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An assessment of recent developments and future directions

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CONTINUITY, CONVERGENCE AND CHANGE IN ENVIRONMENTAL LAW AND GOVERNANCE IN SCOTLAND – AN ASSESSMENT OF RECENT DEVELOPMENTS AND FUTURE DIRECTIONS

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A. INTRODUCTION

An important question arising after the 2016 Brexit referendum was the impact that leaving the European Union (EU) would have on environmental law in the United Kingdom (UK). There was a concern that Brexit could lead to a lowering of environmental standards, in part driven by a belief that EU institutions ‘played a key role in driving improvements to the UK’s environment during the UK’s membership of the EU’¹ and an accompanying fear that the UK would once again become the ‘dirty man of Europe.’² A key factor underpinning this narrative was the anticipated disappearance of independent institutions to routinely monitor the application of environmental law in the UK.³ In particular, the powers of the European Commission to bring legal action against recalcitrant Member States was seen as a major loss in the field of environmental protection, potentially leaving a significant gap in environmental governance.⁴ These debates were even more prominent in Scotland given that the Scottish Government itself opposed Brexit.⁵

It was recognised in these debates that the existence or scale of governance gaps would depend upon any agreement reached between the UK and the EU concerning their future relationship, as well as arrangements to replace those aspects of EU law that would be lost as a result of Brexit. In this respect, it is only recently that the emerging picture of post-Brexit environmental governance in Scotland has been revealed, allowing a preliminary study of the future for environmental standards in the jurisdiction. This article aims to provide an overview and analysis of the changes that have recently been introduced by the UK-EU Trade and Cooperation Agreement (TCA) and new UK and Scottish legislation aiming to fill the gaps in environmental governance caused by Brexit. It considers the impact that these new arrangements will have on the development of Scottish environmental law and in particular the implications for Scottish institutions in deciding whether to promote ongoing continuity with EU law, promote convergence with other parts of the UK, or strike out on their own path of environmental law reform. The article concludes that the new

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¹ House of Lords European Union Committee, *Beyond Brexit: food, environment, energy and health*, 22nd report of session 2019-21 (March 2021) para 136. The academic literature recognises that the impact of EU law on UK environmental policy has varied from sector to sector; see e.g. C Burns et al, ‘De-Europeanising or disengaging? EU Environmental Policy and Brexit’ (2019) 28 *Environmental Politics* 271-292; A Savaresi, ‘The impact of Brexit on environmental protection in Scotland: early reflections’ (2018) 22 *Edinburgh Law Review* 115.

² See The Guardian, *Brexit would return Britain to being ‘dirty man of Europe’*, 3 February 2016, available at <https://www.theguardian.com/environment/2016/feb/03/brexit-would-return-britain-to-being-dirty-man-of-europe>.

³ E.g. CT Reid, ‘Brexit and the future of environmental law’ (2016) 34 *Journal of Energy and Natural Resources Law* 407, 413.

⁴ See Scottish Government, *Environmental governance in Scotland after Brexit: A report* (June 2018); United Kingdom Environmental Law Association, *Brexit and Environmental Law: Enforcement and Political Accountability Issues* (July 2017).

⁵ Scottish Government, *Scotland’s Place in Europe* (December 2016).

arrangements may well have set the frame for future discussions of environmental law in Scotland, but much will still depend on how new powers are exercised in practice. To this end, it identifies key factors and outstanding questions concerning future developments in Scottish environmental law.

B. BREXIT AND THE EVOLVING DEVOLUTION SETTLEMENT IN THE CONTEXT OF ENVIRONMENTAL LAW

There is no doubt that Brexit has had profound implications for law and governance in the UK, many of which are still being discovered and discussed. In particular, the departure of the UK from the EU has put significant pressure on relations between the UK government and the devolved administrations, not only because of political differences concerning Brexit⁶, but also because membership of the EU, and the common standards that it entailed, had underpinned the devolution settlement.⁷ Brexit therefore has profound ramifications for the devolved institutions and the exercise of their powers.⁸

In the environmental sphere, Scottish institutions had exercised significant autonomy in determining how EU law was implemented from the beginning of devolution, with the result that there are important differences between environmental law in Scotland and the rest of the UK. Examples include the adoption of broader rules relating to strategic environmental assessment in the Environmental Assessment (Scotland) Act 2005 and the more stringent application of certain elements of the Habitats and Birds Directives through the progressive development of the Conservation (Nature Habitats, &c) Regulations 1994.⁹ This division of competence will not fundamentally change following Brexit and most environmental matters will continue to fall within the remit of the Scottish institutions, provided that they do not impinge upon reserved matters.¹⁰ Indeed, the powers of the Scottish institutions are arguably broader as a result of the European Union (Withdrawal) Act 2018, because Acts of the Scottish Parliament no longer need to be consistent with EU law.¹¹ It follows that there is in theory more leeway for the development of environmental law in Scotland in the future. Yet, the extent to which this greater flexibility is utilised will partly be determined by other features of the legal framework, discussed throughout this article.

One possible constraint on the use of these powers is the ability of the UK Government to temporarily constrain the devolved competence of the Scottish Parliament in areas previously covered by EU law through the adoption of regulations under section 30A of the Scotland Act. This power has been described as ‘a transitional arrangement where decisions are taken on where common policy approaches are needed or not.’¹² This power only exists until two years after exit day, i.e. 31 January 2022, and no such action has been to date. Nor has there been any suggestion that it should. Yet, it has been recognised that there are certain matters on which it is preferable for the constituent parts of the UK to develop common frameworks to ensure a degree of consistency in regulation across the country. A

⁶ Ibid.

⁷ See Scotland Act 1998, s 31 (as enacted).

⁸ See generally N McEwen, ‘Negotiating Brexit: power dynamics in British intergovernmental relations’ (2020) *Regional Studies* DOI: 10.1080/00343404.2020.1735999

⁹ This includes the framing of criminal offences to include reckless as well as intentional activity; see Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2004, SSI 2004/475, reg 10.

¹⁰ Scotland Act 1998 (1998 Act), s 29(2)(b) and Sch 5.

¹¹ See *ibid.*, s. 29 as amended by the European Union (Withdrawal) Act 2018 (2018 Act).

¹² Finance and Constitution Committee, Scottish Parliament, *Report on Common Frameworks*, 4th Report (Session 5), (March 2019) para 19.

common framework has been defined as ‘a consensus between a Minister of the Crown and one or more devolved administrations as to how devolved or transferred matters previously governed by EU law are to be regulated after IP completion day.’¹³ This definition suggests that not all common frameworks will necessarily involve all devolved administrations. Furthermore, it does not speak to the form or content of a common framework, which may be statutory or non-statutory and ‘may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued.’¹⁴ In other words, not all common frameworks will necessarily impose the same standards across all of the UK and a common framework could equally recognise the value in regulatory divergence subject to a set of common objectives. In principle, common frameworks should be agreed by the devolved administrations. On this point, both the Finance and Constitution Committee of the Scottish Parliament¹⁵ and the Scottish Government has taken the view that common frameworks cannot be imposed¹⁶, although such an outcome cannot be ruled out as a matter of law in light of the continuing power of the UK Parliament to legislate on behalf of Scotland.¹⁷

The protection of the environment is one area where a number of common frameworks are expected to emerge.¹⁸ To date, key examples include the Fisheries Act 2020, the Greenhouse Gas Emissions Trading Scheme Order 2020, the Hazardous Substances and Packaging (Legislative Functions and Amendment) (EU Exit) Regulations 2020, the Fluorinated Greenhouse Gases (Amendment) (EU Exit) Regulations 2021. Insofar as common frameworks are applied with the agreement of the relevant administrations, they will not necessarily constrain future law-making and innovation in the environmental field by the Scottish institutions, who retain significant freedom of action.¹⁹ However, it has been suggested that there is a need for robust inter-governmental institutions if common frameworks are to be developed and applied in a fair and transparent manner²⁰, including ‘clear and trusted mechanism[s] to resolve disagreements.’²¹ Moreover, MSPs have expressed frustration about their ability to scrutinise common frameworks in the absence of clear and timely information²², a view reiterated by the House of Lords Common Frameworks Scrutiny Committee, which also pointed to the lack of transparency and stakeholder engagement in the development of common frameworks.²³ These concerns point

¹³ United Kingdom Internal Market Act 2020, s 10(4).

¹⁴ Joint Ministerial Committee (EU Negotiations) Communiqué (October 2017).

¹⁵ *Report on Common Frameworks* (n12) para 188.

¹⁶ Policy Memorandum to the UK Withdrawal from the EU (Continuity) (Scotland) Bill, para 23.

¹⁷ 1998 Act, s 28(8): ‘it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’ The Supreme Court has held that this provision entrenches a constitutional convention but it is a rule of law that can be enforced through the courts; *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

¹⁸ See e.g. Cabinet Office, *Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competences in Scotland, Wales and Northern Ireland* (April 2019).

¹⁹ This is often explicitly recognised; see e.g. the Explanatory Memorandum to the Fluorinated Greenhouse Gases (Amendment) (EU Exit) Regulations 2021, para 2.9.

²⁰ See Royal Society of Edinburgh, *Common UK Frameworks*, Advice Paper No 18-15 (August 2018).

²¹ *Report on Common Frameworks* (n12) para 88.

²² *Ibid*, paras 136-141. For continuing concerns, see the Environment, Climate Change and Land Reform Committee, Scottish Parliament, Official Report (16 March 2021) where one member describes the process of oversight as ‘at times ... meaningless.’

²³ House of Lords Common Frameworks Scrutiny Committee, *Common Frameworks: building a cooperative Union*, 1st Report of Session 2019-2021 (31 March 2021) paras 54-55.

to the need for further changes to overall constitutional structures of the UK, a vital subject, but one which goes beyond the scope of this article.²⁴

Another new piece of the UK constitutional puzzle is the United Kingdom Internal Market Act 2020, the main provisions of which came into force on 31 December 2020. This legislation introduces the non-discrimination principle and the mutual recognition principle into UK law²⁵, both of which sound innocuous, but were described by one parliamentarian as taking ‘a wrecking ball to the devolution settlement.’²⁶ The rationale for these principles as explained by the UK Government was to provide ‘businesses regulatory clarity and certainty and ensure that the cost of doing business in the UK stays as low as possible ... without damaging and costly regulatory barriers emerging between the nations of the UK.’²⁷ In other words, the aim is to promote free movement of goods around the UK ‘by providing a baseline level of regulatory coherence.’²⁸ This is a legitimate objective and one that was previously pursued by EU law, but the 2020 Act promotes it in a very different manner. Whilst EU law did impose limitations on the ability of Member States to restrict the free movement of goods within the single market, it also recognised a broad range of circumstances in which restrictions could be applied²⁹, in line with the overarching principle of subsidiarity.³⁰ In contrast, the principles enshrined in the 2020 Act would seem to go much further in limiting the regulatory space of the four nations of the UK.³¹

Of the two internal market principles, it is the mutual recognition principle which is the most restrictive as it allows goods that are produced or imported into one part of the UK to be sold in other parts of the UK ‘free from any relevant requirements that would otherwise apply to the sale.’³² Any such restrictions which fall within the scope of this principle simply ‘do not apply in relation to the sale.’³³ The strict application of the principle is, however, tempered by a number of exceptions. Firstly, it does not apply to certain requirements that were in place prior to the commencement of the legislation where there were no equivalent requirements in each of the other parts of the UK.³⁴ In other words, this ‘grand-fathering’ clause protects pre-existing regulatory divergence within the UK. Secondly, the principle does not extend to so-called ‘manner of sale’ requirements, such as where or how a product can be offered for sale, unless such a requirement ‘appears to be designed artificially to avoid the operation of the mutual recognition principle [such as] where a manner of sale requirement involves an unusually restrictive condition such that it

²⁴ These issues were identified early in the Brexit process; see Public Administration and Constitutional Affairs Committee, House of Commons, *Devolution and Exiting the EU: reconciling differences and building strong relationships*, eighth report of session 2017-2019 (July 2018). In March 2021, the UK Government announced certain reforms that would be made to intergovernmental relations, including the establishment of a new committee structure serviced by an impartial secretariat; see UK Government, *Progress Update on the Review of Intergovernmental Relations* (24 March 2021).

²⁵ The legislation is protected from change by virtue of the 1998 Act, Sch 4.

²⁶ Brendan O’Hara, Hansard, HC Deb 14 Sep 2020, col 80. Similar sentiments were held by other Scottish and Welsh MPs.

²⁷ Paul Scully (The Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy), Hansard, HC Deb 7 Dec 2020, col 599.

²⁸ *UK Internal Market* (Cmnd 278: July 2020) para 22.

²⁹ See e.g. Treaty on the Functioning of the European Union (TFEU), art 36.

³⁰ See Treaty on the European Union, art 5(3).

³¹ See S Weatherill, *Will the United Kingdom Survive the United Kingdom Internal Market Act?*, UKICE Working Paper 03/2021.

³² 2020 Act, s 2(1).

³³ *Ibid*, s 2(3).

³⁴ *Ibid*, s 4.

would be impossible to comply with the condition and have a practical chance of selling goods.’³⁵ Thirdly, taxation is exempt from the market access principles³⁶, making this a legitimate regulatory tool for different parts of the UK to pursue their own policy objectives. Finally, the legislation permits parts of the UK to apply divergent standards in order to pursue specified regulatory objectives listed in Schedule 1, which includes the prevention and reduction of pests or diseases and the prevention and reduction of unsafe food or feed. Yet, these exceptions are often narrowly construed or subject to stringent conditions. Moreover, they are much narrower than the exceptions previously contained in EU law, which tolerated regulatory divergence for a number of reasons, not least environmental protection.³⁷ In contrast, the 2020 Act would seem to impose significant practical barriers to the adoption of divergent environmental standards related to the sale of products in different parts of the UK.

Although the mutual recognition principle may not technically alter the competence of the Scottish institutions to adopt their own standards³⁸, it does prevent the application of those standards to goods that come from another part of the UK, which clearly has implications for the effectiveness of environmental standards in Scotland. Thus, the legislation has been described as pursuing a ‘deregulatory model’, which ‘contains a strong bias in favour of market access.’³⁹ For example, it is difficult to see how the Scottish Government could enforce a prohibition against the sale of single use plastics and oxo-degradable plastic products, as has been proposed, given that it would have to continue to allow the offering for sale of products coming from other parts of the UK. This challenge was explicitly recognised by the Scottish Government in its consultation on this issue where it said that:

‘It is currently unclear what impact the Internal Market Act 2020 may have on the final version of these Regulations. If lesser standards are applied elsewhere in the UK then it is likely the mutual recognition principle under that Act may impact on our ability to ban or restrict from the Scottish market the supply of such products produced in other nations of the UK, or imported into other parts of the UK. We are therefore continuing to engage with our UK counterparts, but are proceeding for now on the assumption that they will introduce the same or similar restrictions as those required by [Directive 2019/904].’⁴⁰

Even if such an assumption can be made, it is worth noting that where similar, but not identical, restrictions are introduced in other parts of the UK, then any sale will only be able to proceed in accordance with the lowest common denominator. This example therefore reveals the practical implications of the 2020 Act for environmental standards in Scotland. During the passage of the Bill, it was suggested that the highest possible environmental standards would be pursued through the common frameworks programme⁴¹, but there is no guarantee that even standards adopted pursuant to common frameworks would be protected

³⁵ Ibid, s 3(6).

³⁶ Ibid, Sch 1 para 11.

³⁷ See e.g. Case 302/86 *Commission v Denmark* [1988] ECR 04607, para 9.

³⁸ In other words, they can still adopt new regulations and apply them, in theory, to products from Scotland.

³⁹ Weatherill (n31) 5 and 10.

⁴⁰ Scottish Government, *Draft Environmental Protection (Single use plastic products and oxo-degradable plastic products) (Scotland) Regulations 2021: discussion paper* (March 2021) para 8.

⁴¹ See e.g. Lord Callanan (Parliamentary Under-Secretary of State in the Department for Business, Energy and Industrial Strategy) Hansard, HL Deb 19 Oct 2020, col 1285; Paul Scully (Parliamentary Under-Secretary of State in the Department for Business, Energy and Industrial Strategy), Hansard, HC Deb 7 Dec 2020, col 601.

from the effects of 2020 Act, unless a specific exemption is agreed.⁴² Moreover, it is questionable as a matter of principle whether the ability of the Scottish institutions to adopt high environmental standards should be limited to those areas where a common framework has been agreed. Rather, it is necessary to recognise that environmental protection is a legitimate objective which justifies regulatory divergence in a broad range of circumstances, provided that any measure is proportionate and it continues to satisfy the principle of non-discrimination. Thus, serious consideration needs to be given to the scope of the exceptions to the mutual recognition principle contained in the 2020 Act in order to allow the Scottish institutions to pursue environmental objectives in a non-discriminatory manner. The House of Lords had attempted to insert a clause containing a list of public interest derogations, including the protection of the environment, into the Bill⁴³ but it was removed by the House of Commons as it was deemed to ‘render the protections [offered by the internal market principles] almost meaningless.’⁴⁴ A key argument of the UK Government was that the proposed amendment permitted ‘a very wide variety of discriminatory measures using the justifications in the new clause.’⁴⁵ Given that the derogations would have applied to both market access principles, there was some truth to this statement. Most international instruments which contain environmental exceptions to trade rules require such measures to be non-discriminatory.⁴⁶ Yet, a broad environmental exception to the mutual recognition principle is easier to justify, as it acknowledges that different governments may choose their own acceptable level of risk, in line with the precautionary approach. The introduction of an environmental exception to the mutual recognition principle would be possible through the adoption of regulations by the Secretary of State, subject to certain procedural conditions being met.⁴⁷ Without such a change, the ability of the Scottish institutions to pursue progressive and precautionary environmental policies when they impact upon the sale of products is likely to be limited, despite the incorporation of the precautionary principle into Scots law as discussed below. At the same time, it might cause a shift towards greater use of environmental taxation⁴⁸, given that this is exempt from the mutual recognition principle.

One other relevant constraint on the development of environmental law by the Scottish institutions is the need to comply with relevant international rules. Whilst this is not a formal limit on devolved competence, the UK government does have broad powers to prevent action by both the Scottish Parliament and the Scottish Government which it ‘has reasonable grounds to believe would be incompatible with any international obligations.’⁴⁹ These powers have never been used in the first decades of devolution, but the need for their invocation was limited by the fact that many international obligations were in fact implemented through EU law, with which Scottish institutions were required to conform. Yet, these powers may take on a different light under new constitutional arrangements, given the broad range of environmental obligations the UK has at the international level which are no longer filtered through EU law. Moreover, there may be other sources of international law which constrain the ability of the Scottish institutions to develop environmental standards. In this respect, the adoption of the Trade Act 2021, and its delegation of powers to implement

⁴² See *Common Frameworks: building a cooperative Union* (n23) paras 97-102.

⁴³ See Bill as amended on Report, clause 11.

⁴⁴ Paul Scully (Parliamentary Under-Secretary of State in the Department for Business, Energy and Industrial Strategy), Hansard HC Deb 7 Dec 2020, col 603. There were other attempts during the ping-pong procedure to reintroduce such a clause, but they continued to be resisted by the Government.

⁴⁵ *Ibid.*

⁴⁶ See e.g. 1947 General Agreement on Tariffs and Trade, art XX.

⁴⁷ 2020 Act, s 10.

⁴⁸ E.g. Single Use Carrier Bags Charge (Scotland) Regulations 2014, SSI 2014/161.

⁴⁹ 1998 Act, ss 35(1), 58(1).

free trade agreements⁵⁰, is also relevant to the future of environmental standards, although it should be noted that these powers cannot be used to lowering levels of statutory protection in relation to the protection of human, animal or plant life or health, animal welfare or environmental protection.⁵¹ However, attempts by the House of Lords to introduce a legislative requirement for a sustainability impact assessment of future trade deals were resisted by the UK Government, even though the Government has said that it will provide independently verified assessments of the economic and environmental impacts of trade agreements when they are laid for parliamentary scrutiny.⁵²

C. THE INFLUENCE OF THE EU-UK TRADE AND COOPERATION AGREEMENT ON ENVIRONMENTAL LAW AND GOVERNANCE IN SCOTLAND

Beyond the new constitutional arrangements within the UK, another potential constraint on the development of environmental law in Scotland is the TCA between the EU and the UK, which sets the framework for future relations between these two actors. The TCA was signed on 30 December 2020 and it entered into force on 1 May 2021. The TCA is a lengthy and complex instrument, covering a wide range of issues, including trade in goods and services, investment and capital movements, intellectual property, public procurement, transport, energy, and fisheries. Environmental matters are also extensively addressed in the TCA, particularly in Title XI of Heading One of Part Two, which is titled ‘level playing field for open and fair competition and sustainable development.’

From the outset, the EU negotiating mandate made clear that the agreement should promote the pursuit of common interests, including high levels of environmental protection, but should also include ‘sufficient guarantees for a level playing field’⁵³ so as to ‘uphold common high standards, and corresponding high standards over time with Union standards as a reference point’⁵⁴, making particular reference to environmental standards and climate change in this context. In contrast, the UK’s approach to the negotiations emphasised a future relationship based upon ‘friendly cooperation between sovereign equals, with both parties respecting one another’s legal autonomy and right to manage their own resources.’⁵⁵ Bridging these two positions proved to be a major challenge, which remained an obstacle to agreement until relatively late in the process. For example, after the eighth round of talks in September 2020, the EU Chief Negotiator noted that ‘significant differences’ remained, including ‘missing ... guarantees on non-regression from social, environmental, labour and

⁵⁰ The Trade Act 2021 confers powers on both UK and Scottish Ministers to adopt implementing measures to give effect to relevant trade agreements. The UK Government has said that it will not normally use these powers in devolved areas without the consent of the Scottish Ministers and it has committed to consulting them before doing so; see Scottish Government, *Legislative Consent Memorandum: Trade Bill*, LCM-S5-44, Session 5 (2020), paras 16-17.

⁵¹ Trade Act 2021, s 2(7). This provision was added as a result of the ping-pong procedure between the House of Commons and the House of Lords.

⁵² Department for International Trade, *Processes for making free trade agreements after the United Kingdom has left the European Union* (CP 63, February 2019) 9; Statement by Elizabeth Truss, Secretary of State for International Trade, House of Commons, 7 December 2020.

⁵³ Directives for the negotiation of a new partnership agreement with the United Kingdom of Great Britain and Northern Ireland, 25 February 2020, para 17.

⁵⁴ *Ibid*, para 94.

⁵⁵ UK Government, *The Future Relationship with the EU: The UK’s Approach to Negotiations* (February 2020) para 5.

climate standards.⁵⁶ Ultimately, however, a compromise was reached which reflects a delicate balance between the two positions.

Whilst the TCA reaffirms both parties' commitment to pursue high levels of environmental protection, based upon accepted international principles and in accordance with any applicable international agreements⁵⁷, it also recalls the 'right of each party to set its policies and priorities' in relation to inter alia environmental protection and to 'determine the levels of protection it deems appropriate.'⁵⁸ The TCA does encourage voluntary collaboration on regulatory matters⁵⁹ and it mandates cooperation on a number of topics relating to the protection of the environment⁶⁰, but it falls short of requiring parties to adopt the same regulatory standards. This is explicit in Article 1.1.4 of Title XI which provides that 'the purpose of this Title is not to harmonise the standards of the Parties.' Nevertheless, an emphasis is placed upon the need for a 'level playing field for open and fair competition'⁶¹, given effect through two important provisions in Title XI.

Firstly, the ability for a party to change its environmental standards is limited by the so-called non-regression clause, whereby 'a Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection.'⁶² Such clauses are common in modern international trade agreements and recent treaties concluded by the UK with other trading partners contain similar provisions.⁶³ It is significant that such clauses not only apply to the level of protection that is offered by the letter of the law, but also to the actual application of environmental law in practice, meaning that states cannot indirectly lower standards by failing to take enforcement action. In this respect, Article 7.2.3 of the TCA clarifies that 'each Party retains the right to exercise reasonable discretion and to make bona fide decisions regarding the allocation of environmental enforcement resources with respect to other environmental law and climate policies determined to have higher priorities, provided that the exercise of that discretion, and those decisions, are not inconsistent with its obligations under this Chapter.' These provisions highlight the link between the non-regression clause and the establishment of new governance arrangements to promote compliance with environmental law in Scotland, discussed in section 6.

An even more important condition of the non-regression clause is that it only applies to changes in environmental laws which 'affect trade or investment', meaning that it does not necessarily establish a minimum level of protection across the whole gamut of environmental law. It has been observed that there is uncertainty about the precise meaning of this term⁶⁴ and it has been suggested that it sets 'quite a high barrier to clear.'⁶⁵ It is a phrase that is

⁵⁶ Press statement by Michel Barnier following Round 8 of negotiations for a new partnership between the European Union and the United Kingdom, 10 September 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1612.

⁵⁷ See TCA, art 8.4.2.

⁵⁸ See TCA, art 1.2.1.

⁵⁹ TCA, art GRP.12.

⁶⁰ E.g. TCA, arts 8.4-8.10.

⁶¹ TCA, arts 1.1.1 and 1.1.4.

⁶² TCA, art 7.2.2.

⁶³ E.g. Japan-UK Comprehensive Economic Partnership Agreement (Cmnd 311 vol 1, 2020) art 16(2).

⁶⁴ See e.g. *Beyond Brexit: food, environment, energy and health* (n1) para 154.

⁶⁵ *Ibid*, para 156.

found in other trade treaties, where it has been interpreted widely: ‘the ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on’ and thus indicates a broad scope of application.’⁶⁶ From this perspective, the focus of the analysis should be on whether any change in environmental laws ‘might adversely modify the conditions of competition.’⁶⁷ Yet the precise meaning of this term remains to be determined on a case-by-case basis, which causes some uncertainty as to how the TCA may constrain the ability of parties to modify environmental standards in the years to come. Any disputes concerning the implementation of this provision must first be addressed through consultations, but any matter that is not satisfactorily resolved thereby can be submitted to a panel of experts who shall draw up a report that makes findings on the conformity of the measures with the relevant provisions to guide discussions between the parties.⁶⁸ The follow-up to the report of the panel of experts is overseen by the Trade Specialised Committee on Level Playing Field for Open and Fair Competition⁶⁹ and any question of non-compliance can be referred back to the expert panel.⁷⁰ The decision of the panel would appear to be binding⁷¹ and, ultimately, it possible for a party to adopt temporary unilateral remedies against a party who chooses not to take any action to conform with the report of the panel.⁷² It follows that it is a constraint which must be taken seriously.

Another important provision which bears upon the ability of parties to adopt their own environmental standards is the re-balancing clause, whereby ‘either Party may take appropriate rebalancing measures to address ... any material impacts on trade or investment between the Parties arising as a result of significant divergences between the Parties.’⁷³ Whereas the non-regression clause is aimed at ensuring that environmental standards are not lowered, this provision is designed to deal with situations where one party decides to strengthen its own environmental standards over time, whilst the other party maintains lower standards. In practice, the re-balancing clause allows the unilateral imposition of tariffs on products which may receive a competitive advantage due to the difference in environmental standards in one party compared to another, although the imposition of such measures is subject to several procedural requirements which seek to promote a mutually acceptable solution.⁷⁴ Clearly this provision is not meant to be invoked with every single change to environmental law. A party can only trigger the re-balancing procedure if there is a ‘significant divergence.’ There is some ambiguity over the meaning of this term, which will require a case-by-case decision. In addition, the impacts must be ‘material’ and there is a requirement for parties to base such an assessment on ‘reliable evidence and not merely on conjecture or remote possibility’ of an impact.⁷⁵ In both cases there is room for disagreement and therefore it is significant that any dispute over the proposed application of the rebalancing provision can be submitted to arbitration, if consultations fail to produce a mutually satisfactory solution.⁷⁶

⁶⁶ WTO Panel Report, *Canada – Autos* (2001) para 10.80.

⁶⁷ See GATT Panel Report, *Italian Discrimination against Imported Agricultural Machinery* (1958) para 12.

⁶⁸ TCA, arts 9.2 and 9.3.

⁶⁹ TCA, art 9.2.17.

⁷⁰ TCA, art 9.2.18.

⁷¹ TCA, art 9.2.19 provides that Article INST.29 applies mutatis mutandis to the panel procedure. Article INST.29.2 says, inter alia, that ‘decisions and rulings of the arbitration tribunal shall be binding...’

⁷² TCA, art 9.3.3.

⁷³ TCA, art 9.4.2.

⁷⁴ TCA, art 9.4.3.

⁷⁵ TCA, art 9.4.2.

⁷⁶ TCA, art 9.4.3(b).

Whilst the re-balancing provision does not remove the right of either party to set its own environmental standards, it does mean that there may be economic consequences for failing to keep pace with any developments in environmental law-making by the other party. However, the TCA does not account for the fact that environmental standards may not always be the same across the UK. Indeed, the TCA has been described as ‘blind to devolution’⁷⁷, which could pose some challenges for the operation of the re-balancing clause. For example, could the EU decide to impose re-balancing measures against all UK products being imported into the EU on the basis of an assessment that there was a significant divergence between environmental standards in England and the EU which had a material impact on trade and investment, even though Scottish products met the same standards as those applied in the EU?

This leads us to a broader question about the role of the devolved administrations in the oversight of the TCA. Given that the TCA will have important implications for the exercise of devolved functions, there is a strong case for the involvement of devolved institutions in the institutions established under the Agreement. Whilst international relations is a reserved matter, the Scotland Act expressly foresees that the Scottish Ministers may be involved in ‘assisting Ministers of the Crown’ on these matters.⁷⁸ Such assistance could take a number of forms, from being a leading member of the delegation to providing prior input to the negotiating position of the UK. The Concordat on International Relations entered into between the UK Government and the devolved administrations foresees a rather weak form of cooperation on foreign affairs, simply requiring relevant UK government departments to ‘consult the devolved administrations about the formulation of the UK's position for international negotiations, to the extent that the negotiations touch on devolved matters.’⁷⁹ For its part, the Scottish Government has called for a ‘more direct, formal and acknowledged involvement in bodies such as the Partnership Council [under the TCA].’⁸⁰ A compromise position would involve a more structured coordination process in which all nations of the UK have a say in agreeing upon the negotiating position of the UK when it affects their individual functions. Indeed, such changes are needed not only for the purposes of ensuring effective Scottish participation in the implementation of the TCA, but also other international agreements which have implications for devolved functions. This includes future trade agreements with other countries⁸¹, but also multilateral environmental agreements. This observation further strengthens the call for reconsideration of the current constitutional structures in the UK to ensure fair and robust cooperation between the four nations.

D. CONTINUITY OF ENVIRONMENTAL PRINCIPLES IN SCOTS LAW

Whereas the scope for future regulatory divergence envisaged in the TCA was the product of negotiation between the UK Government and the EU, the Scottish Government has for its part taken a consistent position that it intends to continue to maintain its environmental

⁷⁷ Dr Viviane Gravey, Environment Climate Change and Land Reform Committee, Scottish Parliament, Official Report (16 February 2021) 2.

⁷⁸ 1998 Act, Sch 5 Part 1 para 7(2).

⁷⁹ Concordat on International Relations, para D4.5.

⁸⁰ Roseanna Cunningham (Cabinet Secretary for Environment, Climate Change and Land Reform, Environment), Climate Change and Land Reform Committee, Scottish Parliament, Official Report (23 February 2021) 7.

⁸¹ See e.g. Scottish Government, *Scotland's role in the development of future UK trade arrangements* (August 2018).

standards and to ‘keep pace’ with developments in EU environmental law.⁸² This policy position has now been reflected through the adoption of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, which addresses the continuity and convergence of Scots law and EU law in the environmental sphere on a number of different levels.

Chapter 1 of Part 2 of the 2021 Act introduces a requirement for Scottish Ministers, Ministers of the Crown and other public authorities to continue to have reference to those environmental principles reflected in EU environmental law, namely:

- The principle that protecting the environment should be integrated into the making of policies;
- The precautionary principle as it relates to the environment;
- The principle that preventative action should be taken to avert environmental damage;
- The principle that environmental damage should as a priority be rectified at source;
- The principle that the polluter should pay.⁸³

The legislation makes clear that the principles ‘are derived from the equivalent principles provided for in Article 11 of Title II and Article 191(2) of Title XX of the Treaty on the Functioning of the European Union.’⁸⁴ It follows that there is a continuity between the principles that apply as a matter of EU law and the principles that apply under the legislation. Yet, the manner in which the principles have been incorporated does not necessarily guarantee full continuity with EU law.

Firstly, the 2021 Act only requires Scottish Ministers and Ministers of the Crown to ‘have due regard to the guiding principles on the environment’ ... ‘when making policies’, with exceptions relating to national defence, civil emergency and finance or budgets.⁸⁵ Section 15 applies a similar duty to other responsible authorities when ‘doing anything in respect of which the duty under section 1 of the Environmental Assessment (Scotland) Act 2005 applies, namely the preparation of a qualifying plan or programme. The overarching purpose of these duties is to protect and improve the environment as well as to contribute to sustainable development.’⁸⁶ The nature of this duty was strengthened during the passage of the 2021 Act, when the originally proposed requirement to ‘have regard to’ the environmental principles was replaced by a duty to have ‘due regard’ to them. However, the language still differs from the TFEU which required environmental policy to be ‘based on’⁸⁷ the principles and some observers had called for even stronger language, such as a duty to ‘act in accordance with the environmental principles.’⁸⁸ Any such change was resisted by the Scottish Government who argued that such a duty would ‘constrain the ability to take into

⁸² See Scottish Government, *Consultation on Environmental Principles and Governance* (February 2019). This is part of a broader policy to ‘take a positive and proactive role in engaging with the EU institutions and Member States on shared challenges and opportunities’; see Scottish Government, *Steadfastly European: Scotland’s Past, Present and Future* (March 2021) 13.

⁸³ UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, s 13.

⁸⁴ *Ibid*, s 13(2).

⁸⁵ *Ibid*, s 14.

⁸⁶ *Ibid*, s. 16.

⁸⁷ TFEU, art 191(2).

⁸⁸ See Environment, Climate Change and Land Reform Committee, *Stage 1 Report on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill*, 10th Report (Session 5) (September 2020) para 94.

account other legitimate considerations when developing policy.’⁸⁹ Yet, it must be remembered that principles by their very nature do not require strict adherence to a particular result, but rather principles are designed to steer decision-makers in a certain direction whilst leaving significant discretion as to how much weight to be given to the principle in a particular situation and allowing them to be balanced against other principles or considerations.⁹⁰ In other words, principles always give some discretion to decision-makers as to how to act.

More important is the range of situations in which the principles must be applied. In this respect, the principles only need to be taken into account when ‘making policies’ or preparing plans or programmes under the 2005 Act. Yet, it was pointed out during the passage of the Bill that environmental principles play a much broader role in EU environmental law, influencing both administrative decision-making and judicial reasoning. This is arguably the significance of the language in Article 191(2) of the TFEU which provides that EU environmental policy shall be ‘based on’ environmental principles, as it allows invocation of the principles at all stages of policy development, from inception to concrete application in a particular case. In particular, the Court of Justice of the European Union has ‘frequently made use of the principles to interpret provisions of EU law.’⁹¹ A recent example is the case of *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo — Kainuu ry*, where the Court invoked the precautionary principle in determining the legality of a decision to issue a derogation from the prohibition on killing wolves in Finland under the Habitats Directive⁹², even though the precautionary principle is not expressly mentioned in that instrument. Whilst the Scottish Ministers resisted any attempts to broaden the scope of the duties in the 2021 Act, they did acknowledge that ‘it would remain open to the domestic courts, after the transition period has ended, to consider the new domestic guiding principles in the same sorts of circumstances and scenarios as they had previously considered the EU principles.’⁹³ Indeed, it is worth remembering that the TCA expressly requires parties to ‘[respect] the internationally recognised environmental principles to which it has committed’ including the five principles mentioned in the 2021 Act.⁹⁴ Yet, as a treaty, the TCA is not binding as a matter of domestic law and therefore the continued integration of environmental principles into broader aspects of Scottish environmental law will depend upon a willingness of the Scottish public bodies and courts to utilise them in their decision-making.

As well as having regard to the principles themselves, the 2021 Act introduces an obligation for the Scottish Ministers to produce guidance on the interpretation of the principles, how they relate to each other, and how to comply with the duty of due regard.⁹⁵ Once this guidance has been published, public authorities must ‘have regard’ to this guidance when doing anything covered by the duty to have due regard to the principles themselves.⁹⁶ This layering of obligations presents some interesting challenges for understanding the decision-making framework that is introduced by the Act. Whilst the Act provides that the principles themselves are ‘derived from the equivalent principles’, in developing guidance,

⁸⁹ See Environment and Climate Change Committee, Scottish Parliament, Official Report (24 November 2020) 19.

⁹⁰ See e.g. S Kingston et al, *European Environmental Law* (CUP 2017) 93.

⁹¹ *Ibid*, 92.

⁹² Case C-674/17, *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo — Kainuu ry*, 10 October 2019, unreported, para 66.

⁹³ *Stage 1 Report – Scottish Government Response* (October 2020) 16.

⁹⁴ TCA, art 7.4

⁹⁵ 2021 Act, s 17.

⁹⁶ *Ibid*, s 17(2).

the Scottish Ministers are only required to ‘have regard to the interpretation of those equivalent principles by the European Court from time to time.’⁹⁷ It follows that the guidance may not necessarily follow the EU jurisprudence and so there could potentially be a divergence between the EU principles and the guidance. A decision-maker would then be in the unenviable position of having to refer to two sources of information which may be in tension. At the same time, the Act requires that the decision-makers must have ‘due regard’ to the principles, but only have ‘regard’ for the guidance⁹⁸, which may suggest a subtle hierarchy between these two duties. In practice, the guidance is likely to be more detailed and so it may have a greater influence on the decisions of public authorities when framing legislation. We will have to wait to see how these considerations play out.

E. KEEPING PACE POWERS AND THE PROTECTION OF THE ENVIRONMENT

The incorporation of environmental principles into Scots law is only one element of consistency with EU environmental law promoted by the 2021 Act. Perhaps more important for substantive protection is the power conferred by section 1 of the Act allowing Scottish Ministers to adopt regulations in order to make provision corresponding to changes in EU law.⁹⁹ ‘Environmental protection’ is one of the explicit purposes of these power.¹⁰⁰ These so-called ‘keeping pace’ powers therefore permit the Scottish Ministers to act rapidly in order to adopt legislation ensuring that Scottish environmental law mirrors any new developments in EU law. The introduction of this power was partly justified in the Policy Memorandum accompanying the Bill by the desire for Scotland to remain ‘an active and constructive participant on EU matters’¹⁰¹ but also in order to ‘ensure consistency and predictability for the people who live and work in Scotland, and those who do business here and with Scotland in Europe.’¹⁰²

The relevant provisions of the 2021 Act are framed as powers and so there is no obligation on the Scottish Ministers to keep pace with EU environmental law. Whether or not to exercise these powers is therefore a matter of policy choice by the Scottish Government of the day. Nevertheless, the Scottish Ministers must publish and keep under review a policy statement relating to how those powers are to be exercised.¹⁰³ This is unlikely to be prescriptive and so the decision to follow new EU environmental rules will still be made on a case-by-case basis. Indeed, in light of other developments discussed above, there may often be a difficult choice between promoting continuity with EU law or convergence with the rest of the UK.¹⁰⁴

There is also a broader question as to whether it is always appropriate to use secondary legislation as a means of keeping pace with EU law. In particular, the Finance and Constitution Committee expressed the view that secondary legislation could be appropriate to introduce ‘minor and technical amendments ... to refine retained EU law [but] primary legislation is the most appropriate vehicle for domestic law to implement significant new

⁹⁷ Ibid, s 13(3).

⁹⁸ Ibid, s 17(3).

⁹⁹ For a list of issues which require the agreement of Parliament, see *ibid*, s 5(2). There are also certain limitations on these powers, set out in section 3.

¹⁰⁰ 2021 Act, s 2.

¹⁰¹ UK Withdrawal from the European Union (Continuity) (Scotland) Bill, Policy Memorandum, para 20.

¹⁰² *Ibid*, para 21.

¹⁰³ 2021 Act, ss 6-7.

¹⁰⁴ Such issues are already arising in the context of the new chemical common framework; see Environment, Climate Change and Land Reform Committee, Scottish Parliament, Official Report (23 February 2021) 12-13.

policy proposals that have no equivalent in retained EU law.¹⁰⁵ One reason for making this distinction is that there may be policy questions about whether EU legislation goes far enough. After all, in many instances, Scotland has chosen to go beyond the basic provisions of EU Directives by introducing more detailed or more stringent requirements. From the perspective of environmental protection, keeping pace may not always offer the best way ahead. A clear example is the Environmental Assessment (Scotland) Act 2005 which substantially extends the scope of the requirement to carry out a strategic environmental assessment beyond the narrower range of circumstances covered by the EU's Strategic Environmental Assessment Directive.¹⁰⁶ It follows that the Scottish Parliament must keep a careful watch over the exercise of these powers in order to ensure that the right policy choices are being made for environmental protection. The Scottish Government has acknowledged the need for Parliament to be 'central to the process' of deciding upon the use of these powers.¹⁰⁷ In this regard, parliamentarians may also be aided by the emergence of a new actor in Scottish environmental governance, as discussed in the following section.

F. A NEW ENVIRONMENTAL WATCHDOG

The other change to the governance landscape introduced by the 2021 Act is the establishment of Environmental Standards Scotland (ESS) as an independent¹⁰⁸ body to monitor and investigate public authorities' compliance with environmental law and to monitor the effectiveness of environmental law and how it is implemented and applied.¹⁰⁹

Perhaps the core part of this mandate is to keep under review compliance by public authorities with environmental law in Scotland, thereby substituting the role of the European Commission as the 'guardian' of EU law.¹¹⁰ However, it is worth noting that ESS is responsible for overseeing all environmental law¹¹¹, whereas the Commission was only able to investigate breaches of EU environmental law. Therefore, the 2021 Act in fact introduces a much broader level of oversight than was previously available. Section 43 of the Act sets out three situations in which a public authority can be deemed to be failing to comply with environmental law, namely: failing to take proper account of environmental law when exercising its functions; exercising its functions in a way that is contrary to or incompatible with environmental law; and failing to exercise its functions where the failure is contrary to or incompatible with environmental law. A number of powers are granted to ESS to deal with situations in which a public authority is deemed to have failed to comply with environmental law, as discussed below.

Yet, the mandate of ESS clearly goes beyond ensuring the effective implementation and enforcement of existing environmental law in Scotland and it also includes considering the effectiveness of current environmental law and encouraging its progressive development. For the purposes of the legislation, 'effectiveness of environmental law' is defined as the ability of environmental law to achieve its intended effect by reference to (i) its contribution to environmental protection or (ii) its contribution to the implementation of any international

¹⁰⁵ Finance and Constitution Committee, *Stage 1 Report on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill*, 10th Report (Session 5) (October 2020) paras 67-68.

¹⁰⁶ Council Directive 2001/42/EC, OJ 2001 L197, 30-37.

¹⁰⁷ *Stage 1 Report on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill* (n88) para 28.

¹⁰⁸ ESS Members are however appointed by the Scottish Ministers, which was criticised in the passage of the Bill; see e.g. *ibid*, paras 175-180.

¹⁰⁹ 2021 Act, s 20.

¹¹⁰ EU website: https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law_en.

¹¹¹ For a definition of environmental law, see 2021 Act, s 44.

obligation of the United Kingdom.¹¹² It must be noted that these two elements of effectiveness are quite distinct.

The first element of effectiveness involves an investigation into the intended effect of a particular piece of legislation and an evaluation of whether the legislation is meeting that objective and, if not, what improvements could be made. There are certainly challenges for carrying out such an assessment. Unlike EU legislation which often contains detailed preambular information concerning the intentions behind the legislation, the tradition in Scotland is to be much more concise on this front. For example, the long title of the Nature (Conservation) Scotland Act 2004 simply provides that it is ‘to make provision in relation to the conservation of biodiversity; to make further provision in relation to the conservation and enhancement of Scotland’s natural features; to amend the law relating to the protection of certain birds, animals and plants; and for connected purposes.’ Given the general way in which objectives tend to be drafted, there is considerable scope for ESS in determining what is effective in this context. In practice, the exercise of this function is likely to be linked to the broader role of ESS to ‘consider, assess and review data on the quality of the environment in Scotland’¹¹³ and to ‘have regard to developments in, and information, on the effectiveness of international environmental protection legislation’¹¹⁴, which is defined as ‘legislation of countries and territories outwith Scotland and of international organisations.’¹¹⁵ In other words, ESS may look to environmental law developments in other countries in order to inform its understanding of effectiveness of environmental law. In this respect, ESS is likely to pay close attention to the manner in which the Scottish Ministers exercise their keeping pace powers, discussed in the previous section, as EU environmental law is an important benchmark against which to assess effectiveness. At the same time, ESS may wish to look further afield in order to identify innovations which go beyond EU law. Such contributions by ESS will be helpful in discussions between Ministers and the Parliament about the use of keeping pace powers and the ambition of environmental law in Scotland in general.

The second element of effectiveness mentioned above will allow the ESS to investigate whether the Scottish Government is complying with the international obligations of the UK through its implementation of environmental law. This provision was introduced into the legislation at stage two in order to address concerns that compatibility of Scots environmental law with international law was a matter that fell outside the competence of ESS.¹¹⁶ Framing this as a matter of effectiveness rather than compliance is understandable given that international treaties are not formally a part of Scots law until they are implemented through domestic legislation. Nevertheless, it conceals the fact that what ESS is essentially called upon to do in this context is to determine whether Scotland meets obligations in relevant treaties and customary international law. Ultimately, it is therefore a legal assessment that is being carried out under this remit, although designating this as a question of effectiveness has implications for how ESS may follow-up on potential breaches.

Depending on which function it is fulfilling, a range of different informal and formal approaches are available to ESS in the pursuit of its mandate.

¹¹² 2021 Act, s 44(7).

¹¹³ *Ibid*, s 20(2)(d).

¹¹⁴ *Ibid*, s 20(2)(e).

¹¹⁵ *Ibid*, s 46(1).

¹¹⁶ See Environment, Climate Change and Land Reform Committee, Scottish Parliament, Official Report (24 November 2020) 40.

Firstly, it is clear that ESS can instigate investigations of its own accord, but the legislative scheme also anticipates that ESS will be able to receive representations from members of the public or non-governmental organisations about any matter concerning compliance with or effectiveness of environmental law.¹¹⁷ It does not follow that ESS will have to investigate any matter submitted to it and the organisation will have to agree criteria against which it decides whether to carry out an investigation.¹¹⁸ It is likely that there will be a period of learning in the first years of operation, as the new body finds its feet. At the same time, its ability to engage with key stakeholders will be a critical factor in determining its credibility in the long term.

Once it does decide to investigate a particular matter, a variety of powers are available to ESS. In the first place, ESS may require any public authority to provide information which is relevant to its task.¹¹⁹ Such a request is likely to instigate an informal exchange between ESS and the public authority concerned about the nature of the issue and what steps may be needed in order to ensure compliance with or improvement of applicable environmental standards. Indeed, it was emphasised by the Scottish Ministers that the intent behind the legislation was to ‘see matters resolved through discussion and negotiation ... and ... instances where [formal powers] are [used] are minimised.’¹²⁰ To this end, the strategic plan to be prepared by ESS should set out information concerning how ESS will engage with public authorities ‘with a view to swiftly resolving ... any matter concerning a failure to comply with environmental law, to make effective environmental law or to implement or apply it effectively.’¹²¹ This wording suggests a clear preference for informal engagement, which has been further emphasised by the principles adopted by the interim Board of ESS in April 2021, one of which provides that ‘we will seek to resolve issues through agreement where possible.’¹²² Should this approach not produce a satisfactory solution, ESS does have several formal powers at its fingertips.

Where the matter under investigation concerns compliance with existing environmental law, ESS may issue a compliance notice, setting out its reasons for determining that the public authority has failed to comply with environmental law in a manner which is causing or has caused environmental harm or risk of environmental harm.¹²³ The purpose of the compliance notice is to inform the public authority of the nature of the alleged non-compliance and to indicate the concrete steps that ESS believes must be taken in order to address the situation.¹²⁴ In doing so, ESS will clearly have to take a position on the meaning to be given to the relevant legal provisions and whether a public authority has acted in accordance therewith. ESS can also set a particular deadline by which the prescribed action must be taken.¹²⁵ If the public authority is not content with the decision of ESS, it may appeal to the Sheriff Court on the grounds that it has not conducted itself in the manner alleged in the notice, the alleged conduct does not constitute a failure to comply with

¹¹⁷ 2021 Act, Sch 2 para 1(1)(b).

¹¹⁸ Ibid, Sch 2 para 1(1)(e).

¹¹⁹ Ibid, s 24.

¹²⁰ *Stage 1 Report – Scottish Government Response* (n93) 18.

¹²¹ 2021 Act, Sch 2, para 1(1)(g)(i).

¹²² Environmental Standards Scotland, Mission Statement, Vision, Values and Principles, available at <https://environmentalstandards.scot/about-us/mission-statement-vision-values-principles/> <accessed 8 June 2021>.

¹²³ 2021 Act, s 31(1).

¹²⁴ Ibid, s 33(1).

¹²⁵ Ibid, s 33(1) subject to the restriction in section 33(2) that the prescribed period cannot be less than 28 days beginning with the date on which the notice was issued.

environmental law, or the alleged failure has not caused environmental harm or risk of environmental harm.¹²⁶ The Sheriff may cancel, confirm or modify the notice.¹²⁷ Where a compliance notice is validly issued, the public authority has an obligation to comply with it, although the legislation does envisage that a public authority may request further time to comply¹²⁸ and ESS is permitted to take into account any other ‘reasonable excuse’ before reporting the matter to the Court of Session, who may ultimately make an order for enforcement.¹²⁹ The possibility of involving the courts should compliance not be forthcoming potentially opens the door for fines for public authorities if they fail to abide by compliance notices, as the Court can decide to treat non-compliance as a contempt of court.¹³⁰ In what situations the Court makes use of such a power remains to be seen, but even the risk of such an outcome potentially provides a significant incentive for public authorities to comply and avoid judicial proceedings.

Another route open to ESS is an improvement report, which can be issued if ESS considers that a public authority has failed to comply with environmental law¹³¹, but also if it considers that a public authority has failed to make effective environmental law or to implement or apply environmental law effectively. The improvement report must *inter alia* include a proposed timescale in which the relevant public authority should take remedial action, as well as recommendations on what measures might be taken.¹³² Yet, an improvement report does not have the same legal effects as a compliance notice, as it is subject to political oversight. Thus, an improvement report is submitted to the Scottish Ministers and laid before the Scottish Parliament, triggering a requirement for the Scottish Ministers to prepare an improvement plan. It is this plan which ultimately determines what steps must be taken to address the issues identified by ESS, as well as the proposed timescale and arrangements for reviewing progress.¹³³ In drafting an improvement plan, the Scottish Ministers are not obliged to follow the recommendations of ESS, although they must justify any departure therefrom.¹³⁴ This allows the Scottish Ministers to take broader considerations into account, but the improvement plan is subject to approval by the Scottish Parliament, which can require the Scottish Ministers to review and revise the plan, potentially triggering a ping-pong procedure between these institutions until agreement is reached.¹³⁵

There is one significant limitation on both of the powers discussed above, as neither of them can be used to address ‘a failure to comply with environmental law arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case.’¹³⁶ At first sight, this restriction would seem to potentially limit the ability of the ESS to deal with shortcomings in environmental law in a significant number of instances, given the wide range of situations in which licences or permits are used to control environmental harm. Some concerns were expressed over this restriction during passage of

¹²⁶ *Ibid*, s 36(1).

¹²⁷ *Ibid*, s 36(4).

¹²⁸ *Ibid*, s 34 envisages that ESS can vary a compliance notice in order to extend the compliance period, presumably on the basis that a public authority has requested more time to comply.

¹²⁹ *Ibid*, s 37(2).

¹³⁰ *Ibid*, s 37(2)(b).

¹³¹ If this route is taken to address compliance issues, then the ESS may not subsequently issue a compliance notice; *ibid*, s 32(1)(b).

¹³² *Ibid*, s 28(d).

¹³³ *Ibid*, s 30(2)(a).

¹³⁴ *Ibid*, s 30(2)(b).

¹³⁵ *Ibid*, s 30(5)-(6).

¹³⁶ *Ibid*, ss 27(a) and 32(1)(a).

the Bill, particularly as the European Commission did not operate under such constraints.¹³⁷ Yet, as explained by the Scottish Government, ‘if ESS were given powers to overturn individual regulatory and planning decisions, that would result in significant regulatory uncertainty and disruption [which could have] significant economic costs and severe impacts on the developing planning systems.’¹³⁸ Even if one accepts this reasoning, it does not follow that ESS will not be able to deal with these sorts of situations at all. Firstly, there is nothing in the legislation to prevent ESS from informally engaging with public authorities if it receives communications which deal with decisions in relation to a particular person or case. Indeed, ESS should be encouraged to take such cases seriously, given the importance of licensing as a regulatory tool in the environmental context. Secondly, repeated failure to comply with environmental law in situations involving an individual person or case may amount to ‘a failure to implement or apply environmental law effectively’ and so it could be addressed through an improvement report on that basis. Such a report would not address the individual circumstances per se, but rather it would consider the broader strategic and operational framework within which decisions of the public authority were made.¹³⁹ Finally, the 2021 Act does give ESS a power to apply for judicial review in relation to a public authority’s conduct for situations which constitute ‘a serious failure to comply with environmental law’ and where ‘it is necessary to make the application to prevent, or mitigate, serious environmental harm.’¹⁴⁰ This power can be used in individual cases. There is no definition of ‘serious failure’ or ‘serious environmental harm’ in the legislation and it would appear that ESS has some discretion in determining when to take such action.¹⁴¹ The ultimate test that would be applied in these cases would be the ordinary principles of administrative law which are available in judicial review proceedings, including illegality and unreasonableness. In practice, the initiation of judicial review is unlikely to be a common course of action and the ability for ESS to pursue this route will also depend upon its budgetary constraints, given the costs associated with judicial review. Nevertheless, judicial review may be appropriate in some situations which concern a serious failure to comply with environmental law and so this option should not be ruled out.

Overall, it is clear that ESS will fill a significant gap in environmental governance left by the withdrawal of the UK from the EU. The precise operation of ESS will depend to a large extent upon how it determines its priorities in the strategic plan required by section 22 of the 2021 Act. Yet, ESS is not expected to operate alone in overseeing the implementation of environmental law in Scotland. In particular, any issues relating to disclosure of, or access to information, are excluded from the remit of ESS as these are already addressed through the Scottish Information Commissioner under relevant legislation.¹⁴² In its original form, the Bill also excluded climate change matters, but this exclusion was removed at stage 3 and therefore ESS will have to work alongside and coordinate with the UK Climate Change Committee in order to address this important issue.¹⁴³ ESS may also have to coordinate with

¹³⁷ See *Stage 1 Report on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill* (n88) para. 144.

¹³⁸ Environment Climate Change and Land Reform Committee, Scottish Parliament, Official Report (24 November 2020) 46.

¹³⁹ See *Stage 1 Report – Scottish Government Response* (n93) 19.

¹⁴⁰ 2021 Act, s 38.

¹⁴¹ See 2021 Act, Sch 2, paras 1(2)(b)(iv)-(v).

¹⁴² E.g. Freedom of Information (Scotland) Act 2002, Pts 3-4; Environmental Information (Scotland) Regulations 2004, SSI 2004/520, reg 17.

¹⁴³ Indeed, it is required to explain in its strategy how it proposes to exercise its functions in a way that respects and avoid any overlap with inter alia the Committee on Climate Change; 2021 Act, Sch 2, para 1(1)(d)(ii).

the Office for Environmental Protection to be established under the UK Environment Bill¹⁴⁴, particularly given that the mandate of ESS is limited to Scotland and devolved issues and it cannot address reserved matters. In practice, environmental problems may straddle this formal delimitation of powers requiring these different bodies to work together in order to ensure a seamless system of accountability. Even if this is not the case, expecting the layperson to understand precisely where an environmental issue sits within the complex constitutional framework of the UK is optimistic and the bodies operating in different parts of the UK should ensure that any communications they receive that fall outside of their competence are forwarded to the appropriate body.

G. CONCLUSION

This article has reviewed recent developments in relation to environmental law and governance in Scotland in order to consider how they may impact upon the future evolution of standards in this area. The past twelve months have seen a number of significant legal reforms, which offer some clarity on the questions concerning environmental standards and governance that were raised by Brexit. Many of the gaps that were identified in the Brexit debate have to a large extent been filled. Several of the new mechanisms are designed to promote continuity between Scottish environmental law and EU environmental law, but other reforms would appear to pull in a different direction, calling for convergence with other parts of the UK. How these tensions resolve themselves cannot be fully anticipated at this early stage in the implementation of the new legal regimes and the real impact of these reforms will only be judged by time. The precise operation of these new instruments will depend upon how powers are used by the relevant bodies and how new legal obligations are interpreted in practice. What common frameworks will emerge? How will the TCA be interpreted? How much impact will the environmental principles have in practice? How often will the Scottish Ministers make use of their keeping pace powers? How strictly will ESS enforce environmental law? These are questions that future scholarship will have to address.

It is clear that the debate about environmental governance in Scotland is not closed. Section 41 of the 2021 Act introduces a duty on the Scottish Ministers to prepare a report and consultation addressing whether the Act has ensured that there is an effective and appropriate governance relating to the environment following the withdrawal of the UK from the EU, whether the law in Scotland on access to justice in environmental matters is effective and sufficient and whether the establishment of an environmental court could enhance governance arrangements. This requirement reopens a debate about environmental justice that has been addressed in Scotland in recent years¹⁴⁵, although recent reforms are sufficiently important that it is worthwhile revisiting these questions. Other issues that could be addressed in such a consultation include the incorporation of a range of additional environmental principles into Scots law¹⁴⁶, as was encouraged by a number of groups and individuals during the discussion of the 2021 Act.¹⁴⁷ Such a review could also consider the introduction of statutory environmental targets, another issue raised during parliamentary

¹⁴⁴ See Chapter 2 of Part 1 of the Environment Bill (as introduced).

¹⁴⁵ See e.g. Scottish Ministers, *Developments in environmental justice in Scotland: a consultation* (March 2016).

¹⁴⁶ See the power to add principles under section 13(4)(a) of the 2021 Act.

¹⁴⁷ See e.g. *Stage 1 Report on the UK Withdrawal from the European Union (Continuity) Bill* (n88) paras 76-79. For a modern statement of global environmental principles, see the proposed Global Pact for the Environment: <https://globalpactenvironment.org/en/>.

consideration of the Act¹⁴⁸ and an approach that is promised under the UK Environment Bill.¹⁴⁹ This consultation exercise is to be carried out within six months of ESS publishing its strategy, which is rather early for a review of the 2021 Act, as there will be little evidence available about the actual operation of the new regime. Nevertheless, it means that environmental governance will remain on the political agenda and we cannot rule out further significant reform on this topic in the years to come.

¹⁴⁸ *Stage 1 Report on the UK Withdrawal from the European Union (Continuity) Bill* (n88) para 51.

¹⁴⁹ See clauses 1-6 of the Environment Bill (Bill 9–EN) (as introduced) (January 2020).