UKELA

elaw

October 2023 | Issue 138

Focus on environmental law in Scotland

Also in this issue

Better law for the environment

Welcome

Welcome to the October 2023 edition of elaw. The focus of this issue is environmental law in Scotland.

We start off with Environmental law in Scotland: A round-up by Professor Colin Reid. This provides an excellent summary of developments in environmental law in Scotland, discussing post-Brexit arrangements such as the creation of Environmental Standards Scotland, progress with new legislation and policy in areas such as wildlife, the circular economy and climate change as well as significant innovations, such as legal recognition of a human right to a healthy environment. One thing is for certain: environmental law in Scotland is certainly not standing still!

This piece is complemented very nicely by Environmental Standards Scotland – what it is and what it does by Mark Roberts. This useful piece explains not only what Environmental Standards is and what it does, but also how it works and the context for its work, which dovetails very nicely with Colin's piece. Thanks so much Mark for this fantastic contribution.

Also in this edition, we have The role of Artificial Intelligence in environmental regulation by Paul Collins. This engaging and topical article considers how AI will transform the way public sector organisations make decisions and deliver public services, including delivering more efficient and more effective environmental regulation. The use of appropriate safeguards and the potential for the rule of law to be undermined are also carefully considered.

In addition, Issy Dickson, Ana Kantzelis and Becky Clissmann have written up the highlights of UKELA's Climate Change and Energy Working Party recent air pollution event in Clean air for all: exploring regulatory frameworks to address air pollution in the UK. Thanks so much to them all for making time to convey the key parts of this event for those who could not make it. I'm sure you will all agree clean air is such an important issue and I would urge you all to sign the petition for Ella's law (see UKELA news section for the link to sign).

We also have a student contribution, The impact of evolving climate change understanding on the fair and equitable investment treaty standard by Jesse Mattinson. This fantastic article explores how the protection of environmentally damaging investments under the fair and equitable treatment (FET) standard in bilateral and multilateral investment treaties may be impacted by the evolving nature of host states' responses to climate change.

Finally, don't miss out on our two book reviews this edition: Biodiversity Litigation (Guillaume Futhazar, Sandrine Maljean-Dubois, and Jona Razzaque (eds), Oxford University Press, 2023) by Paul Wyard and Noise and Noise Law – A Practitioner's Guide, Francis McManus with Andy McKenzie, Edinburgh University Press, 31 May 2023 by Paul Collins.

Best wishes

Sophie Wilkinson
elaw Editor

elaw editorial team

Sophie Wilkinson, Editor
Sophie is an environmental law specialist at LexisPSL with 17 years' experience, including 11 years' experience in private practice. She moved to LexisNexis from Shoosmiths LLP where she was a Senior Associate. Prior to this Sophie trained at Browne Jacobson LLP and spent 6 years at Eversheds LLP.

Julia Klapperich
is a third year law student at the University of Oxford taking courses in environmental law.

Violet O'Gorman
is a trainee solicitor having completed the Post Graduate Diploma in Law (PGDL) and Legal Practice Course (LPC). She has also worked as an editor at LexisNexis.

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graduated from the University of Leicester, before specialising in Environmental Law and Policy at UCL. He is a research assistant for prof. Benoit Mayer at the Chinese University of Hong Kong. Mateusz also volunteers for UKELA's Nature Conservation Working Party.

Words from the Chair

Recently I have had the misfortune of contracting another bout of covid, yes we all thought those dark days were behind us. Thankfully it was short lived, but it did put me back a few days while I recovered at home, which gave me an opportunity to reflect on matters that have been occurring recently in the media. Recent headlines have seen a bit of a clash between policy and the law, whether that be on the topic of nutrient neutrality, a watering down of net zero policies, delays to Biodiversity Net Gain etc. which got me pondering… What drives us as individuals, as a society and as a diverse membership organisation? Where should we stand and what should we do when we see changes occurring that will have an actual or potential adverse effect on the environment from a legal perspective?

A hot topic currently within UKELA circles, and Council is looking into how we can better respond to potential and actual legal changes, and how we bolster our consultation responses from across the membership. I would certainly welcome views on this from the membership. As mentioned in the last edition of elaw, Chris Stark will be delivering the Garner lecture this year, so given the recent headlines around the UK Government's net zero policies, I am sure this will be an event not to be missed (get those tickets while you can)!

You'll see in the following pages that there is (as ever) a lot going on behind the scenes with various working parties and committees within UKELA working hard on responding to consultations, and also behind the scenes a deeper strategy within the staff team and wider Council. The strategy is being driven hard over the next few weeks and months to help add further value to membership. More details will follow soon on what's going on – I'd like to think we can be more transparent in what we are doing and how we communicate these efforts to really highlight the great work that often doesn't get spoken about from within UKELA, all of which should go some way to supporting retention of membership, consideration as to whether corporate membership is important to your firm, and perhaps getting involved in other areas of the UKELA work programme.

Don't miss out on the Scottish Conference which is online this year on the 5 October with update sessions provided by SEPA and Environmental Standards

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For information about working parties and events, including copies of all recent submissions, please visit our website. You can also get in touch with us at info@ukela.org.

elaw
The editorial team is looking for quality articles, news and views for the next edition due out in December 2023.

If you would like to make a contribution, please email elaw@ukela.org by 10 November 2023.

Letters to the editor will be published, space permitting.

Scotland, a session on marine protection and a discussion on ESG for lawyers – thanks to our UKELA Scotland team for arranging a great programme.

Following on from the Scottish conference it's also important to recognise the impact we have from an ESG perspective. Behind the scenes UKELA has a group focussed on developing our policy and strategy and will be coming back to our membership in due course on this – so watch this space. For those considering a career change or early career developers, two key careers events are coming up via our 'Dragons of Justice' team (AKA UKELA's Welsh working party!) as an online event on the 12 October and also an in person event in London on the 1 November kindly hosted by our friends at Latham & Watkins – thanks to everyone involved in helping shape these events.

As I close now, it seems like only yesterday we were all congratulating ourselves on such a wonderful turnout for and the success of the UKELA Annual Conference in Reading this year. Well, we're not resting on our laurels, the 2024 conference committee has already been established and is working on the programme for next year's event to be bigger and better. If you have any ideas, hot topics you want covering or speaker suggestions please do reach out – more to follow in the coming months.

So all in all – I hope we can all agree that UKELA has a special place within the UK environmental sector, and that through the good will and expertise of our members, and staff team, shall continue to play a vital role in shaping environmental law, thank you for your support.

Warren Percival

News

UKELA news

UKELA Membership

We understand the challenges our members are facing, both as individuals and organisations, as a result of the ever-increasing cost of living, and we are committed to supporting our members through this difficult time. In recognition of the inflationary pressures affecting us all, we are excited to share some good news – UKELA membership rates have been frozen for 2024. This means you can continue to enjoy all the benefits of being part of the UKELA community without an increase in fees.

This decision by our Trustees comes as a heartfelt thank you for your unwavering support over the years. We truly appreciate your dedication and engagement, and we want to ensure that UKELA remains accessible and affordable for as many of our members as possible. Renewal invoices will be issued towards the end of the year, but if your colleagues are not already members, do let them know that if they join in October, they'll be able to benefit from being a member for an extra 3 months free!

If you're currently an individual member and have colleagues who would also benefit from UKELA membership, do get in touch to discuss setting up an organisational membership under which up to 10 individuals can all enjoy the discounted event tickets, receiving elaw and access to the member only online resources.

We are pleased to continue free membership for any students studying environmental law, and have extended this to include students studying environmental sciences. Please get in touch to receive a promotion code.

Finally, if you'd like to not have to worry about paying your renewal invoice, please do get in touch to set up a Direct Debit Mandate.

To get in touch email info@ukela.org.

Annual Garner Lecture 2023

We are delighted that Chris Stark, Chief Executive of the Committee on Climate Change (CCC), will be delivering this year's Garner Lecture. He will be speaking on the CCC, climate change and the law on 22 November (hybrid, London, and regional hubs are planned for Bristol, Manchester and Leeds). This is one of the highlights of the UKELA year – please join us. Timings: 5.30pm to 7.30pm. Find out more and book your place.

Catch up with Conference 2023 recordings

Recordings from this year's Annual Conference, including plenaries from Reading University, keynote speeches and working party sessions are available for all members to catch up or watch again. Visit our website to view, making sure you log in to your account first.

Petition for Ella's Law

We had the privilege of hearing Rosamund Adoo-Kissi-Debrah CBE (Founder of the Ella Roberta Foundation and WHO BreatheLife Champion) speak at our Clean Air for All event, hosted by the climate change and energy working party in September.

Her daughter, Ella Roberta Adoo Kissi Debrah is the first person in the world to have air pollution listed as a cause of death on her death certificate. Rosamund is asking for support to sign a petition to get Ella's Law debated in the House of Commons before Parliament breaks up over Christmas. Please use this link to the petition and help to bring Clean Air to the top of the agenda.

News

UKELA working party news

UKELA's specialist working parties and the Governance and Devolution Group head into autumn with an unprecedented level of calls for evidence and consultation responses alongside an impressive line up of events.

The Wales working party is running a careers event with students on 12 October 2023. This follows the recently submitted extensive response to the Senedd's Climate Change Committee on the 6th Senedd's Priorities.

The Scottish working party has recently submitted its views on the Circular Economy Bill and is working to draw together responses to the Human Rights Bill for Scotland and the Environmental Governance Review which considered a range of important discussion areas such as access to justice, an environmental court as well as governance post-Brexit. The main focus for events is the Scottish Annual Conference, scheduled as an online event for 5 October 2023.

As part of a general review, the noise working party is changing its name to better reflect the work it does and from now on will be called the noise and nuisance working party. It is also finalising plans for an event to consider the recent House of Lords Select Committee report on light and noise pollution published a few weeks ago.

The nature conservation working party held an in-person event in Ashdown Forest, East Sussex. In August it submitted extensive evidence to the OEP in terms of nature recovery, and more recently it has responded to Defra's consultation on a review of the hedgerow regulations.

The waste working party is holding a hybrid meeting in London on 8 November 2023 with drinks afterwards. It is also currently drawing together a response to the extended producer responsibility consultation due for submission in early October.

While the environmental litigation working party is organising an in-person event at 6 Pump Court with a focus on water with guest speaker Samantha Yates (former Secretary General at Global Waters Leaders Group) along with Charles Morgan or Nick Ostrowski from 6 Pump Court. They will also be hosting a seminar in November on renewable energy and litigation and continue to publish and circulate to its members the quarterly environmental litigation update.

The climate change and energy working party recently held a hybrid air pollution event entitled Clean Air for All: exploring the regulatory frameworks to address UK air pollution. Speakers included Rosamund Adoo-Kissi-Debrah CBE (Founder of the Ella Roberta Foundation and WHO BreatheLife Champion), Dr Maria Neira (Director of Department of Environment, Climate Change and Health at the WHO) and Professor Eloise Scotford (Dean of UCL Faculty of Laws and advisor to the UNEP). The working party is also drafting responses to the consultation about the UK implementation of the IFRS Sustainability Disclosure Standards.

As may be evident from the discussion above, the level and nature of the consultation responses has meant that UKELA's Governance Devolution Group (GDG) has had an important role in coordinating some of the analysis and evidence for the consultation responses including e.g. liaising across the four nations. It is also finalising a briefing paper on the REUL Act 2023.

Increasing working party membership involvement

In the recent working party and regional group convenors meeting a number of convenors were pleased to mention the increase in the number of UKELA members joining the various working parties. This is excellent and something that UKELA is keen to encourage further. As can be seen there is no shortage of tasks and opportunities to get involved with, and all UKELA members are encouraged to simply email info@ukela.org if they are interested in getting involved. The research, analysis and drafting that is often involved really helps to get an understanding of how environmental law and policy is moving forward at quite a rapid pace. It also allows members to network and get to know each other better. It is clear that the annual UKELA Conference is a great time to meet up and catch up – but why wait until then? Please email info@ukela.org today to join one or more of UKELA's specialist working parties and be actively involved in, and informed on, the latest in environmental law reform.

News

Students news

UKELA Moot Competition 2023

We're pleased to announce the opening of entries for the 2023 Environmental Law Moot Competitions sponsored by No5 Chambers and ENDS Report. Our thanks to Richard Kimblin KC for setting the Moot problem and Howard Leithead our Moot Master. This year, semi-finals and finals will return to being in-person at No5 Chambers on (TBC) Monday 4 December 2023. We are thrilled to confirm that Mr Justice Dove has kindly agreed to judge the finals. This is a fantastic opportunity to develop your advocacy skills and receive in-depth feedback from a senior judge of the High Court of England and Wales. You will be able to register to attend the finals nearer the time.

Prizes

- A trophy for each winning team;
- £150 from No5 Chambers for each winning team;
- Free UKELA membership for all finalists for one year; and
- Three months free ENDS subscription for the four winners.

How to enter

There are two competitions, if there is any uncertainty as to whether an individual qualifies for either the senior or junior competition, the matter will be referred to the Master of the Moot for a final determination.

The Lord Slynn of Hadley Moot (Senior Competition)

Open to those who, as of 1 September 2023, are in pupillage, a trainee solicitor, on the bar professional training course (BPC) or legal practice course (LPC), or those who have completed the BPC or LPC but have not yet secured a pupillage or training contract.

The Dame Frances Patterson Moot (Junior Competition)

Open to those who, as of 1 September 2023, do not qualify for the Lord Slynn Moot but who are studying for a degree (including a graduate degree eg. LLM or a non-law degree) or taking the Graduate Diploma in Law (GDL). IF you have completed a vocational course (LPC and BPC) you are not eligible to enter the Junior Competition.

Teams (which must consist of two members, but need not be from the same institution) must submit two skeleton arguments, one on behalf of the Appellants, the other the Respondents. Please refer to The Moot Competition Rules for the full details. Skeleton arguments and completed entry forms must be submitted by email by Midday on Monday 6 November 2023. Please download all of the following documents:

- The Moot Problem
- The Mooting Competition Rules
- The entry form

Dragons of Justice: igniting environmental careers in Wales

Join the Wales Working Party for a FREE online careers event 17.30-19.00 on Thursday 12 October. Highlighting the opportunities to work in environmental law in Wales from both public and private practice speakers as well as academia. Register here.

The speakers include:

- Sioned Davies – Barrister, No 5 Chambers
- Dr Ludivine Petetin – Reader in Law, Cardiff University
- Sarah Asbrey – Head of Legal Services, Natural Resources Wales
- Bill Cordingley – Senior Associate and Barrister, Browne Jacobson

During the session, the speakers will discuss:

- The rewards and challenges of their job.
- Useful tips to follow in their footsteps.
- The changing role of ethics in a climate crisis.
- Why work in Wales (as opposed to England or elsewhere)?

Careers evening in London

Join us for our first FREE in-person careers evening in 4 years! Our thanks to Latham & Watkins for hosting this event at their offices in London, between 17.00-18.30 on 1 November. Register here.

A range of member organisations will each have a stand, in the form of a 'freshers fair' so you can speak to someone on each stand during the evening and network with other student members. We're in the process of finalising who will be taking stands, but Latham & Watkins, RSK, Landmark Chambers and the Environment Agency have already confirmed.

News

Student Newsletters

Following the Reading Conference, we published a special conference edition student newsletter featuring feedback from some of the student members who attended. Do have a read, we hope you'll find it inspiring and be first to book one of the limited student rate tickets when the 2024 Annual Conference tickets go on sale early next year. Download here.

Hot off the press, here's Issue 3 of the Newsletter, just in time for the new Academic year. This issue, Alison York provides an 'Insight' into SEPA; Warren Pervical, UKELA's new Chair of Trustees, gives valuable advice on making the most of UKELA membership and his career in environmental consultancy. 'Bitesize' introduces Rights for Nature and Emma Lui tells us about her varied UKELA experience. Download here.

FREE Student Membership!!

UKELA membership is FREE for anyone who is studying environmental law, environmental science or volunteering in an Environmental Law Clinic. So, do download and share this flyer with your classmates so they too can benefit from UKELA membership.

Get involved, the more you put in the more you'll get out!

- Join the Student Networking google group to be the first to hear about events, competitions, volunteering opportunities and help with research.
- Want to link up with fellow UKELA student members to share your views? If so, please join the UKELA Student members' Facebook group and follow us on Instagram.
- Join a working party and volunteer to help on consultations responses and events.
- Join your local regional group (or devolved administration group) to start building your personal network.
- Become a University Rep.
- Co-author a hot topic article with an environmental professional for publication here in elaw. Submit a short extract of up to 500 words and if selected, the Editorial Board will aim to pair students with a supervising practitioner in that field. Articles can be on the elaw issue theme or on any topic related to environmental law. All upcoming themes are available on the website.

Events

10 October 2023
Briefing on the first major Parliamentary report on noise in 30 years

Join us to find out more about the recently published report of the House of Lords Select Committee on Science and Technology on artificial light and noise, hosted by the Noise Working Party (online). Timing: 5pm to 6.30pm. Find out more and book your place.

12 October 2023
Dragons of Justice: igniting environmental careers in Wales

Join us for a careers advice session on training and working in environmental law aimed at those based in Wales. Together, let's pave the way to a brighter, more sustainable future (online, FREE). Timing: 5.30pm to 7pm. Find out more and book your place.

1 November 2023
Careers evening – in person

Join us for our careers evening on training and working in environmental law; our first in person careers event in 4 years (London). Timing: 5pm to 6.30pm. Find out more and book your place.

8-10 November 2023
Introduction to wildlife law course 2023

The course is designed to introduce the wildlife law framework in England and Wales focusing upon species and Habitats Regulations Assessments (HRAs) legislation and providing participants with the chance to look at relevant case studies. Based in Nottingham. Find out more and book your place.

22 November 2023
Annual Garner Lecture 2023

Join us for one of the highlights of the UKELA year. Our distinguished speaker is Chris Stark, Chief Executive of the Climate Change Committee (hybrid, London and regional hubs are planned for Bristol, Manchester and Leeds). Timings: 5.30pm to 7.30pm. Find out more and book your place.

The elaw 60-second interview

Jamie Whittle

What is your current role?
I am a partner at R & R Urquhart LLP Solicitors based in the beautiful county of Moray in the North of Scotland. The law firm was formed in 1829 and I am the sixth generation of three families who have managed the firm, following in my late father's footsteps. My work is a mix of environmental law, rural land law and general practice, which includes renewable energy, litigation, agricultural and crofting law. I also teach environmental law and renewable energy law on the Legal Diploma at Edinburgh Law School, which I've had the privilege of doing for the last 17 years. Outside of the law I am a trustee/director of a number of environmental organisations which focus on wildlife conservation and environmental education. I also run a Cub Scout pack in our nearby village. My son and daughter are involved in lots of drama, dance and music classes, and so a main part of my role is as taxi driver and roadie to them during evenings and weekends.

How did you get into environmental law?
When I was 15, I had the opportunity to travel to Kenya where the experience of being close to a number of wild animals (one cheetah in particular, called 'Duma') had an incredibly powerful impact on me. I knew I wanted to become involved in conservation and protecting the natural world in some shape or form but was never sure how. After my undergraduate degree I was doing some volunteer work in Costa Rica, and the idea of trying to become an environmental lawyer started to emerge. I attended law school at the University of Edinburgh, did a simultaneous MSc in human ecology at the Centre for Human Ecology/Open University, volunteered in the Ladakh Project in India and interned at the Centre for International Environmental Law in Geneva. I trained with a large commercial firm in Glasgow, but the opportunities to work in environmental law were few and far between. I then switched to working as a ski instructor and outdoors instructor/guide for a while travelling to the Alps, Patagonia and British Columbia. After that I moved back to the North of Scotland and said that I would help out my dad in his firm during the pre-Christmas period – we agreed that if I stayed on I could build up an environmental law practice amongst other work, and that was now 20 years ago and I haven't looked back.

What are the main challenges in your work?
Managing the volume of email traffic is an ongoing learning process/battle, as is trying to improve my life/work balance. My wife reminded me the other day that the last time I took a holiday where there were no work calls or emails was in 2005 (it's pitiful, I know), and I'm aiming to set that right next month when we go on holiday.

What environmental issue keeps you awake at night?
Water pollution and marine protection. I'm an avid paddleboarder and surfer, and feel very strongly about the appalling record of sewage and chemical discharges into rivers and seas. We need much stronger governance of the seas for marine conservation so that, for example, inshore areas that are breeding grounds for fish and crustacean populations are protected from bottom trawling, dredging and pollution, and so that coral reefs and seagrass habitats are restored.

What's the biggest single thing that would make a difference to environmental protection and well-being?
Governance. We have lots of environmental laws, policies and principles, but they are not enforced in the manner they could and should be. Part of that would be for the 'planning judgement' and 'Wednesbury unreasonableness' approaches to be overhauled so that the courts could scrutinise governance in ways that are presently off limits, and I'm all in favour of having a dedicated environmental court to underpin all of that.

What's your UKELA working party of choice and why?
I need to get more involved with the working party aspect of UKELA, but over the years have been really interested in the development of wild law. I've also chaired the organising committee at two of UKELA's annual conferences, and last year had the chance to interview Rosamund Kissi-Debrah which was a very humbling and powerful experience for me.

What's the biggest benefit to you of UKELA membership?
It has to be the friends I've made with an interest in environmental law. Working in a field which often feels likes an uphill battle, I really value being able to connect with like-minded people and also collaborate with a number of UKELA members for transactional work and litigation.

Environmental law headlines

A selection of recent environmental law news and updates prepared by the teams at Lexis+® UK Environment and Practical Law Environment.

Levelling-up and Regeneration Bill 2022-23: House of Lords rejects government amendment to cut nutrient neutrality requirements for housing developers

Practical Law Environment

On 13 September 2023, the House of Lords rejected the recent government amendments to the Levelling-up and Regeneration Bill 2022-23 that sought to reduce nutrient neutrality requirements for new housing developments. Nutrient (particularly nitrogen and phosphate) pollution is an urgent problem for protected freshwater habitats.

The House of Lords rejected the amendment that would have required planning authorities to assume that nutrients in urban wastewater from potential developments would not adversely affect a habitats site connected to a nutrient affected catchment area. It also rejected the amendment that would have allowed the Secretary of State (SoS) to make regulations to revoke or amend any Act of Parliament or retained direct EU law that relates to the environment, planning or development in England, in relation to the effect of nutrients in water that could affect a habitats site connected to a nutrient affected catchment area.

The House of Lords agreed other government amendments that will amend clause 158 of the Bill (relating to nutrient pollution standards), including:

- A requirement for sewerage undertakers to consider using nature-based solutions in meeting the nutrient pollution standard.
- A requirement for the SoS to designate the catchment areas for habitats sites in an unfavourable condition due to nutrient pollution as "nutrient affected catchment areas".
- A power for the SoS to designate a catchment area as a "catchment permitting area" subject to the environmental permitting regime.
- A power for the SoS to make provision about setting and enforcing nutrient pollution standards.

For more information, see *Legal update, Levelling-up and Regeneration Bill 2022-23: House of Lords rejects government amendment to cut nutrient neutrality requirements for housing developers*.

Waste prevention programme for England

Lexis+® UK Environment

On 28 July 2023 Defra published the new waste prevention programme policy paper, a cross-departmental plan to maximise resources and minimise waste in England.

The plan was published alongside the summary of responses to the 2021 consultation on the Waste Prevention Programme and the summary of responses to its consultation on improved food waste reporting in business.

The programme builds upon the Resources and Waste Strategy for England (2018), in particular strategic principle two 'Preventing waste from occurring in the first place and managing it better when it does'. It proposes to do this by adopting a circular economy approach, which retains products and materials in circulation for as long as possible and at their highest value.

The programme sets out government's intentions on waste prevention in three cross-cutting areas: designing out waste, systems and services, and data and information and across seven key sectors: construction, textiles, furniture, electronics, food, road vehicles, and plastics/packaging.

The government commits to exploring the role that contractual guarantees and warranties can play in ensuring products stay in use longer and meet the circular economy aims.

In terms of wider environmental goals, the government sets out its aim to monitor and evaluate its progress in preventing waste long-term. This will support wider environmental goals as it enables the government to look at the impact the reduction in waste has on the reduction of carbon emissions. It will also highlight those areas where waste is not being reduced (or not reduced enough) and where further measures and/or regulation may be necessary.

The programme supports the government's goal to reduce residual waste (on a per capita basis) and to

eliminate avoidable plastic waste, and perhaps most importantly, the overarching aim for the government to achieve zero avoidable waste by 2050.

Examples of actions include:

- Scrapping fees for households to have bulky domestic furniture collected from their homes by retailers by 2025.
- Developing policy options to tackle fast fashion – keeping textiles out of landfill and in circulation for longer through reuse and recycling.
- Making sure vapes are properly disposed of, by consulting the public on changes to the waste electricals regulations, helping make sure the vape industry pay and strengthening take-back requirements for retailers and online sellers.
- Launching proposals on reforming the batteries regulations 2023, to mitigate the environmental impact of vehicle batteries while also keeping Britain at the forefront of the electric vehicle revolution.

For more information, see News Analysis: Waste prevention programme for England—maximising resources, minimising waste.

Packaging extended producer responsibility (EPR): data reporting deadline extended in England

Practical Law Environment

On 5 September 2023, the Environment Agency (EA) published regulatory position statement (RPS) 288, Reporting packaging data under Extended Producer Responsibility (EPR).

Packaging producers currently pay only a fraction of the cost of dealing with packaging waste. The government is looking to introduce EPR for packaging in order to incentivise producers to think carefully about using less packaging, and to reduce the use of unnecessary and difficult-to-recycle packaging, to improve design for optimal recyclability, and to ensure more packaging waste can be recycled and made from recycled material.

The EA has published the RPS as the government has decided to defer the coming into force of the packaging EPR regime until October 2025. RPS 228 effectively extends the deadlines for large producers and compliance schemes to submit the first and second reports containing the data covered by regulation 17(1) of the Packaging Waste (Data Reporting) (England) Regulations 2023 (*SI 2023/219*) (as amended) as follows:

- The first reports must be submitted on or before 31 May 2024 (instead of 1 October 2023).
- The second reports must be submitted on or before 31 May 2024 (instead of 1 April 2024).

This data will be used to calculate the fees for devolved enforcement, which in England will be by the EA.

For more information, see *Practice note, Packaging waste regime in England and Wales* and *Legal update, Packaging extended producer responsibility (EPR): data reporting deadline extended in England*.

Environment Agency consultation on amendments to its enforcement and sanctions policy in light of the extension of civil sanction variable monetary penalty powers

Lexis+® UK Environment

In July 2023, the Department for Environment, Food & Rural Affairs (Defra) issued the summary of responses and government response to its consultation on strengthening the Environment Agency's abilities to issue monetary penalties for environmental offences in England. This confirmed that legislation is expected to come into force on 1 December 2023 to remove the current cap of £250,000 on variable monetary penalties (VMPs) set out in the Environmental Civil Sanctions (England) Order 2010 (ECS Order 2010), SI 2010/1157 and to introduce unlimited VMPs as a civil sanction in the Environmental Permitting (England and Wales) Regulations 2016 (EP Regulations 2016), SI 2016/1154. The draft Environmental Civil Sanctions (England) (Amendment) Order 2023 has now been published.

Following this announcement, the Environment Agency (EA) opened a consultation on 15 August 2023 on amendments to its enforcement and sanctions policy in light of the proposed changes to its civil sanctions powers. The consultation closes on 8 October 2023.

Much of the EA's existing Enforcement and Sanctions Policy will remain unchanged and, before issuing a VMP, it will still have to be satisfied beyond reasonable doubt that the person or organisation in question has committed an offence. However, given the expansion to a broader range of activities by virtue of the extension of VMPs to the EP Regulations 2016, the EA has invited comments on the existing VMP policy more generally, including its current policy on appeals of VMPs. The ECS Order 2010 requires the publication of such guidance and consultation in respect of amendment of the same.

The key change proposed by the EA is to Annex 1 of the Policy, which sets out how the regulator calculates VMPs. The existing approach is modelled on the Sentencing Council's Guidelines for environmental offences, however Step 4 (identifying the starting point and range) had been modified (by dividing the starting point by 4) to account for the £250,000 cap, which was exceeded in the Guidelines. The proposed amends remove that modification, effectively bringing the EA's approach to calculating a VMP in line with the approach set out in the Guidelines.

For more information, see News Analysis: Extending civil sanction variable monetary penalty powers.

Government calls for evidence on batteries strategy

Practical Law Environment

On 24 August 2023, the Department for Business and Trade (DBT) published a call for evidence for a UK batteries strategy that will be published in the coming months. The call for evidence invites views on specific questions on the priorities and outline scope of a batteries strategy, and seeks evidence that is not already available from recent reports.

The government is proposing an approach based on the three pillars of design, build and sustain. The government intends that the strategy will:

- Set out UK policies and government activity relevant to batteries, including in relation to their design, manufacturing, transportation, use, re-use and end-of-life, to reflect the international and national context.
- Unlock investment by identifying where investment is needed, signposting battery demand and promoting the use of suitable financial instruments to bring it about.
- Set out the key properties and potential of current and future battery technologies, focussing on technologies with applications in mobility, industrial and energy storage applications.
- Consider the whole life cycle of battery development and use, including access to supply chains, manufacturing, use, and second life, end of life and recycling.

The call for evidence closed on 28 September 2023. For more information, see *Practice note, GB batteries regime* and *Legal update, Government calls for evidence on batteries strategy*.

Local authority can vary statutory nuisance abatement notice (High Court)

Practical Law Environment

In *R (Ball) v Hinckley and Bosworth BC [2023] EWHC 1922 (Admin)*, the High Court (Administrative Court) concluded that it was lawful for a local authority to subsequently vary an abatement notice that it had issued for a statutory nuisance under section 80 of the Environmental Protection Act 1990 (EPA 1990).

The statutory nuisance was in respect of noise emitted from Real Motorsport Ltd's (RML) racing circuit near a village. An abatement notice was issued by the council to RML stipulating that it cannot operate the circuit other than in accordance with the terms set out in the schedule to the notice. A clause in that schedule allowed RML to apply to the council for variations. The Council granted a number of subsequent variations, with the latest in 2022.

A local resident applied for judicial review of the Council's 2022 variation of the abatement notice, arguing that it was unlawful because the Council had no power under the EPA 1990 to vary it.

The High Court refused the application for judicial review. It explained that the Court of Appeal's approach in *R (on the application of Everett) v Bristol City Council [1999] EWCA Civ 869,* which implied a power for a local authority to withdraw an abatement notice, also applied to the variation of an abatement notice. Therefore, a power to vary an abatement notice should be implied into the EPA 1990.

The court also concluded that it was not necessary for the Council to rely on section 111 of the Local Government Act 1972 in light of the court's conclusion that a power to vary could be implied into the EPA 1990. However, section 111 would not operate to empower the council to vary an abatement notice if such a power had not arisen by way of necessary implication.

For more information, see *Legal update, Local authority can vary statutory nuisance abatement notice (High Court)*.

High Court refusal of permission for ClientEarth derivative action

Lexis+® UK Environment

On 24 July 2023, the High Court handed down judgment confirming its earlier decision to refuse ClientEarth's application for permission to continue a derivative action on behalf of Shell plc seeking to challenge its directors' response to the risks posed to Shell's business by climate change.

The judge maintained his decision on the basis that, in both its written and oral submissions, ClientEarth has failed to establish a prima facie case for granting permission, as required by Companies Act 2006 (CA 2006), s 261(2).

If the applicant establishes a prima facie case, the test for the substantive application is set out in CA 2006, s 263. Under CA 2006, s 263(2), the court must refuse the application if it is satisfied that a person acting in accordance with the directors' duty under CA 2006, s 172 (to promote the success of the company) would not seek to continue the claim. CA 2006, s 263(3) sets out discretionary factors which the court must take into account in considering whether to grant permission, including whether the applicant is acting in good faith in seeking to continue the claim.

The court disagreed with ClientEarth that the discretionary factors under CA 2006, s 263(3) were not relevant to the prima facie stage. Since the court had to take these factors into account in deciding whether to grant permission, they must also be taken into account in assessing whether the evidence established a prima facie case.

The same applied to the nature of the relief sought, which was as much a factor in the decision whether to grant permission as the nature of the breaches relied on. The court was unlikely to grant the relief sought in this case because the mandatory injunctive relief sought was too imprecise to be suitable for enforcement and would require constant court supervision, and the declaratory relief would serve no legitimate purpose.

The attempt to impose absolute duties on the directors relating to climate change, in the form of the alleged incidental duties, was 'inconsistent with the well-established principle that it is for directors themselves to determine (acting in good faith) how best to promote the success of a company for the benefit of its members as a whole' under CA 2006, s 172 (a subjective test). It also could not be reconciled with the directors' duty to exercise reasonable skill, care and diligence under CA 2006, s 174, which required them to manage the business with an open mind and have regard to a range of competing considerations. The question is whether the decision falls outside the range of decisions reasonably available to the directors at the relevant time.

ClientEarth has confirmed that it has requested permission to appeal.

For more information, see News Analysis: High Court confirms refusal of permission for ClientEarth derivative action against Shell directors (ClientEarth v Shell plc).

First environmental class action brought under the UK collective action regime

Lexis+® UK Environment

A claim against Severn Trent Water for allegedly misleading regulators about the number of times it discharged sewage into waterways has been brought in the Competition Appeal Tribunal (CAT) on behalf of the company's eight million customers.

The case against Severn Trent Water is the first of six parallel claims to be brought against water companies on behalf of more than 20 million customers across the UK. Leigh Day, acting on behalf of the claimant, has alleged that the companies abused their dominant position in the market to overcharge customers. It is alleged that by failing to properly report sewage spills to the Environment Agency and Ofwat, the companies evaded penalties which would have affected the price they could charge customers, with customers instead paying water bills on the basis that the companies were meeting required standards. If successful, the claims could require the defendants to pay compensation to anyone who has paid a water bill to any of these companies since April 2020, with total compensation arising out of the six cases potentially amounting to over £800m.

The claims are being brought under the opt out collective action regime for competition claims established by the Consumer Rights Act 2015 (CRA 2015). So long as a claim falls within the scope of the regime, this allows a single claimant to bring a claim on behalf of an entire class of affected consumers unless these consumers individually opt out of the claim.

In order to proceed, proposed cases must pass a two-stage certification assessment which deems the proposed class representative as authorised to act and the claim as eligible for inclusion in collective proceedings.

It is the first time the 'opt out' collective action regime has been used to bring an environmental claim and marks a significant development in the ESG litigation landscape in the UK.

For more information, see News Analysis: First environmental class action brought under UK collective action regime.

Environmental law in Scotland themed articles

Environmental law in Scotland: A round-up

Colin Reid

At a glance

- Developments in environmental law in Scotland reflect the ongoing effects of Brexit, continuing business and significant new proposals.
- Some post-Brexit arrangements such as Environmental Standards Scotland, are settling in well but disputes between the Scottish and UK Governments are disrupting others.
- Progress continues to be made with new legislation and policy in areas such as wildlife and climate change.
- Significant innovations are also under way, including legal recognition of a human right to a healthy environment.

In recent years, providing an overview of environmental law developments in Scotland has not been easy, with lots happening and many elements contingent on wider political and constitutional manoeuvrings.The position continues to be fluid in many respects but three themes can perhaps be identified in presenting where things stand today. The first is the continuing backwash from Brexit, where some of the new arrangements are settling in, the impact of others is just starting to be felt, whilst in some further areas the position remains unclear. A second theme is the continuation of business that has been under way for several years but is now coming to fruition in terms of legislative and policy developments. The third, overlapping one is the presence of some innovations where novel (for the UK, at least) legal approaches are being introduced to deal with a number of challenges.

Post-Brexit backwash

The UK's withdrawal from the European Union has led to various new arrangements being put in place in Scotland and these are at various stages of maturity.[1] The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (the Continuity Act) addressed two of the 'governance gaps' identified as a consequence of Brexit, namely oversight of compliance with the law and the status of environmental principles.The first of these has been dealt with by the creation of Environmental Standards Scotland as an independent body with responsibility for overseeing compliance with and effective implementation of environmental law.[2] It is now fully operational and has already carried out a number of investigations, including one, on air quality in Scotland, that has led to the making of a statutory improvement report[3] and consequent improvement plan from the Scottish Ministers.[4]

Also in place are the measures regarding environmental principles. The requirement on Ministers and other policy makers to 'have due regard' to the principles was set out in the Continuity Act[5] and the supporting guidance has recently been laid before Parliament, with a view to these provisions coming into force later this year.[6]

A further provision in the Continuity Act calls for a report on the effectiveness of environmental governance arrangements, including the potential for an environmental court.[7] This report was published in June[8] but has been widely viewed as a missed opportunity, looking at the structures for governance and redress at a high level of generality and not dealing with many of the concerns raised before Brexit that the public in Scotland do not have effective access to environmental justice. The consultation on this report closes in mid-October and it will be interesting to see the overall reaction and the Government's response to that.

These matters may be well in hand, but for others the impact of the post-Brexit arrangements is still being worked through, affected by the tensions between the Scottish and UK Governments. The prospect of a major clash between the Scottish Government's policy of alignment with EU law[9] and the 'cliff-edge' of the sunset provisions of the Retained EU Law (Revocation and Reform) Bill may have gone, but the much more limited list of measures being revoked at the end of this year under the final Act is still a measure of contention.[10] In particular, the governments have been disagreeing over whether the provisions on the National Air Pollution Control Programme[11] should be included among the measures to be revoked or should be retained or replaced. At the time of writing discussions on this are continuing.

More visible clashes have arisen over the operation of the United Kingdom Internal Market Act 2021 (Internal Market Act), especially in relation to the proposed deposit and return scheme that was due to be introduced in Scotland this year, but has now been delayed until at least October 2025.[12] The plans for a

similar scheme in the rest of the UK are not as far advanced as in Scotland and do not include glass, which is part of the Scottish scheme. The UK Government was willing to make the adjustments to the Internal Market Act necessary to allow the Scottish scheme to operate effectively only if there was greater alignment between the schemes and most notably that glass was excluded in Scotland. This has caused the introduction of the scheme in Scotland to be delayed.

The position on other matters is less certain but there are clear risks of further difficulties. One example is over the future of environmental impact assessments under the Levelling-up and Regeneration Bill currently before the Westminster Parliament. The proposal to move away from the current assessments to the new scheme of environmental outcome reports[13] clearly amounts to a departure from alignment with the EU, contrary to Scottish Government policy, and there are no signs that Scotland wishes to follow the plans being developed in Whitehall. The Bill allows UK ministers to legislate on this matter, even though it falls mostly within devolved competence, but how far it is intended to exercise such powers remains unclear.

Continuing business

Away from the matters affected by post-Brexit structural issues, many other developments are progressing. The Wildlife Management and Muirburn (Scotland) Bill has started its parliamentary passage,[14] drawing on the Werritty Report[15] from 2019 and introducing licensing for grouse-shooting and muirburn. A further consultation proposes extending the Bill to include a ban on snaring and wider powers for Scottish Society for Prevention of Cruelty to Animals (SSPCA) inspectors in relation to wildlife crime.[16] A new Biodiversity Strategy has been published[17] and plans are being made for the introduction of statutory nature recovery targets, for adjustments to the arrangements for national parks and the creation of additional ones.[18]

Also before Parliament is the Circular Economy (Scotland) Bill, providing for a Circular Economy Strategy, statutory targets, restrictions on the disposal of unsold consumer goods (a further area where the Internal Market Act is likely to come significantly into play) and adjustments to aspects of waste law.[19] A Scottish Aggregates Tax Bill is promised for the current parliamentary session, giving effect to the transfer of this matter to devolved competence under the Scotland Act 2016.[20]

In relation to climate change, a new Climate Change Plan is promised as well as a Climate Change Adaptation Programme, Energy Strategy and Just Transition Plan.[21] A distinctive feature here is the plan to consult on a Heat in Buildings Bill.[22] The focus on this major source of greenhouse gas emissions is something of a novelty but is an important area to tackle if net zero ambitions are to be met.

Innovation

That example of innovation within a continuing programme is joined by others such as the plans for a Land Reform Bill[23] which is likely to include measures enhancing the status of the Land Rights and Responsibilities Statement. For large landholdings there may be a requirement for a Land Management Plan to be in place and the potential to intervene in transactions where the public interest justifies this.[24]

Most significant, though, is the proposal for a Human Rights Bill that will incorporate into Scots law the provisions of several international conventions on economic and social rights[25] and introduce a right to a healthy environment.[26] The extent to which the rights under the various conventions can be recognised without falling foul of the limits on devolved competence remains to be fully resolved following the Supreme Court's decision in relation to the earlier attempt to incorporate the United Nations Convention on the Rights of the Child,[27] and the recognition of a right to healthy environment enters new territory, with a number of questions over the scope of such a right left open in the current consultation.[28] The overall plan is for the first step in recognising these rights to take the form of a procedural obligation on public authorities to take account of these rights before a duty to comply with the rights is introduced at a later stage, once certain minimum core obligations have been defined.[29] Although the intention is to introduce the Bill during this session of Parliament, it will therefore be some time before any right to healthy environment exists as a directly enforceable legal right. Nevertheless, the journey towards that marks a substantial innovation within the United Kingdom.

Conclusion

The disruption caused by Brexit continues to cast a long and disruptive shadow, creating uncertainties over whether, how and when certain policy objectives of the Scottish Government can be put into practice. These policies include both incremental developments and innovations such as the recognition of a human right to a healthy environment. As predicted in the run-up to Brexit, divergence within the UK on various matters is causing considerable strain and this dimension is likely to feature as a major aspect of discussions on environmental law and policy as much as the substantive merits of the options being explored.

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Endnotes

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3 Air Quality Investigation Improvement Report (Case Reference IESS.21.013; September 2022) 20220929-ESS-AIR-QUALITY-INVESTIGATION-REPORT-IESS.21.013.pdf (environmentalstandards.scot)
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6 Scotland's guiding principles on the environment: statutory guidance (August 2023) https://www.gov.scot/publications/scotlands-guiding-principles-environment-statutory-guidance/.
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23 Ibid., pp 24,
24 Equality, opportunity, community: New leadership – A fresh start (n 9) pp 46,57; Land Reform in a Net Zero Nation: consultation paper (July 2022) Land reform in a Net Zero Nation: consultation paper – gov.scot (www.gov.scot).
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Environmental Standards Scotland – what it is and what it does

Mark Roberts

At a glance

- Environmental Standards Scotland (ESS) is the independent body responsible for the oversight and scrutiny of environmental law in Scotland following the UK's departure from the European Union.
- ESS' role is to assess public authorities' compliance with environmental law and the effectiveness of implementation of environmental law.
- ESS is accountable to the Scottish Parliament and is wholly independent of the Scottish Government.
- The constitutional and political context for ESS' work is becoming increasingly complex.

What is Environmental Standards Scotland?

ESS is a public body that now forms part of the system of environmental governance in Scotland. It came into formal existence two years ago on 1 October 2021. It was established by the Scottish Parliament under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ('the 2021 Act') in the aftermath of the United Kingdom's exit from the European Union. It replaced some of the governance functions previously performed by the European Commission in overseeing the implementation of environmental law.

What does Environmental Standards Scotland do?

The 2021 Act gives ESS two jobs. Firstly, it has to assess public authorities' compliance with environmental law and secondly, it has to consider the effectiveness of environmental law and how it is implemented and applied in Scotland. The definition of public authorities is broad, spanning the Scottish Government and its network of agencies and arms-length bodies, health boards, transport authorities and local authorities. ESS has no role in advising the Scottish Government. Nor does it act as an appeal body for any individual regulatory decisions made.

Perhaps the most important aspect of how ESS is established is its independence. As a non-ministerial office, ESS is accountable to the Scottish Parliament and is wholly independent of Scottish Ministers in how it operates and in the findings and judgements it makes. It is overseen by a non-executive Board of seven members whose appointment is subject to parliamentary approval. Its first strategic plan required parliamentary approval.

How does Environmental Standards Scotland work?

There are two primary ways in which ESS fulfils its role. It can receive representations from individuals, communities and organisations about environmental concerns. Secondly, it can decide to examine particular aspects of environmental law based on its own analysis and monitoring work.

To date, ESS has received 37 representations from individuals, communities and organisations. These have covered areas ranging from local authorities' climate change reporting duties to the effectiveness of the law and systems associated with the bycatch and discharge of fish (details of all representations received are on the ESS website). If ESS concludes that there is no alternative remedy and a representation meets its criteria for investigation, it can begin a formal investigation. These criteria are:

- importance, in terms of scale, significance, risk and urgency;
- scope, whether the issue is systemic or long-standing;
- neglect, whether the issue has had limited attention; and
- added value, whether there is ongoing work by other bodies.

Once an investigation has concluded there are a range of options ESS' strategic plan commits it to trying, wherever possible, to reach informal resolution with public authorities. One example of this informal approach was work on the Scottish Environment Protection Agency (SEPA)'s programme of work to remove physical barriers (weirs) from Scotland's rivers. ESS received a representation suggesting SEPA was not carrying out its responsibilities to ensure barriers over one metre in height were licenced. At the heart of the representation was a wish to see all barriers licenced so that action could be taken to remove them. SEPA shared its planned programme of work for the next five years which set out when it expects barriers to be removed. ESS will now review and report on progress against this plan annually until 2027. The initial review in May 2023 demonstrated that good progress had been made against the plan.

The 2021 Act provides ESS with a range of formal powers. One of these powers is that it can issue

improvement reports to public authorities which those organisations have to respond to in the form of an improvement plan. These improvement plans are then subject to parliamentary scrutiny.

In September 2022, ESS issued an improvement report following an investigation into the systems in place to secure compliance with standards for nitrogen dioxide. This was an issue that had been subject to a judgment by the European Court of Justice in 2021[1]. The investigation concluded that there were opportunities to strengthen the system of air quality management in Scotland and, given the systemic and long-standing nature of the non-compliance, ESS decided to issue an improvement report to the Scottish Government. As required by the 2021 Act, the Scottish Government responded with an improvement plan in early 2023 which was scrutinised and approved by the Scottish Parliament.

In addition to the power to issue improvement reports, ESS has the power to issue a compliance notice requiring a public authority to take action. This would be if ESS considers that there has been a failure by a public authority to comply with environmental law when exercising a regulatory function and that failure is causing, or is at risk of causing, environmental harm. In extreme situations where a public authority's failure to comply with environmental law is serious and there is a risk of serious environmental harm, ESS can make an application for judicial review. ESS has not used either of these powers to date.

The second way that ESS can deliver its twin roles of assessing compliance with environmental law and the effectiveness of environmental law is by undertaking work based on its own analysis and monitoring work. During the development and establishment of ESS, it identified a number of priority areas for this work. These priority areas are air quality, biodiversity, climate change, environmental governance, human health, land and soil, resource use and waste and water quality. At the time of writing, ESS is in the latter stages of two significant pieces of work within these priority areas: one on air quality and one on sewage discharges into the water environment. ESS expects to publish these pieces of work during autumn this year. In addition, ESS monitors and engages with emerging developments in environmental policy and legislation across the UK and internationally.

What is the context for Environmental Standards Scotland's work?

As a small, young organisation with a broad remit across the full spectrum of environmental issues, ESS is operating in a complex constitutional and political environment, within Scotland, inside the UK and still with an eye on Europe.

This contribution began by noting that ESS was established to replace some of the governance functions previously performed by the European Commission. By virtue of being closer to what is happening on the ground in Scotland, there is a sense that ESS is more immediately accessible to the public than the European Commission. This accessibility is a priority for ESS and, as part of its next phase of development, it will be carrying out a programme of community engagement. This will allow it to hear directly from groups and communities about their environmental concerns. This will in turn inform ESS' future work and, ideally, enhance understanding of ESS' role and what it can, and cannot, do.

Within Scotland, there are important legislative changes planned for the current Scottish parliamentary session (which runs until 2026). Most notably, the Scottish Government plans to introduce a Human Rights Bill which will include a human right to a healthy environment. The Scottish Government is currently developing and consulting on the policy behind this legislation. Understanding how ESS might play a future role in the governance underpinning this right is a key strand of work. In addition, the Scottish Government plans to introduce a Natural Environment Bill during the current parliamentary session. This will likely establish statutory targets around biodiversity and nature loss, analogous to the existing targets to reduce greenhouse gas emissions under climate change legislation. This will represent a major addition to the system of environmental governance.

One key aspect of the post-Brexit environmental governance is how the various parts of the United Kingdom are starting to diverge. A fundamental difference lies in the Scottish Government's commitment to maintaining alignment with European Union policy and legislation. This is significant both in terms of the volume of environmental legislation being developed under the European Green Deal and the different position of the UK Government. Monitoring and understanding how European environmental policy and legislation is developing is an important priority for ESS as it enables us to assess whether the Scottish Government is maintaining alignment.

The constitutional relationship between Scotland and the rest of the UK is different post-Brexit. The most notable illustration of this in the sphere of environmental governance is the Scottish Government's decision earlier this year to pause the introduction of a Deposit Return Scheme until at least October 2025. The Scottish Government planned to introduce the scheme to promote recycling, reduce litter and contribute to a circular economy. However, under terms of the Internal Market Act 2020, the UK Government decided not to grant an exemption for glass products (in other words, excluding glass bottles from the scheme) in the interests of the wider UK internal market. This is an early manifestation of the one of the new tensions that has emerged post-Brexit within the UK. It will no doubt not be the last.

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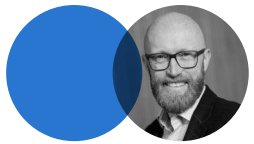

Endnotes

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Matters in practice

The role of Artificial Intelligence in environmental regulation

Paul Collins

'*My program will not allow me to act against an officer of this company.'*
Quote from Robocop (1987)

At a glance

- Artificial Intelligence (AI) will transform the way public sector organisations make decisions and deliver public services, including delivering more efficient and more effective environmental regulation. But for the public to have confidence in the use of AI, and to maintain public standards, regulators must have appropriate safeguards in place.
- Courts will need to decide on the application of AI in environmental law enforcement and decision-making and hold organisations to account for environmental damage caused by its use. More widely, the lack of transparency of AI could undermine the rule of law.

Introduction

The integration of Artificial Intelligence (AI) into our lives promises to change the way we live and interact with our environment. However, if we are to realise and adopt any benefits of AI, we must face the challenges and ethical considerations that come with it, including in relation to environmental regulation. This article aims to provide an overview of the opportunities and challenges associated with integrating AI into the development of environmental regulations. At the same time, the article considers and provides possible solutions to the issues associated with accountability and liability, the rule of law and public standards as the use of AI becomes more widespread.

Current use of AI in environmental regulation

Environmental regulation is complex, time-consuming and expensive. AI can help in making regulation more efficient and effective. Some reported uses of AI in this area include:

- **Predicting environmental risks** – for example, predicting oil spills or natural disasters. This can help enforcement bodies prepare for potential incidents and respond more quickly and effectively.
- **Informing policy decisions** – for instance, in evaluating the impact of proposed policies and laws by simulating different scenarios and predicting outcomes. AI can help identify areas for improvement.
- **Monitoring compliance with environmental law** – for example, by analysing data from drone footage, satellite imagery and social media posts. AI can also identify resource optimisation by selecting where manual inspection would be most beneficial. One of the key advantages of AI in monitoring compliance with environmental law is its ability to facilitate real-time monitoring and enforcement. AI systems can be used to maintain air and water quality and detect illegal waste dumping. By providing real-time data, AI can help enforcement bodies quickly identify areas that require intervention, leading to more effective and efficient enforcement efforts. Clearly, this raises challenges for enforcement bodies in terms of prioritising performance objectives, allocating resources on the ground and reputation management.

Important implications for regulated organisations

As a result of AI technology being able to deliver or predict potential breaches of environmental law, there is a higher risk of breaches being detected and environmental sanctions resulting. Regulated organisations could be subject to greater scrutiny and regulatory action, in particular where AI technology provides a low-cost method for detecting potential breaches of environmental law.

However, decisions made by AI technology are open to challenge. For example, drone image footage or satellite data could easily be processed wrongly by AI technology, predicting a breach of environmental law where none exists. Similarly, a business that invests in AI technology would need to be alive to the fact that whilst the technology may be relatively inexpensive (say, compared to an environmental fine), the technology is not infallible, and errors could result in a business being wrongly accused of a breach.

For businesses that wish to invest in AI technology, it is important to be aware of the regulatory environment and the potential impact of AI on the business. In-house teams should include regular testing of AI models and systems for handling errors. Businesses should design and implement procedures for the use of AI in environmental compliance, including how data is to be

collected, stored and shared, reflecting new legislation and guidance from the environmental regulators.

Accountability and liability and the role of courts

The many challenges that AI technology raises require innovative and responsive systems to ensure that AI systems are held accountable and used appropriately in environmental law enforcement and decision-making.

AI systems should be required to provide *explanations* for their decisions, similar to the requirement for human decision-making under the law. This can help ensure that AI systems are accountable and transparent. Policies and legislation should be developed to provide *responsible use* of AI in environmental law enforcement and decision-making. This can involve measures such as requiring AI systems to be tested for their environmental and socio-economic impact.

Litigation and courts can play a role in addressing the challenges and opportunities of AI in environmental law enforcement and decision-making. For example, court cases can be used to challenge the use of AI systems in environmental decision-making or to hold organisations to account for environmental damage by the use of AI.

Courts could shape the regulatory framework for AI in environmental law, by interpreting existing law and requirements in light of new technological developments.

A rule of law or rule of algorithm?

A core element of the rule of law is that laws should be accessible in order that people can comply with them and know what is expected of them, predictability being paramount. The lack of accessibility of AI could undermine these prescribed attributes. The technology and complexity associated with AI does not make it suitable for human comprehension, insight, or transparency. AI has rules; however these rules are rules of mathematics and statistics. The rule of law is dependent on natural language in order to be understood. Therefore, as governance increasingly finds its expression in computer code, its comprehension by the public is bound to decrease. Public services may be automated, and algorithms may be used to streamline government. However, by using opaque technology that is incomprehensible, our trust in technology is nothing more than the inability to understand it. AI is an existential threat to the rule of law and a question that has been put is whether the future will bring with it a rule of law or a rule of algorithm? The rule of law requires laws that are accessible, that court decisions are accessible and that the effects of laws are foreseeable. However, the use of AI by the judiciary can be seen as undermining these principles.

AI and public standards

AI will transform the way public sector organisations make decisions and deliver public services. The government has committed significant resources to this new technology through the AI Sector Deal,[1] which promises to deliver a more accurate, capable, and efficient public sector.

Adherence to high public standards will help fully realise the great benefits of AI in public service delivery. By ensuring that AI is subject to appropriate safeguards and regulations, the public can have confidence that new technologies will be used in a way that upholds the Seven Principles of Public Life (also known as the Nolan Principles).[2]

In February 2020, the Committee on Standards in Public Life published its report, *Artificial Intelligence and Public Standards*,[3] setting out steps to ensure that high standards of public conduct are upheld as AI is adopted more widely across the public sector.

In their report, the Committee makes eight recommendations to government, national bodies and regulators to help create a strong and coherent governance and regulatory framework for AI in the public sector. The recommendations include: (1) all public organisations should publish a statement on how their use of AI complies with relevant laws and regulations before they are deployed in public service delivery; and (2) government should establish guidelines for public bodies about the declaration and disclosure of their AI systems.

In July 2023, the Chair of the Committee wrote to the government asking for an update on what progress the government has made against the recommendations and what the government's plans are for supporting regulators to regulate AI effectively in their sectors and remits. At the time of writing this article, that response is awaited.

Conclusion

The potential for AI to improve the effectiveness of environmental regulation must be considered alongside ethical principles and implemented in a responsible way. This requires close working between policy makers, researchers, and environmental bodies to ensure that AI is used in a way that is transparent, fair and delivers effective environmental protection.

Paul Collins is a Senior Lawyer at the Environment Agency. The views expressed are those of the author and do not reflect the views of his employer.

Endnotes

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Clean air for all: exploring regulatory frameworks to address air pollution in the UK

Issy Dickson, Ana Kantzelis and Becky Clissmann

At a glance

- The World Health Organization (WHO) estimates 99 per cent of the global population are exposed to air pollution levels higher than those deemed safe, resulting in roughly seven million premature deaths each year.
- Tackling air pollution will also help address climate change.
- Ambient air quality is not protected in one-third of the 195 countries assessed in UNEPs 2021 report on air quality and 37 per cent of countries had no legal requirements for monitoring and assessing air quality standards.
- The UK's national pollution limits are set at a level far higher than the WHO Guidelines. To prevent further children dying because of air pollution, sign the Ella's law petition.

On Thursday 13 September 2023, UKELA's Climate Change and Energy Working Party hosted a hybrid event at Ashurst and online on the topic of air pollution. We heard from three fantastic speakers:

- Dr Maria Neira (Director of Department of Environment, Climate Change and Health at WHO);
- Professor Eloise Scotford (Dean of UCL Faculty of Laws and advisor to the UNEP); and
- Rosamund Adoo-Kissi-Debrah CBE (Founder of the Ella Roberta Foundation and WHO BreatheLife Champion).

We first heard from Dr Maria Neira, who began by outlining the global scale and complexity of air pollution as a public health challenge. She shared data indicating that roughly 7 million premature deaths each year result from breathing air with pollution levels exceeding the standards set out in the WHO Air Quality Guidelines 2021. Alarmingly, she noted that 99% of us are exposed to air pollution levels higher than those deemed safe – a figure that surpasses previous estimates.[1]

Dr Neira also highlighted the interconnections between air pollution and climate change, emphasising that many drivers of climate change, such as fossil fuel combustion, are also significant sources of air pollution. With the international climate conference COP28 approaching in November 2023, Dr Neira stressed the need for countries to prioritise tackling air pollution in their efforts to achieve the Paris Agreement's objectives. She emphasised that with the right interventions, up to three million premature deaths from poor air quality could be averted annually. Furthermore, she appealed to political leaders to support a just and equitable phase-out of fossil fuels at COP28, highlighting that such a move would not only reduce air pollution and save lives but also bring economic benefits.

Next, we heard from Professor Eloise Scotford, who discussed the findings of the United Nation Environment Programme's (UNEP) 2021 report titled 'Regulating Air Quality: The First Global Assessment of Air Pollution Legislation'.[2] Headline findings from the report included:

- Ambient air quality lacked protection in one-third of the 195 countries assessed in the report.
- 37 per cent of countries had no legal requirements for monitoring and assessing air quality standards.
- There is an urgent need to better monitor and regulate indoor air quality, which, often involving private spaces, presents a challenge.
- Startlingly few regimes link air quality standards to public health objectives.

Following this report, UNEP has produced a guide for policymakers to use when drafting air quality laws.[3] On an encouraging note, Professor Scotford highlighted the proactive steps that many countries are now taking to review or create new air quality laws, particularly since WHO published their latest version of the Air Quality Guidelines in 2021.[4] The inclusion of a number of air quality targets within the Environment Act 2021 was characterised as a step in the right direction. Nevertheless, given that much of the UK's air quality legislation stems from EU directives, the post-Brexit legal landscape for air quality is complex and marked by critical governance gaps.

Professor Scotford concluded her remarks by emphasising the importance of taking a holistic approach and coordinating policy responses to both air quality and climate change, so that one area does not improve at the detriment of the other.

Finally, we heard the tragic but inspiring story of Rosamund Adoo-Kissi-Debrah CBE and her asthmatic daughter, Ella. Ella was just nine years old

when she died and is the first person in the world to have air pollution posthumously included on her death certificate. In December 2020, a coroner's inquest concluded that air pollution was a significant contributory factor to the induction and exacerbations of asthma, and that she was exposed to levels of pollution that exceeded levels set out in WHO Air Quality Guidelines.[5]

The primary source of Ella's exposure to pollution was traffic emissions, and during the course of her illness there was a recognised failure by the UK to reduce the levels of pollution to within legal limits set by EU and domestic law. A Prevention of Future Deaths report issued after the inquest highlighted as a matter of concern that national pollution limits were set a level far higher than WHO Guidelines. Rosamund made it clear that, in her view, the government knows that air pollution needs to be reduced in London and elsewhere, and that they must do more to help the public better understand the health risks and need for policies like the Ultra Low Emissions Zone (ULEZ) in London.

To prevent more children dying because of air pollution, Rosamund is now advocating Ella's Law – a wide-ranging piece of legislation that would make clean air a human right and enshrine WHO-aligned air quality standards in law. Ella's Law has made its way through the House of Lords and is waiting to pass through the House of Commons. The Green Party's Caroline Lucas attempted to introduce it, but it needs to reach 100,000 signatures to be considered for debate. If you are able, please do sign the petition (linked below) and share amongst your networks.[6]

Issy Dickson is a member of UKELA's Climate Change and Energy Working Party. She is a law student at BPP University and future trainee solicitor at Linklaters LLP.

Ana Kantzelis is an Australian-qualified lawyer with a specialisation in international environmental and natural resources law. Now based in London, she has worked as a consultant and advisor to a number of private and non-governmental organisations in the field of climate change law and policy, and has participated in the UNFCCC multilateral process as a state party delegate to the Paris COP21 in 2015. Ana is an Associate Member of 6 Pump Court.

Becky Clissmann is a co-convenor of the Climate Change and Energy Working Party. Becky is a counsel in Ashurt's strategic governance & advisory practice, specialising in ESG with a particular focus on climate change and the transition to net zero.

Endnotes

1 'Billions of People Still Breathe Unhealthy Air: New WHO Data' (WHO, 4 April 2022), available at <https://www.who.int/news/item/04-04-2022-billions-of-people-still-breathe-unhealthy-air-new-who-data>, accessed 22 September 2023.

2 'Regulating Air Quality: The First Global Assessment of Air Pollution Legislation' (United Nation Environment Programme, 2 September 2021), available at <https://www.unep.org/resources/report/regulating-air-quality-first-global-assessment-air-pollution-legislation>, accessed 22 September 2023.

3 'Guide on Ambient Air Quality Legislation – Air Pollution Series' (United Nation Environment Programme, May 2023), available at <https://wedocs.unep.org/handle/20.500.11822/42536>, accessed 22 September 2023.

4 ibid.

5 ibid.

6 Andrea Carey Fuller and Rosamund Adoo-Kissi-Debrah, 'Petition: Find Time to Take the Clean Air (Human Rights) Bill through the House of Commons' (*Petitions: UK Government and Parliament*), available at <https://petition.parliament.uk/petitions/639320>, accessed 22 September 2023.

Student submission

The impact of evolving climate change understanding on the fair and equitable investment treaty standard

Jesse Mattinson

At a glance

- Investment treaties have come under scrutiny for deterring regulation to combat climate change.
- The reasonableness of an investor's legitimate expectation could be re-evaluated as our response to protecting the climate evolves.
- Different investment tribunal opinions on whether a breach of the fair and equitable treaty standard can be justified will have an important impact on a host state's ability to regulate in the environmental interest.

Introduction

This article explores how the protection of environmentally damaging investments under the fair and equitable treatment (FET) standard in bilateral and multilateral investment treaties may be impacted by the evolving nature of host states' responses to climate change.

The FET standard is a controversial investment treaty norm. States are wary of the broad discretion it confers upon tribunals to find measures as unfair and to make huge awards in favour of the investor. It is today an abundant source of investment claims and is the standard which is most frequently found to have been infringed.[1]

Tribunals will look at the transparency of laws which will apply to the investment and, importantly, whether a legitimate expectation of the investor exists. The legitimate expectations limb will be the focus of this article. It protects against state infringement of the investor's expectation of 'the stability of the legal and business framework'.[2] A legitimate expectation arises from a commitment of varying specificity given by the host state, on the basis of which an investor 'reasonably trusted' that a certain law affecting the investment would not change.[3] The logic is that investors will be attracted to invest if they can be assured that the host state will not change their domestic laws in a way that negatively affects the investment after it has been made. Yet, there is nuance in the legitimate expectations doctrine because it does not require a total 'freezing' of regulation at the time of investment.[4] Rather, a tribunal will have to determine three elements: i) whether an expectation has arisen, ii) whether the investor's reliance on the expectation was reasonable and, although not universally accepted, iii) whether the state proportionately exercised its right to regulate in the public (including the environmental) interest.

The first element usually concerns the specificity of the commitment made by the host state. The second and third elements are of interest in this article. In respect of the tribunal's analysis of the reasonableness of an expectation in the context of environmental cases, this article firstly explores the impact of the obligation of due diligence of the investor, and the risk of regulatory change inherent to environmentally sensitive industries. Secondly, the article considers whether a legitimate expectation can be justified, for example, in the interests of combatting climate change.

Reasonableness of the investor's expectation

The question of due diligence

For an expectation to be reasonably relied upon, an investor must have carried out sufficient due diligence in respect of the conduct of the host state when the alleged commitment was made. In *Plama v Bulgaria* an investor in a privatised oil refinery in Bulgaria alleged that the host state had infringed its legitimate expectation by amending a law that placed liability for past environmental damage at the refinery on the current owners, rather than on the state.[5] However, at the time that the commitment arose, the Bulgarian parliament was debating whether to shift the burden of liability, as it eventually did. Since these debates were in the public record, the tribunal held that a diligent investor ought to have known this, and would have sought specific, express commitments from the host state.[6] In the same vein, climate change is subject to much political and public debate. It may become increasingly difficult for investors in polluting industries to discharge the obligation of due diligence because these industries are today subject to political scrutiny and differing policy ideas to mitigate climate change in the host state. Investors will therefore need to be careful to obtain more specific commitments on the regulatory stability of environmental laws. Further, in *RWE Innogy v Spain*, during its due diligence analysis, the court placed particular weight on the interpretation (that the investor ought reasonably to have known) by domestic courts of the stability of the

provision which gave rise to the investor's expectations.[7] Therefore, a state's climate commitments (interpreted and enforced by national courts) can inform the due diligence obligation. This will be further explored in the discussion on justification of breach of legitimate expectation.

The risk of regulatory change inherent to environmentally sensitive industries

The obligation of due diligence and the reasonableness of an expectation are also impacted by 'broader circumstances',[8] such as an 'industry's regular patterns',[9] or 'the political, socioeconomic, cultural and historical conditions prevailing in the host state'.[10] It forms part of the assessment of 'whether a prudent and experienced investor could have reasonably formed a legitimate and justifiable expectation of the immutability of such [domestic] legislation'.[11] For example, in *Mamidoil Jetoil v Albania*, legislative stability could not reasonably have been expected because Albania was emerging from a communist dictatorship.[12] The question relevant to climate regulation, as commentary has suggested,[13] would be whether an expectation of regulatory stability is reasonable in industries materially affected by climate change, given the rapid deterioration of the climate, the growing recognition of the need for transformative policies in response, and the development of international climate obligations.

In *Chemtura v Canada*, the investor should have been aware of the 'exposure risk' of producing pesticides that were damaging to the environment.[14] Canada, having revoked the investor's pesticide licence on environmental and public health grounds, was found to have neither infringed the FET standard nor the expropriation clause. There was a risk inherent to pesticides that made regulation to protect the environmental consequences likely and supplemented the investor's due diligence obligation. Therefore, no legitimate expectation could reasonably be relied upon. The tribunal in *Chemtura v Canada* concluded that Canada 'took measures within its mandate, in a non-discriminatory manner, *motivated by the increasing awareness of the dangers presented by lindane for human health and the environment*'.[15] It is interesting to apply this reasoning to industries causing, and exposed to, environmental damage – there is an inherent risk of regulatory change because our understanding of climate change and the policies needed to mitigate it evolve. Therefore, without an express and specific commitment from the host state, a 'prudent' investor could not expect states to refrain from legislating to mitigate the impact of polluting industries on climate change. For example, it would be difficult to see how an expectation of stability could reasonably arise out of a carbon credits scheme, first because the cap-and-trade model is inherently 'unstable' – it operates by gradually reducing the credits available to make purchasing them more expensive – in order to ultimately reduce emissions.[16] Second, because the fossil fuel industry materially affects climate change and there is an inherent risk of regulation to mitigate its impact. An expectation of stability is thus fundamentally illegitimate.

Justifying a breach of legitimate expectation

If a legitimate expectation has arisen, can its frustration be justified in the public interest? Tribunals disagree. This is an important question because if a state's breach of a legitimate expectation can be justified, it is less constrained by the FET clause and its regulatory space to combat climate change is significantly larger. The Spanish solar energy subsidy cases illustrate the differences of opinion.

In the 2000s, Spain had sought to increase its renewable energy use in line with its EU obligations by introducing subsidies to investors in renewable energy projects, including solar (photovoltaic) energy plants. The investors' return depended on the prices they could charge for the energy they produced. Therefore, to incentivise investment, Spain offered favourable tariffs to investors which guaranteed a certain rate of return. However, during the financial crisis in 2008–2009, Spain revoked these favourable guarantees in order to save costs to bail out the Spanish financial sector, rebalance the 'tariff deficit' (consumer energy demand dropped during the crisis, meaning the subsidies were costing Spain more) and protect consumers from energy price rises. Disputes arose under the Energy Charter Treaty (ECT), with claims of breach of legitimate expectations being brought via the FET clause under article 10(1) ECT.

In *Kruck v Spain* the majority found that Spain had infringed the FET clause. The investors had reasonably relied on Spain's legislative guarantee and the tribunal did not conduct an analysis of the justifiability of Spain's breach.[17] The host state was in this sense *strictly liable* once the existence of a legitimate expectation had been breached. In a dissenting opinion, Professor Zachary Douglas KC asserted that a 'fault-based approach'[18] was the correct conception of the legitimate expectations doctrine, where the state's right to regulate in the public interest, proportionality exercised, justified a breach. This approach was also taken in *RWE Innogy v Spain*[19] where a proportionality analysis was conducted against the state's legitimate aim 'to put in place a new regime that addressed the problem of the Tariff Deficit and the unsustainable electricity sector debt'.[20]

Although the debate is still ongoing in doctrine and in jurisprudence, a strict liability form of legitimate expectations would be disastrous for environmentally protective measures. Environmental regulation would become 'locked in' to satisfy expectations that had arisen before efforts to combat climate change – for example, under a new government – could be implemented.

On the contrary, on the assumption that Professor Douglas' conclusion is correct, would regulating to

ensure compliance with international conventions constitute a *justified* breach of a legitimate expectation? In *Urbaser v Argentina*, international obligations informed the analysis of legitimate expectations. The tribunal asserted that an investor's legitimate expectations are based upon 'the rights and obligations of the host state and of its authorities, subject to the protections provided in the BIT' and recognised that 'the host state is bound by obligations under international and constitutional laws'.[21] Hence, a national measure that purports to conform to international treaty obligations – from subsidy schemes to carbon pricing under the Kyoto Protocol, to the implementation of the Paris Agreement goals – could justify a breach of legitimate expectation in the name of an international treaty.

Conclusion

States' knowledge of and response to climate change are likely to impact both the reasonableness of a legitimate expectation and the possibility of justifying a breach. However, given the diversity in interpretation of the FET standard, the extent of its scope will depend more on the opinions of the international arbitrators appointed compared to other treaty norms whose doctrinal and jurisprudential foundations are more solid. Therefore, in the interests of the host state, with its political pressures and international obligations to meet climate-based goals, an investment treaty should not leave necessary environmental investment treaty provisions to the interpretation of arbitrators. States should, therefore, incorporate concrete environmental provisions into their investment treaties which narrow the discretion of tribunals to interpret away its right to regulate through the FET clause. General references to environmental protections will not suffice because they risk an unfavourable interpretation by an investment tribunal. As Sornarajah asserts, 'the tendency of tribunals has been to read down the effect of the rare environmental provisions that are to be found in investment treaties, thus preserving the original basis of these treaties as investment protection treaties'.[22] Therefore, tribunals which interpret environmentally conscious provisions consider them as an inferior standard in a treaty designed to promote foreign direct investment. Stronger provisions are needed. For example, the EU-Andean Communities free trade agreement affirms the primacy of international climate frameworks over the free trade agreement's economic provisions.[23]

The generic FET standard is immense in its potential reach, and the doctrine of legitimate expectations has the potential to significantly deter progress on combatting climate change. States would be wise to draft their clauses with this potential in mind.

Jesse is a student on the Bar Course at City University, London. He is interested in International Arbitration, International Climate Law, and Corporate Governance.

Endnotes

1 Only 125 out of a total of 2,574 investment treaties do not contain a FET provision as of 2022. See Elodie Dulac and Jia Lin Hoe, 'Substantive Protections: Fairness' (Global Arbitration Review, 14 January 2022), available at <https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/substantive-protections-fairness#footnote-068>; See also Nigel Blackaby and others, '*Redfern and Hunter on International Arbitration*', Sixth edition (Oxford University Press, 2015) para 8.96 (Redfern & Hunter call it the standard most frequently found to be breached); Federico Ortino, 'The Public Interest as Part of Legitimate Expectations in Investment Arbitration: Missing in Action?', in C. Brower and others (eds) *By Peaceful Means: International Adjudication and Arbitration: Essays in Honour of David D*. Caron (OUP, 2022, forthcoming) 9 (Professor Ortino says it is 'rare' to not encounter a FET claim in an investment treaty dispute).

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3 *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) para 160.

4 To quote the tribunal in *Saluka Investments B.V. v The Czech Republic*, UNCITRAL, Partial Award 17 March 2006) at para 305, '[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged'.

5 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008).

6 ibid, para 221.

7 *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum (30 December 2019) paras 519-534.

8 JE Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 352–355.

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12 *Mamidoil Jetoil v. Albania*, ICSID Case No. ARB/11/24, Award (30 March 2015).

13 Alison Macdonald KC and others, 'Climate Change, International Investment Law and Arbitration', Essex Court Chambers publications, (Week 4. Series 2, March 7 2023), page 4.

14 *Chemtura Corporation v Government of Canada*, UNCITRAL, Award (2 August 2010) para 149.

15 ibid. para 266 (emphasis added).

16 Markus Gehring and Marios Tokas,'Synergies and Approaches to Climate Change in International Investment Agreements' (2022) 23 The Journal of World Investment & Trade 778, 794.

17 *Mathias Kruck and others v Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Damages (14 September 2022).

18 *Mathias Kruck and others v Kingdom of Spain*, ICSID Case No. ARB/15/23, Partial Dissenting Opinion by Zachary Douglas (13 September 2022) para 22. See also; Alison Macdonald KC and others (n 13) page 4.

19 *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain*, ICSID Case No. ARB/14/34, Award (18 Dec 2020).

20 ibid, para 555.

21 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) paras 619–621. See also, Gehring and Tokas (n 16), 797.

22 Sornarajah M, *The International Law on Foreign Investment* (5th edn, Cambridge University Press 2021) section 5.5.1.

23 Article 270; see Gehring and Tokas (n 16), 783.

Book reviews

Biodiversity Litigation (Guillaume Futhazar, Sandrine Maljean-Dubois, and Jona Razzaque (eds), Oxford University Press, 2023)

Paul Wyard

At a glance

- *Biodiversity Litigation* is an edited volume published in 2023. Its main premise is that, while conversations about climate law are alive and heathy in international environmental law, less emphasis is placed on biodiversity law.
- The work brings together perspectives from different jurisdictions in an attempt to survey the state of international biodiversity law and provide an answer to whether there exists a body of biodiversity litigation correlated with the development of international biodiversity law.
- This review article considers *Biodiversity Litigation* a stimulating work which helps to understand biodiversity law's significance on the international environmental law stage.

In December 2022, Montreal played host to Part 2 of the 15th Conference of the Parties (COP15) to the Convention on Biological Diversity. It was billed as an unprecedented chance to stem the loss of global biodiversity and there were calls to reach an agreement akin to the Paris Agreement on climate change.[1] What followed was a historic resolution to place 30 per cent of land and water under effective restoration, and a commitment to make available $200 billion a year for nature by 2030.[2] It was said that COP15 represented a 'Paris moment for biodiversity'.[3]

Comparisons with the Paris Agreement were striking. Published after COP15, the editors of *Biodiversity Litigation* might point out that the use of the Paris Agreement as a benchmark for success typified climate change's prevalence in the conversations around international environmental law. Indeed, many in the UK might remember the challenge to Heathrow Airport's third runway,[4] but fewer people are likely to recall cases relating, for example, to badger culling[5] or wetland habitats.[6] *Biodiversity Litigation* begins by noting a general trend: global developments to tackle climate change have correlated with a rise in the number of legal disputes relating to the climate.[7] Furthermore, there has been an increase in domestic climate litigation in tandem with the development of international climate law.[8] With that in mind, the editors set out to explore whether there is a corresponding trend in relation to biodiversity.

The editors of *Biodiversity Litigation* are three academics based in Germany, France and the UK, each with a strong grounding in international environmental law. They have all written extensively on the subject and given their expertise, are well placed to deal with a question that has hitherto not been explored in a systematic way by legal scholarship[10]. They ask: does there exist a body of biodiversity litigation correlated with the development of international biodiversity law?[9] Following COP15, the question is a timely one, and it is fleshed out in more detail when the editors discuss the purpose of this edited volume:

First, we seek to identify what we label as 'biodiversity litigation'. To do so, we will follow a comparative approach in order to understand its trends in different contexts and reframe it in the more general context of environmental litigation. Secondly, we also want to understand how international biodiversity law might have influenced biodiversity litigation. Understanding this correlation will help us to better grasp the full impact of international biodiversity law on states and will suggest paths to improve its effectiveness.[11]

'Biodiversity litigation' is defined by the editors in broad terms. It is heavily influenced by principles that underpin the Convention on Biological Diversity and a detailed rationale is provided for why the Convention has been used as the foundation for it:

We define biodiversity litigation as any legal dispute at the national, regional or international level that concerns conservation of, sustainable use of and access and benefit-sharing to genetic resources, species, ecosystems and their relations.[12]

The range of international perspectives garnered as a result of the editors' comparative approach is the volume's standout feature. Authors from nine countries were invited to contribute chapters about their jurisdictions' approaches to biodiversity law and litigation.[13] They are either academics or practicing lawyers in the field of environmental law. Every continent (except for Antarctica) is represented. The content of *Biodiversity Litigation* is therefore necessarily wide-ranging, with lots of stimulating analysis; the countries were deliberately selected in order to represent a variety of legal systems and

stages of international development.[14] Each chapter is guided by the same series of questions set by the editors in an effort to help identify overarching trends.[15]

Given the range of perspectives in *Biodiversity Litigation*, and the sheer amount of substantive information, it is difficult to see how anyone could not take something away of interest. It is well-structured – there are lots of headings and subheadings, paragraphs and sub-paragraphs – and the editors and authors deliberately guide the reader though their respective chapters.[16] It is suitably detailed; for example, in the chapter on France there is a captivating discussion about the reintroduction of Pyrenean bears and resulting legal challenges brought by shepherds to the *Conseil d'État* (Council of State).[17] The chapters are well-referenced, with a preponderance of footnotes throughout.

Despite the quality of the material, there is one criticism to be made: it is difficult to see why a work claiming to cover 'international' biodiversity litigation only draws on one case study from Africa, a continent whose organisms comprise roughly a quarter of global biodiversity.[18] That said, this shortcoming is arguably redeemed by the inclusion of a dedicated (and comprehensive) chapter covering biodiversity law before the international courts,[19] which includes decisions from regional African courts (albeit references to Africa are slim).[20] In any case, the editors acknowledge that additional case studies are required to develop their synthesis.[21]

Biodiversity Litigation is a hugely interesting work, filled with insight and legal perspectives from around the world. It is likely to be a valuable resource for anyone interested in biodiversity law or policy. In the UK, the general position is that domestic courts are not required to determine cases in accordance with international law.[22] So it is perhaps unsurprising for a UK audience that one of the volume's conclusions is that the most important influence of international biodiversity law is its indirect influence as an interpretive tool.[23] Moreover, although 'biodiversity litigation' does not have an identity as strong as 'climate litigation', it is slowly becoming a staple in environmental law in its own right.[24] *Biodiversity Litigation* can be seen as a solid step towards cementing this newcomer, and understanding its significance, on the international environmental law stage.

Paul Wyard is an environmental and planning law paralegal at Richard Buxton Solicitors. Paul provided research assistance to one of the work's contributing authors.

Endnotes

1 Patrick Greenfield ''Paris agreement' for nature imperative at Cop15, architects of climate deal say' (*The Guardian*, 16 November 2022).
2 Kunming-Montreal Global Biodiversity Framework (adopted on 17 December 2022) targets 2 and 19, article 13.
3 Terry Slavin, 'How Elizabeth Mrema is striving to affect a 'Paris moment' for nature' (*Reuters*, 25 October 2022).
4 See *R (Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52, where the court considered the Secretary of State's alleged failure to take account of the UK's climate change commitments under the Paris Agreement.
5 See *R (Langton) v Secretary of State for Environment, Food and Rural Affairs* [2021] EWHC 2199 (Admin), where the court considered the 'duty to have regard to conserving biodiversity' housed in section 40 of the Natural Environment and Rural Communities Act 2006 (which was subsequently amended by the Environment Act 2021).
6 See *R (Wyatt) v Fareham Borough Council* [2022] EWCA Civ 983, where the court considered the defendant local planning authority's duty under regulation 63(5) of the Habitats and Species Regulations 2017.
7 Guillaume Futhazar, Sandrine Maljean-Dubois, and Jona Razzaque (eds), *Biodiversity Litigation* (Oxford University Press, 2023) 4.
8 Ibid 5.
9 Ibid 5.
10 Ibid 5.
11 Ibid 6.
12 Ibid 15.
13 Ibid 27.
14 Ibid 27.
15 Ibid 28.
16 Ibid 27 and 359.
17 Guillaume Futhazar and Lucas Dermenghem, 'Biodiversity Litigation in France: a Quest for Balance' in Guillaume Futhazar, Sandrine Maljean-Dubois, and Jona Razzaque (eds), *Biodiversity Litigation* (Oxford University Press, 2023) 160.
18 UNEP-WCMC, *The State of Biodiversity in Africa: A Mid-term Review of Progress Towards the Aichi Biodiversity Targets* (2016) iv.
19 Sandrine Maljean-Dubois and Elisa Morgeta, 'International Biodiversity Litigation: the Increasing Emphasis on Biodiversity Law Before International Courts and Tribunals' in Guillaume Futhazar, Sandrine Maljean-Dubois, and Jona Razzaque (eds), Biodiversity Litigation (Oxford University Press, 2023) 331.
20 Ibid 334.
21 Futhazar, Sandrine Maljean-Dubois, and Jona Razzaque (n 7) 27 and 359.
22 See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [55] and, more recently, *R (Friends of the Earth) v Secretary of State for International Trade* [2023] EWCA Civ 14 at [26].
23 Futhazar, Sandrine Maljean-Dubois, and Jona Razzaque (n 7) 398.
24 Ibid 399.

Noise and Noise Law: A Practitioner's Guide by Francis McManus and Andy McKenzie, Edinburgh University Press 2023, 200 pp, ISBN: 9781399505055

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I had the pleasure of reading *Noise and Noise Law* during a visit to a nature reserve in rural Monmouthshire. The soothing sounds of birds calling and the wind blowing across the wildflower meadow offered a sense of place and belonging. The following day, the familiar seemingly uncontrolled neighbourhood noises welcomed me back to city life.

In the opening chapters of *Noise and Noise Law,* McManus and McKenzie succeed in striking the difficult but perfect balance of explaining the science behind our perception of noise and go on to neatly weave that explanation into an engagingly comprehensive and accessible account of the law relating to the control of noise. That is no small achievement.

The range of law covered is bold and, I should admit, having read the contents pages, a little daunting. But fear not. The writing is fresh and sparky. Any doubts that the subject area may be, let's say, a little 'dry' are soon extinguished. The text includes an enlightening and thought-provoking account of common law nuisance and there are equally interesting and vital chapters on statutory nuisance, neighbourhood noise, noise and human rights, workplace noise, and noise and town planning. The detailed commentary on the statutory provisions and case law is invaluable and gently leads the reader through what could otherwise be an impenetrable maze of noise law.

What is clear from this timely book is that legislation relating to noise is deeply fragmented and piecemeal. The 1980s witnessed a growing awareness that environmental noise was getting worse and more recently, neighbourhood noise is viewed not as a free-standing problem but rather as part of the wider problem of antisocial behaviour. But what is one person's noise nuisance is another's right to carry out a lawful activity.

I would have liked the authors to have suggested ways in which the plethora of noise control legislation could be consolidated and more user-friendly or, indeed, effective (they ask whether the law ought to be consolidated and simplified as a question to discuss in the chapter summaries). For those unfamiliar with this area of law, it would have been valuable for the authors to have shared their insight and experience on how noise complaints are investigated on the ground and what important evidential issues arise when it comes to successfully prosecuting noise complaints.

In coming to the end of reading *Noise and Noise Law*, I was delighted (yes, really!) to arrive at an appendix of chapter summaries and discussion questions. I rather like that feature in a textbook; it reminds me of the important points I ought to have picked up. And it works here too. Personally, I would have liked a few more questions to test my understanding and kick off a bit more of a discussion but that is a very small criticism.

I would highly recommend *Noise and Noise Law* as the 'go to' book for anyone who may need to advise on noise issues, whether that is in the context of noise complaints or environmental assessments or is studying this fascinating area of science and law.

Paul Collins is a Senior Lawyer at the Environment Agency. The views expressed are those of the author and do not reflect the views of his employer.

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