



Brexit and Environmental Law

**Enforcement and Political
Accountability Issues**

The UK Environmental Law Association is the foremost body of environmental lawyers in the UK. UKELA aims to promote better law for the environment and to improve understanding and awareness of environmental law. UKELA is composed of 1,400 academics, barristers, solicitors, consultants, and judges involved in the practice, study and formulation of environmental law across England, Scotland, Wales and Northern Ireland.

UKELA remained neutral on the Brexit Referendum. In order to ensure regulatory stability and continued environmental protection UKELA considers it imperative that the UK's current environmental legislation is preserved pending proper review, and full and open consultation on options for change. UKELA's full position on Brexit can be found at www.ukela.org/ukelaposition.

UKELA's Brexit Task Force was established in September 2016 to advise on all matters relating to and arising from the UK's decision to leave the European Union insofar as this impacts environmental law, practice and enforcement in the UK. The Task Force has been examining the legal and technical implications of separating our domestic environmental laws from the European Union and the means by which a smooth transition can be achieved. With the assistance of UKELA's specialist working parties the Task Force aims to inform the debate on the effect of withdrawal from the EU, and draw attention to potential problem which may arise.

The UKELA Brexit Briefing Papers have been produced under the guidance and approval of UKELA's Brexit Task Force chaired by Andrew Bryce and Professor Richard Macrory, and with input from relevant UKELA Working Parties and individuals. They do not necessarily and are not intended to represent the views and opinions of all UKELA members.

This report is the first in a series to be published by UKELA on the implications of Brexit for environmental law.

Other titles will include:

- 1 Brexit and Environmental Law: Exit from the Euratom Treaty and its Environmental Implications**
- 2 Brexit and Environmental Law: the UK and International Environmental Law after Brexit**
- 3 Brexit and Environmental Law: Environmental Standard Setting Outside the EU**
- 4 Brexit and Environmental Law: the UK and European Environmental Bodies**

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Executive summary

The Government stated in the White Paper on the Repeal Bill that 'it will ensure that the whole body of existing EU environmental law continues to have effect in UK law'. This is consistent with UKELA's view that the preservation of existing environmental law is important for regulatory stability and environmental protection pending a proper and open review of our legislation. The focus of attention of the European Union (Withdrawal) Bill will be on the challenges of the effective 'roll-over' of the black letter of EU law. But there are significant features under the EU system concerning legal and political accountability which are equally important for an effective system of environmental law. A critical question is whether they will be replicated within our national system in future.

Implementation Reports

Most EU environmental laws have required Member States to provide the European Commission with regular reports on their implementation in practice. These reports can provide vital information on problem areas with the legislation and its effectiveness. These obligations have not generally been transposed into national environmental law, and there is therefore every likelihood they will be lost post Brexit.

Systematic reporting on the implementation of individual laws has not been a general feature in our national environmental law. We believe it is a good discipline for government. It is all too easy to impose new legal requirements without regularly assessing their actual implementation and effectiveness in achieving environmental outcomes. The principle of systematic reporting under EU environmental legislation should be continued after Brexit but with reports to Parliament and the devolved Assemblies.

Accountability of Government and public bodies for discharging their legal obligations

Ensuring compliance by industry and individuals with their responsibilities under existing environmental law is the task of local government and the specialised environmental agencies. They must be adequately resourced to continue carrying on this vital function. Here, however, we are concerned with the legal duties of government and other public bodies under environmental law.

One of the functions of the European Commission to date has been to monitor the extent to which Member States comply in practice with the commitments they

have made under EU laws. The Commission employs distinctive enforcement powers which can eventually lead to action before the European Court which has power to impose financial penalties on Member States. The Commission had developed a citizen's complaint procedure under which anyone, free of charge, can alert it to a possible infringement. The vast majority of infringement proceedings are settled in discussion and negotiation without the need to go to court.

These powers are available in all areas of EU law, but the majority of infringement proceedings have been brought in the environmental field. There are good reasons for this. In many areas of European Union law (such as competition law, employment rights, internal market) there are individuals or bodies with clear legal and economic interests to protect and defend. The environment is in a different position. It may be unowned, and while environmental organisations are committed to promote the general interest of the environment they vary in strength and coverage, and cannot be expected to take on the role of systematic supervision. In this sense the environment can all too easily die in silence.

Post-Brexit the supervisory role of the Commission and the citizen's complaint procedure will disappear. The Government to date has suggested that in future legal accountability can be handled solely by ordinary judicial review brought by environmental NGOs. Judicial review can provide a powerful long-stop check, but we question whether the process can in itself replicate the more systematic supervision hitherto conducted by the European Commission. Apart from the costs involved, judicial review is ill-suited to resolving issues by discussion and negotiation which has been a valuable feature of the Commission's investigatory functions.

A more imaginative approach

The loss of the European Commission's role as guardian of the treaty following Brexit presents an opportunity to innovate and improve on our domestic mechanisms for ensuring that duties on government and other public bodies are properly implemented. Rather than a single solution for legal accountability the issue is best addressed with a range of mechanisms, of which judicial review would form one element.

Other jurisdictions have recognised the particular vulnerability of the environment, and the need to establish a specialised independent supervisory body. Examples include the New Zealand Parliamentary

Commissioner for the Environment, and various specialised environmental ombudsmen in other European countries. We should learn from their lessons. Such a body could investigate cases of alleged failures of public duties, and provide a valuable source of independent information to Parliament, the devolved assemblies and their relevant committees.

But whatever processes are developed, some environmental disputes will require resolution by an independent court or tribunal. We need to consider how we can strengthen the capabilities of our existing system to handle environmental disputes involving public bodies in a less costly and more effective way.

Post-Brexit, the United Kingdom should aspire to be a leader in the design and implementation of effective environmental law, building on its existing strengths and addressing areas of weakness. We support the UK Government's goal to be the first to leave the environment in a better place for future generations, but if we do not address the institutional gaps concerning political and legal accountability following Brexit there is a real danger that these aspirations will be undermined.

Brexit and Environmental Law: Enforcement and Political Accountability Issues

The Context

- 1 According to the Government's White Paper, *"The Great Repeal Bill will ensure that the whole body of existing EU environmental law continues to have effect in UK law"*. UKELA was neutral on the Brexit referendum but the Government's view is consistent with UKELA's position statement that the preservation of existing environmental law pending proper and open review is vitally important for regulatory stability and the continued protection of the environment. The immediate focus of attention will be on the challenges of rolling-over the substance of EU environmental law. This paper, however, considers important, broader issues of legal and political accountability which have hitherto been a key feature of the EU legal system and will disappear on Brexit. These questions are not addressed in the White Paper, but a critical question is whether they can be - and how they should be - replicated within our national system in future.
- 2 The general enforcement of environmental law in respect of industry and other bodies will remain the responsibility of specialised agencies such as the Environment Agency, Scottish Environment Protection Agency, Natural Resources Wales, Natural England, and other bodies such as local authorities with enforcement responsibilities. Informed advice will often continue to be the initial and preferable means of securing compliance. The criminal law remains an important sanction for serious or repeated breaches, and we welcome the willingness of the courts in recent years to impose far higher sentences than used to be the case. Equally, we endorse the use of the wider range of civil sanctioning powers, including enforcement undertakings now available to many environmental enforcement bodies, which can, in appropriate cases, be a more effective and efficient sanction than the criminal law. It will be important to ensure that such bodies are adequately resourced in future to carry out these important enforcement functions.
- 3 The concern here, however, is with the legal duties of government and other public bodies under environmental law. These duties can encompass, for example, the obligation to designate certain types of waters, to introduce pollution reduction plans, to meet air or water quality standards, or to secure targets. The supervisory and enforcement role of the European Commission and the CJEU to date has essentially been concerned with such public duties under EU environmental law.

The supervisory role of the European Commission

- 4 One of the functions of the European Commission is to monitor the extent to which Member States comply with the commitments they have made under EU laws. The Commission can employ distinctive enforcement powers under Art 258 Treaty of the Functioning of the European Union (TFEU). This is essentially a three-stage procedure – a formal notice from the Commission that they consider the Member State to be in breach of its obligations, a Reasoned Opinion, and finally application to the Court of Justice of the European Union (CJEU). Since the Maastricht Treaty amendments, the CJEU has power to impose a financial penalty on a Member State that does not comply with its judgments, a power that was promoted by the British Government at the time.
- 5 These enforcement powers of the Commission have applied to all areas of European Union law, but the Commission has been especially active in the environmental field – in 2015 the highest number of infringement actions were opened in the environmental field. There are good reasons for this. In many areas of European Union law (such as competition law, employment rights, internal market) there are individuals or bodies with clear legal and economic interests to protect and defend. The environment is in a different position. It may be unowned, and while environmental organisations are committed to promote the general interest of the environment they vary in strength and coverage, and cannot be expected to take on the role of systematic enforcement. The distinctive nature of the environment means that in most jurisdictions, including the UK,

public bodies (government departments, local authorities, specialised agencies) have a particular responsibility for environmental protection – but it is often these same bodies that face conflicting policy priorities and financial constraints, making it all too easy for their environmental obligations to be compromised or underrated. The supervisory role of the Commission in ensuring that the obligations of these bodies under European environmental law are properly implemented has, as a consequence, been especially important.

- 6 The Commission does not have its own inspectorate in the environmental field. It has developed a citizens' complaint procedure under which anyone can alert the Commission of a potential breach without any cost - again, for the reasons above, it is in the environmental field that most complaints are made. The Commission also relies upon implementation reports sent by Member States as well as its own studies and issues highlighted in MEPs' questions.
- 7 The Commission is concerned not just with ensuring that national law fully reflects obligations under EU environmental law, but that it is applied in practice. Many of its infringement proceedings have been concerned with instances where the formal law is in place but has not been effectively implemented, and its focus is on the Member State – be it a government department, local authority or other public body. According to the Commission, the UK has had a very good record in formally transposing EU environmental law in a timely fashion, and most of its infringement proceedings concern the actual application of the laws adopted. Of 34 cases brought by DG Environment against the United Kingdom before the CJEU, 30 resulted in judgment against the UK in whole or in part.
- 8 But in assessing the impact of the Commission's enforcement activities, it is important to note that the procedures allow the Commission to resolve many cases without initiating formal legal proceedings against Member States. In particular, in 2008 the Commission launched a new scheme (the EU Pilot Scheme, now including all Member States) under which complaints could be sent to Member States for resolution without formal registration by the Commission. The Commission sends a query to a Member State giving it 10 weeks to reply, following which the Commission then has 10 weeks to assess the response. If there has been no satisfactory voluntary resolution the Commission may start infringement proceedings. In 2015, three quarters of cases under the Pilot Scheme were resolved without the need for formal infringement proceedings. It is also important to note that nearly all cases that have been raised by complaints from citizens are resolved. The cases that go to Reasoned Opinion Stage or the European Court tend to be those that the Commission itself has initiated.
- 9 Post-Brexit, the Commission will no longer have any enforcement functions against the United Kingdom. The citizens' complaint procedure will disappear. The question is whether existing procedures within our national systems concerning accountability can replicate the features of legal and political accountability which the Commission has brought to date in the environmental field, and ensure the Rule of Law is upheld.

Implementation Reports

- 10 The majority of EU environmental laws require Member States to provide regular reports to the Commission on their implementation. This is additional to the requirement to provide details of national laws and regulations used to transpose EU directives. Examples include Art 13 of the Bathing Water Directive 2006/7/EC which require member states to provide annual reports: "*Member States shall provide the Commission with the results of the monitoring and with the bathing water quality assessment for each bathing water, as well as with a description of significant management measures taken*". Annual reports to the Commission are required under the Shipments of Waste Regulation 2006/1013/EC including, for example, information on the number of objections to shipments in order to implement the principles of proximity, priority for recovery, and Community self-sufficiency.
- 11 Annual reports are the exception and more commonly three yearly reports are required, such as Art 13 of the Drinking Water Directive which requires reports on the quality of drinking water intended for human consumption and covering at a minimum "*all individual supplies of water exceeding 1 000 m³ a day as an average or serving more than 5 000 persons*". Before 1990 the inclusion of reporting requirements in EU environmental legislation was inconsistent. However, in 1991 a new Directive was agreed with the intention of standardising reporting requirements across a large number of environmental directives. Directive 91/692/EEC requires three yearly reports on the implementation of the directives covered but based on a questionnaire to be sent by the Commission. The Directive provides that a committee of Member State representatives assists the Commission in the drafting of the questionnaire.

Reporting requirements post-Brexit

- 12 Under existing UK law, various bodies such as the Scottish Environment Protection Agency and Natural Resources Wales have statutory obligations to publish annual reports on their activities during the year, and bodies such as the Drinking Water Inspectorate also publish annual reports. But a legal obligation for government to provide regular reports on the actual implementation of individual environmental laws has been a distinctive contribution of EU environmental law, and one that we feel should continue after Brexit. At present, it is not immediately clear whether the reporting requirements as well as substantive obligations will be rolled-over under the European Union (Withdrawal) Bill.
- 13 The Government's White Paper on the Repeal Bill does not expressly address the issue. It acknowledges that "*The Great Repeal Bill will ensure that the whole body of existing EU environmental law continues to have effect in UK law*" but later states in respect of information sharing generally with Community institutions that where preserved legislation continues to require the UK to send information to EU institutions, "*where the UK had not explicitly agreed during exit negotiations to continue to provide such information to the EU, there may well be reasons why the UK would no longer wish to send such information after we exit the EU, and where it would make sense to amend the legislation to avoid previously reciprocal arrangements becoming one-sided.*"
- 14 We are not advocating that such implementation reports should continue to be sent to the European Commission post-Brexit (the point dealt with in the White Paper above); but we strongly feel that the reporting requirements should be retained as a domestic legal obligation, adapted as appropriate.
- 15 Rather than report to the Commission, the UK and devolved governments should report to their respective Parliaments/Assemblies. This will strengthen the general principle of executive accountability to the legislature, assist in alerting Parliaments/Assemblies to problematic areas, and the information may suggest a need for further investigation by a relevant select committee. The information will help in assessing the effectiveness and environmental outcomes of the individual legal regimes. Our suggestion that respective governments should report on implementation to their respective Parliaments/Assemblies (rather requiring a single report covering implementation across the UK) reflects the fact that many of the functions are divided on a devolved basis. Removing the requirement under EU law for the UK to report to the European Commission would cut out the amalgamation stage in the reporting process.
- 16 While the European Court of Justice has insisted that most provisions of Directives have to be transposed into national law, the European Commission has accepted that this principle does not apply to provisions concerning administrative cooperation between Member States and the Commission. This means that our national laws transposing EU environmental directives do not generally contain provisions concerning government's reporting requirements to the Commission. There is therefore a real danger that they will be lost in the roll-over complexities of the Great Repeal Bill.
- 17 Substitution of respective Parliaments/Assemblies for the European Commission in the relevant provisions of directives such as Bathing Water and Drinking Water would be a relatively straightforward amendment (assuming the Great Repeal Bill will be used to amend the text of directives when converting the body of EU law into domestic law). The references in directives to a questionnaire prepared by the Commission and the committee of Member State representatives in Directive 91/692 cannot so readily be replicated or rolled-over in national law, and amendments would be needed simply to refer to three yearly reports.
- 18 The creation of new domestic reporting obligations is an opportunity to improve on and rationalise reporting requirements. There are already examples of reporting requirements in domestic law: the Climate Change Acts; Nature Conservation (Scotland) Act 2004, ss.2, 2A; Wildlife and Natural Environment (Scotland) Act 2011, s.20. Consideration should be given to how effective they are and how far they do, or could be adjusted to, fill the role of the Commission. The rather varied reporting obligations to the Commission noted above could be streamlined, for example by setting reporting frequency and timings so as to synchronise with the current national state of the environment report. The scope of implementation reports could be clearly defined so as to cover key aspects of compliance and implementation. As suggested by Professor Maria Lee and Professor Liz Fisher, implementation reports could: 'include reporting on failure to comply, or on any lawful use of legal derogations, exceptions or 'alternative' standards (for example damage to a protected habitat or exceedance of water quality standards, within the terms of the legislation). This should be coupled with explanations of how compliance will be maintained or achieved.' The reports should be made publicly accessible to promote transparency and political accountability.

19 Providing these reports on implementation should not impose undue extra costs on government, and much of the information should already be available whether in government or in the relevant enforcement agencies. If it is not, then UKELA considers that it should be – it is all too easy to impose new legal requirements without regularly assessing their actual implementation and effectiveness in achieving environmental outcomes. National environmental law has not systematically contained provisions concerning implementation reports, and we recommend that in any future revision of environmental law post the roll-over period, provisions on implementation reporting should be included as a regular requirement.

Accountability of government and public bodies for discharging their environmental legal obligations

20 Under national law, the enforcement of public law duties by the courts generally falls within the ambit of judicial review, where the courts are concerned essentially with the legality of government action or inaction rather than the merits of the decision. But judicial review is not equivalent to an independent supervisory body such as the European Commission. The House of Lords EU sub-committee on Energy and the Environment concluded in its report on Brexit and the Environment that *“The evidence we have heard strongly suggests that an effective and independent domestic enforcement mechanism will be necessary, in order to fill the vacuum left by the European Commission in ensuring the compliance of the Government and public authorities with environmental obligations. Such enforcement will need to be underpinned by effective judicial oversight, and we note the concerns of witnesses that existing domestic judicial review procedures may be inadequate and costly”*. In the debate of the report, however, the Minister repeated the Government’s present position that existing judicial review procedures will remain the core mechanism for allowing the courts to hold the government to account for its legal obligations: *“Our system of judicial review and its body of public law enables any interested party to challenge the decisions and actions of the Government through the UK courts.”*

21 Judicial review can provide a powerful long-stop check, but we question whether the process can in itself replicate the more systematic enforcement role hitherto conducted by the European Commission. While the courts in England and Wales have long taken a liberal approach to questions of standing in environmental judicial reviews – allowing almost any concerned individual or non-governmental organisation to bring a claim – this is very much a recent development in Scotland. Further, the costs of litigation remain extremely high in this country. The UK remains a party to the 1998 Aarhus Convention which requires that procedures for access to the courts in environmental cases provide for *“adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.”* We remain doubtful whether existing costs procedures, even as modified in respect of Aarhus claims, meet the “not prohibitively expensive” requirement. Taking the example of costs rules in England and Wales, the Aarhus costs regime caps an unsuccessful Claimant’s liability for their opponent’s costs at £5,000 (if the claimant is an individual) or £10,000 (for claimants that are companies, charities or other groups). It also caps at £35,000 the amount that a successful claimant can recover from their opponent towards the claimant’s own legal costs. Recent reforms, however, allow these caps to be varied up or down or removed altogether. In respect of these reforms, we note with concern the recent conclusions of the House of Lords Statutory Instrument Committee: *“Although the [Ministry of Justice] states that its policy intention is to introduce greater certainty into the regime, the strongly negative response to consultation and the submissions received indicate the reverse outcome and that, as a result of the increased uncertainty introduced by these changes, people with a genuine complaint will be discouraged from pursuing it in the courts”*.

22 Even if costs were not an issue, we question whether solely relying on judicial review after Brexit can be the most effective and efficient means of ensuring compliance with environmental public duties. Courts can only react to cases brought before them whether by individuals or NGOs, but environmental NGOs have their own priorities and do not necessarily cover all areas of environmental protection. Furthermore, environmental NGOs, let alone individuals, do not necessarily have the technical expertise, resources or access to data that is often needed to bring environmental cases which can turn on complex assessments of environmental data. Judicial review time limits can exacerbate this problem. The requirement to bring cases promptly and in any event within 3 months can be very challenging where reports will need to be produced, or where monitoring data is patchy. Furthermore, despite the aspirations in the Pre-Action Protocol for Judicial Review cases in England and Wales, in practice judicial review procedures often appear ill-suited to resolving complex environmental disputes by less formal means or alternative dispute resolution. Judicial review cases in many areas of law such as housing or education often do settle before reaching court, but this is dependent on the negotiating tactics of the parties.

There is no independent agency or body seeking to resolve the issues in the way that the European Commission has been able to do so in its own proceedings. We stress again that the vast majority of environmental proceedings initiated by the Commission as a result of citizens' complaints are resolved by discussion with governments and the Commission without the need for formal legal proceedings before the European Court of Justice. We doubt whether existing judicial review procedures are capable or suited for replicating this aspect of the procedures.

- 23 As to remedies, national courts in judicial review cases have a range of remedies but no power to impose financial penalties equivalent to those available to the CJEU. In the environmental field the powers have been used sparingly (11 cases up until 2015), but their very existence (and the large sums imposed including daily penalties until compliance is secured) is bound to have had some deterrent impact. The United Kingdom has not yet been subject to such a penalty in the environmental field, but distinctive powers were introduced under Part 2 Localism Act 2011 allowing the UK government to recover any penalty imposed on it by the CJEU from a local authority or other public body where it could show it was this body that had caused the breach of EU law. The devolution Concordats spell out that any penalty suffered by the UK as a result of non-compliance with EU law on the part of a devolved authority will have to be met from that authority's budget. As far as we know, these provisions have not been relied on to date, but again the knowledge that they exist has no doubt encouraged compliance with EU environmental law, though as with any deterrent power this is very difficult to quantify precisely. These provisions will cease to apply on Brexit day.

The need for a supervisory body

- 24 We emphasise again that, from a legal perspective, the environment is in a distinctive and potentially vulnerable position compared to other areas of law where there are more clearly defined legal and economic interests. The environment is often unowned, and environmental harms diffusely spread, placing a special responsibility on government and other public bodies to comply with their own obligations to ensure the protection of the environment.
- 25 The loss of the European Commission's role as guardian of the treaty following Brexit presents a unique opportunity to innovate and improve on our domestic mechanisms for ensuring environmental law is properly implemented and enforced. Lessons could be learned from the approaches taken in other jurisdiction, and from the experience of our domestic courts and tribunals. Rather than a single solution for legal accountability – the UK Government's present position on judicial review – we feel that the issue is best addressed with a range of mechanisms, of which judicial review would form one element.
- 26 Relying on the single solution of judicial review also brings political and economic dangers in that it could jeopardise a successful Brexit agreement between the UK and the EU. It is likely that during the negotiations the EU will consider the extent to which mechanisms are in place in the UK for ensuring that environmental obligations are as effectively enforced as in the rest of the EU (which will remain subject to the supervisory jurisdiction of the Commission the Court of Justice). See for example, paragraph 20 of the European Council (Art 50) Guidelines for Brexit Negotiations: any free trade agreement “... must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices”. The development of credible national mechanisms dealing with alleged failings of environmental legal duties on public bodies and government is significant in this context.
- 27 A number of other jurisdictions have recognised the particular need to ensure independent supervision of government and public bodies in the environmental field by establishing specialist environmental ombudsmen of various sorts. The ombudsman typically receives complaints from the public against government (and sometimes private parties), investigates, mediates and reports findings and recommendations to higher government authorities. The ombudsman in these circumstances does not typically have binding decision or enforcement powers, but some can initiate or participate in lawsuits. Examples are now found in Austria, Hungary, Kenya and Greece. In other countries there are examples of specialised environmental divisions with the general national ombudsman office. Appendix 1 to this report gives further details of environmental ombudsmen in a number of jurisdictions.
- 28 A general ombudsman office such as this country's Parliamentary and Health Service Office (dealing with UK central government) and the Local Government Ombudsman for England (dealing with local government and bodies such as the Environment Agency) handles complaints concerning poor administrative practice. General ombudsman staff are experts on government administration issues, but usually not experts on environmental

matters and it is not their function to deal with questions of potential illegality. As such, they are ill-suited to deal with the type of complex factual and legal issues that have often been involved to date in environmental investigations by the European Commission. The system is organised rather differently in Scotland with the unified Scottish Public Services Ombudsman, and a Public Services Ombudsman in Wales and in Northern Ireland. But as with England these are all generalised bodies, and their focus is the investigation of maladministration within government and public bodies.

- 29 A recent and more specialised independent institution is the Future Generations Commissioner for Wales, established under the Well-Being of Future Generations (Wales) Act 2015. The Commissioner has a general duty to *'promote the sustainable development principle, in particular to act as a guardian of the ability of future generations to meet their needs and encourage public bodies to take greater account of the long-term impact of the things they do.'* The Commissioner's functions include providing advice to public bodies to meet their 'well-being' objectives under the legislation and reviewing how such bodies are taking into account the longer term impact of their actions.
- 30 Another particularly interesting model is the New Zealand Parliamentary Commissioner for the Environment established under Part I Environment Act 1986. The Commissioner is an independent body reporting to Parliament with quite distinct roles from environmental protection bodies and regulators. Unlike an Ombudsman dealing solely with complaints of maladministration, the Commissioner carries out investigations and reviews of the effectiveness of government processes for managing the environment and the effectiveness of environmental planning, and investigate any matter where the environment has been adversely affected. The Commissioner has extensive powers to require information, and members of the public are open to send complaints or letters of concern about particular issues. The Commissioner has a fairly small staff (around 20) and acknowledges that it cannot act upon or investigate all complaints but takes note of all concerns raised. In 2014 the Commissioner took on a new function of providing commentaries to Parliament on state of the environment reports produced by government.
- 31 A body such as the Parliamentary Commissioner for the Environment could play an extremely valuable role in this country post-Brexit – providing independent environmental expertise in the supervision of government and public bodies, helping to resolve disputes, and assisting Parliament in the process of ensuring political accountability. Part of its functions could include providing advice on the reports on the implementation of environmental legislation discussed in paragraphs 10-19 above.
- 32 But we need to recognise that whatever processes are developed, some issues of law and fact in environmental disputes will require resolution by an independent court or tribunal. Many countries round the world have recognised the distinctive characteristics of environmental law by establishing various forms of specialised environmental courts or tribunals. The types of court or tribunal established will often reflect the particular characteristics and needs of the jurisdiction in question, and simply transposing one model from another country will rarely be appropriate. Appendix 1 to this report gives details of a number of such environmental courts and tribunals.
- 33 In England and Wales a First Tier (Environment) Tribunal was established in 2010 and handles a range of environmental appeals, with further appeals on points of law to the Upper Tribunal. The Tribunal's members can combine both legal professionals and professionals with other expertise suitable to the case in hand, and where appropriate can handle cases in a less formal manner, more flexibility, and with less costs than a conventional court. The tribunal is equipped to handle the complex mixture of disputed facts and law which are often present in environmental disputes. Alternative dispute resolution is encouraged. More information about the Tribunal is provided in Appendix 2.
- 34 For a number of years there have been arguments for establishing a specialised environmental court dealing with a potentially broad range of environmental law disputes. Our focus here, though, is the legal accountability of government and other public agencies in environmental law post-Brexit, and there is a case for building on the existing strengths and experience of the already existing First Tier (Environment) Tribunal to deal with questions of environmental legal accountability post-Brexit in England and Wales. As we have stated, we are not convinced that solely relying upon existing judicial review procedures and the willingness of NGOs or members of the public to bring actions will be sufficient, and we doubt whether they satisfy the low-cost and accessible access to environmental justice aspirations of the Aarhus Convention. The rules governing the Tribunal's procedures very much reflect these concepts of environmental justice. One model might be to extend appeal rights to the environment tribunal to members of the public or NGOs to appeal against environmental regulatory decisions but only on the grounds of procedural or substantive illegality (reflecting the grounds under Aarhus) rather than a full merits appeal. Were a Parliamentary Commissioner for the Environment or a

specialised Environmental Ombudsman established, another model would be to empower this body to refer issues to the Tribunal where it had been unable to resolve with government factual or legal questions involved in a particular investigation.

- 35 In Scotland there may be similar arguments for building on the existing jurisdiction of the Scottish Land Court which deals with some environmental law issues. Similarly, in Northern Ireland there could be a case for expanding the role and jurisdiction of the current Planning Appeal Commission which handles planning and water appeals.
- 36 In dealing with questions of institutional reform we have deliberately avoided at this stage advocating any one model to fill the supervisory gap that will follow post-Brexit. Indeed supervision and enforcement are probably best effected by having in place a range of different approaches and bodies rather than by a single solution. The issue requires a careful study of the different options available, the direct costs involved, but set against the benefits and avoided costs that would follow to the regulated community, the public and the environment. We recommend that government initiates an independent review on possible options for a specialist environmental Commissioner or equivalent, and on strengthening the role of courts or tribunals in the environmental field. We recognise that since the environment is a devolved matter, the decision to initiate such a review may in practice be a matter for each of the devolved administrations. But equally the loss of the Commission's supervisory function post-Brexit is something that will affect the whole of the United Kingdom, and having in place equivalent and convincing mechanisms could be important in securing effective trade and other agreements between the UK and the EU where equivalence of enforcement and supervision may well be a relevant issue. At the very least the issue deserves good coordination between the different administrations in the UK.
- 37 Brexit offers an opportunity to rethink imaginatively how we can handle more effectively the question of political and legal accountability in the environmental field. Simply relying upon existing national mechanisms will not be sufficient. Thirty years ago, the United Kingdom acquired a poor reputation in the rest of Europe in its approach to environmental protection. The "dirty man of Europe" image was sometimes unfair, and in its most recent report on environmental implementation in the United Kingdom the European Commission, while noting continuing challenges facing this country (notably air pollution, water quality from agricultural pollution, and nature protection), also highlights innovative approaches and points of excellence which the UK has brought to the field (including green procurement and natural capital accounting). Post-Brexit, we want to see the United Kingdom build on its strengths and be seen as a leader in the design and implementation of effective environmental law. We support the UK Government's aspiration to be the first to leave the environment in a better place for future generations, but if we do not address the institutional gaps concerning political and legal accountability following Brexit there is a real danger that these aspirations will be undermined. The rule of law will be jeopardised, and once again the UK will acquire a poor environmental reputation with our European neighbours.

Appendix 1 Environmental ombudsmen and courts around the world

The material in this Appendix is taken from the following three sources:

1. George and Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (UNEP 2016);
2. George and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009, The Access Initiative); and
3. Forever Sabah, *Environmental Courts and Tribunals: An introduction to national experiences, lessons learned and good practice examples* (2016).

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Examples of Environmental Ombudsmen

Environmental Ombudsmen, Austria

Austria has environmental ombudsman offices located in each of its 9 *landers* or states with the duty to represent the interests of nature conservation and the environmental laws. They have all the usual powers and have proved effective in resolving disputes. They are also authorised to bring complaints before Austria's courts. They do not have Environmental Court/Tribunal-like powers to issue enforceable decisions.

Ombudsman for Future Generations, Hungary

Sitting within the General Ombudsman's Office the Ombudsman for Future Generations may, inter alia: initiate and/or participate in investigations upon complaints and *ex officio* conducted by the general Ombudsman; initiate intervention in public administrative court cases regarding environmental protection; and propose to turn to the Constitutional Court or the Curia of Hungary in cases where there is a strong belief that a national or local piece of legislation is in violation of the Fundamental Law. The Ombudsman is involved in the elaboration of non-binding statements and proposals to any public authority including the Government, and ensures that the direct link between the nation's common heritage and the fundamental rights of all generations (including future generation) are respected and not forgotten.

Public Complaints Committee on Environment, Kenya

Kenya's Public Complaints Committee on Environment is an environmental ombudsman and covers the whole country. It has a lofty mission "to facilitate access to environmental justice to the public by providing a forum for environmental conflict resolution and contributing to environmental policy" and a vision "to be the leading environmental ombudsman in Africa." However, the committee is under-resourced and generally unable to investigate all the complaints it receives, let alone act to resolve them.

Parliamentary Commissioner for the Environment, New Zealand

New Zealand has an independent, very active environmental ombudsman, the Parliamentary Commissioner for the Environment (PCE). That body has the power to investigate government environmental efforts and environmental problems, compel the production of information whether it is public or not, summon people under oath, report and advise the House of Representatives and recommend changes in the laws. Like all ombudsman offices (except briefly Hungary's), the PCE can reach conclusions and make recommendations but does not have enforcement power.

Examples of Environmental Courts/Tribunals

Planning and Environment Court, Queensland, Australia

The State of Queensland's Planning and Environment Court is highly regarded as a model for a successful environmental court. It shares its overheads, budget, courtrooms, staff and facilities with the general court and therefore benefits from lower administrative expenses, less management time and greater efficiency. The court's judges are located throughout the state, and can hold hearings when appropriate elsewhere in Queensland.

The court has jurisdiction to hear a wide range of matters relating to environmental protection and planning, including climate issues, land use planning, mining and minerals and other natural resources, compulsory acquisition of land, land administration and management, and public, private and community land and contracts.

The court has appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

It has the power to make any order and grant any relief as the court deems fit and just. This includes interim or permanent preservation orders, damages, compensation, specific performance, restitution, declarations and costs.

Some of the court's best practices include:

- expert judges, appointed based on their knowledge, expertise and interest in environmental and land use planning law;
- a registrar who conducts case management conferences, chairs meetings of experts and conducts mediation without cost to the parties, resulting in a high percentage of cases resolved without a judicial trial;
- methods for managing expert witnesses and evidence Directions hearings in which the judges actively manage deadlines and expectations;
- opportunities for affected residents and the public to observe proceedings affecting their communities; and
- taking hearings to the area in question as much as possible, given Queensland's immense size, including "flying judges."

Environmental Review Tribunal (ERT), Province of Ontario, Canada

Ontario's Environmental Review Tribunal is hailed as 'a very impressive independent environmental tribunal' and is one of five environmental tribunals housed within a 'clustered' umbrella-type tribunal, the Environment and Land Tribunals Ontario (ELTO) which has jurisdiction over some 100 laws. ELTO and its sub-tribunals are organisationally under the Ministry of the Attorney General allowing them independence from the agencies and ministries whose decisions they review. ELTO's mission for its tribunals emphasises:

- "Modern, fair, accessible, effective and timely dispute resolution services"
- "Consistency in procedures and outcomes"
- "An evolving development of the law"
- "Outcomes that are in the public interest."

Environmental courts in China

China has a four-tiered judicial system comprised of Basic Courts, Intermediate Courts, Provincial High Courts and the Supreme People's Court. It boasts a number of environmental divisions within both the Basic and the Intermediate Courts in difference provinces, totalling around 370 to date. They are "noteworthy in setting forth rules or implementing practices with a variety of innovations in standing, jurisdiction, and remedies," especially since those rules vary based on region; there is no governing central authority for environmental courts.

Going against traditional Chinese court practice, the environmental courts have been granted wide ranging jurisdictional powers (administrative, civil and criminal) and even some limited enforcement powers. There is also evidence that these courts are willing to engage in judicial activism and alter rules of law. For example, the *Guiyang Two Lakes* case heard by the Qingzhen Court reduced the evidentiary burden borne by the plaintiff. China's environmental courts are also renowned for increasingly engaging in public interest litigation, which are generally to be filed in the appellate Intermediate People's Courts given their significance and because the Basic Courts are not required to specialise in environmental matters.

There has been some concern that the environmental courts were only created as a symbolic gesture on the government's part in response to particular environmental problems. According to a study by Wang and Gao, however, these "concerns regarding the efficacy of the courts are unwarranted." In fact, there is significant evidence that the two-tiered regional system is actually improving access to environmental justice through its case law. Chinese environmental courts generally favour beginning with

mediation (usually by the judge who is assigned to hear the case), with cases only going to hearings where the mediation is unsuccessful. Where mediated agreements are reached, the parties are deemed to have entered into a civil contract, which is therefore not legally binding. Whether this is effective or not remains to be seen. Moreover, there is evidence that a new type of damages, Natural Resource Damages, is being explored as a means for the Chinese government to recover from environmental damage to publicly owned resources. This would substantially increase the scope of environmental governance while reducing the economic burden of clean-ups and of continuing environmental impacts.

Although it might still be too early to obtain a full picture of the capacity and effectiveness of the Chinese environmental courts given their recent creation (starting in 2007, with some created as late as 2010), there is some evidence that training and recruitment of decision-makers has begun to take effect. Over 300 judges have now been environmentally trained. The recent launch of the Supreme People's Court's national environment and resources court (May 2014) and the concurrent foundation of a training centre for judges should also serve to improve the state of environmental governance in China. As recently as June 2015, the Supreme People's Court released a statement on the interpretation of tort liability dispute resolution in environmental cases. Of particular interest is the decision to impose a reverse burden of proof, meaning that defendants must rebut the presumption that they are liable for "harm caused by pollution regardless of fault." This could have wide-ranging implications for polluter liability.

One author reports that pollution victims have found it difficult to have their cases tried in China's courts, in part due to local officials' suppression of litigation efforts. Statistics published by the Asian Development Bank indicate that, although environmental litigation has increased throughout the country, its growth rate has declined in recent years as a result of the increasing obstacles faced by plaintiffs before even reaching court.

National Green Tribunal (NGT), India

Created in 2010, India's National Green Tribunal incorporates a number of best practices. It is independent of the Ministry of the Environment and is supervised by the Ministry of Law and Justice, giving it formal independence from the agency whose actions it reviews.

The National Green Tribunal has many of the same powers and features of a civil court, including the power to summons, conduct discovery, receive evidence, requisition public records, sanction for contempt and issue cost orders, interim orders and

injunctions. Its jurisdiction is limited to seven major environmental laws, but it does not have criminal jurisdiction. It has the power to regulate its own procedures (although the Central Government also has some rule-making authority over it). It is not bound by the general courts' Code of Civil Procedure or Rules of Evidence, but is to apply principles of 'natural justice' and international environmental law, including sustainable development and the precautionary and polluter pays principles.

As a sign of its powerful position, appeals from it go directly to India's Supreme Court, rather than to an intervening appeals court. The National Green Tribunal's authorising act sets high standards for selection of the Chairperson (requiring a former Supreme Court judge or High Court chief justice), other 'Legal Members' (former High Court justices) and 'Expert Members' (advanced science-engineering degrees and 15 years of experience, as well as 5 years of environmental specialisation), assuring both legal and science-technical expertise on its bench.

The National Green Tribunal has become 'a major arbiter of some of the most pivotal environmental battles in India,' including Ganges River pollution, New Delhi air pollution, waste collection, mining, toxic dumps and dam projects. As the authorising legislation specifically gives the Tribunal the authority to apply natural law and international environmental laws and principles, many of its decisions have been visionary and innovative. Ritwick Dutta, a leading Indian environmental barrister, says 'The Green Tribunal is now the epicenter of the environmental movement in India. It has become the first and last recourse for people because their local governments are not doing the job of protecting the environment.'

The National Green Tribunal not only takes on high profile cases against government and industry; it also reaches out for cases on its own initiative and is adjudicating huge numbers of cases quickly.

Environmental Dispute Coordination Commission (EDCC), Japan

Japan's Environmental Dispute Coordination Commission, also called the '*Kouchoi*', is a quite different model of environmental tribunal in that it emphasises a 'settlement system' based on investigations and ADR conducted by its members 'instead of adversary proceedings'. However, recent studies indicate the EDCC may be moving toward a more adjudicatory model.

The national EDCC is an independent external agency of the Prime Minister's Office. There are also subnational or provincial versions of it, called Prefecture Pollution Examination Commissions (PPECs) established in 37 of Japan's 47 prefectures; in

each of the other 10 prefectures there are authorised Pollution Review Commissioners to perform ADR. In addition, at the local government/municipal level there are Consultation Services for Environmental Complaints (CSECs) which, according to one report, handle some 100,000 applications a year employing a total staff of over 11,000.

The EDCC and the prefecture and local units do not have power to review or overturn decisions of government agencies. Traditionally their major role has been the award of compensation to individuals for harm done by industry pollution and development (with the government largely paying the compensation rather than the violator). The EDCC does not apply principles of international environmental law. A substantial benefit for those filing complaints is that there are no filing fees and the entire investigation process is paid for by the EDCC.

National Environmental Tribunal, Kenya

Kenya's National Environmental Tribunal has a very limited jurisdiction of cases with potentially large environmental impact. Its principal function is to decide appeals from decisions of the national environmental agency on issuance, denial or revocation of environmental impact assessment (EIA) licenses for major developments (such as roads, industries, housing facilities, hazardous waste, tourist facilities and marine activities). Developers can appeal adverse EIA decisions, and individuals, NGOs and others can appeal approvals. It is also authorised to hear appeals of forestry decisions and to advise the government when requested, but these are rarely used.

The Tribunal has decided 140 appeals since it was established in 2005. It functions very much like a court of law, with wide powers to confirm, overturn or vary the environment agency's decisions. It can also issue an EIA license itself if it overrules the agency, or issue a development injunction to stop a project. It is not bound by court rules of evidence and has the power to make its own rules of procedure, which it keeps 'simple and precise ... to ensure the proceedings are informal and people-friendly,' particularly for self-represented parties. Its fees are lower than the courts 'to make justice more accessible to the public.' It can appoint experts to advise it.

The Tribunal consists of 5 members: a chair nominated by the national Judicial Service Commission (with qualifications to be a judge of the High Court), one lawyer qualified to appear before the High Court of Kenya nominated by the Law Society of Kenya, another lawyer with environmental qualifications appointed by the Minister, and two other members of "exemplary academic competence in environmental management" appointed by the Minister.

Appeals from the National Environmental Tribunal formerly went to the High Court but now go to the new Environment and Land Courts (ELCs). The Tribunal survived having its jurisdiction transferred to the ELCs during passage of the ELCs' operating act in 2011, but question remains whether the Tribunal should continue or have its cases transferred to the ELCs.

Environment Court, New Zealand

New Zealand's Environmental Court is one of the oldest free-standing environmental courts, and widely viewed as one of the best. It is staffed with nine law-trained environment judges and fifteen environment commissioners trained in a variety of scientific-technical, business, and agricultural fields as well as mediation. It serves the entire country with three registries in different parts of the islands and has the ability to hold hearings at the place in issue. This allows the Environmental Court to create consistent national environmental jurisprudence for all citizens, including the indigenous Maori, while being geographically accessible.

It relies heavily on a wide range of court-assisted ADR methods, facilitated by one of the fifteen trained commissioners. The ADR results in a very high percentage of cases being resolved without a court hearing/decision. Mediated agreements can be submitted to the court and approved or amended by a judge as part of the final court order.

Significantly, the authorising act allows the Environmental Court to regulate its proceedings as it thinks fit, so that it is not bound by general court rules of procedure or evidence. Individuals and groups may represent themselves without a lawyer; if so, they are assigned a 'process advisor' to guide them through the procedures and consolidate issues for efficient adjudication. The Court has embraced information technology extensively, including iPads to track case materials, an interactive website, video and phone conferencing.

The Environmental Court is praised for its significant adoption of Rio Principles and especially its focus on the core principle of environmental sustainability. Specifically, the *Resource Management Act* states that its purpose is to "promote the sustainable management of natural and physical resources."

Moreover, the *Act* and the Environment Court promote the concept of effects-based management, which essentially shifts the focus of environmental regulation from the activities themselves to their potential effects. This is done through: (a) avoiding or remedying any adverse environmental effects; (b) considering alternatives to environmental and resource management plans; and (c) requiring project proponents to submit environmental effects

assessments as part of all environmental impact assessments. These concepts are then enforceable in court.

The Environmental Court is especially recognised as: “instructive both for nations that have mature traditions of environmental governance and adjudication and for countries that have nascent systems of environmental law”. There is some evidence that there exists a “high level of satisfaction amongst a range of players ... with the performance and role of the Environment Court.”

The Environmental Court also adheres to the principles of the Aarhus Convention in that all hearings are held in public, except where there is clear reason to do otherwise. The Court is given the power to “waive, reduce, or postpone the payment to the court of any fee prescribed by regulations made under [the] Act,” as well as the ability to hear matters jointly to reduce fees.

The Court does not have a single designated courthouse. Instead, it sits in various courthouses across the country so cases may be heard as close as possible to the location of disputes.

The Court’s enforcement powers include civil and criminal proceedings and provides for wide-ranging standing, including ‘a person who has an interest in the proceedings that is greater than’ the interest of the general public.

Scientific expertise is guaranteed as sections 250-254 of the *Resource Management Act* require decision-makers to have both judicial and scientific experience. It is recognised that decision-makers should be selected in such a way as to create a heterogeneous ‘mix of knowledge and experience in matters coming before the court.’ Categories of experience include, but are not limited to, economic, commercial, planning, resource management, environmental science, architecture, and aboriginal treaty matters.

Despite many positive aspects of the structure of the *Resource Management Act* and the Environmental Court, studies have found that it is difficult to evaluate the Court’s efficiency in adjudicating environmental matters. Unlike its Australian counterpart, the Environmental Court does not have a self-assessment system. Some question remains as to whether *de novo* review is actually a better option than judicial review, as it can limit government’s decision-making and law-making power, allowing the judiciary to substantively review governmental powers. The most recent major study conducted (2000) found evidence of resource, structural, political and personnel problems, but the consensus was that the operations of the court were satisfactory overall.

Supreme Court, Thailand

The Thailand Supreme Court has established an Environmental Division of 13 justices and is in the process of establishing both environmental appeals and trial courts. The environmental courts in the Intermediate People’s Courts of Kunming and Wuxi, China, both accept first-instance filings of public interest lawsuits (PILs), although they are appellate-level courts. The rationale for PILs jumping over the trial level and going straight to the appellate level is that there is no environmental specialisation at the trial level in those jurisdictions.

Environmental Appeals Board, United States of America

The American Environmental Appeal’s Board which serves as the appellate (second-instance) adjudicator of administrative cases arising under the many environmental laws over which USEPA has jurisdiction. Created in 1992, the EAB generally hears cases after first-instance decisions by the USEPA Office of Administrative Law Judges (an independent agency also highly regarded for their professional competence) or permit decisions by the USEPA Regional Offices (multistate entities). EAB’s decisions are generally final for the agency and may be appealed to the federal courts in accordance with the individual statute(s) involved. It is staffed with 4 experienced Environmental Appeals Judges who report directly to the USEPA’s Office of Administrator, as well as 8 experienced attorneys serving as counsel to the Board.

Environmental Appeals Board Judges jointly responded about what they see as the success factors for the Environmental Appeals Board, as follows:

- Professional judges who understand environmental law and science
- Permanent career judges carefully prescreened by the US Senior Executive Service in the independent US Office of Personnel Management
- Judges not limited in the number of terms they can serve (no arbitrary “term-limit” rules)
- A ban on ex parte contacts and conflicts of interest
- Clear written rules and procedures published on a user-friendly website
- All case filings and decisions available online
- Final agency decisional authority (unless a party is another government agency)
- Mediation on request
- Community outreach
- Training and collaborative exchange of best practices with other ECTs and stakeholders domestically and internationally
- Consultation with other governments on access to justice, environmental democracy and best practices.

Appendix 2 First-tier (Environment Tribunal) England and Wales

The Tribunal was established in 2010 initially to hear appeals against civil sanctions imposed by environmental regulators under Part III of the Regulatory Enforcement and Sanctions Act 2008.

Since then the Tribunal has acquired other appeals functions under various environmental regulations. These include:

- *CRC Energy Efficiency Scheme Order 2013 (Carbon Reduction Commitment)*
- *Climate Change Agreements (Administration) Regulations 2012*
- *Designation of Features Appeal Regulations 2012*
- *Environmental Protection Act 1990 (s.46C penalties)*
- *Eco-Design for Energy-Using Products Regulations 2007 and 2010*
- *Emissions Performance Standard Regulations 2015*
- *Energy Information Regulations 2011*
- *Flood and Coastal Erosion Risk Management Information Appeal (Wales) Regulations 2011*
- *Green Deal Framework (Disclosure, Acknowledgement, Redress, etc) Regulations 2012*
- *Household Waste (Fixed Penalty and Penalty Charge) Regulations 2015*
- *Nagoya Protocol (Compliance) Regulations 2015*
- *Nitrate Pollution Prevention Regulations 2015*
- *Marine Licensing (Notices Appeals) Regulations 2011*
- *Reservoirs Act 1975 (Exemptions, Appeals and Inspections) (England) Regulations 2013*
- *The Single Use Carrier Bags Charges (England) Order 2015*
- *Waste (England and Wales) Regulations 2011*

The Tribunal sits within the General Regulatory Chamber of the first-tier tribunal system. It has both legal members and members with relevant scientific or technical expertise, and has flexibility in how it handles appeals.

The Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009 emphasise the need for the tribunal to handle cases fairly and justly. In particular, regulation 2 states that:

2.—(1) *The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*

(2) *Dealing with a case fairly and justly includes—*

(a) *dealing with the case in ways which are*

proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) *The Tribunal must seek to give effect to the overriding objective when it—*

(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) *Parties must—*

(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally.

The Tribunal is required where appropriate to bring to the attention of parties the availability of alternative dispute resolution procedures and to facilitate such procedures if the parties wish.

Generally, each side bears their own costs in the proceedings, whatever the result.

Appeals on points of law are made to the Upper Tribunal which has the status of the High Court. The Upper Tribunal also has the jurisdiction to hear judicial reviews in classes of cases designated to it, or in an individual judicial review application where the High Court considers it just and convenient. The Upper Tribunal has yet to hear any environmental judicial reviews.

In 2013 the UK Government proposed that planning judicial reviews might be transferred to a new Land and Planning Chamber within the Upper Tribunal in order to speed up procedures and bring more specialist judicial knowledge to such cases. However following consultation the Government was convinced by judges that speed of delivery could be met by establishing a new Planning Court within the Administrative Court of the High Court. The Planning Court handles planning judicial reviews and those involving EU environmental legislation and its domestic transposition.

Endnotes

- 1 *Legislating for the United Kingdom's Withdrawal from the European Union*, Cm 9446 March 2017.
- 2 For the full position statement see <https://www.ukela.org/UKELAposition>.
- 3 Written evidence of European Commission to the House of Commons Environment Audit Committee, February 2016.
- 4 *Ibid.*
- 5 Art 51(2) and Annex IX.
- 6 *Legislating for the United Kingdom's Withdrawal from the European Union*, Cm 9446 March 2017 at p.17.
- 7 p.21.
- 8 Bizarrely, perhaps, where a reporting requirement appears in an EU environmental Regulation such as Shipments of Waste presumably under the proposed automatic roll-over of EU regulations these will become national obligations though substitution of references to the Commission etc will be needed.
- 9 *Environmental Governance after the EU: The Need to Ensure Accountability*, Professor Maria Lee, Professor Liz Fisher (University of Oxford), 28 November 2016, *The EU Referendum and the UK Environment: An Expert Review*. Available at <https://environmenteuref.blogspot.co.uk/2016/11/environmental-governance-after-eu-need.html>
- 10 Para 81 *Brexit: Environment and Climate Change* HL Paper 109 February 2017.
- 11 Hansard House of Lords 23 March 2017, col 343.
- 12 Relying on the Supreme Court in *AXA General Insurance Ltd v The Lord Advocate* [2011] UKSC 46 and *Walton v The Scottish Ministers* [2012] UKSC 44.
- 13 Civil Procedure Rules, Part 45: Rules 45.41-45.44, as amended by the Civil Procedure (Amendment) Rules 2017 SI 2017/95.
- 14 25th Report Civil Procedure (Amendment) Rules 2017 SI 2017/95 3 Feb 2017.
- 15 Civil Procedure Rules Pre-action Protocol for Judicial Review.
- 16 For the most extensive recent review see *The Dynamics of Judicial Review: The Resolution of Public Law Challenges before Final Hearing*, Bondy and Sunkin (2009). Of 75 Judicial Reviews studied (but with the exception of one planning case, none in the environmental field) the authors concluded that some 60% had been settled.
- 17 For example, C-533/11 (Belgium – incorrect transposition of urban waste water directive in respect of five municipalities) lump sum of 10 million Euros, plus 859,404 euros for every six months of non-compliance).
- 18 For a full survey see *Environmental Courts and Tribunals: A Guide for Policy Makers*, George and Catherine Pring (UNEP 2016).
- 19 A new environmental court could play an important role here in addressing both compliance and accountability after Brexit. For example, McAuslan proposes an 'investigative' and 'pro-active' environmental court, serving also as an advisory body on technical and scientific matters. McAuslan, P., (1991), *The role of courts and other judicial-type bodies in environmental management*, *Journal of Environmental Law* 3(2) p.195-208.
- 20 See Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) 2009. The overriding objective of the rules are to deal with cases "fairly and justly" which includes— (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; and (e) avoiding delay, so far as compatible with proper consideration of the issues (Reg 2).
- 21 European Commission *The EU Environmental Implementation Review Country Review – the United Kingdom* (SWD (2017) final Feb 2017).
- 22 The material in this Appendix is taken from three sources: George and Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (UNEP 2016); George and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009, The Access Initiative); and Forever Sabah, *Environmental Courts and Tribunals: An introduction to national experiences, lessons learned and good practice examples* (2016).
- 23 George and Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (UNEP 2016) p.36.
- 24 *Ibid.*, p36.
- 25 Alex Wang & Jie Gao, *Environmental Courts and the Development of Environmental Public Interest Litigation in China* (2010) 3:1 J Ct Innovation 37 at 39.
- 26 *Ibid.*, at 48.
- 27 Karl Boudreau, Scott Fulton & Kristin Gladd, *China's Top Court Clarifies Environmental Tort Liability Standards* (June 26, 2015) Beveridge & Diamond PC News Alert at 1.
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- 29 Lakshmi, R. (2015) *India's aggressive green court takes lead role in high-stakes battles*, in *Washington Post* (Sept. 16), http://www.washingtonpost.com/world/asia_pacific/indias-aggressive-green-court-takes-lead-role-in-high-stakes-battles/2015/09/15/5144ed98-5700-11e5-9f54-1ea23f6e02f3_story.html.
- 30 *Ibid.*
- 31 Malcom Grant, *Report to the Department of Environment, Transport and the Regions* (2000, England) at 149.
- 32 Forever Sabah, *op. cit.*, [36].



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Brexit and Environmental Law: Enforcement and Political Accountability Issues

This report highlights the need for effective mechanisms to hold government and public authorities to account for their environmental law responsibilities after Brexit.

The European Union (Withdrawal) Bill will be concerned with ensuring that the body of EU environmental law is rolled over on Brexit. This is important for regulatory stability and environmental protection. But the focus on 'black letter' law means that broader issues of the accountability of government and other public bodies for their legal responsibilities under environmental law, which have been an important feature of the EU system to date, may disappear. If these institutional gaps are not properly addressed there is a danger of undermining the effectiveness of environmental law.

Current EU environmental laws require governments to provide regular reports to the European Commission on the actual implementation of the legislation. This is a valuable discipline. The report recommends retaining such reporting requirements in our domestic environmental law post Brexit, but with governments reporting to Parliament and the devolved assemblies.

The Commission's role in supervising how Member States carry out their obligations under EU law will, together with its citizen's complaint procedure, disappear after Brexit. The procedures have been used most commonly in the environmental field because the environment has no legal interest and can all too easily die in silence. Judicial review brought by environmental NGOs before the courts may be a valuable long-stop for ensuring that government and other public bodies carry out their duties under environmental law. But it cannot replicate the more systematic supervisory function hitherto carried out by the Commission. This report calls for a review of possible options for a specialist environmental Commissioner or equivalent, and for strengthening the role of courts or tribunals in the environmental field.

July 2017

The UK Environmental Law Association (UKELA) is the foremost body of environmental lawyers in the UK. UKELA aims to promote better law for the environment and to improve understanding and awareness of environmental law.

UKELA remained neutral on the Brexit Referendum. UKELA's Brexit Task Force was established in September 2016 to advise on all matters relating to and arising from the UK's decision to leave the European Union insofar as this impacts environmental law, practice and enforcement in the UK.

The Task Force has been examining the legal and technical implications of separating our domestic environmental laws from the European Union and the means by which a smooth transition can be achieved. The Task Force aims to inform the debate on the effect that withdrawal from the EU will have, and to draw attention to potential opportunities and problems which may arise.

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