

# CERIDAP

RIVISTA INTERDISCIPLINARE SUL  
DIRITTO DELLE  
AMMINISTRAZIONI PUBBLICHE

Estratto

FASCICOLO  
1 / 2021

GENNAIO - MARZO

# Brexit: challenges and opportunities in the EU-UK environmental law & policy framework

*Giuseppe Poderati*

DOI: 10.13130/2723-9195/2021-1-4

*La Brexit rappresenta un cambiamento rilevante nel quadro giuridico e politico delle relazioni UE-Regno Unito. Le attuali normative sulla sicurezza alimentare e idrica, nonché quelle riguardanti gli standards di valutazione di impatto sull'ambiente, potrebbero essere messe in pericolo. Questo contributo considera la Brexit non solo come una mera "rottura" negativa del sistema al fine di abbassare gli standards ambientali stabiliti. Infatti, si mette in evidenza che i potenziali rischi ambientali posti dalla Brexit potrebbero essere mitigati applicando il principio di non regressione, e contemporaneamente le istituzioni possono andare avanti adottando strumenti giuridici e azioni politiche più in linea con l'ecologia, tra l'altro creando una nuova governance ambientale e mantenendo un livello alto di cooperazione con l'UE.*

*Brexit represents a meaningful change within the legal and political framework of the EU-UK relationship. The current food and water security regulations, as well as the environmental impact assessment standards, could be considered at stake. Thus considered, this paper points out Brexit not just as a mere "breakdown" in the system in order to lower the contemporary established environmental standards. Indeed, potential environmental risks posed by Brexit could be effectively mitigated by applying the principle of non-regression, and simultaneously institutions can move forward adopting greener legal instruments and political actions inter alia creating new environmental governance and maintaining a high level of cooperation with the EU.*

## **1. Introduction**

Many centuries ago, Confucius firmly asserted: «*study the past, if you would*

*define the future».*<sup>[1]</sup> Promptly agreeing with this important statement, the current world state of affairs can be better understood by looking at the past historical events as our best teacher in order to avoid mistakes that the progress of humanity sometimes implied in so far doing. However, delivering reasonable predictions of what will happen next in today's world after Brexit is not the scope of this paper. Instead of, this paper analyses why current existing legal and political environmental standards could be considered at risk within the new framework of EU-UK regulatory relations. With this purpose, **Section I** briefly outlined a historical excursus of the European integration process. This process could be described as a sort of a roller coaster path not only characterized by failures or slowdowns crisis but also by the achievement of successful milestones towards a full political European integration. Simultaneously to the process of integration, it was a great environmental normative development. Furthermore, despite the existence of the new Trade and Cooperation Agreement (TCA) 2020 between EU and UK, **Section II** shows what were the potential and suitable as well as considered cooperation patterns that could be adopted by the stipulating parties, highlighting what would be the best potential model under the lenses of environmental protection. Particularly, this section also tries to answer the interrogative of whether the UK could contribute to creating a new system of bilateral sectoral relations. Then, **Section III** offers an initial environmental assessment of the Trade and Cooperation agreement. Subsequently, **Section IV** demonstrates the latent risk of domestic deregulation – after Brexit – in the environmental legal regime by also recalling the not so positive previous cases of air pollution and soil directive framework. This section focuses on critical areas such as (i) water, (ii) air pollution, (iii) environmental permitting system, (iv) EIA and (vi) soil. Of note, one could make the case of possible significant changes in the agricultural and fisheries policy, food and water security standards, and implementation of the obligation to carry out an environmental impact assessment for projects and activities in the UK.

Conversely, **Section V** puts the light on the Brexit as a paradoxical opportunity for the UK to improve and innovate its environmental set of rules by means of (i) new domestic green governance institutions, (ii) approval of laws and regulations on the adoption of best available technologies and artificial intelligence. Significantly, **Section VI** refers to international law and the importance of the

principle of non-regression as a way to mitigate the risk of deregulation in the above-mentioned environmental areas. However, one ought to note that the realization of a so-called *Green Brexit* heavily relies on the political will of the British public institutions, which, most probably, are going to be called to establish a proper set of laws and measures not necessarily harmonized with the European legal and political context. **Section VII** provides with the final remarks.

## **2. The European integration process: historical excursus and environmental normative development.**

The European Communities and the United Kingdom *environmental policy* was really conceived in 1973, after the integration of a good number of European States in the Communities. It is relevant to note in our present context – among these new Member States – the membership of the United Kingdom of Great Britain and Northern Ireland (UK). At that time, it was paved the road for the making of a common market area (i) pulling down the economic custom barriers, (ii) increasing the freedom of circulation of workers, and exchange of goods and services, (iii) drawing the beginning of the common agricultural and commercial policies.<sup>[2]</sup>

The **Single European Act (SEA) 1986** entered into force, marking the beginning of the environmental *normative development*. The European Community actively worked on different grounds, such as energy (other than nuclear), transport, telecommunication, and **environmental protection**. Of note, with reference to the latter ground, Article 130 - R of the *SEA* states that: «*The action [of the EEC] in what concerns the environment has the following objectives: (i) preserve, protect and improve the quality of the environment, (ii) contribute to the protection of the health of people, (iii) assure a prudent and rational use of the natural resources*».<sup>[3]</sup> Thus, the EEC well considered the intersection between environmental protection and human security, inviting its Member States to increase the related living standards within their own domestic legislation. This was incredibly important to advance environmental protection at the regional and national as well as *strictu sensu* at the European level.<sup>[4]</sup> Although already in 1973 there was a successful publication of the **1<sup>st</sup>**

**Environmental Action Program**<sup>[5]</sup> by the Commission, it is an opinion of the writer that only after the stipulation of the *SEA*, environmental protection started being considered as an important component of the political action and program set by the European institutions besides the achievement of economic objectives. It is worth pushing this point a step further, stating that with the *SEA*, the environmental normative development becomes a parallel track to the progressive advancement of the integration process; basically, they move forward together.

In the current *parlance*, the **Treaty of Maastricht 1992** assumes fundamental importance. This treaty is literally a historical turning point within the European integration process.<sup>[6]</sup> Besides that, the fact that this treaty created a mere obligation upon the European Union to protect the environment should be here emphasized. As a general rule, Article 2 plainly states that: «*The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities ... to promote throughout the Community a harmonious and balanced development of economic activities, **sustainable and non-inflationary growth respecting the environment**, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States*».<sup>[7]</sup> Member States like the UK got deeply influenced by the EU law. Thus considered, the Treaty of Maastricht embodied both the concept of sustainable economic development and several principles of international environmental law, namely (i) prevention principle; (ii) polluter pays principle, (iii) precautionary principle.<sup>[8]</sup> This brings up to another critical point within environmental protection. In particular, the Treaty of Maastricht established the principle of subsidiarity by which the EU's action could complement some ineffective domestic legislation, for example, with reference to national plans, specific laws on air pollution, water security, food security, and so forth. Thus, the European integration process<sup>[9]</sup>, in this particular phase, was characterized by a normative development focused on the elaboration of an integrated model of policies and laws able to consider both the principles of precaution and subsidiarity. As such, it is possible to think about it as a consistent legal innovation added to the EU system. Subsequently, without the specific purpose

of leveling up the integration among EU Member States, the **Treaty of Amsterdam**, entered into force in 1999, introduced mechanisms of enhanced cooperation in some matters as well as it established the duty to integrate environmental protection into all EU sectoral policies with the unambiguous intent of promoting sustainable development<sup>[10]</sup> considering the principles of (i) the high level of environmental protection<sup>[11]</sup> and (ii) the integration of environmental requirements into other Community policies.<sup>[12]</sup> Notably, Article 100a (4) confers the possibility of adopting more stringent national environmental measures; interestingly, this has been considered by some Scandinavian scholars as a sort of “environmental guarantee”.<sup>[13]</sup> Definitely, the implementation of stringent measures would contribute to creating a healthy environment. By way of illustration, it is sufficient to mention that – within this broad historical excursus – the **Treaty of Nice 2002** and the **Convention on the Future of Europe** had, despite some critics, the primary purposes of facilitating the realization of the enlargement of the EU.<sup>[14]</sup>

The **Treaty of Lisbon**, entered into force in 2009, represents another significant progressive move of the integration process. The Preamble of this treaty significantly expresses the commitment of the EU «*to complete the process started by the Treaty of Amsterdam [1997] and by the Treaty of Nice [2001] with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action*». <sup>[15]</sup> In holding this view, it assumes a functional status the recognition of the EU as a subject of international law. Technically speaking, the EU holds the legal personality that enables itself to sign international or multilateral agreements (assuming rights and obligations) and to participate as a sovereign member in international organizations. By doing so, the EU external action (with the Third Countries) is now strengthened and stabilized.<sup>[16]</sup>

It is important to remember here that, despite an arguable opt-out<sup>[17]</sup> had by the UK and Poland (through the Protocol 30 of the Treaty), the **Charter of Fundamental Rights of the EU** is now acknowledged as a *hard* law by the provisions contained in the Treaty of Lisbon.<sup>[18]</sup> Of note, the UK distinguished itself as a “reluctant” or not an “easygoing” EU Member States defending and preferring the British way of conducting legal and political affairs. Not surprisingly, one could argue that the origin of Brexit might be rooted in that

historical period of time. As to the specific content of this treaty, it is important to briefly highlight that the EU adopts and develops a holistic approach to environmental protection by making reference not only to the socio-economic but also to peace and security dimensions, and by considering sustainable development as a goal to be fully achieved through integrated policies and activities (e.g., in the field of fisheries and energy).<sup>[19]</sup>

From a legal standpoint, an important novelty was added to the treaty. In particular, it is successfully bordered the legal exclusive and shared competences of the EU besides those actions implemented «*to support and coordinate or supplement the action of the Member States, without thereby superseding their competence in these areas*». <sup>[20]</sup>

Certain concrete suggestions about the last observation would seem logically to arise within the sphere of environmental law of the Union. First and foremost, the conservation of marine biological resources under the common fisheries policy is an exclusive competence of the Union. Secondly, there is a set of shared competences in different fields, such as (i) environment<sup>[21]</sup>; (ii) agriculture and fisheries<sup>[22]</sup> (obviously excluding the conservation of marine biological resources), and (iii) energy.<sup>[23]</sup> These distinctions should not be taken too rigidly; however, it is quite important to have them established to pursue a high level of environmental protection for developing a set of consistent laws and policies, for instance, focusing on the spreading of renewable energies and combating climate change.

To reconcile these whole set of considerations made so far, it should be said at once that, after all, the *sui generis* organization of EU – through its complicated and slow process of integration – was able to elaborate the most advanced and “brave” normative in the theme of environmental law and policy. Nowadays, after the Brexit referendum and the reached agreement, the EU integration process is experiencing a chaotic moment or better to say another challenge in its path. Chiefly, the impacts of Brexit are still unknown, except for the Euroscepticism that has been produced – not accidentally – soon after the signature of the Treaty of Lisbon. The debate on the deepening of the Union political integration is open like never before.

### 3. Looking back and forward: what models of cooperation between the UK and the EU have been or are still in consideration for a higher level of environmental protection?

Analyzing Brexit implications implies the study of a number of factors related to history, economy, politics and law. Around November 2020, one could only affirm with a high degree of certainty that «*whatever happens, the relationships between the UK and the EU and its member states will continue to be regulated by international law - treaty and customary law as well as general principles of international law - and submitted to the governance and dispute resolution mechanisms of international law*».<sup>[24]</sup>

From an institutional standpoint, it is assertable now that the UK is not willing to adopt a so-called “**Norway Model**” with a future enlargement of the membership of the European Economic Area (EEA) and the European Free Trade Association (EFTA). In fact, although by adhering to this model the UK could have almost full access to the EU common market benefiting of the four freedoms (regarding the movement of goods, services, people and capital) and without jeopardizing closer cooperation in fields like environment,<sup>[25]</sup> one could say that UK is not interested in it because this model follows the principle of *integration without representation*. This would create a situation where the UK could become a great *norm taker*. As a matter of fact, Norway, by carrying out the *two-pillar structure* incorporation procedure<sup>[26]</sup> plainly outlined in the EEA Agreement, incorporated almost 75% of EU law.<sup>[27]</sup> This is an important legal and political aspect of the *constructive* Norway model. Many of these are sectoral laws related to climate change, energy, and chemical management; plus, framework and strategy directives on water and marine. With a particular focus on climate change, the UK, following this model, could establish a strong cooperation with the EU. And yet, chiefly, the UK could be in favor of the EU Emissions Trading System (EU ETS), sharing EU targets for renewable energy, energy efficiency, energy savings, and regulations of the environmental performance of various products as Norway does.<sup>[28]</sup>

In somewhat simplistic terms, a UK membership in the EEA and EFTA would



significantly help to reduce the impact of the Brexit on EU environmental law and policy.<sup>[29]</sup> Notably, the EU institutions have taken the lead in conducting environmental affairs even on behalf of the EEA members (namely, Liechtenstein, Norway, and Iceland). One further observation of a general character must be made here. In order to have a better understanding of the importance of the environmental protection in the **EEA context**, it is necessary to methodically recall **Article 73 paragraphs 1 and 2 of the Agreement** that declares: «*Action by the Contracting Parties relating to the environment shall have the following objectives: (a) to preserve, protect and improve the quality of the environment; (b) to contribute towards protecting human health; (c) to ensure a prudent and rational utilization of natural resources. 2. Action by the Contracting Parties relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Contracting Parties' other policies*». <sup>[30]</sup> Of note, the EEA Agreement does not apply *inter alia* to «*Common Agriculture and Fisheries Policies (although the Agreement contains provisions on various aspects of trade in agricultural and fish products)* » <sup>[31]</sup>; these are specifically regulated through bilateral agreements. Additionally, one ought to note that the UK would not incorporate the Birds Directive, the Habitats Directive and activate the Natura 2000 network of protected areas simply because there are no provisions on nature management and conservation in the EEA agreement. However, as long as the EEA considers environmental protection as a priority, the adoption of the model in the current parlance would at least mitigate or abundantly avoid the risk of deregulation in the UK environmental law and policy. This argument is also supported by some eminent scholars that have firmly emphasized the EEA membership in order to keep a good amount of EU law applicable in the UK. <sup>[32]</sup> Anyway, at the time of writing, the *Brexiteers*, including the current Prime Minister Boris Johnson, consider the Norway model a *bad deal*; a strongly disadvantageous agreement for the United Kingdom that is looking «*for taking its sovereignty back*». <sup>[33]</sup>

Undoubtedly, for the *Brexiteers* staying in the European framework by way of the single market would limit British sovereignty. As the Member States vetoed *cherry picking* (the power to adopt or restrict the fundamental freedoms of the

single market), access to the EEA would prevent the United Kingdom from setting constraints on the free movement of EU citizens, one of the strong points of Brexit supporters. Also, Theresa May, the Former Prime Minister, invited the EU to be *creative* and not to resort to pre-established models, such as the “Norway model” or the “**Canada model**”<sup>[34]</sup> (referring here to the 2017 Comprehensive Economic Trade Agreement (CETA) stipulated between Canada and the EU).<sup>[35]</sup> Some words should be spent on the latter mentioned model. To some extent, it seems justified to argue that the Parties, particularly the UK, considered the adoption of the CETA model, in which the environment, climate and health are not contemplated as an urgent priority. There is a room for some arguments here. First and foremost, although it is true that CETA is by itself qualified as a comprehensive agreement (setting provisions to pull down economic barriers in several trade and non-trade areas), this new-generation type of bilateral free trade agreement could be more effective in establishing not just general but specific rules and commitments in areas related to the environment and human security (e.g., climate and health).<sup>[36]</sup> The UK would have been bound to an agreement where environmental protection and sustainable development are general goals without any explicit obligations to be carried out. Secondly, the UK would be subject to an agreement where, in the area of sustainable development for agriculture (e.g., biotechnology, GMOs, and field crops), the legal standards on the use of pesticides and food quality are lower than the current European ones. Finally and above all, the UK would be operating in a legal framework characterized by: (i) no limit to the rise of CO<sub>2</sub> emissions due to aviation and shipping activities and trade in fossil fuel; and (ii) no provisions, for instance, with reference to low carbon economy or zero waste economy to fight climate change. Needless to say, CETA does not look like the most adequate model to be followed by the UK having regards to environmental related issues.

To varying degrees within the Brexit context, the **Swiss model** was considered in order to maintain a quasi-interlocked and more integrated EU-UK regulatory relation. This model is based on the Swiss membership to the EFTA and a series of very interesting bilateral legal arrangements with the EU inherent also to the sphere of environmental protection. In this sphere, the UK would have gotten the chance to dynamically participate in the programs and actions of the European Environmental Agency. This entity carries out environmental

information activities gathering significant data and empirical analysis through an Information and Observation Network called EIONET and advising the EU Commission on environmental policy. Formally speaking, the UK would have been in the position to establish a closer cooperation with the EU undertaking transnational environmental issues through a pivotal system of an exchange of information with neighboring countries and participating in common initiatives focusing on the realization of research activities with reference to several areas, namely: (i) soil contamination; (ii) biodiversity; (iii) greenhouse gas emission trading scheme; (iv) air pollution; (v) ecolabel and resource efficiency; (vi) environmental permitting. It is an opinion of the writer that, with the Swiss model grounded on the principle *integration without membership*<sup>[37]</sup>, the UK would have been probably able to orient itself towards the creation and protection of a healthy environment. It must be stressed that the UK could either incorporate much of the EU environmental laws and also, freely, adopt more stringent environmental measures in areas not yet covered by the EU law; or conversely, it would have the option of not taking into account the acceptance of environmental legislations. Thus considered, this model would be able to safeguard British sovereignty. Although the Brexiters are working on a new model, it would not be remote the chance for the UK to embrace the Swiss model without compromising the current environmental standards.

#### **4. An environmental assessment of the UK-EU Trade and Cooperation Agreement 2020**

While in the reached agreement it is straightforwardly expressed the will to protect the sovereignty of the stipulating parties, at first glance and to some extent, this agreement appears to be like an attempt to strike a balance between the right to regulate for achieving self-reliantly legitimate policy goals (such as a clean environment) in their respective territories and the duty to keep a high level of environmental protection (including climate change).<sup>[38]</sup> Following Article 1.2 of the reached agreement, it is recognized the *precautionary principle*.<sup>[39]</sup> Meaning that the lack of scientific knowledge of a particular issue cannot affect the right and duty to adopt, maintain and enforce measures of safeguard and the established level of protection of the living environment.

Interestingly and pragmatically, this agreement has some provisions that focus on the promotion of a *large cross border or international cooperation projects* from which people can benefit at large.<sup>[40]</sup> Very welcome are projects that push toward the creation of a low carbon international society, particularly those projects stimulating and fostering the implementation and utilization of renewable energies whereas these are imperative for fighting climate change. Of note, energy and environmental subsidies will support the energy transition and decarbonization of emissions linked to their respective industrial activities without compromising the rules related to the level playing field for open and fair competition and sustainable development.<sup>[41]</sup> This will definitely help the achievement of an overall reduction in greenhouse gas emissions while keeping a high level of energy efficiency.

Most importantly in our present context, Chapter 7 of the reached agreement is entitled “environment and climate.”<sup>[42]</sup> In accordance with Article 7.4, the parties, on the one hand, acknowledge their respective commitments to carry an environmental impact assessment ensuring the right of public participation for projects and activities; and yet, on the other hand, «*each Party commits to respecting the internationally recognized environmental principles... in particular: (a) the principle that environmental protection should be integrated into the making of policies, including through impact assessments; (b) the principle of preventative action to avert environmental damage; (c) the precautionary approach referred to in Article 1.2(2) [Right to regulate, precautionary approach and scientific and technical information]; (d) the principle that environmental damage should as a priority be rectified at source; and (e) the polluter pays principle*».<sup>[43]</sup> This is important to underline because it represents one of the reflections of the authoritative *principle of non-regression* (see below Section VI) to which the agreement seems to be committed through a regulatory convergence of the parties based on relevant international standards (e.g., in the field of airworthiness and environmental certification, motor vehicles). Thus considered, both Parties considered significant the multilateral action of the United Nations particularly, through the United Nations Environmental Program in order to tackle transnational environmental related issues.<sup>[44]</sup> This is an important aspect as we are living in a historical momentum in which, at times, protectionism and bilateralism seem to prevail over multilateralism.

## 5. Risks of domestic deregulation in environmental areas

By way of illustration, it is important methodologically to start stating that the UK has undoubtedly – although no perfect – one of the most advanced legal systems in the world to protect the natural environment. On closer examination, the UK adopted different regulatory techniques, namely: (i) command and control; (ii) anticipatory control; (iii) continuing control; (iv) adaptive management. Through these relevant techniques aimed at the elaboration of primary, secondary, and tertiary environmental legislation, the UK is broadly able to keep itself in decent but not excellent ecological status – removing at least the label of being *the dirty man of Europe*.<sup>[45]</sup> It is certainly possible to argue that after Brexit, the *British* approach to pollution control could be back. It has been pointed out by some scholars that this approach is a mix of pragmatism in combination with other factors like the need for more flexibility rather than uniform and centralized application of the laws and regulations imposing environmental standards – similar to the EU way of doing.<sup>[46]</sup> As a particular note, the environmental laws produced within the EU institutional framework and transposed in the UK domestic sphere are in large part uniformly interpreted without discrimination; while there are two centralized and decentralized administrative binaries due to the devolution of powers to local governments.<sup>[47]</sup> This is a key characteristic of the UK institutional system that provides devolved authorities with a good amount of discretion so far.

In the present context, Brexit could hide the latent risks of deregulation in some areas of different environmental legal regimes. Here as follows six areas have been identified.

### *Observations on Water Legal regime:*

This institutional structure is also able to influence the implementation of the EU law domestically. For instance, in the case of the implementation of the **EU Bathing Water Directive (2006/7/EC)**, it was adopted a flexible approach to set standards for achieving good water quality allowing the UK to designate the bathing seasons in consideration of the diverse landscape of the country (having both inland and coastal bathing waters). After Brexit, the British institutions may pass new laws without the need to comply with EU law that could not be able to achieve the same positive outcome of this particular EU directive; apparently,

once out from the EU, the UK Government will not have the duty to comply with any EU obligations.

*Town and Country Planning:*

The UK has elaborated on several sectoral laws that probably could result affected in the post Brexit period. In particular, the UK set of rules related to the *town and country planning* is greatly shaped by the EU law firmly centered on some important directives, notably: The Environmental Impact Assessment Directive 2011, the Strategic Environmental Assessment Directive 2001, and the Habitats Directive 1992. The domestic legislation in this area is based on the prevention principle disciplining anticipatory control on the development of projects and activities to avoid environmental harm. The duty to carry out an EIA for the developer is the key feature of this sectoral law. It is important to underline here that the EIA is considered to be the most effective tool in protecting the natural environment and creating the ideal conditions for sustainable development. Unfortunately, at the same time, EIA is quite expensive also for UK operators in charge of it. Having regards to this latter aspect and with the political goal of stimulating economic growth, Brexit could be able to soften EIA obligation in two possible ways. Firstly, by eliminating the threshold that set EIA as a requirement to request licenses or permits (e.g., a construction permit in a certain territorial area and according to the type of project and activities to be developed). And secondly, by removing the requirement of demonstrating *«imperative reasons of overriding public importance indicated in the Habitats Directive»*.<sup>[48]</sup> In doing so, the EU obligations would not be a material consideration in planning decisions; especially in the case of a *hard* Brexit. Differently, if the UK would choose to adopt the Norway or Swiss model of cooperation with the EU, this deregulation could be easily avoided since the EU law would be still valid.

*Environmental Permitting:*

Furthermore, the UK *environmental permitting* system mirrors almost completely the EU one that is organized in a series of main directives.<sup>[49]</sup> It is the emblematic case in which the EU law profoundly shaped the UK law. For this reason, assessing the potential implication of Brexit in this area is really critical, and it is not an easy task. Basically, the regulatory relation could remain unchanged, or probably the UK would be more inclined to get the chance of

setting up lax standards. Brexit will require a transitional period of time for the UK to stabilize its own environmental law while keeping a decent level of legal certainty.

*Air Quality:*

In our present context, peculiar importance has a reference to *air quality-related issues*. The UK domestic law is well outlined with several laws and regulations, one above all is the National Air Quality Plan 2007 that, by way of a regulatory listing technique, tries to control and impose limits of emissions of certain toxic chemical substances in the air. The UK also centered its action on the role played by the local authorities that, at the time of writing, still carry out assessment activities verifying compliance with the EU law. Given that, it could be stated that, presumably the duty to comply with EU law in this environmental area can be easily bypassed after the advent of Brexit constituting a danger in safeguarding natural environment and human health and security.<sup>[50]</sup> Within the area of air quality enforcement rules, it appears to be well established the jurisprudence of the CJEU in relation to the UK environmental matters on air pollution. In particular, emblematic is the case *ClientEarth vs. Secretary of State for the Environment Food and Rural Affairs*<sup>[51]</sup> in 2015 in which the CJEU condemned the UK because of non-compliance with the European normative contained in the Air Quality Directive. The non-compliance was demonstrated through assessment activities, pointing out a violation of established limit values to protect human health (precisely, 95 percent of the examined areas were characterized by high concentration of toxic substances). The CJEU stated that this is a case of a direct breach of **Article 13** and **22** of the mentioned EU Directive. The UK government violated the specific obligation to take all necessary measures to secure the environment. Besides that, the CJEU obliged the UK to set a new air quality plan to undertake this dangerous situation. Subsequently, the UK presented a plan (supposed to be implemented by 2025) without referring to the European normative considered too strict and difficult to comply with for “practical difficulties.” Later, the CJEU newly condemned the UK government, affirming the duty to immediately set a quality plan (by July 2017) given the fact that a particular urgency characterized the situation in relation to the critical level of pollution. All in all, the CJEU’s judicial review, in so far doing, is crucial in creating a safe venue for the application of

environmental quality standards within the legal systems of the Member States. Trying to assess the post-Brexit epoch, it is, at the moment, possible to assert that a large part of the Brexiteers negatively considers the series of mandatory orders issued by the CJEU; defining these as an overruling activity upon the British Parliament and national courts (with no legitimacy).<sup>[52]</sup> Thus considered, it is highly probable or better saying roughly certain that after Brexit judicial review made by CJEU in the UK, environmental matters will be absent. The implications of that would be catastrophic for maintaining or creating a healthy environment.<sup>[53]</sup> Pragmatically, the UK institutions could find excuses emphasizing, for instance, the point of practical difficulties to enforce environmental quality standards; this argument leads (i) to a lack of action in taking necessary measures to protect the environment, and concurrently (ii) to a proliferation of environmental degradation.

*Soil Legal regime:*

To further understand the potential impacts that Brexit is likely to produce in the next years, it is worth elaborating on one observation on the *soil legal regime* too. It must be stressed that the EU adopted a Soil Thematic Strategy 2006, highlighting the need to have a high level of soil protection. Subsequently, in 2014, the EU withdrew the proposal of a Soil Framework Directive after the opposition of some Member States – among this the UK. Accordingly, «*a particular concern was a proposed requirement on landowners to provide a soil status report when selling land. Defra argued that this would be costly and could have liability implications, given that the UK and other member states had existing contaminated land regimes*».<sup>[54]</sup> This is another evidence about the intolerance that the UK has towards additional command and control regulation – farmers do not really like.<sup>[55]</sup> Brexit would likely encourage the UK to have its own “independent” soil legal regime (though this could be part of the negotiations in case of *soft* Brexit). And perhaps, the focus would be on the development of the agri-business sector linked to the use of new technologies. Eventually, the UK soil legal regime should have a section of relation with European countries as most of the environmental related issues have a considerable transnational character.

*Risks of Deregulation:*

As a theoretical model and discourse, *deregulation* is always around the corner in



the UK policy that considers on the one hand cutting useless and time-consuming bureaucracy and reducing the amount of government regulations that somehow can interfere in business activities, whereas, on the other hand, it produces cost savings – in theory – moving towards better regulation. Unfortunately, it is important to note that in the UK, the government (in recent years) reduced its environmental control and inspection activities after having used deregulation as a mean to cut public expenditure.<sup>[56]</sup> Brexit could multiply this kind of situation unless DEFRA and Environment Agency have a more significant amount of financial resources.<sup>[57]</sup> It should be borne in mind the fact that in 2014, the Environmental Audit Committee created an environmental scorecard to monitor and assess the government environmental policies in several selected areas. Unfortunately, the result was remarkably negative because many areas were considered “red risks” or “amber risks,” while none of them were evaluated as satisfactory.<sup>[58]</sup> On a totally different trend – meaning by adopting an additional regulation – the UK positively uses some other economic instruments for environmental ends subsidizing project development for renewable energies in the political framework of combatting climate change. Conversely, it is possible to consider a breach of EU state aid rules, the cutting of financial aids to the green energy sector while delivering subsidies, and other economic support to the oil and gas sector that happened in 2015.<sup>[59]</sup> In this scenario, Brexit is likely to worsen the environmental issues and energy package, and climate change safeguards in the UK within the long term unless a strategic political action would be taken in order to phase out these subsidies; all of that would represent a significant regression of current existing EU policy.<sup>[60]</sup>

The exit of the UK from the EU potentially could still result in a sort of deregulation of all binding established sets of domestic rules and multilateral environmental agreements so far stipulated; it depends always on the respect of the principle of non-regression (see below Section VI). In point of fact, environmental issues were not part of the political debate of the 2016 referendum. The White paper just mentioned a little bit about it. Environmental protection does not even appear on the twelve points established by the UK Government to start the negotiations with the EU. Unsuccessfully, the Parliament’s Environmental Audit Committee tried to work with the executive power organ to undertake environmental concerns. At the same time, public

pressured political activities initiated by a number of Environmental Non-Governmental Organizations (ENGOS) were not enough to catalyze the attention of the main British political actors engaged in several harsh debates on other matters, such as the boundary issue between Northern Ireland and Ireland or even the Scottish political will to formally remain in the EU. Despite that, ENGOS were able to publish a *manifesto* asking the UK Government to set some environmental guarantees before leaving the EU.<sup>[61]</sup> At this time, there is still a high degree of uncertainty for the future and fear for the difficulties of possible incorporation or *internal nationalization* of the European environmental normative. Technical and legislative operations would leave a wide range of discretion to those who suffer the current EU environmental safety and human security standards because of the economic slowness that, in certain circumstances, these produces. For these considerations, it is possible to argue that if Brexit succeeds, it might be a challenge to synchronize and, consequently, to reframe the UK and EU legal and political systems. Sincerely, this would not be an easy task, not even for a team of experienced or “seasoned” legal and political experts.

A number of commentators and scholars or even experts working in international organizations have the strong perception that the UK would be free to reform its environmental policy towards less ambitious goals by getting even distant from the actions and programs related to the achievement of the Sustainable Development Goals established by the United Nations to which it agreed with the EU.<sup>[62]</sup> This argument could be linked to the failure of the recent Environmental Bill to complete its passage through the Parliament. One of the main reasons for this no legislative progress it might be rooted in the attempt to establish the Office for Environmental Protection (OEP).<sup>[63]</sup> Basically, the UK Government tried to introduce this new institution providing it with several powers in order to ensure a high level of environmental protection. In particular, the OEP would have had primarily the powers (i) to scrutinize and advice public authorities’ environmental policies, (ii) to open investigation, and overall (iii) to refer the Courts about failures by public authorities to comply with environmental law.<sup>[64]</sup> However, if the OEP was supposed to replace the enforcement role of the EU Commission, this latter supposed assigned power can be easily criticized. In fact, while the EU can impose heavy sanctions on the

Member States for violation of environmental safety standards, the OEP would have merely the command to report to the relevant Minister, and to activate, for instance the accessible environmental courts and tribunals<sup>[65]</sup> (established in England and Wales) for a judicial review. In such a way, it could not have the same *modus operandi* of the EU Commission that directly can punish the violators with economic fines.<sup>[66]</sup> Moreover, the OEP would have simply the function of an environmental watchdog attached to government, and financially funded by it. Thus considered, it is possible to agree with the majority of commentators underlining the need to have an effective OEP with definitely much greater independence.<sup>[67]</sup> This can be considered as an example of deregulation in the sphere of enforcement for non-compliance with environmental laws.

It is crucial to underline that parallel to the above-mentioned risk of deregulation, there is one of environmental fragmentation nationwide. As it is commonly recognized, the UK has a constitutional framework dividing competences between the Central Government (located in Westminster London) and the Devolved Governments (of Scotland, Wales, and Northern Ireland); the latter ones can request the Central Government to have a higher degree of discretion on dealing with environmental matters. Thus characterized, before proceeding with the incorporation of the EU environmental law, it would make sense to redraw well the line establishing the division of competences between the Central and Devolved Governments bearing in mind the importance of the principles of subsidiarity, proportionality together with the principle of conferral. It would be fundamental to renegotiate and reframe the internal legal and political order also in the area of the environment. Additionally, there could be another see-through and realistic hypothesis here. In particular, after taking back the legislative powers exercised by the EU and restoring the centrality of the British Government, the UK could prefer to design just one central and uniform legislation in order to avoid any technical harmonization issues at the domestic level with the Devolved Governments.

## **6. The *paradox* of Brexit as an opportunity to innovate**

## **environmental law and governance**

Although Brexit could pose institutional and international normative challenges, it could be an opportunity to rethink and redesign environmental law and policy in Europe and, broadly, in the world at large inasmuch a new type of environmental governance could be created. This could be done by increasing the focus of environmental law and policy on implementation and enforcement as well as the effectiveness of its regulations (e.g., in replacing the EU Common Agricultural Policy or the EU Common Fisheries Policy). Thus considered, Brexit must not be seen just as a “breakdown” in system in order to lower the contemporary established environmental standards. Indeed, institutions could move forward, adopting greener legal instruments and political actions, maintaining a high level of cooperation with the EU. Moreover, the need to create new environmental governance<sup>[68]</sup> is implied in the goals set up in the 25 Year Environmental Plan that UK Government published in 2018.

Moving from the implicit to the explicit, the *living* aspect of this plan is rooted in the ambitious goal to create a dynamic economy and to maximize its benefits without destroying the environment; indeed, having higher consideration of the natural capital and fight to climate change for the generation to come.<sup>[69]</sup> The existing legal and political instruments such as the UK’s Climate Change Act (2008)<sup>[70]</sup>, the Clean Growth Strategy (2017)<sup>[71]</sup>, the National Adaptation Program (2018)<sup>[72]</sup> must be reinforced with new institutions able to create positive leadership to take more effective action solving contemporary problems. Here as follows, some ideas can be briefly sketched.

First and foremost, acting within a model of institutional network-based governance setting up an interdependent relation – obviously a nonhierarchical one – with the EU is fundamental as a large part of the environmental issues hold a strong transnational character. After Brexit, it will be still important to share common values and to achieve collective goals through cooperation with the EU. Thus, a new interinstitutional EU-UK body would facilitate communication and organization of common long-term flexible programs (with or without binding commitments).

Secondly, recognizing Brexit not only as external but also as an internal systemic change, a new domestic independent body would be useful to hold the UK

Government accountable for its environmental law and policy (ensuring transparency and legitimacy too). In a way, it is possible to consider the attempt to create the above mentioned OEP. However, as already referred (and criticized above) the OEP must be financially independent and not attached to any public authority in order to be effective. In other words, it has to be able to work as the EU Commission did so far holding the power to impose high financial sanctions against the violators. Of note, the OEP would watch the application of the principle of non-regression (see the section below) in the context of post-Brexit environmental protection.

Thirdly, the use of the National Ecosystem Assessment (NEA)<sup>[73]</sup> tool would be of great help in monitoring inclusively the current status of the natural environmental conditions and the human well-being values producing better decision-making processes outcomes. In particular, this modern assessment tool has an appealing and attractive potential in its use and scope. Combining a plurality of different scenario (e.g., economic, cultural, environment) with the ecosystem, the NEA is able to provide significant reports on several issues, for example, related to the coastal and marine ecosystem, cultural, ecosystem, and so forth.

It is an opinion of the writer that NEA is an advancement of the integrated and social impact assessment because it adopts an interdisciplinary and anthropocentric approach, putting the ecosystem at the center to reverse the ongoing deterioration. NEA can try to forge new ecological rights and contribute to managing crosscutting issues like population growth and health, intersecting with sustainable development, urbanization as well as cultural acceptability of a specific project.

Lastly, the creation of a new Green Investment Bank would be able to strengthen the local leadership that could be exercised by several territorial Green Business Councils. These later local institutions, through the support of a specific investment bank, could favor the use of economic instruments like green bonds financing projects able to move towards the low carbon economy, for instance, gaining benefits from the zero-waste economy or circular economy. In the same line, this would encourage the adoption of expensive and extremely beneficial best available technologies; in particular, artificial intelligence and satellite data to assess ecosystems referring to soil health, air quality, and so forth. Perhaps, in a

sense, one could argue that the UK, after Brexit, would have that necessary higher degree of autonomy, speed, and flexibility than sometimes working closely with the EU do not allow to have. As a final note, it should be emphasized that it is a royal established truth that every deep crisis contains major opportunities. And perhaps, after Brexit, the EU-UK environmental regulatory relation will open a new era of cooperation patterns based on new institutions with a different and advanced *modus operandi* of environmental law and governance as well.

## **7. Brexit and International Law: The Principle of Non-Regression**

Brexit could be interpreted as one of the vivid reflections of certain political orientations having the objective of overthrowing large part of the so far developed environmental normative in Europe in favor of the *centrality* of the sovereign British Parliament. Practically speaking, this argument could also hide, for instance, the specific intent of the *Brexiters*, among other things to replace the current Common Agricultural Policy with new regulations, since they consider the EU farming system as a profound disgrace.<sup>[74]</sup> In fact, on closer examination, it is worth to note that under the EU legal framework, the UK organic farmers and food producers must undergo strict production requirements and inspection regime that might negatively affect their own businesses. In order to avoid financial sanctions, these above-mentioned economic operators have to comply with the general food law (e.g., on ecolabelling) and cross-compliance legislation in connection with health (e.g., reduction of diseases and sickness), and environment (e.g., soil erosion, biodiversity protection, water pollution).<sup>[75]</sup> Indeed, the *Brexiters* could be able in the future to promulgate new regulations determining a less stringent bureaucratic system with the opportunity to deliver environmental subsidies as well.<sup>[76]</sup> Needless to say that, it does not take to have a law or business school degree to understand that with higher legal standards come higher costs; and yet, with competitive deregulation, one can obtain higher economic profits heavily constraining the surrounded environmental conditions.<sup>[77]</sup> Against this background, and within a specific perspective of having a *Green Brexit*, international law can be adequately applied to maintain good environmental

standards through its important existing set of environmental principles and rules. Most importantly, in our present context, the principle of non-regression<sup>[78]</sup> could functionally work as an environmental guarantee to keep on adopting – even now after Brexit – an environmentally safe approach to development. Here it is necessary to highlight the definition reported by the IUCN Commission on Environmental Law that plainly states: «*the Principle of Non-Regression is an International Law Principle known by Human Rights specialists requiring that norms which have already been adopted by States not be revised, if this implies going backwards on the subject of standards of protection of collective and individual rights*».<sup>[79]</sup> It should be borne in mind that incorporating the EU environmental laws in a new UK bill will be in the critical position to decide what to regulate, amend or repeal. Concerns have been expressed with reference to the EU Water Framework Directive and the EU Air Pollution Framework Directive (see the previous section). In both cases, the UK could undermine the effectiveness of quality standards by not choosing the same EU rules setting strict sanctions against the violators. Hence, the principle of non-regression would be able to, at least, mitigate this risk.

Based on that thinking, the principle of non-regression also operates in the sphere of foreign direct investment (FDI) law and policy. In the hypothesis that the UK would decrease the level of environmental safeguard to facilitate new FDIs, this principle would operate once again as an environmental guarantee increasing the state responsibility. It would avoid a dramatic rollback in the UK national legislation keeping the track to strike a balance between economic development and environmental degradation.<sup>[80]</sup> Interestingly, according to the reached agreement, it is possible to figure out that the principle of non-regression could find application in the sector of products with new technologies or new features to ensure human security and environmental protection while accessing the market.<sup>[81]</sup>

Another most widespread concern is, perhaps, that the so-called *environmental democracy* could also be weakened by way of Brexit. In particular, hypothetically the effectiveness of the fully established procedural rights enshrined in the Aarhus Convention, such as public participation in decision-making processes, access to information, and access to justice in environmental matters<sup>[82]</sup> could be flawed by the new coming political will of the UK institutions (e.g., in case of

victory of the election by the Conservative Party<sup>[83]</sup>). This could lead, for instance, to a lack of implementation of a proper environmental social impact assessment for small- or large-scale economic projects, programs, and activities. Bearing in mind these hypotheses, the principle of non-regression could significantly contribute to granting the incorporation and application of an extensive and essential part of the EU environmental law. Thus characterized, it would be possible to have a stable and interlocked EU-UK regulatory relation concerning transboundary environmental related issues too. Harmonization would be kept to a high level through framing generic or specific commitments and obligations around the important principle of non-regression, avoiding *de facto* less stringent non-compliance system.

Consolidating the view of Brexit as a *systemic* change within the EU-UK environmental regulatory relation, the principle in the current parlance combined with principle of progressive development (having also regards in signing future environmental agreements) would allow the UK to hold, and, perhaps, to keep to develop a human right approach to environmental protection having firm consideration of the right to a healthy environment and the principle of inter-generational equity while carrying out what is possible to be defined as daunted task of converting EU environmental law in UK law.

## 8. Final Remarks

Brexit is not a fringe scenario any longer, and its considerable potential deregulation risks can undermine the legal certainty and integrity of the UK environmental legal system, potentially having substantial consequences within the EU-UK regulatory relation.

At the time of the writing, one ought to note that future negotiations (even after the above-mentioned agreement) must be centered correspondingly on (i) building structural legal arrangements granting a higher level of cooperation between the parties and (ii) creating an institutional system able to ensure a new green environmental governance. Within this perspective, a win-win environmental cooperation pattern should be elaborated; previously either the *Norway or Swiss model* represented good options to be adopted by the UK. Now the Trade and Cooperation agreement might be a good cooperation pattern, but



still needs more provisions through protocols, and so forth. Anyway, the EU-UK future environmental *sui generis* regulatory relation must be based on equality producing mutual benefits where the environment should be a central topic. Thus considered, the two parties should jointly promote environmental protection with the ideal components of sustainable growth and enhanced cooperation – similar to the ones established, respectively, in the treaties of Maastricht and Amsterdam (with the analyzed further developments of Lisbon Treaty) – in order to offset, for instance, the impact of carbon-based economic activities. All in all, cooperation and consensus must exceed competition and disagreement within the EU-UK environmental regulatory relation; this could make real and possible the hypothesis for a *Green Brexit*. The two parties could embrace the future teaming up together *inter alia* to preserve and protect the environment developing a firm consideration for generations to come. Given the magnitude of the importance of having a healthy environment, it is fundamental to prioritize the setting up of environmental guarantees in future bilateral legal arrangements over the political choice of achieving an instant departure from the EU through a *speedy* Brexit. Hence, it is very relevant the application of the principle of non-regression and progressive development in signing environmental agreements.

In their future relations, the EU and the UK have to consider the transnational factor characterizing the environmental-related issues. It is fairly possible to agree with the opinion of Ludwig Kramer, one of the founding fathers of the European Environmental Law, that highlighted the following point: «*the main function of the EU in the environmental sector, it is to allow states to protect their own environment, a goal that alone cannot be possible to be achieved*».<sup>[84]</sup> In the same line, the UK Government has to maintain the environmental rule adopted at the European level. Still, it also must or should try to harmonize the mechanism of the common market to keep commercial relations with the EU (e.g., rules on the packaging of goods, management of chemical wastes, and so forth).

To conclude with, therefore, it is of a good auspicious to presently advocate for a regulatory alignment able to grant future legal arrangements focused on the reduction of divergence between the two parties. It is necessary to orient the political will to reach the best suitable agreements (e.g., on trade matters) wide-

## CERIDAP

ranging, and comprehensive of environmental norms centered around the implementation of EU and UK international obligations and the respect of shared values to protect the natural environment as well as to promote sustainable development. This will not happen overnight, nevertheless both parties' political leadership and legal communities have to work hard to make it happen, and undoubtedly, they are moving in this direction.

1. Confucius (497 BC) *Analects*.
2. Thus characterized, the Member States started to think about the creation of a European currency system by converging their own national economies, and by also trying to make the efforts to reduce the gap between developed and developing regions through the essential technical support of a specific European Regional Development Fund.
3. *See, The European Single Act 1987*, article 130 -R.
4. On closer examination, the EEC adopted fundamental legislative regulations under the *European Single Act 1987*. For instance, the law that established the European Environmental Agency and a monitoring information network (regulation 1210/90), the environmental impact assessment directive (Dir. 85/337), access to environmental information directive (Dir. 90/313), the regulation on integrated financial instrument for the environment Reg. 1973/92.
5. «The task of the European Economic Community is to promote...a harmonious development of economic activities...which cannot now be imagined in the absence of an effective campaign to combat pollution and nuisance or of an improvement in the quality of life and protection of the natural environment are among the fundamental tasks of the Community». *See, the First Environmental Action program (1973) O.J. C112/1*. Subsequently, other six environmental action programs were adopted by the European Union.
6. The Treaty of Maastricht marked the transition from an organization characterized by a so-called community's structure (chiefly created for economic and monetary purposes – EEC) to another one the European Union (EU) that, at least in the long term, must aim at accomplishing the political union with a *quasi*-federal institutional framework. In point of fact, this treaty *inter alia* reinforced the existing policies by strengthening the union with the establishment of: (i) a common foreign and security policy and (ii) cooperation in matters of justice and internal affairs, and, importantly, (iii) a common currency: the euro. The European institutions got closer to the citizens trying to widespread a sort of solidarity among the peoples by officializing the European citizenship as well.
7. Article 2 Treaty of Maastricht 1992.
8. *See, Article 130 R of the Treaty of Maastricht*: «1. Community policy on the environment shall contribute to pursuit of the following objectives: - preserving, protecting and improving the quality of the environment; - protecting human health; - prudent and rational utilization of natural resources - promoting measures at the international level to

## CERIDAP

- deal with regional or worldwide environmental problems. 2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies».
9. Of note, the non-participation of the UK in signing the Social Policy Protocol attached to the treaty of Maastricht. «The Social Policy Protocol was the legal mechanism adopted to resolve the impasse reached over the social policy provisions of the Treaty of Maastricht at the summit in December 1991. Eleven of the EU Member States agreed on the provisions of a new Social Chapter of the EC Treaty, reflecting the Agreement on Social Policy reached by the European social partners on 31 October 1991; the United Kingdom was opposed. Unanimity was required for the Maastricht Treaty to be adopted. The outcome of Maastricht was the Treaty on European Union signed by the Member States of the European Community on 7 February 1992, a Protocol on Social Policy and an Agreement, annexed to the Protocol, between 11 Member States, with the exception of the UK (which benefited from an opt-out), also on Social Policy. The Protocol notes that 11 Member States ‘wish to continue along the path laid down in the 1989 Social Charter [and] have adopted among themselves an Agreement to this end’; accordingly, all 12 Member States: 1. Agree to authorize those 11 Member States [excluding the UK] to have recourse to the institutions, procedures and mechanisms of the Treaty for the purposes of taking among themselves and applying as far as they are concerned the acts and decisions required for giving effect to the above-mentioned Agreement. 2. The [UK] shall not take part in the deliberations and the adoption by the Council of Commission proposals made on the basis of this Protocol and the above-mentioned Agreement... 3. Acts adopted by the Council... shall not be applicable to the [UK].’ This division in the Community over social policy might have been resolved by the expected victory of the Labour Party in the British general election of April 1992, which would have led to the UK becoming party to the Agreement. Its provisions would then have substituted for the provisions in the Treaty. As this did not happen, there continued in existence two parallel sets of provisions: one applicable to all the Member States (in the Treaty), and one applicable to all but the UK (in the Agreement). The election of a Labour government in the UK in May 1997 led the UK to opt-in, and the Treaty of Amsterdam, agreed on 7 June 1997, provided for the provisions of the Agreement on Social Policy to be incorporated into the EC Treaty, terminating the Social Policy Protocol». see European Observatory of Working Life (2007) Social Policy Protocol. Available at [www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/social-policy-protocol](http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/social-policy-protocol) (accessed 3 November 2020).
10. *See*, Article 1 para 2 of the Treaty of Amsterdam, precisely states that: «determined to promote economic and social progress for their peoples, taking into account the principle

of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields». Furthermore, Article 6 (Treaty of Amsterdam) plainly states that: «Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development».

11. Article 2 para 1.
12. Krämer (1995) *E.C. Treaty and Environmental Law*. London: Sweet & Maxwell.
13. Article 100a (4) Treaty of Amsterdam: «If, after the adoption by the Council or by the Commission of a harmonization measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30 [former Article 36], or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them». Further, *see*, Miljögarantin in Christiernsson A (2004) *Environmental Taxation and EC Law*. Luleå University of Technology C Extended Essay 04/18: 24. See, Decisions of the 18<sup>th</sup> December 2002 by the Commission, relating to more stringent national provisions on limiting the importation and placement on the market of certain NK fertilizers of high nitrogen content and chlorine in France. The Commission found that France had not provided new scientific evidence and did therefore not fulfill the conditions laid down in article 95(5), (O.J.L001,90). The same conclusion was made in Commission Decision of 2 September 2003, relating to national provisions on banning the use of genetically modified organisms in the region of Upper Austria. Austria had not provided new scientific evidence and not demonstrated that there was a specific problem within the territory of Upper Austria (O.J.L230, n.75,76). However in the Commission Decision of 23 January 2002, relating to national provision on limitations on the marketing and use of creosote-treated wood in the Netherlands, the Commission found that the request by the Netherlands for introducing stricter national provisions could be approved in accordance with article 95(5), (O.J. L023,n.95).
14. «Enlargement is one of the most powerful policy tools that the European Union has to extend peace, stability and prosperity. The pull of the EU has helped to transform Central and Eastern Europe into modern, well-functioning democracies with market economies. More recently, it has inspired far-reaching reforms in... Western Balkan countries. The political benefits of EU enlargement, such as the extension of peace, stability, prosperity, democracy, human rights and the rule of law across Europe, seem to be widely recognized. On the other hand, one might ask whether citizens are really aware of the enlargement process and its consequences, and whether there is skepticism in Europe's public opinion about these benefits and the less emphasized economic and social consequences of enlargement... European Union citizens do not perceive enlargement as a win-win situation; while they consider that the 2004 enlargement process benefits the new member states, they are more concerned about the problems that could arise. Furthermore, they

consider future accessions as primarily in the interest of the candidate and potential countries and fear the consequences for the economic situation of their own country. All in all, they seem to have insufficient information about, and are less aware of, the benefits for citizens of the old member states and the collective good thereof. This also holds true for future enlargement processes; apart from the low level of knowledge about the topic in general, benefits for the EU are less known compared to benefits for potential future member states», see Special Eurobarometer 255, Enlargement, *Attitudes towards European Union Enlargement*, EU Commission, Fieldwork March-May 2006, Publication July 2006. Another point is that «Despite the problems faced by the European Union, enlargement remains a flagship policy. However, expansion is a far more complex process than is often acknowledged, either by policymakers or by scholars. While the institutional dimensions of enlargement are undoubtedly important, and generally well-understood, it is also vital to recognize the role played by domestic political dynamics within member states. Although meeting the basic standards of economic and political openness and conforming to the terms of the *acquis* are both necessary conditions for membership, doing so is not wholly sufficient for accession. Member states must give their approval. This veto power is not subject to appeal or oversight. Nor can it be outdone by the collective votes of other members. It is an absolute and uncontested prerogative of members. To this extent, national politics matter enormously. Although the role of domestic politics within member states in the accession process may be accepted in general terms, very little research has been conducted on the subject. Few efforts have been made to investigate the way in which individual member states conceptualize enlargement in a broad sense, let alone how they approach enlargement in regional or country-specific terms. This collection is an attempt to investigate the way in which a variety of member states approach enlargement and highlight the true range of differences that exist within members over the question of the future expansion of the European Union. It tries to remedy this lacuna in the literature by providing a range of case studies prepared in such a way as to maximize their comparative value. Given the range of issues at stake, the Western Balkans is therefore a valuable testing ground for examining the wide range of issues that underpin member state support or opposition towards enlargement. What it shows is that the national politics of EU enlargement are not only very different, they are driven by very different and often very specific national concerns. They are also open to change. This needs to be more explicitly recognized. The support of countries can alter over time. The EU needs to respond to this, as do aspiring members», see Ker-Lindsay J, Armatolas I, Balfour R and Stratulat C (2017) *The national politics of EU enlargement in the Western Balkans*, *The national politics of EU enlargement in the Western Balkans*, *Southeast European and Black Sea Studies*, 17:4: 511-522. See, *Debating Europe Arguments for and Against EU Enlargement* available at [www.debatingeurope.eu/focus/infobox-arguments-for-and-against-eu-enlargement/#.Xb7VS0VR3ow](http://www.debatingeurope.eu/focus/infobox-arguments-for-and-against-eu-enlargement/#.Xb7VS0VR3ow) (accessed 3 November 2020).

15. Treaty of Lisbon 2009, Preamble.

16. Furthermore, «the Treaty creates the figure of a High Representative of the Union for Foreign Affairs and Security Policy and Secretary General of the Council merging the High Representative of the Union for Foreign Affairs and Security Policy and the European Commissioner for external relations (which is eliminated from the Commission structure). The High Representative is appointed by the European Council (by qualified majority) in agreement with the President of the Commission and the European Parliament and will become Vice-President of the Commission, and chair the External Relations Council», see ClientEarth Justice for the Planet, *The impact of the Lisbon treaty – an environmental perspective*, p. 48. See, the UK House of Lords, European Union Committee (2007-2008) Treaty of Lisbon: An Impact Assessment; Robert Shuman Foundation (2007) The Lisbon Treaty: 10 easy-to-read fact sheets, December; Leinen J (2008) *Parliament's new role and responsibilities implementing the Treaty of Lisbon*, Committee of Constitutional Affairs.
17. Horspool M, Humphreys M and Wells-Greco M (2016) *European Union Law*, Oxford University Press. See, Protocol 30 to the Treaty of Lisbon, in particular, «Article 1 1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. 2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law. Article 2 To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognized in the law or practices of Poland or of the United Kingdom». It has also been noted that «the Court of Justice of the EU (CJEU) has confirmed that the UK does not have an opt-out from the Charter» (see *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Joined Cases C-411/10 and C-493/10 (21 December 2011) at paras 116-122). The UK government has also clarified that «the Protocol is not, and never has been, an opt out for the UK from the application of the Charter(at para 3.6)» see, Lucy Moxham, *FAQ: Brexit and the EU Charter of Fundamental Rights*, British Institute of International and Comparative Law, June 2018.
18. According to art.51(1) CFR it applies to Member States only «when they are implementing Union law». «The CJEU has interpreted this broadly to mean that they are bound to comply with Charter rights whenever they are acting in the scope of EU law. This is the case either where a Member State is acting in pursuance of an EU law obligation, e.g. transposing a directive into national law or applying a regulation, or when a Member State is derogating from one of the fundamental freedoms of the EU. Where this is not the case, the Charter does not apply», see, Lock T (2017) *Human rights law in the UK after Brexit*, Brexit Special Extra Issue November, p. 118.

## CERIDAP

19. See, Section 8, Article 194 of the Treaty of Lisbon.
20. See, Article 2 of the Treaty of Lisbon.
21. See, Article 191-193 of the Treaty of Lisbon.
22. See, Article 3 (1) of the Treaty of Lisbon.
23. Treaty of Lisbon, Chapter on Energy. Further, Hans Vedder (2010) The Treaty of Lisbon and European Environmental Law and Policy, *Journal of Environmental Law*, 22(2): 285–299.
24. «Both the EU and the UK have agreed in the Political declaration that was signed on 24 January 2020 together with the Withdrawal agreement that they were determined to work together to safeguard the rules-based international order, the rule of law and promotion of democracy, and high standards of free and fair trade and workers' rights, consumer and environmental protection, and cooperation against internal and external threats to their values and interests» and therefore to establish «an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defense and wider areas of cooperation» see, Jacques Ziller, *Brexit: To have or not to have a deal? (first episode)*, CERIDAP, 30 November 2020.
25. See, Article 1, EEA.
26. «This is ensured through the incorporation of EEA-relevant EU acts into the EEA Agreement, and the uniform interpretation and application of such rules throughout the EEA... The two-pillar structure is necessary because the EEA EFTA States have not transferred any legislative competences to the EU or to the joint EEA bodies. In addition, the EEA EFTA States are also, as a main rule, constitutionally unable to accept binding decisions made by the EU institutions directly. II. Incorporation of new EU acts into the EEA Agreement 4. In order to extend the applicability of an EU act to the EEA EFTA States, the act has to be made part of the EEA Agreement by incorporation into one of the Annexes of the EEA Agreement. This is done by means of a Decision of the EEA Joint Committee (JCD).<sup>2</sup> Some JCDs may contain technical or other adaptations to the incorporated EU act in order to adapt the act to specific situations within the EEA or one of the EEA EFTA States. 5. When an EU act is foreseen to be incorporated into the EEA Agreement, the act must be scrutinized to determine whether it contains provisions conferring competences to an EU institution and, if that is the case, how to allocate those competences in the EFTA pillar. 6. If it does, there are two possibilities to confer these competences to an EFTA institution. Certain two-pillar issues are covered by the general horizontal adaptations of Protocol 1 to the EEA Agreement, and hence no adaptation text is needed in the JCD. In contrast, for those two-pillar issues not covered by Protocol 1 EEA, a specific adaptation text to the act must be included in the JCD. Protocol 1 EEA – horizontal adaptations 7. In principle, each EU act incorporated into the EEA Agreement has to be read in the light of Protocol 1 EEA. 3 Protocol 1 EEA sets out how EU acts incorporated into annexes to the EEA Agreement shall apply, in order to avoid recurring general adaptations to every act included in a JCD. 8. Protocol 1 EEA implies for example

that a reference in an EU act to EU Member States or the European Commission shall be understood in the EEA context as a reference to the EEA EFTA States or the EFTA Surveillance Authority. 4 Various two-pillar issues are thus solved by Protocol 1 EEA, such as procedures for verification or approval, the submission and exchange of information, notifications or consultations and similar matters. Adaptations texts 9. Protocol 1 EEA does not resolve all two-pillar issues that may arise, and adaptations may therefore be needed upon incorporation of those acts into the EEA Agreement. Some EU acts, for instance, confer to EU institutions the competence to adopt binding decisions, to grant authorizations or to issue fines or other pecuniary measures towards an undertaking. Such acts generally require an adaptation text to be included in the JCD, laying down how this should be reflected in the EFTA pillar», see, European Economic Area Standing Committee of the EFTA States, Subcommittee V on Legal and Institutional Questions, *The two-pillar structure of the EEA Agreement – Incorporation of new EU acts*. For further information see EFTA, the basic features of the EEA Agreement, available at: [www.efta.int/eea/eea-agreement/eea-basic-features](http://www.efta.int/eea/eea-agreement/eea-basic-features) (accessed 3 November 2019); EEA – Subcommittee V On Legal And Institutional Questions, *The two-pillar structure of the EEA Agreement – Surveillance and judicial control*. Available at: [www.efta.int/sites/default/files/documents/eea/eea-institutions/The-Two-Pillar-Structure-Surveillance-and-Judicial-Control.pdf](http://www.efta.int/sites/default/files/documents/eea/eea-institutions/The-Two-Pillar-Structure-Surveillance-and-Judicial-Control.pdf) (accessed 3 November 2019) and EFTA, *How an EU act becomes an EEA act and the need for adaptations*, available at: [www.efta.int/media/documents/eea/1113623-How-EU-acts-become-EEA-acts.pdf](http://www.efta.int/media/documents/eea/1113623-How-EU-acts-become-EEA-acts.pdf) (accessed 3 November). See, also, EFTA, *How EU acts become EEA acts and the need for adaptations*, available at: [www.efta.int/media/documents/eea/1113623-How-EU-acts-become-EEA-acts.pdf](http://www.efta.int/media/documents/eea/1113623-How-EU-acts-become-EEA-acts.pdf) (accessed 3 November); EFTA, *EEA Agreement*, available at: [www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol1.pdf](http://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol1.pdf) (accessed 3 November 2020).

27. Payne A and Bienkov A (2018) *What is the Norway model?* Business Insider. Available at [www.businessinsider.com/what-is-the-norway-model-brexit-2018-4](http://www.businessinsider.com/what-is-the-norway-model-brexit-2018-4) (accessed 6 November 2019); Espen Barth Eide, *The Guardian* (2015), available at: [www.theguardian.com/commentisfree/2015/oct/27/norway-eu-reality-uk-voters-seduced-by-norwegian-model](http://www.theguardian.com/commentisfree/2015/oct/27/norway-eu-reality-uk-voters-seduced-by-norwegian-model) (accessed 6 November 2020).
28. «The climate and energy package was adopted in April 2009 and sets out ambitious targets in these areas. The key climate-related target is to reduce greenhouse gas emissions by 20 % by 2020 relative to the 1990 level, or by 30 % if other major economies commit themselves to similar targets in a global agreement. The climate and energy targets have also been included as one of the five targets in the EU's growth strategy, *Europe 2020*. The legislation in the climate and energy package is constantly updated through work in committees and supplementary legislative proposals. In 2010, the EU established the Directorate-General for Climate Action, or DG CLIMA, whose tasks include ensuring that the member states meet their obligations as set out in EU climate policy, and a new



## CERIDAP

post of Commissioner for Climate Action», available at: [www.regjeringen.no/en/topics/european-policy/areas-cooperation/environment-climate/id686218/](http://www.regjeringen.no/en/topics/european-policy/areas-cooperation/environment-climate/id686218/) (accessed 5 November 2020).

29. «The approach of EU negotiators was therefore based on rationality and damage control, trying to replicate the content of the EU regulatory system as much as possible. Previous experience with the association agreement with EFTA countries before Austria, Finland and Sweden accessed the Communities, which culminated in the European Economic Area Treaty that still applies to Norway, Iceland and Liechtenstein, would have been extremely useful if there had been trust in the UK Government, as was to a large extent the case until it appeared that Teresa May did not have the necessary support in the House of Commons and not even in her own party» see, Jacques Ziller, *The new Brexit deal: predictable outcome of a loose Blues negotiation. At first glance assessment of the EU UK trade agreement 24.12.2020 (second episode)*, CERIDAP, 29 December 2020.
30. See, Article 73 EEA. Furthermore, Article 74 states: «Annex XX contains the specific provisions on protective measures which shall apply pursuant to Article 73».
31. See, EFTA, EEA Agreement available at: [www.efta.int/eea/eea-agreement](http://www.efta.int/eea/eea-agreement) (accessed 6 November 2020).
32. Bell S, McGillivray D, Pedersen OW, Lees E, Stokes E (2017) *Environmental Law*, Oxford University Press.
33. «While we made our fair share of compromises during the negotiations, we never wavered from the goal of restoring national sovereignty – the central purpose of leaving the EU». Indeed, this recalls the referendum of 20 October 2013 where the abstention of more than 68% of the electorate allowed San Marino to maintain its sovereignty by not joining the EU although 50,28 % of the voters voted in favor. As the Summary states in its preamble signed by Boris Johnson, «Most importantly, the agreement provides for the UK to take back control of our laws, affording no role for EU law and no jurisdiction for the European Court of Justice». And in point 6 of the Summary: «The Agreement is based on international law, not EU law. There is no role for the European Court of Justice and no requirements for the UK to continue following EU law».. In point 81 «The system that has been agreed upon does not compromise the UK's sovereignty in any area, does not involve the European Court of Justice in any way, and is reciprocal.» And further in point 171 «This Agreement includes dispute resolution mechanisms that are appropriate for a relationship between sovereign equals. This means that there is no role for the Court of Justice of the European Union. All these mechanisms are fully reciprocal and equally available to both Parties.» On the whole, a dramatic obsession with the European Court of Justice is clearly present within the summary. See, *supra* note 37, p. 2.
34. «A technical solution exists, provided there is good will and trust. As has happened with the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, which is a mixed agreement that has already been ratified by Canada, the EU and nine out of twenty-seven Member States and thus has not yet entered into force. As codified in Article 25 of the Vienna Convention on Provisional application, the CETA contains

## CERIDAP

clauses on provisional application in order to prepare for its entry into force. Any Agreement between the EU and the UK could contain clauses on provisional application, especially maintaining the zero duties and zero quantitative restrictions that are applying to movement of goods until 31 December, as well as provisions on governance» see Jacques Ziller *supra* note 32, p.2.

35. Theresa May, “Florence Speech” (22 September 2017) available at: [www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu](http://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu) (accessed 6 November 2020).
36. Nanette Neuwahl, CETA as a potential model for (Post-Brexit) UK-EU relations, *European Foreign Affairs Review*, January 2017, p. 1 – 23.
37. Vahl M and Grolimund N (2006) *Integration without Membership Switzerland’s Bilateral Agreements with the European Union*. Brussels: Centre for European Policy Studies.
38. See, UK-EU Trade and Cooperation Agreement, Summary, December 2020.
39. See, Trade and Cooperation Agreement between the European Union and the European Atomic Community, of the one Part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, 24 December 2020.
40. See, *supra* note 39, p. 186.
41. See, *supra* note 39, p. 782.
42. See, *supra* note 39, p. 201.
43. See, *supra* note 39, p. 203.
44. See, *supra* note 39, p. 206.
45. John Vidal, ‘Brexit would return Britain to being ‘dirty man of Europe’ (2016) *The Guardian* ,  
<<https://www.theguardian.com/environment/2016/feb/03/brexit-would-return-britain-to-being-dirty-man-of-europe>> accessed 23 December 2020.
46. British approach to pollution control-namely, a tradition of discretionary, local decision-making and a system based on pragmatism, in which the effects on the environment are balance with social, economic, and political factors» see Bell S, McGillivray D, Pedersen O, Lees E, and Stokes E (2017) *Environmental Law*, Oxford University Press, p 241.
47. Giulia Caravale, ‘Scozia e Irlanda del Nord: la *devolution* dopo la Brexit’ (2017) 16 *Federalismi* <<https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=34623>> accessed 23 December 2020. Intervento al convegno organizzato da *Federalismi* “Brexit: ad un anno dal referendum, a che punto è la notte?”, Roma, 23 giugno 2017.
48. Article 6(4) of the Habitats Directive; See, Department for Environment, Food and Rural Affairs (2012), Alternative solutions, imperative reasons of overriding public interest (IROPI) and compensatory measures, available at: [//assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/82647/habitats-directive-iropi-draft-guidance-20120807.pdf](http://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/82647/habitats-directive-iropi-draft-guidance-20120807.pdf) (accessed 8 November 2020).
49. For example, Waste Framework (2008/98/EC) (Sch. 9 to the Environmental Permitting (England and Wales); Landfill (1999/31//EC) (Sch. 10); End-of-Life Vehicles

## CERIDAP

- (2000/53/EC) (Sch.11); Waste Electrical and Electronic Equipment (WEE; 2002/96/EC) (Sch. 12); Mining Waste (2006/21/EC) (Sch.19); Batteries (2006/66/EC) (Sch.19); Water Framework Directive (2000/60/EC); Groundwater Directive (2006/118/EC); Groundwater Daughter Directive (Schs. 21 and 22); Industrial Emissions (Integrated Pollution Prevention and Control) Directive (2010/75/EU).
50. Matthews-King A (2019) UK worst in Europe for pollution-linked childhood asthma cases, study shows, *Independent* available at: [www.independent.co.uk/news/health/child-asthma-air-pollution-uk-nitrogen-dioxide-children-lancet-a8865016.html](http://www.independent.co.uk/news/health/child-asthma-air-pollution-uk-nitrogen-dioxide-children-lancet-a8865016.html) (accessed 8 November 2020).
  51. R.(ClientEarth) v. Secretary of State for the Environment Food and rural Affairs (Case C-404/13) [2015] Env LR 17
  52. Joe Barnes (2019) Nigel Farage attacks ‘thuggish tyrants’ in EU after its own court throws out ‘bias’ case *Express*, 7 November. Further, BBC Question Time 08/05/2014. Available at: [www.bbc.co.uk/programmes/b043b2rs](http://www.bbc.co.uk/programmes/b043b2rs) (accessed 9 November 2020).
  53. «The UK might well be inclined either to relax them or fail to improve them if the Government was free to do so, representing therefore a significant risk to the health of UK citizens in major urban areas where meeting EU standards is currently a problem». Baldock D, Buckwell A, Colsa-Perez A, Farmer A, Nesbit A, Pantzar M (2016), *The potential policy and environmental consequences for the UK of a departure from the European Union*. London: Institute for European Environmental Policy, p. 36.
  54. Why was the Soil Framework Directive withdrawn? available at <https://www.lexisnexis.co.uk/blog/built-environment/why-was-the-soil-framework-directive-withdrawn>; Bamba C, Robertson S, Adetayo K, Smith J, Cairns-Nagi JM, Copeland A, Finlay N, Johnson K (2014) Healthy land? An examination of the area-level association between brownfield land and morbidity and mortality in England, *Environmental Planning A*, 4, pp. 433 – 454 available at: [//pdfs.semanticscholar.org/2903/0d78623c05a70a32757a1c661a4d896a3617.pdf](https://pdfs.semanticscholar.org/2903/0d78623c05a70a32757a1c661a4d896a3617.pdf) (accessed 8 November 2020).
  55. NFU (2014) Withdrawal of Soil Framework Directive welcomed. Available at: [www.nfonline.com/withdrawal-of-soil-framework-directive-welcomed/](http://www.nfonline.com/withdrawal-of-soil-framework-directive-welcomed/) (accessed 8 November 2020).
  56. ENDS Report (2012) 447 20 (regarding SEPA).
  57. National Audit Office (2016), The Business Impact Target: Cutting the Cost of Regulation (HC 236 2016-17).
  58. House of Commons Environmental Audit Committee (Fifth Report of Session 2014-15) *An Environmental Scorecard* (HC 215).
  59. Carrington D (2015) UK becomes only G7 country to increase fossil fuel subsidies, *The Guardian* available at: [www.theguardian.com/environment/2015/nov/12/uk-breaks-pledge-to-become-only-g7-country-increase-fossil-fuel-subsidies](http://www.theguardian.com/environment/2015/nov/12/uk-breaks-pledge-to-become-only-g7-country-increase-fossil-fuel-subsidies) (accessed 7 November 2020). Carrington D (2019) UK has biggest fossil fuel subsidies in the EU, finds commission, *The Guardian* available

- at:  
[www.theguardian.com/environment/2019/jan/23/uk-has-biggest-fossil-fuel-subsidies-in-the-eu-finds-commission](http://www.theguardian.com/environment/2019/jan/23/uk-has-biggest-fossil-fuel-subsidies-in-the-eu-finds-commission) (accessed 7 November 2020).
60. Holder M (2019) “Significant Regression”: MPS blast governments post Brexit green protection plans, *Business Green*, available at: [www.businessgreen.com/bg/news-analysis/3074785/significant-regression-mps-blast-governments-post-brexit-green-protection-plans](http://www.businessgreen.com/bg/news-analysis/3074785/significant-regression-mps-blast-governments-post-brexit-green-protection-plans) (accessed 7 November 2020).
  61. «Following the **end of the transition period** on the 31st of December 2020, existing **EU environmental legislation will continue to operate** under the policy of “roll-over”, however decisions made by the Union will no longer be binding for courts in the UK. Brexit also signifies that certain structures will cease to exist in the UK and will thus need to be replicated, such as the European Committee’s supervisory role in ensuring regulations are properly applied: this means that an independent watchdog needs to be established. In these respects, the **Environment Bill 2020** mandates the founding of the Office of Environmental Protection (OEP), a new independent statutory body that will oversee compliance with environmental law and hold those breaching it to account». See, Flavia Olivieri, A trade deal was reached just days before the end of the transition period, yet the effects of Brexit on UK environmental policy and law remain unclear, *Lifegate*, (29 December 2020) available at <<https://www.lifegate.com/brexit-environment-risks-opportunities>> (accessed 5 January 2021).
  62. Baskut Tuncak stated: «Brexit is clear threat for environmental conditions in the EU», OCHHR (2017) Brexit puts UK at risk of worsening pollution and lower environmental standards, UN rights expert warns. Available at: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22061&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22061&LangID=E) (accessed 9 October 2020). Lucas MP C, Brighton P and Green Party Co-Leader – Spring 2017, Exiting the EU not the Environment.
  63. The UK Parliament (2019) Bills, Environment Section. Available at: [//services.parliament.uk/Bills/2019-20/environment.html](http://services.parliament.uk/Bills/2019-20/environment.html) (accessed 9 October 2020).
  64. Environmental Bill (2019), The OEP’s enforcement functions, Chapter 2, 26, p. 15.
  65. Christman B (2017) Just like England and Wales, Scotland needs an environmental court. In the Conversation. Available at: [//theconversation.com/just-like-england-and-wales-scotland-needs-an-environmental-court-86089](http://theconversation.com/just-like-england-and-wales-scotland-needs-an-environmental-court-86089) (accessed 10 October 2020)
  66. Weston P (2019) New environment bill removes power to fine government for missing targets, *The Independent*, available at: [www.independent.co.uk/environment/government-watchdog-office-environment-protection-oep-a9156401.html](http://www.independent.co.uk/environment/government-watchdog-office-environment-protection-oep-a9156401.html) (accessed 9 October 2020)
  67. Vaughan A (2019) UK government’s post-Brexit environment bill comes in for criticism, *New Scientist*. Available at: [www.newscientist.com/article/2221072-uk-governments-post-brexit-environment-bill-comes-in-for-criticism/](http://www.newscientist.com/article/2221072-uk-governments-post-brexit-environment-bill-comes-in-for-criticism/) (accessed 10 October 2020).

68. Jenkins BR (2013) *The New Environmental Governance*. Holley C, Gunningham N and Shearing C (2013) *Journal of Environmental Law*, 25(1): 161–163.
69. The UK Government – Department for Environment, Food & Rural Affairs (2018) A Green Future: Our 25 Year Plan to Improve the Environment, sets out what we will do to improve the environment, within a generation, 25 Year Environment Plan, Policy Paper, available at: [www.gov.uk/government/publications/25-year-environment-plan](http://www.gov.uk/government/publications/25-year-environment-plan) (accessed 10 November 2020).
70. «The Climate Change Act 2008 is the basis for the UK’s approach to tackling and responding to climate change. It requires that emissions of carbon dioxide and other greenhouse gases are reduced and that climate change risks are prepared for. The Act also establishes the framework to deliver on these requirements. The Act supports the UK’s commitment to urgent international action to tackle climate change». Available at: [www.theccc.org.uk/tackling-climate-change/the-legal-landscape/the-climate-change-act/](http://www.theccc.org.uk/tackling-climate-change/the-legal-landscape/the-climate-change-act/)
71. The UK Government – Department for Business, Energy and Industrial Strategy (2017) Clean Growth Strategy, Policy Paper. Available at: [www.gov.uk/government/publications/clean-growth-strategy](http://www.gov.uk/government/publications/clean-growth-strategy) (accessed 10 November 2020).
72. The UK Government – Department for Environment, Food and Rural Affairs (2018) Climate change: second national adaptation programme (2018 to 2023), available at: [www.gov.uk/government/publications/climate-change-second-national-adaptation-programme-2018-to-2023](http://www.gov.uk/government/publications/climate-change-second-national-adaptation-programme-2018-to-2023) (accessed 12 November 2020).
73. «The need for the UK NEA arose from findings of the 2005 global Millennium Ecosystem Assessment, which not only demonstrated the importance of ecosystem services to human well-being, but also showed that at global scales, many key services are being degraded and lost. As a result, in 2007 the House of Commons Environmental Audit recommended that the Government should conduct a full MA-type assessment for the UK to enable the identification and development of effective policy responses to ecosystem service degradation (House of Commons Environmental Audit, 2007). The UK NEA will help people to make better decisions that impact on the UK’s ecosystems to ensure the long-term sustainable delivery of ecosystem services for the benefit of current and future populations in the UK, thereby addressing the needs set out in Defra’s current *Action Plan for Embedding an Ecosystems Approach* (2007). The UK NEA will also support global and regional obligations such as the Convention on Biological Diversity’s call on countries to conduct such assessments and the European Union Water Framework Directive, which encourages the management of ecosystem services». See, UK National Ecosystem Assessment (2019). Available at: [//uknea.unep-wcmc.org/Resources/tabid/82/Default.aspx](http://uknea.unep-wcmc.org/Resources/tabid/82/Default.aspx) (accessed 12 November 2020).
74. Monbiot G (2018) The one good thing about Brexit? Leaving the EU’s disgraceful farming system, *The Guardian*, available at: [www.theguardian.com/commentisfree/2018/oct/10/brexit-leaving-eu-farming-agriculture](http://www.theguardian.com/commentisfree/2018/oct/10/brexit-leaving-eu-farming-agriculture) (accessed 12 September 2020).

75. For details see, EU (2015) Food, Farming, Fisheries Key Policies of Common Agricultural Policy. Available at: [//ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/income-support/cross-compliance\\_](http://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/income-support/cross-compliance_) (accessed 8 November 2020).
76. Polly Toynbee, Brexiteers promised a new dawn for UK farming, not agricultural Armageddon, *The Guardian*, (15 August 2019) available at <https://www.theguardian.com/commentisfree/2019/aug/15/brexiters-uk-farming-agriculture-no-deal-brexit> (accessed 05 January 2021).
77. Jiang, Yi, Tun Lin, and Juzhong Zhuang (2011) Environmental Kuznets Curves in the People's Republic of China: Turning Points and Regional Differences.
78. «The Rio +20 Conference reminded us of the necessity to secure commitments made during Rio1992. The notion of “non-regression” has thus been integrated into international law with an amendment presented by the Group of 77 during negotiations in New York (May 2012). Due to the efforts of Professor Prieur and many environmental legal experts, this safeguard was made possible. Although this amendment’s wording remains cautious and cannot yet be considered as a new principle of environmental law, it does guarantee the legal advances obtained at Rio 1992, based on which numerous countries have or will constitutionalize environmental law. However, the author reminds us of the necessity to enshrine the principle of non-regression in order to avoid circumvention—on the basis of the precautionary principle for example—still too frequently adopted as the “rule”», Prieur M (2013) La non-régression, condition du développement durable, *Vraiment Durable*, 3/1:179-184.
79. IUCN (2010) Non-regression principle knowledge forum. Available at: [www.iucn.org/content/non-regression-principle-knowledge-forum](http://www.iucn.org/content/non-regression-principle-knowledge-forum) (accessed 10 November 2020).
80. Mitchell AD and Munro J (2019) No Retreat: An Emerging Principle of Non-Regression from Environmental Protections in International Investment Law, *Georgetown Journal of International Law* (Forthcoming).
81. See, *supra* note 39, p. 490.
82. These three-notable democratic procedural rights found legitimacy in the *Rio Declaration on Environment and Development 1992*. Note that in the European context it is quite crucial the Convention on Access to information, Public Participation in decision making processes and Access to Justice in environmental matters (Aarhus, 25 June 1998) It entered into force on 30 October 2001.
83. The Conservative Party is traditionally in favor of protectionist policy not particularly incentivizing the creation of the low carbon society.
84. Kramer L (2002) *Casebook on EU Environmental Law*. Oxford: Hart Publishing.