that almost one third of EU environment legislation and policies will not be continued by the EU (Withdrawal)

⁶Andrew Sparrow ET AL, *UK appears to capitulate on sequencing on first day of Brexit talks - as it happened* at The Guardian, Jun 19, 2017, <https://www.theguardian.com/politics/blog/live/2017/jun/19/boris-johnson-and-gove-both-back-may-as-tory-leadership-speculation-continues-politics-live>.

⁷*Europarl* Jesus Carmona, Carmen- Cristina Cirlig&GianlucaSgueo, *EU and UK Environmental Policy, EPRS (2017)*.

⁸*Id.*;Charlotte Burns ET AL, *The EU Referendum and the UK Environment: An Expert Review* (2016).

⁹Chris Hilson, *The Impact of Brexit on the Environment: Exploring the Dynamics of a Complex Relationship*, 7 TEL, 89 (2017).

¹⁰Brian Flynn, *What a Difference a Vote Makes? Second Guessing British-EU Environmental Policy Interactions after Brexit*, Aug. 1, 2016, <http://environmentaleurope.ideason europe.eu/2016/08/01/difference-vote-makes-second-guessing-britisheu-environmental-policy-interactions-brexit>.

Bill¹¹ B) while a head-to-toe overhaul of environmental legal frameworks is improbable, small-scale tinkering is almost inevitable which may further change the effect the laws were meant to have.

III. POSSIBLE FUTURE RELATIONSHIP MODEL

Article 50 of the Treaty on European Union (TEU) gives a statutory period of two-years as the negotiation period once any country triggers the exit process by a formal communication of that state's intention to leave, in this case it was done by the UK government at the end of March 2017. The objective here for the two parties is to come to an agreement within the span of two years, after which the UK will cease to be an EU Member State. If, for some reason the negotiations do not work out and an agreement cannot be reached then, according to Article 50 TEU, UK will drop out of the EU and an extension can only be given to the said process when all 27 countries unanimously agree for an extension beyond the 2 years as per the statute. There is a popular belief that it isn't practical to settle the termination terms as well as the future relationship goals within the span of two years and therefore certain amount of time has to be given separately to establish future relationships. The attempts however from both ends have been with the hope that an Article 50 TEU agreement would cover both issues. The European Council's stands is that it is 'ready to engage in preliminary and preparatory discussions' w.r.t the future relationships with the Article 50 TEU negotiations but only when it is able to identify that enough progress has been made in the first phase, i.e. the termination terms of UK's membership from the EU.¹²

The ultimate decision regarding the framework to be adopted for future relationships will definitely have a significant impact on whether Brexit will yield a positive or negative result for the environment. Most experts believe that the options present with the UK lie on a scale of 'Hard' and 'Soft' Brexit.¹³ The format wherein UK will cease to be part of single market and possibly even the customs union is classified as the Hard Brexit. On the other end a format wherein the full single market access is preserved and UK remains a member of the European Free Trade Area (EFTA) and the European Economic Area (EEA) (the so-called 'Norway model') can be classified as Soft Brexit. A whole other soft brexit model would be on the lines of the 'Swiss-model' wherein UK will have to enter into a Sector-by-sector bilateral agreement.

¹¹European Union (Withdrawal) Act, 2018 No. 808 (C 63), <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>.

¹²European Council, European Council (Art. 50) Guidelines for Brexit Negotiations, 2018 No. 808 (C. 63), <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines>.

¹³ It should be noted that this spectrum was rejected by the Prime Minister, Theresa May, in her speech to the 2016 Conservative Party Conference. It was conveyed that it is going to be an agreement between an independent, sovereign United Kingdom and the European Union: *Britain after Brexit: A Vision of a Global Britain*, Oct. 2016, <http://press.conservatives.com/post/151239411635/prime-minister-britain-after-brexit-a-vision-of>.

If United Kingdom were to adopt the Norway-model based on EEA membership, it would result in withholding the current EU policy stand w.r.t environment, with an exceptions being the Habitats¹⁴ and Birds¹⁵ Directives and the Bathing Water Directive.¹⁶ Here, policies that have significant environmental implications such as agriculture and fisheries would return to UK's control. In case the Swiss there had merely been some attempt at coordination between the EU ETS and the Swiss ETS. Switzerland also enjoys (paid) membership of the European Environment Agency. A Hard Brexit format that was adopted by Canada/CETA-style free trade agreement, even a minimal level of direct involvement in EU policies regarding environment was absent (CETA does however give an option for cooperation on environmental issues). The CETA in addition protects the rights of the countries involved to pick out their own levels of environmental protection, subject to some conditions that stop the states to lower standards in a way that would push their countries to the bottom. Thus, irrespective of what style of Brexit is adopted i.e. a Swiss-style soft Brexit or a hard Brexit, the legal landscape for UK's policies regarding the environmental will always be unpredictable as opposed to the predictable EEA Norway-model, which primarily aims to maintain status quo.

However, in neither scenarios in terms of the impact of the UK's future relationship with the EU will the UK be able to retain the power to do away with or even dilute the proposed EU laws that it does not support. On this basis, Brexit would irrespective of what kind will lead to a positive impact on the stringent EU policies regarding Environment.

IV. CAUSATION

It is infamously hard to state with any level of surety that upgrades to UK's environmental quality were caused by its' enrollment to EU. A few changes may have occurred in time in any occasion, even without EU's interference, and it isn't always plausible to ascertain various reasons for environmental change (for instance, isolating the effect of EU arrangements from enhancements to environmental quality caused by deindustrialization, or other financial and sociological changes, for example, the 'dash to gas').¹⁷ While evaluating the impact, time has the utmost importance on asserting whether Brexit will have a negative or positive impact on the environment. In the Bathing Water Directive for instance, numerous have rightly pointed to the effect this instrument has had, alongside the Urban Waste Water Treatment Directive, on the environment of UK bathing waters that were already extremely dirtied with untreated sewage profluent. Be that as it may, in endeavoring to set up whether, on balance, the EU has been positive for UK environmental approach, we can't

¹⁴ Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992]OJ L 206/7.

¹⁵ Directive 2009/147/EC on the Conservation of Wild Birds [2010] OJ L 20/7.

¹⁶ Directive 2006/7/EC concerning the Management of Bathing Water Quality [2006] OJ L 64/37.

¹⁷ C. Burns, A. Jordan & V. Gravey, 'The EU Referendum and the UK Environment: The Future under a "Hard" and a "Soft" Brexit' (2016), <http://ukandeu.ac.uk/wp-content/uploads/2016/08/The-Environment-under-Soft-or-Hard-Brexit.pdf>.

without any doubt evaluate whether the UK would, in time, have made a move itself in these territories in any occasion. The only conclusion we can securely come to is that, at the time, the UK was not acting and EU strategy forced it into acting.

Stepping away from the historical perspective, the paramount question that needs to be answered is whether EU policies still have a pressure on UK regarding environmental policies. The answer to this w.r.t bathing water is that as of today over 96% of UK beaches are in the least of sufficient quality or above.¹⁸ Having said that the United Kingdom still falls way behind the rest of the EU when it comes to bathing water as it has poor quality and the country stands second from the bottom with poor quality of water. One of the most obvious areas of environmental laws where the EU pressure is still dominant is Air pollution. The EU is one of the biggest sufferers of NO₂ intoxication with also the biggest number of lives lost as a result of the same,¹⁹ and EU laws have played an instrumental role coupled with judicial efforts of non-governmental organization (NGO) Client Earth in putting pressure on the UK's governance to improve air quality standards

It hence becomes difficult to state that pressure over UK by way of its' EU membership will be jeopardized completely. This is because international obligations of UK will still exert enough pressure over it although a lesser one.

V. ENFORCEMENT

It would be highly improper to evaluate the possible environmental impacts on UK for leaving the EU by a checklist approach classifying the sectorial policy changes as wins or losses. As noted by Lee²⁰, The biggest gap that could emerge and potentially left unattended is of enforcement governance. The members of the European Union are obligated to report²¹ to the Union authorities and they are also exposed to various enforcement mechanisms to ensure that the the environmental policies are being complied with. This extensive design is a fundamental part of the effectiveness of environmental administration in the UK. Some current UK laws, eminently the Climate Change Act 2008, do have their own particular institutional, reporting and enforcement courses of action or arrangements, which could work as motivation while developing a post-Brexit legal framework. At last, leaving EU also sparks concern not just about the future nature of environmental enactments, but also about how the citizens and NGOs are to make their government accountable. Judicial

¹⁸ European Environment Agency, 'European Bathing Water Quality in 2016', Report No. 5/2017, 23 May 2017, available at: <https://www.eea.europa.eu/publications/european-bathing-water-quality-in-2016>. This is compared with only 27% in 1990: DEFRA, Environment Agency & Rory Stewart MP, 'England's Bathing Water Results 2015', 5 Nov. 2015, available at: <https://www.gov.uk/government/news/englands-bathing-water-results-2015>.

¹⁹ European Environment Agency, 'Air Quality in Europe – 2016 Report', Report No. 28/2016, 23 Nov. 2016, p. 59, available at: <https://www.eea.europa.eu/publications/air-quality-in-europe-2016>.

²⁰ Lee, *The Ambiguity of Multi-Level Governance and (De)-harmonisation in EU Environmental Law*, 15 CELS, 357 (2013).

²¹ Directive 2000/60/EC, *Establishing a Framework for Community Action in the Field of Water Policy* [2000] OJ L 327/1 (Water Framework Directive), Art. 15. It is the duty to report on river basin management plans to the Commission.

review shall be of utmost importance here and obviously, it will still be accessible, but a civil society could lose its capacity to hold the government to strong environmental standards. One of the center qualities of EU's environmental law is the fact that it represents a reliable long-term commitment, which can't be changed at the impulse of individual governments on the grounds that, for instance, they are attempting to meet existing targets.

Like everything else we have discussed so far, the extent to which Brexit would create an enforcement gap is dependent upon the Future Relationship model that will eventually be adopted. This is valid for both public enforcement by the Commission and private enforcement by people in the national federal courts. With a hard Brexit, the majority of this would cease to exist. Public enforcement under a soft Brexit Norway/EEA model includes an observation authority with comparable supervisory powers to the Commission. Nonetheless, this course of action does not have the capacity to force monetary punishments on refractory states.²² The main plan of action comprises of a second appearance under the watchful eye of the EFTA Court. This same game plan applied in the EU before bringing in monetary forms of punishment either installments or lump sums and was viewed as unsatisfactory. With respect to private enforcement, in EEA law there is a backhanded impact and state risk, yet there is no immediate impact and no principle of supremacy. These last two doctrines, specifically, have been fundamental to the capacity of citizens and NGOs to assemble EU law successfully in their national courts.

VI. CONCLUSION

To summarize my research on 'Brexit and the nature Treaty Negotiations and withdrawal in International Law' my arguments have been for a systematic and dynamic analysis of the impact the environment will face on UK's exit from the EU. I have also taken into consideration issues of sovereignty and control specifically taking into consideration environmental governance, a great amount of stress has been put on the importance of Effective control over the environment which more often than not requires collation of resources between states, particularly in cases of pollution that affects several countries and where the question of wildlife migration is involved. The solution here could be pooling of sovereignty of several states by way of either multilateral or bilateral international agreements instead of any Intra EU level action. As time has passed it has become amply evident that Brexit, subject to its eventual shape, is very possibly going to give rise to a contestation over state sovereignty and control within a UK that is devolved. Without basic EU government activity on regarding environmental issues post-Brexit, there will be a requirement for the UK to make a comparable concentrated framework (as that of the EU) internally in a few areas of environmental policy. In

²² Richard Macrory, *Brexit Unlikely to Give UK Free Rein over Green Laws*, ENDS Report 499, Sept. 2016; Burns et al., *Supra note 7* at 95.

any case, having contended energetically for sovereign control over the environment as a devolved issue, the devolved administrations have just started to express a level of antagonistic approach towards the possibility that Westminster may reclaim control at the inside when the EU natural *acquis* is repatriated. The UK will still at present need a large number of the functions that the EU served in connection to the environment to be completed. Removing EU from the equation completely would basically imply that these subsidiarity-justified functions must be performed somewhere else: by means of International/global law participation and by means of focal UK control. Pooling UK power with that of external states remains essential for the former; and pooling, in any event, some sovereignty that would otherwise be devolved appears to be unavoidable for the latter. The Brexit is still at the negotiation phase wherein the negotiations have been divided into 3 phases (I – Withdrawal agreement, II – Transitional agreements, III – Trade Relations with EU after Brexit.) As of March 2018 the last issue of discussion was w.r.t the Irish Borders. According to the latest reports of The Times and Business Insider on 9th August 2018 that EU had made concessions and agreed to accept, among other things, a free trade deal which does not include free movement of EU citizens.²³ Under the proposal, the EU would also accept the terms outlined in the White Paper if Britain agreed to abide by the EU's social, environment and customs rules.²⁴

²³ Asa Bennett, *The price EU leaders want Britain to pay for a Brexit deal is becoming clear* at The Telegraph, Aug. 9, 2018, <https://www.telegraph.co.uk/politics/2018/08/09/price-eu-leaders-want-britain-pay-brexit-deal-becoming-clear/>.

²⁴ Kate Buck, *EU backs down in negotiations to allow UK to remain in single market* at Metro News 2018, Aug. 9, 2018, <https://metro.co.uk/2018/08/09/eu-on-brink-of-backing-down-over-single-market-membership-after-brexit-7818675/>.