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The Global Reach of EU Law and Brexit: Between Theory and Praxis?

Elaine Fahey*

The essence of the phenomenon of the global reach of EU law is that the laws, rules and standards governing the single market constitute homogenous forms of regulation for a vast range of subject areas, governing a bloc of half a billion consumers and traders, are sufficiently desirable that many third countries adopt them as takers. Alternatively, traders, businesses, companies, associations, countries receive them or are subjected to them, compelled to or otherwise. The paper argues that a significantly overlooked point as to the future of the UK in the Brexit negotiations with the EU is that, irrespective of the outcome of the negotiations, the UK will inevitably become subject to this phenomenon.

Overview

Where does a country get its laws and rules from in a globalised world? In order to trade, cooperate, allow airplanes into one's airspace, goods to cross your borders, parts to circulate within a supply chain, there needs to be a certain level of international standards, rules and cooperation that cannot be solely within the purview of the Nation State. The development of autonomous standards is expensive, time-consuming and requires considerable scientific and technical expertise. It also relates to a vast range of activities outside of one's territory. The rise of the 'America First' Trump campaign and 'Brexit Britain' has seen a specific form of engagement with globalisation, rooted in particular views of sovereignty and a firm view of the ability of the nation state to shape and fashion globalisation within its own territories. Its complex relationship with the reality of global commerce, markets across borders, complex supply chains and increasingly sophisticated consumers seeking out transbordered activities, products and services is a murky morass to unpack. It is even more complex for the UK to leave the world's largest trading block in its Brexit in the hope of becoming 'Global Britain'.¹

This paper seeks to unpack the significance of the phenomena of the Global Reach of EU law and its practical operation and inevitability for the UK Brexit negotiations as it becomes a 'rule taker' in the global legal order through its own laws. It focuses upon the Global Reach of EU law as a well-documented scientific phenomenon across subjects, disciplines and jurisdictions largely relating to the EU's internal market but increasingly pertaining to a broad range of other policies in various ways. As will be outlined, it denotes how a significant number of third countries take, receive and or are subjected to EU law. EU laws, rules and standards, from space to the regulation of wine, increasingly propose to 'set' international standards or incorporate international standards, and also, increasingly vice versa. The paper argues that a significantly overlooked point as to the future of the UK in the Brexit negotiations with the EU is that, *irrespective* of the outcome of the negotiations being a hard or soft Brexit or any other formulation thereof,² in reality the UK will inevitably become subject to what is referred to as the Global Reach of EU Law. A less sophisticated but succinct synopsis of the argument might be that: 'you can run but you cannot hide from EU law'.

The negotiation stance of the UK on Brexit has moved arguable swiftly to the aspiration of 'Global Britain' without engaging much in the specifics of how this is possible eg the state of global governance or the current malaise of the WTO etc. What may be beneficial at this point in time of the UK-EU negotiations is to attempt to reflect upon the Global Reach of EU law for the meaning of 'global Britain' going forward and its capacity to interact with the EU and global governance in turn.³ Hard or soft

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¹ Speech by Prime Minister Theresa May, Lancaster House, 17 January 2017.

² Eg 'Europe after Brexit: A proposal for a continental partnership' (29 August 2016), <<http://bruegel.org/2016/08/europe-after-brexit-a-proposal-for-a-continental-partnership/>>, JHH Weiler, 'Editorial: The Case for a Kinder, Gentler Brexit' *European Journal of International Law* (6 February 2017) <<https://www.ejiltalk.org/editorial-the-case-for-a-kinder-gentler-brexit/>>; Thomas Streinz, 'Cooperative Brexit: Giving back control over trade policy' (2017) 15 (2) *I-CON* 271.

³ European Commission website, 'Brexit negotiations The Article 50 negotiation process and principles for the United Kingdom's departure from the European Union,'

Brexit, the UK faces a significant loss of influence and input into the EU trading bloc governing less than half a billion people and consumers, in the short-term at least. It is probably doubtful that all UK business trading with the EU will voluntarily and unilaterally *decide* or *want* to stop circulating their products, look for entirely new markets, new consumers to replace all 440 million remaining EU consumers, stop global supply chains, cease contracts and services etc on 'Brexit day'. On the contrary, it appears reasonable to assert that all or a significant proportion of UK businesses, firms, companies doing business in the EU on Brexit day will want to continue as usual with their European counterparts, as much as possible. All businesses in the UK appear to express this desire to some degree, most seeking to avoid a 'cliff edge'.⁴ Opponents to this view will argue that Britain will become a global power, uninhibited by its current restraints as part of the EU. However, as Sands et al in the Harvard Business School study of 'Making Brexit Work for British Business' state, a massive expansion of trade with non-EU countries is required for the 'circle to be squared' and replicate the statistics for current UK-EU trade.⁵ The Global Reach of EU law is thus likely to become an increasingly salient question.⁶

The EU and UK have exchanged several policy papers in summer 2017, including future partnership policy papers, and the overall negotiating intent of the UK still remains far from clear-cut. A 'Repeal Bill', now formally a UK European Union (Withdrawal) Bill 2017, is the UK's legislative proposal to deal with the legal and regulatory vacuum of Brexit and is going through Parliament at the time of writing.⁷ However, its core formula is argued here to be deficient for its failure to engage with the operation of the Global Reach of EU law. Instead, it is argued that it could be formulated with much more sophistication and dynamism in order to reflect the reality of the Global Reach of EU law that the UK will inevitably face outside of the EU, although the paper will limit itself to developing 'global reach' and its salience, generally and specifically as it relates overall to the Bill.

This paper examines in the first section the phenomenon of the Global Reach of EU law generally. The second section reflects upon the UK becoming an object of EU law and a 'rule-taker' as a matter of law and governance in broader thematic terms. The third section examines the UK European Union (Withdrawal) Bill 2017 as to the specifics of the form of Brexit, followed by Conclusions.

The Global Reach of EU law

The phrase 'global reach' has long had connotations of 'world reach, success or influence', in a commercial context. Understandings of the 'reach' of law 'globally' conventionally have had a high Anglo-American rather than European content and relate predominantly to the extra-territoriality of US law.⁸ This state of affairs, however, has radically changed in recent times. The global reach of EU law nowadays denotes a variety of situations where the EU acts as a 'rule-exporter' to many countries, organisations and associations and gives its rules or compels others to take them, setting high standards or cohesive standards for a block of half a billion consumers, traders and enterprises and so on.

The Global Reach of EU law is charted in literature over several decades and is distinctively developed often by US and Swiss-based authors as much as from EU-based authors/ scholars across a range of

<https://ec.europa.eu/commission/brexit-negotiations_en>. For the negotiation documents and joint statements: <https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en> last accessed 28 July 2017.

⁴ Peter Sands, Ed Balls, Sebastian Leape, Nyasha Weinberg, 'Making Brexit work for British Business: Key Execution Priorities' Harvard Kennedy School Study M-RCBG Associate Working Paper No. 77 (2017), mirroring much UK and EU Scholarship and official trade statistics: see 'UK in a Changing EU' research papers series, as a primary source of independent academic interdisciplinary Brexit research <http://ukandeu.ac.uk/research-papers/> last accessed 28 July 2017.

⁵ *ibid.*

⁶ See LSE Commission on the Future of Britain in Europe, 'Britain as a Global Actor after Brexit' <<http://www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-7---Britain-as-a-Global-actor-after-BREXIT-REPORT.pdf>> last accessed 28 July 2017.

⁷ 'The Repeal Bill: White Paper' (30 March 2017); European Union (Notification of Withdrawal) Act 2017; European Union (Withdrawal) Bill 2017-19 (HC Bill 5). See the discussion of 'UK-EU Future Partnership Policy Papers' below in Section III.

⁸ For example, a search on Westlaw International generates thousands of hits, predominantly from US journals.

disciplines rendering it a rich field of global thought.⁹ Its development by authors *outside* of the EU in its analysis often of third countries also has the advantage of bringing added global value as ‘external thought’ or ‘thinking’ to current debates. Thus, the global reach of EU law through rule-transfer thus denotes how the EU has adopted rules and standards governing half a billion citizens, traders, business, companies, markets, across a range of subject areas, that other polities, markets and businesses have in turn adopted, compelled to do so or acting out of sheer necessity. The essence of the phenomenon of the global reach of EU law is that the laws, rules and standards governing the single market constitute homogenous forms of regulation for a vast range of subject areas governing a bloc of half a billion consumers and traders are sufficiently desirable that many third countries adopt them as takers; alternatively, traders, businesses, companies, associations, countries receive them or are subjected to them, compelled to or otherwise.

Thus, the global reach of EU law encompasses the perceived ‘spillover’ effect of EU regulatory standards on US rules in the realm of, *inter alia*, genetically modified foods, data privacy standards and chemical safety rules (‘The so-called *Brussels Effect*’);¹⁰ the extent to which EU legal rules are actually transplanted in the US: for example, the transposition of EU environmental standards in California, Boston and Maine (‘*From Brussels with Love*’),¹¹ the incorporation of EU vehicle emissions standards into Chinese and Japanese law,¹² EU makeup standards in Malaysia and innovative transfers of policies from the EU to the US in socio-economic fields of law.¹³ It also spans the internationalisation of EU law and Europeanisation of international law as a phenomenon in non-economic fields of law, as much as technical and administrative procedures and standards in, for example, environmental and food law.¹⁴

The size and scale of the EU, as a market and as a polity, governing half a billion people and businesses, has thus generated what is understood in more specific terms as ‘rule-transfer’.¹⁵ The process of the outwards adoption of EU rules elsewhere is referred to as ‘*rule-transfer*’, ‘*sideways rule-transfer*’ or ‘*rule-migration*’.¹⁶ Some draw a distinction between the EU’s transfer of legal rules and governance practices externally, for example, the EU’s uploading of its governance to the UN Convention on Disabilities.¹⁷ Additionally, there is a body of *non-legal* scholarship describing the diffusion of values specifically from the EU to the US legal order across legal fields, notably in data protection and data privacy, not understood as rule-transfer but clearly linked thereto.¹⁸ Moreover, from

⁹ A Bradford, ‘The Brussels Effect’ (2012) 107 *Northwestern University Law Review* 1; A Young, ‘The European Union as a global regulator? Context and comparison’ (2015) 22(9) *Journal of European Public Policy* 1233; J Scott, ‘From Brussels with Love: the Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction’ (2009) 57 *American Journal of Comparative Law* 897; E Fahey, *The Global Reach of EU Law* (Routledge, 2016).

¹⁰ *ibid*, Young; Bradford.

¹¹ See Scott (n 10).

¹² M Rousselin, ‘But why would they do that? European External Governance and the Domestic Preferences of Rule Importers’ (2012) *Journal of Contemporary European Research* 470.

¹³ Eg K Linos, *The Democratic Foundations of Policy Diffusion: How Health, Family, and Employment Laws Spread Across Countries* (OUP 2013).

¹⁴ Fahey (n 10); J Mendes, ‘EU Law and Global Regulatory Regimes: Hollowing Out Procedural Standards?’ (2012) 10(4) *I-CON* 1988.

¹⁵ See S Lavenex and F Schimmelfennig, ‘EU rules beyond borders: theorizing external governance in European politics’ (2009) 16 *Journal of European Public Policy* 791; S Lavenex and F Schimmelfennig, (eds) *Democracy Promotion in the EU’s Neighbourhood: From Leverage to Governance?* (London: Routledge, 2012).

¹⁶ Bradford; Scott; Fahey (n 10).

¹⁷ G De Búrca, ‘The European Union in the Negotiation of the UN Disability Convention’ (2010) 35 *European Law Review* 174.

¹⁸ M Pollack and G Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford: Oxford University Press, 2009); D Bach and A Newman, ‘Self-Regulatory Trajectories in the Shadow of Public Power: Resolving digital dilemmas in Europe and the United States’ (2004) *Governance* 387; W Rees and R Aldrich, ‘European and US Approaches to Counterterrorism’ in R Tiersky and E Jones (eds), *Europe Today: A Twenty-First Century Introduction* (3rd ed, Rowman and Littlefield, 2007), 437; G Shaffer, ‘Globalisation and social protection: the impact of EU and International Rules in the Ratcheting up of US Data Privacy Standards’ (2000) *Yale Journal of International Law* 1.

areas as diverse as the internal market,¹⁹ EU refugee law,²⁰ data protection,²¹ EU environmental law, EU banking and financial services and taxation law,²² fundamental rights, to EU competition law,²³ it is now perceived as a commonplace occurrence of EU law that it has global reach through novel forms of extra-territoriality. This state of affairs seems poised to become of greater salience in the future of UK-EU relations. All forms thereof are broadly accepted to depict the phenomenon of the Global Reach of EU law. The Global Reach of EU law is thus far from a mere theoretical idea. Importantly, it also relates to a body of literature on the EU as a 'soft power' and good global actor, evolving to promote its values and norms initially through its trade policy, immortalised in the early work of Ian Manners 'Normative Power Europe'.²⁴ It emphasises the soft behind the scenes diplomacy of a large trading bloc.

The reach of EU law is not merely unidirectional from a predominantly economic perspective but also 'cuts the other way,' from an administrative and procedural perspective and puts an increasing range of obligations on the EU. For example, Article 11(3) Treaty on the European Union (TEU) provides that the Commission is obliged to consult in its rule-making with 'the parties concerned', largely understood to encompass stakeholders irrespective of their country of origin. There are many new obligations under EU law to initiate coordination or to monitor third country conditions and many EU Administrative decisions are also addressed to individuals or legal persons in third countries, eg relating to various administrative procedures in environmental law, the European Neighbourhood Policy (ENP) or Common Foreign and Security Policy (CFSP) sanctions.²⁵ Recent research also suggests that the EU and US in particular have become increasingly open to the view of stakeholders and third parties as they evolve their regulatory reach in the world.²⁶ These developments will arguably ensure that the UK will have a voice in EU law and governance irrespective of the institutional set-up reached, albeit that it falls well below membership and traverses many domains.

EU policy has also expressly sought to seek regulatory convergence in its Global Europe policy and to push tackling complex regulatory issues as a key condition of advancing the EU's global trade agenda.²⁷ However, EU global reach may thus logically appear to imply rule exportation but the position is not so straightforward. With respect to actual EU trade partners (ie third countries with trade agreements with the EU) the picture as to the global reach of EU law is far more nuanced. In a study of four of the EU's New Generation Preferential Trade Agreements (PTA) (i.e. Canada, Central America, Singapore and South Korea), it has been shown, by a leading political economy scholar, how there is no evidence of the EU exporting its rules to its partners with respect to technical barriers to trade, sanitary and phytosanitary measures, domestic regulation of financial services, competition policy, data protection, environmental protection, labour standards.²⁸ Instead, the EU's regulatory influence appears to vary in line with the power of its partner. Agreement to reduce existing regulatory differences is rare and whether it does exist, regulatory coordination through convergence or the acceptance of equivalence occurs, often implying no real change. In cases of convergence, the partner appears to move *towards* the EU's position.²⁹ This is also a point of much significance when considering the so-called 'Repeal

¹⁹ M Cremona, 'The European Union as a global actor: Roles, models and identity' (2004) *Common Market Law Review* 553; Bradford, (n 10); P Eeckhout, *The European Internal Market and International Trade – A Legal Analysis* (OUP 1994); Fahey (n 10)

²⁰ For example, H Lambert, J McAdam and M Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013).

²¹ On the territorial scope of the General Data Protection Regulation: Cedric Ryngaert 'Symposium issue on extraterritoriality and EU data protection (2015) 5(4) *International Data Privacy Law* 221.

²² S Kingston, 'Territoriality in EU (Taxation) Law: A Sacred Principle, or Dépassé?' in J Englisch (ed), *International Tax Law and New Challenges from Constitutional and Legal Pluralism* (IBFD 2015).

²³ See F Wagner-von Papp 'Competition law, Extra-territoriality and Bilateral Agreements' in A Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar 2012).

²⁴ I Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) *Journal of Common Market Studies* 235

²⁵ Eg E Korkeo-aho, 'Evolution of the role of third countries in EU law- towards full legal subjectivity?' Ch 11; I. Vianello, 'From objects to subjects: paving the way for third countries and their natural and legal persons' Ch 12 in S Bardutzky and E Fahey (eds) *Framing the Subjects and Objects of Contemporary EU law* (Edward Elgar 2017).

²⁶ Eg A Berman, 'Taking foreign interests into account: Rulemaking in the US and EU' (2017) 15(1) *I-CON* 235.

²⁷ European Commission, *Global Europe: Competing in the World* (2006)

²⁸ A Young, 'Liberalizing trade, not exporting rules: the limits to regulatory co-ordination in the EU's 'new generation' preferential trade agreements' (2015) 22(9) *Journal of European Public Policy* 1253.

²⁹ *ibid.*

Bill' formula, discussed below and appears to indicate that the UK will need to both retain retrospectively and prospectively considerable amounts of EU law in order to trade with it.

The next section reflects upon the broader themes of framing the UK in the global legal order in law and governance, prior to looking more specifically at its internal manifestations in Brexit.

Framing Shifts in The UK in Forms of Law and Global Governance

In Law: From Subject to Object of EU law

A central point of the EU legal order has been to distinguish its legal order from public international law, as one where the *subjects* are individuals along with the Member States, and thus not limited to Member States.³⁰ The subjects/objects dichotomy is increasingly under pressure as the EU legal order evolves in the global context, with an ever-rising number of interests and actors and more powers cross-cutting internal and external fields.³¹ Post-Brexit, the UK will become formally an *object* of EU law, and will no longer be technically a *subject* of EU law. One may ask: Going from being a subject to object of EU law – is it really such a change? A distinction between subjects and objects of EU law can also be argued to be a very formalistic one when the scope and content of the Global Reach of EU law is reflected upon.³² There is possibly little difference between being a *subject* of EU law and becoming an *object* of EU law where the aspirant state seeks a 'deep and special partnership' of any form.³³ This is because the global reach of EU law has had a tremendous impact upon the internal/external nexus of EU law, upon its fluidity, its territory and its regulatory scope. It provides a means to appreciate the nuances of the global reach of EU law and the UK's shift going forward, which will perhaps be more dynamic than static and unprecedented.

A more concrete example of the challenges of this shift might be evident from a practical example of a recent EU trade agreement. Given the expressed desire in the UK for a 'deep and special partnership' with the EU, it is worth reflecting upon its meaning from the perspective of the global reach of EU law in light of compliance and rule-transfer with existing third country partners. The EU-Canada Economic and Trade Agreement (CETA) has been heralded as the best, most ambitious and the most progressive form of trade agreement by leading European Union actors that the EU has ever concluded.³⁴ It is high praise indeed for a legal agreement, given the broad range of EU agreements under negotiation or concluded in the post-Lisbon period with, *inter alia*, Singapore, South Korea, Columbia Peru, Georgia, India, Malaysia, Japan, Thailand and Vietnam, covering a diverse range of areas and fields, including controversial ones such as investment.

CETA provides for the free movement of goods, persons and capital to various degrees and its depth and breadth remain to be seen, as a high profile next generation 'WTO plus' Agreement, which features provisions on science, education, justice, the environment and sustainability.³⁵ It provides for detailed principles as to regulatory cooperation, in Chapter 21 thereof. While its Joint Interpretive Instrument expresses much sympathy towards the right to regulate and the voluntary nature of EU-Canada regulatory cooperation,³⁶ Commissioner Malmstrom emphasized that after CETA's notorious 'legal

³⁰ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* ECLI:EU:C:1963:1.

³¹ Fahey and Bardutzky, (n 26) Ch 1

³² *ibid.*

³³ T May, 'Article 50 Notification Letter from the UK to President Tusk' (29 March 2017).

³⁴ See generally <http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm>. See such descriptions in many press releases and EU official briefings on CETA: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1570>> (eg EU Council president, or from EU Commissioner for Trade). See Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11, 14.1.2017, p. 1–2; Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11, 14.1.2017, p 23–1079

³⁵ E Fahey, 'CETA and Global Governance' (2017) 2(1) *European Papers, European Forum, Insight* of 9 February 2017.

³⁶ Council, Joint Interpretive Instrument between the EU, Canada and its Member States 13541/16 (27 October 2016).

scrubbing': '... let me underline that CETA does not change EU standards and regulations on consumer safety, product safety, consumer protection, health, environment or labour provisions in any way. Imports from Canada must comply with EU product rules in full – no exceptions....'³⁷ It is an important statement of the reality of the nature of compliance to be required in order to trade with the EU in a Next-Generation Agreement and the difficult relationship between subject and object that the UK has yet to engage with. This leads to the question of framing the UK in the global governance terms.

In Global Governance: From 'Rule-Maker' to 'Rule-Taker'

It is striking that the UK in its Brexit process is widely understood to become a 'rule-taker' and not a 'rule-maker'.³⁸ This results from the view that a mid-sized Nation State with, *inter alia*, limited native industry and high levels of food imports, will have difficulty in reinventing the wheel in creating the economic and technical conditions for widespread adoption of its rules. The lexicon of 'rule-makers' and 'rule-takers' comprises a vast multidisciplinary literature, which depicts the development of global power and standard-setting. It is a literature which in contemporary times is mainly focussed upon Brazil, China, India and Mexico, working within the global legal order as a system of rules evolved from the so-called post-Washington Consensus as to markets and the regulatory state.³⁹ It focusses upon the *genesis* of legal rules and the ability of a legal order to *project* its rules upon the global legal order or a specific constituency thereof- or merely *comply therewith*. The terminology implies a significant power difference or differential or gap between the 'maker' and 'taker'. A 'rule-taker' is considered universally to be an adverse state of affairs where the power dynamic puts the rule-taker at a position of less influence, authority and significance than the 'rule-maker', a point only tacitly raised to date in most UK debates. The so-called 'Empire 2.0 logic' argues that the Commonwealth nations can become the UK's new main market, dominated by its shared common law legal systems, language and shared norms and customs, to certain degrees.⁴⁰ This, however, would require the UK to be at the heart of and leading a new legal order of global significance, currently some distance from the status quo. Initial talks at the time of writing between the UK and other commonwealth countries suggest that there is some distance to go.

The final section reflects upon the legislation proposed recently by the UK Government to implement Brexit internally, and upon how this relates to the Global Reach of EU Law.

The UK Position and Policy Papers and European Union (Withdrawal) Bill 2017: Becoming Rule-Taker?

It is argued here that a legal and political irony of Brexit continues to be its logic to 'take back control' largely because the Global Reach of EU law will probably result in its evolution from rule-maker to 'rule-taker.' The UK in its policy papers on a future UK-EU partnership in a range of areas exchanged with the EU in summer 2017 demonstrates this amply in broader terms. It seeks to *maintain* significant amounts of EU norms both retrospectively and prospectively, and thus the status quo substantively in most of the future partnership policy papers, from data, science, civil justice cooperation and even in foreign policy.⁴¹ For example, in the future partnership paper, 'the exchange and protection of personal data', the paper outlines how... 'the UK will be compliant with EU data protection law... on exit', whereby a UK-EU model for exchanging and protecting personal data could build on the existing adequacy

³⁷ C Malmstrom, 'CETA Legal Revision Done' (4 March 2016), <https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/ceta-legal-revision-done_bg> accessed 28 July 2017.

³⁸ Financial Times 'UK Becomes Rule-Taker' (30 March 2017) <<http://blogs.ft.com/brusselsblog/2017/03/30/from-rule-maker-to-rule-taker/?mhq5j=e1>> accessed 28 July 2017.

³⁹ See Rousselin; (n 13); Wolfgang Alschner and Dmitriy Skougarevskiy 'Rule Takers or Rule Makers' (2016) A new look at African bilateral investment treaty practice NCCR Working Papers; S Kennedy & S Cheng, 'From Rule Takers to Rule Makers the Growing Role of Chinese in Global Governance' (2012)

⁴⁰ Eg J Blitz, 'Post-Brexit Delusions about Empire 2.0 logic' *Financial Times* (7 March 2017), <<https://www.ft.com/content/bc29987e-034e-11e7-ace0-1ce02ef0def9>> accessed 28 July 2017.

⁴¹ Department for Exiting the European Union and The Rt Hon David Davis MP, Future Partnership Position Papers (2017).

model.⁴² In the paper on ‘Foreign policy, defence and development’, it provides for a future partnership of unprecedented breadth, taking in cooperation on foreign policy, defence and security.⁴³ In the paper, ‘Collaboration on science and innovation’, it outlines the position of close regulatory alignment and the desire to seek to agree a continued system for the mutual recognition of professional qualifications.⁴⁴ Moreover, in its paper, ‘Providing a cross—border civil judicial cooperation framework’, it provides for the UK reflecting closely the substantive principles of cooperation under the EU framework and outlines the future incorporation into domestic law of the Rome I and II instruments as an intention.⁴⁵ While not an exhaustive summary, the range of areas and broad thrust of the tentative policy goals expressed suggest an extremely high level of cooperation *predicated* upon incorporation and synchronization of rules and standards.

This role of rule-taker has further become apparent in its emerging legislative form in UK law. Thus, in the publication of a White Paper in February 2017, *The United Kingdom’s exit from the and new partnership outlined in European Union*,⁴⁶ a proposal was made for a so-called ‘Great Repeal Bill’ to remove the European Communities Act (ECA) 1972 from the statute book and convert the *acquis*, the body of EU law into domestic law. It provided that, wherever practical and appropriate, the same rules and laws would apply on the day after the UK left the EU as they did before. A further White Paper from the Secretary of State for Exiting the EU presented on how a Great Repeal bill would do so.⁴⁷ It provided that it would repeal the ECA and return power to UK institutions. It would convert EU law at the moment of exit into UK law.⁴⁸ ‘The Great Repeal Bill’ was to be legislation of fundamental constitutional significance because it is a proposal to paradoxically ‘cut-off’ a prolific course of law, *preserve* that source of law and provide for its future preservation, using a ‘one-size-fits-all’ framework.⁴⁹ The Bill thus had the intention to repeal the ECA and to preserve EU law retrospectively. Prior to the date of its enactment, the existing EU law and related jurisprudence will be binding upon British courts but not thereafter. As a grand act, it purported to freeze in time all such laws but without knowing how many there are precisely as it subject and objects. It then purported to give significant secondary legislation powers to the Executive in order to cope with the influx of law-making. The Queens Speech of 21 June 2017 is a remarkable fate for the Bill, from a significantly weakened Executive since its February development.⁵⁰ In the Queens Speech, the word ‘Great’ had been removed from the Bill.

The Bill published in July 2017 still proposes to repeal the ECA and convert all EU law into UK law as previously outlined, using a formula of ‘retained EU law’ in clause 6 and 6(7) thereof.⁵¹ It raises a broad range of technical and normative issues which are mostly not considered here. Nevertheless, in general, it may be argued that the so-called ‘Repeal Bill’ is illusory in order to ‘take back control’ in a world of globalisation. The necessity to adopt standards which have global significance or impact is seen by many to be incontrovertible in order to trade globally. This element of Brexit might be seen as quite inexplicable when seen in light of its ‘taking back control’ agenda. It may also be viewed as highly

⁴² Department for Exiting the European Union and The Rt Hon David Davis M, Future Partnership Position Papers, The exchange and protection of personal data (24 August 2017), p. 11.

⁴³ Department for Exiting the European Union and The Rt Hon David Davis MP Future Partnership Policy Papers, Foreign policy, defence and development (12 September 2017) p. 18.

⁴⁴ Department for Exiting the European Union and The Rt Hon David Davis MP Future Partnership Position Papers, Collaboration on science and innovation (6 September 2017), p. 8.

⁴⁵ Department for Exiting the European Union and The Rt Hon David Davis MP Future Partnership Position Papers, Providing a cross—border civil judicial cooperation framework (22 August 2017), p. 6.

⁴⁶ Department for Exiting the European Union and The Rt Hon David Davis MP White Paper (2017), <<https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>> (accessed 28 July 2017).

⁴⁷ *ibid.*

⁴⁸ Department for Exiting the European Union, The Rt Hon David Davis MP, and The Rt Hon Theresa May MP Repeal Bill White Paper Legislating for the UK’s withdrawal from the EU (Cm 9446) (30 March 2017).

⁴⁹ See Mark Elliott, ‘The Government’s White Paper on the Great Repeal Bill: Some Preliminary Thoughts’ (March 31 2017) <<https://publiclawforeveryone.com/2017/03/30/the-governments-white-paper-on-the-great-repeal-bill-some-preliminary-thoughts/>> accessed 28 July 2017; K M Hayne, ‘The “Great Repeal Bill”’, UK Constitutional Law Blog (12th Apr 2017) (available at <<https://ukconstitutionallaw.org/>>); see also Piet Eeckhout and Eleni Frantziou, ‘Brexit and Article 50 TEU: A constitutionalist reading’ (2017) 54(3) Common Market Law Review 695.

⁵⁰ Queens Speech, 21 June 2017 <<https://www.gov.uk/government/topical-events/queens-speech-2017>>

⁵¹ European Union (Withdrawal) Bill (HC Bill 5). The Bill was introduced to the House of Commons and given its First Reading on Thursday 13 July 2017. It was passed at first reading in September 2017.

undemocratic because it expressly commits the UK to becoming a 'rule-taker'. There are many deficiencies of becoming a passive 'rule-taker' from an active 'rule-maker', chief among them that the UK no longer gets to input into the rules which it will be subjected to, soft or hard Brexit, if it wishes to trade with a bloc of half a billion consumers and traders etc on its door step. The irony of the outcome may be that the Westminster Parliament will have far less control and input on its laws that it currently has, particularly in the case of a transition regime that seems unlikely to be swiftly entered/ exited.⁵²

The Bill thus purports to freeze EU law in time in the UK and preserve it, in some form of legal gymnastics exercises. Its attempt to freeze the content of an evolving subject, will ground UK law in subjects, fields and disciplines, which may readily alter or change, raising many rule of law concerns.⁵³ For example, the principle of supremacy applies to EU law pre-existing before exit but not changes to the underlying law thereafter (s. 5(3)), raising many difficult questions as to legal certainty and fairness. The Global Reach of EU law arguably also entails that the retrospective time-freeze approach adopted in UK law could become a highly artificial exercise, with only political appeal and with little substantive legal rationale, as the UK's General Court judge has emphasised extra-judicially.⁵⁴

The impossibility of repeal of EU standards and rules is further a likely outcome of globalisation, not Brexit. As outlined above, the internationalisation of EU law and Europeanisation of International law are evolving scientific trends in a variety of fields, such that the UK will find difficult to escape therefrom.⁵⁵ The UK also faces the veritable impossibility of repeal of many EU rules and standards. There is a significant danger that the Global Reach of EU Law is grossly underestimated and how it could become a punitive dimension of future political discourse. The Bill as a 'repeal' mechanism could thus become quite a misnomer, through its failure to capture the practical reality of the Global Reach of EU Law, necessitating the incorporation of EU law going forward in whatever form.

Conclusion

It has been argued here to be factually and legally misleading to overlook the significance of the Global Reach of EU law. It will become highly difficult for the UK, its traders and businesses to escape the single market and its reach. The UK policy papers on a future partnership along with the formula of the EU Bill already demonstrate this amply. They unequivocally outline degrees of incorporation of EU standards and rules going forward, seeking EU standards and retaining much of the *acquis*, from the past and the future. It leads to an inevitability of norm importation as a rule-taker. It becomes inevitable that hard or soft Brexit, UK business, traders and companies, amongst others, will have to follow EU law in order to circulate UK products in the EU, to sell services, to meet safety requirements, to comply with international standards at the heart of a large number of EU rules. The formulation of the UK becoming a rule-taker post-Brexit is provided for in many contexts already in the aforementioned policy papers. They also outline a mere inevitability: it will become too complex, too costly, too inconvenient to attempt to procedure autonomous UK standards and pointless where they do not suffice to satisfy what is required for trading with a bloc of half a billion consumers, businesses and so forth, within the EU. To some extent, the failure to engage with the inevitability of the global reach of EU law indicates the ideological dogma behind Brexit, before rationality or (cold) market logic. There is still a need for more level-headed reflection upon the reality of becoming a rule-taker and norm importer.

⁵² Mark Elliott, 'The Government's White Paper on the Great Repeal Bill: Some Preliminary Thoughts' (31 March 2017) <<https://publiclawforeveryone.com/2017/03/30/the-governments-white-paper-on-the-great-repeal-bill-some-preliminary-thoughts/>> last accessed 28 July 2017.

⁵³ See All Party Parliamentary Group on the Rule of Law: Rule of Law Questions for the Repeal Bill (APPG/ Bingham Centre 4 July 2017), <<https://binghamcentre.biicl.org/appg-rule-of-law>> last accessed 28 July 2017.

⁵⁴ Interview with Judge Ian Forrester: 'European law will apply 'for years' in the UK, says EU judge' EUObserver.com (25 July 2017) <<https://euobserver.com/uk-referendum/138602>> last accessed 7 December 2017.

⁵⁵ Mendes (n 15).