



Brexit, the Good Friday/Belfast Agreement and the Environment: Issues arising and possible solutions

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Abstract

This report sets out to examine cross-border environmental co-operation and joint action on the environment facilitated by the Good Friday/Belfast Agreement, and what role if any the Good Friday/Belfast Agreement will have in maintaining this co-operation after Brexit. The institutions of Good Friday/Belfast Agreement co-operation, and the extent of ongoing environmental co-operation are sketched out. The different legal aspects of the Good Friday/Belfast Agreement as an instrument of international law and human rights law respectively are explored. Some of the impacts of Brexit on cross-border co-operation (in both a Withdrawal Agreement and “no-deal” scenarios) are briefly outlined. Finally, recommendations for preserving or enhancing cross-border environmental co-operation are put forward.

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1. Background & Scope

- 1.1 This independent report was commissioned by the Environmental Pillar and Northern Ireland Environment Link (umbrella bodies for environmental NGOs in Ireland and Northern Ireland respectively), to examine the role of cross-border environmental co-operation under the Good Friday/Belfast Agreement (**hereinafter the GF/BA**) in a post-Brexit reality.
- 1.2 The report was subject to an extensive review process by a panel of academics, and an additional two-stage review by a panel of stakeholders.
- 1.3 Except where otherwise indicated, all opinions offered in this report are the author's own, and not those of the commissioning bodies/reviewers.
- 1.4 This report is intended to inform the debate on how environmental considerations should inform the development of EU-UK relations post-Brexit, and as the basis for policy framework discussions on preserving present levels of environmental co-operation and enhancing or increasing such co-operation where possible.
- 1.5 The question posed was:
“What impact will Brexit have on Good Friday/Belfast Agreement cross-border environmental co-operation and joint action on the environment, and what role if any the Good Friday/Belfast Agreement have in maintaining this co-operation post-Brexit?”
- 1.6 In order to address the question, this report sets out the mechanics of the GF/BA and describes briefly the ongoing environmental co-operation. It then examines the different legal aspects of the GF/BA as an instrument of international law and human rights law respectively, from the point of view of enforceability. It attempts to outline some of the impacts Brexit will have on the present levels of cross-border co-operation. Finally, it makes recommendations for preserving or enhancing cross-border environmental co-operation.
- 1.7 This research was conducted through a mixture of desk-based study and interviews¹.

¹ Interviews were structured and semi-structured. They were conducted in a three-week time-frame in December 2018. Thirteen interviews were conducted, mostly with academics. The purpose of conducting interviews was to ensure a balanced spread of views on issues relevant to the questions at issue in the project, and to provide a counterbalance to the views of the author of the report. Interviewee categories identified as relevant were Senior Academics specialising in areas relevant to the research question, Government Department Officials in Environment and Trade, Civil Servants working in relevant Government Departments, Public Servants working in the GF/BA institutions and bodies North and South of the border with particular emphasis on cross-border activity, and those with first-hand knowledge of the political climate in Northern Ireland and/or experience of the politics of environmental governance issues. It was hoped to conduct interviews with people in each category. However, this was not possible in every category due to the sensitivity of the issues around Brexit and the timeframe.

2. Introduction

- 2.1 Despite being divided into two different sovereign territories and being home to three simultaneous political entities (Ireland, Northern Ireland and the UK), the unavoidable reality is that the island of Ireland is a single bio-geographic unit, with common geology, landscapes, water catchments, and flora and fauna. Effective environmental protection requires a co-operative and co-ordinated approach between Northern Ireland, Ireland and the UK (Gravey, et al., 2018). The conflict in Northern Ireland was detrimental to environmental well-being, relegating environment down the order of priorities (Brennan, Hjerp, & Purdy, 2017) (Turner, 2009). The shared context of EU membership promoted both regulatory alignment and greater cross-border co-operation and integration (Harris, 2001), enabling more effective implementation of the GF/BA.
- 2.2 The “Good Friday Agreement” or “Belfast Agreement” as the 1998 peace agreement is colloquially known, helped settle the decades long conflict in Northern Ireland, establishing the basis of a new devolved governance, and created a complex multi-strand political structure of interdependence and co-operation between Northern Ireland, the UK and Ireland, and also more broadly between Ireland and the United Kingdom. It created fundamental rights guarantees to protect minorities. It established bodies, mechanisms and areas of co-operation. The agreement was extremely successful in its twin aims of helping to bring an end to the conflict and in creating a framework for mutual co-operation and interdependence.
- 2.3 “Brexit” as UK Withdrawal from the European Union is known represents an obvious challenge to the framework of co-operation created by and resulting from the GF/BA. It threatens to undermine the environmental integrity of the Island of Ireland in a number of ways:
- **Regulatory divergence** - loss of the shared regulatory context of the European Union creates the potential for less coherent environmental governance/regulation across the island as a whole. The EU has been a big driver of legislative/regulatory activity in relation to the environment (Cowell, et al., 2019), particularly in Northern Ireland (Turner, 2009). Deregulation in response to market pressure is a possibility, leading to lower standards in Northern Ireland and the UK, issues with cross-border pollution and environmental degradation of protected sites (although it must also be said that there is also the potential for higher standards to be adopted also, as promised by the current UK Government (Gove, 2018)). Membership of regulatory bodies such as the European Chemicals Agency will likely cease (Macrory R. , 2018) (Lee, 2017). The potential exists for divergence from EU standards by Westminster, further complicated by the divisions of responsibility between the devolved administrations, who may set their own standards in the areas of devolved competence (Reid, 2017) (Hilson, 2018).

- **Loss of the supra-national governance structures of the EU** in Northern Ireland, with their agenda of integration and coherence, including the regulatory, monitoring and enforcement functions of the European Commission, and the supra-national Jurisdiction of the Court of Justice of the European Union (CJEU) in Northern Ireland. The CJEU adjudicates on breaches of European Environmental Law, provides hard-law enforcement of environmental protection norms and principles, and provides consistency in interpretation of environmental law in both jurisdictions (Lee, 2017). The Supreme Court in the UK will have the option of departing from previous CJEU interpretations of EU law (Macrory R. , 2018) (Hilson, 2018).
- **Potential loss of significant streams of funding** for cross-border co-operation in general (e.g. PEACE funding) and environmental cross-border co-operation in particular (e.g. Interreg) which have been acknowledged to be a very important driver of cross-border co-operation.
- **Physical and regulatory barriers to cross-border co-operation.** A hard border or a customs border would represent a potential physical obstacle to cross-border environmental projects, potentially causing innumerable problems from movement of staff on projects and goods necessary for the carrying out of projects, to the more abstract problems caused by regulatory divergence and governance changes as a result of Brexit.
- Potential reduction of ability to take joint action on prosecution of Environmental Crime.
- Loss of the EU Charter on Fundamental Rights.

2.4 Overall, this means that Brexit presents a challenge for instituting and maintaining cross-border cooperation. It shifts considerably the context within which the GF/BA operates, simultaneously making it more important and potentially less stable than before. This report explores whether the GF/BA will continue to be able to support cross-border environmental protection after the UK leaves the EU, as well as how the GF/BA might contribute to the future of cross-border environmental co-operation. Finally it makes recommendations for preserving or enhancing cross-border environmental co-operation.

3. The Good Friday/Belfast Agreement – Background

3.1 The agreement which heralded the beginning of a twenty year period of peace in Northern Ireland is somewhat nebulous in character and in name (it has no officially agreed name (O'Leary, 1999)). Known popularly as the Good Friday Agreement², or also as the Belfast Agreement, the Northern Ireland Peace Agreement, it is composed of two main agreements:

- The “British-Irish Agreement” (hereinafter the BIA) which is the shorter of the two and essentially consists of political commitments of the Irish and British Government to uphold and fulfil the provisions of the Multi-Party Agreement.
- The “Multi-party Agreement” entitled “Agreement reached in the Multi-Party Negotiations” (hereinafter the MPA) (i.e. an agreement between the political parties). This agreement has three strands. Strand 1 established the Stormont Assembly and the basis for power-sharing and devolved government in Northern Ireland. Strand 2 focussed on North-South relations and Strand 3 focussed on UK – Ireland relations. These last two Strands created the mechanisms of cross-border co-operation, such as the North-South Ministerial Council, the British-Irish Council and the British-Irish Intergovernmental Council, and identify areas for co-operation.

3.2 The GF/BA comprising therefore of the BIA, and the MPA annexed³ to it constitutes an agreement concluded between two States and as such the whole agreement is an International Treaty and a piece of International Law (Morgan, 2000).

3.3 The Agreement was also approved by referenda in Northern Ireland and Ireland, by overwhelming majority in both jurisdictions (Morgan, 2000, p. 7).

3.4 In addition to being a binding Treaty under international law, the BIA was given effect in UK law, with the Northern Ireland Act 1998 giving some of its provisions effect in domestic law (Morgan, 2000, p. 8). This legislation has been amended numerous times.

3.5 The Agreement was novel in terms of previous peace agreements in Northern Ireland because its multi-party nature (not just an understanding between the British and Irish Governments) and

² The version used for the purposes of this study is the one filed with the UN in their database of Peace Agreements which can be found at <https://peacemaker.un.org/uk-ireland-good-friday98> on the United Nations Peacemaker website (British and Irish Governments, 1998).

³ Article 31(2) Vienna Convention on the Law of Treaties 1969

that it was put to referenda in both Northern Ireland and Ireland (Dybris McQuaid, 2002). O'Leary describes the Agreement as a "major achievement" that emerged from a "political desert whose only landmarks were failed initiatives" (O'Leary, 1999).

- 3.6 The GF/BA, is often described in terms of "constructive ambiguity" (Knox & Carmichael, 2005) (Ruane & Todd, 2001) (O'Leary, 1999), which allows it to encompass conflicting political realities. One reality was the acknowledgement by Ireland of the existence of Northern Ireland, and affirmation of its union to the UK. The second parallel reality was a recognition of the Nationalist minority in Northern Ireland, and allowing for the simultaneous possibility of a future for a United Ireland (Bell & Cavanaugh, 1998) (Nagle, 2017). However, some have characterised the inherent ambiguity of the Agreement as signifying instability (Ruane & Todd, 2001). On the other hand commentators such as McSweeney argue that the Agreement is not the peace process, and is not inherently unstable, as it does not depend solely on the existence of political will and the convergence of public interest for its survival but rather on the interests of its principal actors, most significantly Britain (McSweeney, 1998).
- 3.7 This imaginative political and legal solution was achieved by recognition of the right of the people of Northern Ireland to self-determination and to decide to which State they would belong, and of their right to dual citizenship. In doing so it reconceptualised notions of sovereignty (Ruane & Todd, 2001). It also irrevocably bound the UK and Ireland into a political, legal and administrative relationship by the provisions for cross-border co-operation under Strand 2 and Strand 3.
- 3.8 The Agreement is built on the principles of consent, and democratic, peaceful governance. It prescribed areas for co-operation, including the Environment (the others named were Agriculture, Education, Transport, Waterways, Social Security, Tourism, EU programmes, Inland Fisheries, Aquaculture and the Marine, Health, and Urban and Rural Development). However, the categories are not closed, with the NSMC holding the power to add more categories to the list).
- 3.9 The Agreement is divided into three interlocking Strands, 1, 2 and 3. Strand 1 is about internal governance in Northern Ireland and provides the basis of the structure of devolved governance in Northern Ireland. This devolved governance is consociational (O'Leary, 1999). This means that power is divided between different groupings and decisions are made not by majority but by the culmination of parallel majority within each social grouping. Leadership consists of two quasi presidential figures, one from the Unionist side and one from the Nationalist side. These are the First Minister and Deputy First Minister elected through "parallel consent procedure" requiring support of 50% of the registered Nationalists & Unionists, as well as a majority of the Assembly. Once elected they are almost impossible to depose until the next General Election. They can only be removed by the assembly through impeachment. Depositing one requires depositing both. An important aspect of the consociational element of the agreement is a veto right for minorities where cross-community issues are considered to be at stake (O'Leary, 1999).

- 3.10 Strands 2 & 3 are about external cross-border co-operation between the UK, Ireland and Northern Ireland. Strand 2 describes North-South co-operative mechanism (the North-South Ministerial Council) and areas and bodies for co-operation. Strand 3 creates an East-West axis of co-operation, establishing a body for UK-Ireland co-operation (British-Irish Intergovernmental Conference) and a body for co-operation between England, Ireland, Northern Ireland, Scotland, Wales, the Channel Islands and the Isle of Man (British-Irish Council).
- 3.11 Although discussions of the Agreement tend to focus Strands 1, 2 and 3, there are six sections after this that are equally important. In particular, Section 6, “Rights, Safeguards and Equality of Opportunity” provides a human rights framework with implications for the rest of the UK, guaranteeing basic human rights standards. The rest of the agreement consists of guarantees on decommissioning, security, policing, prisoners and implementation/review provisions.
- 3.12 One frequently praised aspect of the Agreement is its ability to contain and provide for both Unionist and Nationalist aspirations in the same set of arrangements, albeit with compromises on both sides. However, it is this characteristic that also draws criticism. The Agreement is often criticised as institutionalising difference and sectarianism by requiring it (Graham, 2018). This is most apparent in the consociational structure of the Assembly, but also the Executive arrangements⁴. Dybris McQuaid characterises this as being a product of the need to contain the dynamic of British-Irish difference within peaceful procedural rules, but points out that this comes at the expense of more fluid and moderate identities (Dybris McQuaid, 2009) (e.g. the sectoral arrangements in the assembly structure militate against expressing an identity that is both British and Irish simultaneously). One factor which she identifies as having the potential to allow the expression of more complex or moderate identities is civic society discourse and constitutional discourse, through civic consultation mechanisms (provided for in the GF/BA), but this has not happened to any great degree (see Section 7 below for a more detailed discussion on the civic consultative mechanisms).

⁴ Strand 1. E.g. Art 5 (i) & (ii), and Art 15: Key decisions of the Assembly and the election of First Minister and Deputy First Minister must take place according to parallel majority in each of the categories of Unionist and Nationalist.

4. North-South Ministerial Council

4.1 The North-South Ministerial Council (**hereinafter the NSMC**) is a body established for the purpose of co-ordinating all-island co-operation in at least twelve policy areas⁵, and managing the work of six North/South Implementation bodies in six of these areas⁶. The purpose was to bring together those with executive responsibilities in Northern Ireland and the Irish Government, “to develop consultation, co-operation and action within the island of Ireland”⁷.

4.2 The GF/BA makes the NSMC mutually interdependent with the Northern Ireland Assembly. The NSMC cannot sit without Ministers to populate it. Therefore, the failure to form an executive since 2016 in the Northern Ireland Assembly has unavoidably impacted on the work of the NSMC. This interdependence is constructed to ensure that:

“nationalists and unionists cannot 'cherry-pick' the aspects of government which they particularly want to implement. Thus, unionists only get the Assembly and devolved power if they operate the cross-border mechanisms, and for nationalists the situation is reversed” (Bell, 2003, p. 141).

4.3 The areas of co-operation include the environment specifically, as well as a number of related areas such as agriculture, water bodies, tourism, health, transport and funding, which have proved important for environmental cross border co-operation.

4.4 In the NSMC, the Irish Government and the Northern Ireland Executive work together to advance areas of practical co-operation of mutual benefit in the agreed twelve areas. The Council meets in Plenary, Institutional and Sectoral formats. The Plenary meeting normally takes place twice a year. In Institutional format, the Minister for Foreign Affairs and Trade meets with the First Minister and deputy First Minister to consider cross-sectoral issues and to resolve disagreements and difficulties. Sectoral format allows individual Ministers to oversee co-operation in their sectoral areas including the work of the six North-South Implementation Bodies which operate on an all-island basis. Common policies and approaches agreed in the NSMC in the six other areas are implemented separately in each jurisdiction. Finally, there is provision in the Agreement for

⁵ 1. Agriculture - animal and plant health. 2. Education - teacher qualifications and exchanges. 3. Transport - strategic transport planning. 4. Environment - environmental protection, pollution, water quality, and waste management. 5. Waterways - inland waterways. 6. Social Security/Social Welfare - entitlements of cross-border workers and fraud control. 7. Tourism - promotion, marketing, research, and product development. 8. Relevant EU Programmes such as SPPR, Interreg, Leader II and their successors. 9. Inland Fisheries. 10. Aquaculture and marine matters. 11. Health: accident and emergency services and other related cross-border issues. 12. Urban and rural development.

⁶ 1. Waterways Ireland, 2. SEUPB, 3. Foyle, Carlingford and Irish Lights Commission, 4. Intertrade Ireland, 5. Language Body, 6. Food Safety Promotion Board. (<https://www.northsouthministerialcouncil.org/>)

⁷ Strand 2, para 1, Good Friday/Belfast Agreement 1998.

meetings of the NSMC in a dispute resolution capacity⁸.

- 4.5 The NSMC meets in the environment sector in order to make decisions on common policies and approaches in the areas such as environmental protection, pollution, water quality management and waste management in a cross-border context. The work program includes research into environmental protection (with a focus on environmental information and databases), and cross-border water and waste management which encompasses Water Framework Directive river basin issues as well as agricultural impacts (NSMC Website, 2018).
- 4.6 The last meeting of the Environmental Sector Council was on the 14th September 2016, and the communique (NSMC, 2016) produced from it gives a flavour of the breadth of cross-border co-operation in the area of the environment that the NSMC was responsible for co-ordinating. These included water quality, waste legislation, cross-border illegal dumping, fuel laundering, co-operation on the main sources of EU Funding in the Environment sector- Horizon 2020, Interreg VA and LIFE (including joint meetings of Northern Ireland and Ireland contact points, joint training and information events in both jurisdictions, and reciprocal access to partner search databases to facilitate access to the funding).
- 4.7 As mentioned the NSMC oversees the six implementation bodies prescribed for all-island co-operation under the GF/BA. The ones with environmental relevance are discussed below, which are SEUPB (Special European Union Programmes Body), Waterways Ireland, and the Loughs Agency.
- 4.8 The NSMC has been described as having played a key role in developing consultation, co-operation, and action on the island of Ireland and potentially had a crucial role to play in Brexit (Coveney, 2017). It is also viewed as having a crucial role in creating cross-border political and civil-service co-operation, but not providing cross-border co-operation that filters down to on-the-ground grassroots level co-operation (Tannam, 2006).
- 4.9 However, in the absence of a Northern Ireland Executive and a First/Deputy First Minister, the North South Ministerial Council cannot meet. This represents a very unfortunate missed opportunity for much needed dialogue on the issues of Brexit.

Conclusions on the NSMC:

- 4.10 Strand 2 of the GF/BA, and the NSMC, focussed on North-South co-operation. It provides for the NSMC to play a valuable role in all-island co-operation and action across a range of areas,

⁸ Strand 2, paras 3 and 14, Good Friday/Belfast Agreement 1998.

including environmental protection, at a high policy-framing level. It enables the creation of common policies and concerted action, building upon the frameworks provided by the EU. It also co-ordinates the work of the implementation bodies, which is crucial to addressing cross-border environmental issues.

4.11 However, it seems given the nature of the challenges posed by Brexit, the NSMC could have been an extremely important forum for discussion of joint approaches in the areas within its competence (which includes the Environment). The opportunity for this was lost, not due to any fault of the NSMC body itself, but rather to the ongoing crisis in Stormont and failure to form an executive, which meant there were no Ministers to sit on the North-South Ministerial Council.

4.12 The NSMC was originally envisaged to be the most important (O'Donnell, 1999) of the implementation bodies signified by the way in which it was made inter-dependent with the Assembly, weaving it into the democratic governance structures of Northern Ireland. North-South is the natural direction of co-operation to achieve border softening. However, several factors have prevented the full potential of this body being realised:

- The NSMC is contingent on Executive formation. Without an executive in Northern Ireland⁹, there are no ministers to participate in the ministerial council. Therefore, the NSMC has not met since the crisis occurred.
- As a consequence, the governance of Northern Ireland currently rests in the hands of civil servants, and therefore they do not have the authority or the mandate to negotiate on policy harmonisation (recalling one of the key provisions of the GF/BA was that those participants in the NSMC would have sufficient authority to make decisions in the policy areas¹⁰). This last issue is ameliorated somewhat by the increased powers granted to Civil Servants to make decisions in their functional areas without Ministerial approval¹¹. However, this legislation is concerning in itself for reasons of democratic accountability.
- The Withdrawal Act¹², in section 12, reserves control over the amendment of retained EU law to Westminster, except where the EU law was in an area of devolved responsibility (much of environmental law is within devolved competence) (Cabinet Office, 2018) (House of Commons Public Administration and Constitutional Affairs Committee, 2018). This means that the devolved administrations retain some control over areas like

⁹ Strand 2, para 13, Good Friday Agreement 1998.

¹⁰ Strand 2, para 6, Good Friday Agreement 1998.

¹¹ Northern Ireland (Executive Formation and Exercise of Functions) Act 2018

<http://www.legislation.gov.uk/ukpga/2018/28/enacted>

¹² European Union (Withdrawal) Act 2018, C.16.

environmental law. However the section goes on to give a power to the UK Parliament to overreach them where it considers it necessary, for a period of up to 2 years. If the Parliament wishes to exercise this power it must allow the devolved administration an opportunity to agree the measure, but if the measure is not agreed within 40 days then the UK parliament is free to act to pass the measure. Effectively, a significant amount of the power to change retained EU law rests in Westminster. It is arguable therefore that East-West co-operation takes on more significance when it comes to maintaining regulatory alignment.

- Brexit will potentially transform the UK from an EU Member State into a third country, necessitating negotiation at a single point source of power and authority between the EU and UK, and creating legal and political obstacles to the kind of North-South political back channelling that could occur naturally in the shared context of EU membership. Ministers who formerly met regularly on the fringes of EU meetings will no longer do so, and Irish Ministers will only have a limited ability to control the standards on their side, and a restriction in how far they can go in forging a relationship with Northern Ireland and the UK, given that individual EU Member States have limited powers to deal with non-member States.

4.13 In light of the above it is likely the following two bodies, the British-Irish Council and the British-Irish Intergovernmental Conference have the potential to become more important loci of cross-border policy alignment.

5. British-Irish Council (BIC) (Strand 3)

- 5.1 This institution was a distinctively new element in the GF/BA when compared to previous agreements in Northern Ireland (Dybris McQuaid, 2002).
- 5.2 The British-Irish Council was established as part of Strand 3 of the multi-party agreement reached in Belfast on 10th April 1998. Its membership comprises representatives from the Irish Government; UK Government; Scottish Government; Northern Ireland Executive; Welsh Government; Isle of Man Government; Government of Jersey and Government of Guernsey (BIC, 2018) (Morgan, 2000). Its objective is to “*promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands*”. It was to have two summit level meetings per year, plus sectoral meetings, and it was agreed at the outset that the summit level meetings would comprise Heads of State (Morgan, 2000) (although this was not specifically required by the Agreement as it was with the BIIC below). A standing secretariat was established under the 2006 St. Andrews Agreement.
- 5.3 It’s remit is to “discuss, consult” on matter of mutual interest, including but not limited to transport, agriculture, environment, culture, health, education and EU issues. It was to agree common policies and make arrangements for practical co-operation in these areas¹³.
- 5.4 The NSMC is not subordinate to this East-West Body. In fact the text suggests that the NSMC is intended to be more far reaching.
- 5.5 The British-Irish Council represents an important innovation in British-Irish relations (Dybris McQuaid, 2009), diffusing tensions inherent in those relations by reframing British-Irish relations as part of a broader relationship between the British Isles. The Council operates with Ireland, England, Scotland, Wales, Isle of Man and the Channel Islands as independent actors.
- 5.6 The Council’s objectives are wide-ranging and non-specific, and as such it determines its own sectoral focus. It was established to:
- further promote positive, practical relationships among the people of the islands; and
 - to provide a forum for consultation and co-operation.
- 5.7 The current list of work areas and the member responsible are:
- Collaborative spatial planning (Northern Ireland)
 - Demography (Scotland)
 - Digital inclusion (Isle of Man)
-

¹³ Strand 3, para 5, Good Friday Agreement 1998.

- Early years policy (Wales)
- Energy (United Kingdom - Electricity Grids, and Scotland - Marine)
- Environment (United Kingdom)
- Housing (Northern Ireland)
- Indigenous, minority and lesser-used languages (Wales)
- Misuse of Substances (drugs and alcohol) (Ireland)
- Social inclusion (Scotland and Wales)
- Transport (Northern Ireland)
- Creative Industries (Jersey)

5.8 Environment has been a sectoral area of the BIC since 1999. Under environment it has covered topics such as food waste, recycling, invasive and non-native species, climate adaptation and the UN Sustainable Development Goals (BIC, 2018) (BIC, 2017). The area of Collaborative Spatial Planning (and related area of Housing) is obviously of environmental significance, as is the issue of Energy (BIC, 2017). The most recent meeting of the Environment sector subgroup took place in Jersey on the 10th September 2018 and discussed cross-European efforts to control an invasive species, the Asian Hornet.

5.9 Generally the BIC has kept to its schedule of two summit meetings per year plus sectoral meetings. The most recent BIC summit (31st Summit) took place in the Isle of Man on the 9th November 2018 (BIC, 2018).

6. British-Irish Intergovernmental Conference (BIIC) (Strand 3)

- 6.1 Also under Strand 3, this was intended to be another East-West orientated body, but instead of operating on a regional basis like the BIC, it is a contact point between the UK and Irish Governments. Designed to replace the Anglo-Irish Conference (Morgan, 2000), it is described as a forum for bilateral co-operation on “all matters of mutual interest within the competence of both Governments” later specified to be non-devolved issues, in recognition of the Irish Government’s special interest in Northern Ireland. Relevant members of the Northern Ireland Administration were also permitted to be present, and will be invited to “express views” to the conference, suggesting an observer role.
- 6.2 The Conference is supposed to meet at Summit level (Heads of Government) primarily, but provision is made for the Government to be represented by appropriate Ministers.
- 6.3 The institution has a very broad and non-specific remit, basically all non-devolved matters. It has not yet dealt with environmental issues but there is no obstacle to it doing so.
- 6.4 This body has been under-utilised to date, with only four summit meetings having taken place since establishment in 1999 (1999, 2007, 2018) (Melaugh, n.d.). The most recent summit on 2nd November 2018 was dominated by discussions of continuing high-level engagement after Brexit (Department of Foreign Affairs and Trade Press Release, 2018).
- 6.5 This entity does not appear to have its own website, and would seem to require expansion of its secretariat and resources.
- 6.6 The body was recently re-convened after a long absence, meeting twice in 2018 (25th July and 2nd November 2018). No explanation was offered for the 11 year period of inactivity. The reason for resumption seems to be the failure to form an executive in Stormont (The Irish News, 2017). While this was welcomed by the UK and Irish Governments, the DUP criticised it as a “talking shop” (Hillard, 2018). It is submitted that given the lack of a forum for communication in Northern Ireland at the moment, such institutions and opportunities for high-level engagement become even more significant. This viewpoint is shared by many academics (Muinzer, 2018) (Harvey, 2018).

7. Other Good Friday/Belfast Agreement Bodies

7.1 The Consultative Civic Forum

- 7.1.1 **The Consultative Civic Forum**¹⁴ is a body set out in Strand 1, designed to allow engagement between the Stormont Assembly and trade union, voluntary and “other” sectors, for engagement on social, economic and cultural issues. The composition and sectors are open ended and left entirely up to the discretion First Minister and Deputy First Minister. As a Strand 1 body, it is by implication designed to feed into legislative and policy making in the Assembly (although its role is not explicitly defined, and it has been described as sitting “uneasily” in Strand 1 (Morgan, 2000)).
- 7.1.2 The Civic Forum is provided for in section 56 of the Northern Ireland Act 1998, which provides that the First Minister and Deputy First Minister shall take from the forum their views; the Forum is the consultee. The provisions were commenced on the 2nd December 1999 (on devolution). In its first iteration it was established (after cross party consultation) with 60 members, plus a chairperson who was appointed by the First Minister and Deputy First Minister (BBC News, 2000). The Ministers also appointed six members. Business and Trade Unions appointed seven each. The Community and Voluntary sector appointed 18 members. The other sectors sharing 22 seats were: Agriculture/fisheries (3), churches (5), culture (4), arts & sport (4), victims (2), community relations (2) and education (2) (Nolan & Wilson, 2015). There were arrangements for securing nomination from consortia and other sectors with gender, community background, geographical and age balance (Morgan, 2000). The work of the Forum was cut short in 2002 after the collapse of the assembly due to the dispute over decommissioning. The Consultative Civic Forum has not been convened since 2002. Devolution was restored in 2007 but the Forum was not reinstated. Instead a review was announced, and conducted, but the report has not been released. This review led to proposal for a minimized version to be known as the Civic Advisory Panel, with membership reduced to six members (Foster, 2016).
- 7.1.3 The Agreement itself provides only a bare description of the Forum’s purpose, which is to provide for civic engagement/consultation between the Assembly and Executive and with

¹⁴ Article 34 of Strand 1 states: “A consultative Civic Forum will be established. It will comprise representatives of the business, trade union and voluntary sectors, and such other sectors as agreed by the First Minister and the Deputy First Minister. It will act as a consultative mechanism on social, economic and cultural issues. The First Minister and the Deputy First Minister will by agreement provide administrative support for the Civic Forum and establish guidelines for the selection of representatives to the Civic Forum.”

Business, Trade Union and Community and Voluntary Sector. In that sense it is a blank slate and open to reconceptualization.

- 7.1.4 The inclusion of the Consultative Civic Forum in Strand 1 suggests it is deserving of higher status than that accorded to it currently, as Strand 1 is the foundations of devolved democracy. It was intended to shadow the work of the Assembly but it has been left on the periphery (Joint Oireachtas Committee on the Implementation of the Good Friday Agreement, 2014) (Deutsch, 2002).
- 7.1.5 The Forum was considered very productive and successful during its brief two-year period of operation with a small budget and secretariat (Nolan & Wilson, 2015). It produced:
- Two responses to the Programme for Government
 - Two substantial reports (on lifelong learning and anti-poverty strategy)
 - Three submissions (on sustainable development, human rights, and victims)
 - Four editions of a Civic Forum Newsletter (Nolan & Wilson, 2015).
- 7.1.6 The final thematic group established before the Forum came to an end was to investigate sustainable development.
- 7.1.7 The Forum is often overlooked in discussion of the GF/BA, but it was seen as an experiment in new modes of democracy (Bell V. , 2004). It has been compared with Ireland's Constitutional Convention, and the National Economic and Social Council, which was the mechanism of Social Partnership in Ireland (Nolan & Wilson, 2015). By extending the formal consultation opportunity, co-operation is encouraged between groups that might not enter dialogue otherwise (Bell V. , 2004).
- 7.1.8 The Consultative Civic Forum would appear to have a lot of potential as a body which could feed into policy making in Stormont. In terms of environmental and cross-border remit, there is nothing in Article 34 which restricts the sectors from which representatives can be taken from, and it is within the power of the First Minister and Deputy First Minister of the Executive in Northern Ireland to structure it how they see fit. The first iteration of the Forum already examined sustainable development as one of its thematic areas.
- 7.1.9 Dybris McQuaid (2009) describes civil society discourse as an influential focal point for common community construction and highlights the need for such discourse to bring greater balance the Nationalist and Unionist aspirations given expression in the Assembly and Executive. The Civic Forum is an obvious starting point for this kind of neutral civil society engagement and discourse.
- 7.1.10 The Consultative Civic Forum has the potential to be a useful tool for focussing on issues of environmental cross-border co-operation insofar as they come within the remit of devolved

governance, providing as it does for engagement with Civil Society/Community and Voluntary Organisations, to feed into Stormont policymaking. This author argues that it is important that it be re-established as a genuine functional body, potentially on a structured legislative basis, which could create a mandatory engagement with any Executive eventually established in Stormont.

- 7.1.11 Encouraging this type of community consultation, particularly in the area of the environment, would also be in line with international obligations, such as public participation in environmental policy making required under the Aarhus Convention¹⁵, and also envisaged in Agenda 2030 and the Sustainable Development Goals, specifically SDG 17¹⁶ on Multi-stakeholder Partnerships (United Nations, 2015).
- 7.1.12 Finally, it is important to note that the GF/BA also provides for (but does not command) the creation of an all-island civic forum. This is set out in paragraph 19 of Strand 2 under the section on the NSMC. It appears from its positioning it would be established under the NSMC and feed back into it. The Agreement states: “19. Consideration to be given to the establishment of an independent consultative forum appointed by the two Administrations, representative of civil society, comprising the social partners and other members with expertise in social, cultural, economic and other issues.”. The Joint Oireachtas Committee on Implementation of the Good Friday Agreement (Joint Committee on the Implementation of the Good Friday Agreement, 2017) has called for this provision to be given effect to, and it would seem to offer an alternative route of North-South co-operation, in circumstances where the NSMC itself is rendered non-functional by the lack of an Executive.

¹⁵ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998, signed in Aarhus, Denmark.

¹⁶ Agenda 2030 SDG 17: “**Multi-stakeholder partnerships**

17.16 Enhance the global partnership for sustainable development, complemented by multi-stakeholder partnerships that mobilize and share knowledge, expertise, technology and financial resources, to support the achievement of the sustainable development goals in all countries, in particular developing countries

17.17 Encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships” (United Nations, 2015).

7.2 SEUPB

- 7.2.1 SEUPB¹⁷, the Special European Union Programmes Body, is responsible for handling funding streams under the European Regional Development Fund (ERDF). SEUPB's main role is to manage cross-border European Union Structural Funds programmes in Northern Ireland, the Border Region of Ireland and parts of Western Scotland. SEUPB's two current programmes (2014-2020) are the European Union's Programme for Peace and Reconciliation (otherwise known as the PEACE IV Programme) and the European Union's Cross-border Programme for Territorial Co-operation, Northern Ireland, the Border Region of Ireland and Western Scotland (otherwise known as the Interreg VA Programme). SEUPB is responsible to the European Commission, the Northern Ireland Executive and the Irish Government for the delivery and management of the programmes.
- 7.2.2 Concerns have been raised (The Centre for Cross Border Studies, 2016, p. 3) regarding the continued eligibility of SEUPB for structural funding from the EU. Reassurances have been given that funding is secure up to 2020, and that work is being conducted by the European Commission on a PEACE Plus funding program to replace the PEACE and Interreg Programs (Donohoe, 2018) (UK Government, 2018). However, it is not known whether the funding will continue past that point.
- 7.2.3 Loss of the SEUPB funding would undermine environmental co-operation as many environmental cross-border projects are funded through SEUPB under the Interreg programme (SEUPB, 2017) e.g.:
- 7.2.3.1 The Marine Protected Areas Management and Monitoring (MarPAMM) project was been awarded €5,983,173.51 under the Interreg VA Programme to deliver four new cross-disciplinary models to support the conservation of marine habitats and species, through integrated elements including a seabirds model designed to quantify and help manage protected seabird species within the Interreg VA region's Special Protection Areas and a marine mammal model aims to examine the movement of seals, levels of underwater noise, and the potential impacts of this noise on seal foraging behaviour. Evidence generated from these models will be used to develop and implement six marine management plans. These plans will be developed alongside existing data and models produced by sister Interreg VA projects. Two of these plans will be produced for Scotland, one in Northern Ireland and three in Northern Ireland and Ireland.

¹⁷ <https://www.seupb.eu/>

7.2.3.2 The Shared Waters Enhancement and Loughs Legacy (SWELL) Project will be implemented over two phases. The successful completion of Phase 1 resulted in a further application for Phase 2. Phase 1: The cross-border project involved a detailed investigation into the causes of water pollution and the most effective ways to prevent it. It brought together key state-owned water companies from Northern Ireland and Ireland as it will be delivered by both NI Water and Irish Water. Phase 2 of the SWELL project aims to improve water quality in the shared transitional waters of Carlingford Lough & Lough Foyle through the improvement of wastewater assets. The project will implement two sewerage network and wastewater treatment schemes which will deliver improved wastewater treatment for an additional 10,000 people in the eligible region. The mechanism for delivering improved water quality therefore will consider each shared water body as a single ecosystem. A holistic modelling strategy will amalgamate the various catchment and marine models to form an Ecosystem model that intends to be both unique and innovative in its detail and scale. It is anticipated that the project will leave an ecosystem model for use by the water companies, environmental regulators and other stakeholders in the eligible area to identify future improvements to enhance water quality.

7.2.4 The above are just two examples of environmental cross-border co-operation projects that were funded under Interreg, out of a total of 29 granted funding in January 2017 (SEUPB , 2017). Tannam argues that funding is a key driver of co-operation (Henderson & McGloin, 2004) (Tannam, 2006). Clearly the EU funding channelled through this body plays a significant role in on-the-ground grassroots co-operation.

7.3 Other Implementation bodies with Environmental Relevance

- 7.3.1 **Waterways Ireland**¹⁸ manages, maintains, develops and promotes over 1000km of inland navigable waterways principally for recreational purposes. The waterways under the remit of the body are the Barrow Navigation, the Erne System, the Grand Canal, the Lower Bann, the Royal Canal, the Shannon-Erne Waterway and the Shannon Navigation.
- 7.3.2 **The Loughs Agency**¹⁹ (part of the Foyle, Carlingford and Irish Lights Commission under the GF/BA) aims to provide sustainable social, economic and environmental benefits through the effective conservation, management, promotion and development of the fisheries and marine resources of the Foyle and Carlingford Areas.
- 7.3.3 The governing legislation confers the following specific functions on the Agency:
- The promotion of development of Lough Foyle and Carlingford Lough for commercial and recreational purposes in respect of marine, fishery and aquaculture matters;
 - The management, conservation, protection, improvement and development of the inland fisheries of the Foyle and Carlingford Areas;
 - The development and licensing of aquaculture; and
 - The development of marine tourism.

It is clear that any regulatory divergence post Brexit would pose a threat to the all-island nature of the work undertaken by these bodies (The Centre for Cross Border Studies, 2016).

¹⁸ <https://www.waterwaysireland.org/>

¹⁹ <http://www.loughs-agency.org/>

8. Conclusions on the Good Friday Bodies

- 8.1 The GF/BA institutions are likely to take on even more significance post-Brexit (Harvey, 2018). This is because one consequence of the UK leaving the EU is that the opportunities for inter-governmental dialogue that arose naturally in the course of the day to day bureaucracy of the EU will be removed. These opportunities will be lost in any kind of Brexit scenario, because in any Brexit scenario the UK will cease to have membership of the EU Institutions. This intra-EU relationship has played an important role in improving British-Irish relations (Harris, 2001) and has been instrumental in the success of the peace process (Harris, 2001).
- 8.2 In a sense perhaps, the Good Friday/Belfast Agreement structures were rendered unnecessary in practical terms by EU membership. This was because shared regulatory context provided by EU membership, and the existence of the EU supra-national governance structures, provided opportunities for inter-governmental dialogue. It also reframed the nature of the relationship between Ireland, Northern Ireland and the United Kingdom within a broader context, focusing it on different agendas, and removing some of the political tension from that relationship (Harris, 2001). The BIC and BIIC have potential (currently unrealised) to be an alternative to intra-EU dialogue (Doyle, 2018) (Harvey, 2018).
- 8.3 In the absence of the context of EU membership, the GF/BA bodies provide opportunities for maintaining a dialogue, and the potential to maintain momentum for co-operation and common standards across the two jurisdictions on the island of Ireland. If this assisted in avoiding divergence and contributed to joint environmental management, it would enhance environmental protection.
- 8.4 The GF/BA institutions were designed as an important counterbalance to the necessary institutionalisation of identity politics in the Assembly and the Executive of Northern Ireland in Strand 1 of the GF/BA. They offer a means of holding and framing alternative dialogues in British/Irish Relations (through the BIC and BIIC) and leave room for the development of a neutral discourse around community issues (through the Civic Forum). However, they have been widely acknowledged as under-utilised (the NSMC, and BIIC), or not utilised at all in some cases (Consultative Civic Forum, All-Island Civic Forum).
- 8.5 Throughout the Brexit process the Irish Government, UK Government and the EU have all committed to supporting and upholding the GF/BA and its institutions (Department of Foreign Affairs, 2018) (McKay, 2019).
- 8.6 The North-South Ministerial Council itself, while once the primary vehicle of cross-border co-operation, is severely undermined by both the crisis in executive formation in Stormont and the issue of Brexit.

- 8.7 Resolving the defect (first identified in the literature as far back as 1999 (O'Leary, 1999)) in the GF/BA 1998 which allows for prolonged executive crisis such as that ongoing in Northern Ireland currently would do much to restore the effectiveness of the NSMC. This could potentially be done by creating a time clause, with a strict time-period within which an executive must be formed, otherwise an election must be held. Provisions limiting the time for executive formation were introduced to the Northern Ireland Act 1998. The time period has been repeatedly extended by legislative provision, the most recent of which extends the time to the 25th August 2019²⁰. Placing a time limit provision in the GF/BA itself would render it a constitutional provision and therefore not amenable to extension by legislation. However, it is acknowledged that any attempt at re-opening of the GF/BA would be a difficult and politically fraught enterprise (Gallagher & O'Byrne, 2017) (Jack, 2018) that could have unintended consequences. There is also the possibility that having another election would still not resolve the political deadlock that exists between the parties, and may just result in a series of elections. However, this would seem to provide more democratic accountability than current arrangements.
- 8.8 The bodies established under the NSMC (Loughs Agency, Waterways Ireland, SEUPB) continue to operate as before and quite effectively, however issues may arise if alterations to their remit by legislation is required, or high level decisions need to be made. This last issue is ameliorated somewhat by the increased powers granted to Civil Servants to make decisions in their functional areas without Ministerial approval²¹. However, this legislation is concerning in itself for reasons of democratic accountability.
- 8.9 Therefore, in the absence of a functioning NSMC, it is argued that focus for continued and enhanced co-operation should be on East-West co-operation and the bodies that provide a forum for this under the GF/BA. This would be a less effective route for co-operation than that provided for under the North-South co-operation body, the NSMC. But, as highlighted earlier, the NSMC continues to be rendered ineffective by the political crisis in Northern Ireland.
- 8.10 The British-Irish Council already has an environmental remit, this could be expanded, with more frequent meetings of the Environment Group.
- 8.11 An environmental dimension could be added to the remit of British-Irish Inter-Governmental Conference (currently it has no environmental remit). This can be done by the BIIC itself as it determines its own workplan areas.

²⁰ The Northern Ireland (Extension of Period for Executive Formation) Regulations 2019
http://www.legislation.gov.uk/uksi/2019/616/pdfs/uksi_20190616_en.pdf .

²¹ Northern Ireland (Executive Formation and Exercise of Functions) Act 2018
<http://www.legislation.gov.uk/ukpga/2018/28/enacted>

- 8.12 Increased Secretariat and increased funding should be provided by both sides to the BIIC, given that Westminster-Dublin co-operation in the area of the environment assumes greater importance in a post-Brexit scenario, whether that is hard or soft Brexit.
- 8.13 The Consultative Civic Forum has the potential to be a tool for focussing on issues of environmental cross-border co-operation insofar as they come within the remit of devolved governance, providing as it does for engagement with Civil Society/Community and Voluntary Organisations, to feed into Stormont Assembly policymaking. This author argues that it is important that it be re-established as a genuinely functional body, potentially on a legislative basis which could create a mandatory engagement with any Executive eventually established in Stormont.
- 8.14 Assurances should be sought from the EU that if the UK leave, Ireland will continue to have the ability to conduct the kind of co-operation that it now has even if the UK is a third country, and Northern Ireland moves outside the Customs Union.
- 8.15 D'Arcy M. points out for these bodies to continue to operate it is imperative that the shared regulatory context is maintained as much as possible through the institutions processes and governance of the Good Friday/Belfast Agreement and its oversight potential along with that of the North/South bodies by strengthening it as a 'living agreement' with a "backstop" arrangement that provides additional underpinning in EU and UK law (D'Arcy & Ruane, 2018). Therefore, it is imperative that efforts are made in all jurisdictions to ensure maintenance of a shared regulatory context where possible.
- 8.16 While some have commented that the UK leaving the EU may weaken the GF/BA, pointing to the references to EU membership within the text in support of this (Doyle, 2018), the references to the EU are quite oblique, importing the assumption of EU membership but neither relying on nor requiring it. In this writer's opinion, there is nothing in the text of the Agreement itself that prevents the institutions of cross-border co-operation from operating between an EU and a non-EU member. Whether issues external to the Agreement such as changes to the border affects their operation depends entirely on the nature of the post-Brexit relationship between the EU and UK.

9. The GF/BA and the Environment

Introduction

9.1 The GF/BA mentions the environment as an area of cross-border co-operation in the Annex to Strand 2, and as an area of consideration for the British-Irish Council. Improving the environment also gets a mention under Economic, Social and Cultural issues. This repeated mention and focus on environment in the work remit of the institutions was forward-thinking for the time, particularly in the context of a post-conflict society where environmental issues may not have been high up the agenda (Turner, 2009).

9.2 The GF/BA also mandates the creation of a regional development policy, to be concerned with planning matters²² (McKay & Murray, 2017, p. 10).

9.3 The GF/BA supports and provides the impetus for cross-border co-operation in the area of the environment in the sense of being an enabling provision, but the EU regulatory framework provides the context that allows it to happen. Dr. Gravey (Gravey V. , 2018) states that it is difficult to assess how much the GF/BA did for environmental co-operation, but that it is clear the institutions provided a forum and an important opportunity to meet to discuss common policy (although sometimes lacking in practical detail).

9.4 However despite the areas of environmental co-operation outlined above and the work of the cross-border implementation bodies, environmental protection continues to be problematic in Northern Ireland, arguably lagging behind the other areas in the British Isles (Gravey, et al., 2018) (Brennan, Hjerp, & Purdy, 2017) (Macrory, 2004) (Burns, et al., 2018) (Turner, 2009).

9.5 Some of the issues identified by the many reviews of environmental governance conducted in Northern Ireland highlight the following:

- **Lack of consistency in application of EU environmental law** leading to differing standards across the jurisdictions of the UK (Gravey, et al., 2018) (Turner, 2006).

²² Para 2(i), in “Rights, Safeguards And Equality Of Opportunity: Economic, Social and Cultural Issues”, the Good Friday/Belfast Agreement: “a new regional development strategy for Northern Ireland, for consideration in due course by the Assembly, tackling the problems of a divided society and social cohesion in urban, rural and border areas, protecting and enhancing the environment, producing new approaches to transport issues, strengthening the physical infrastructure of the region, developing the advantages and resources of rural areas and rejuvenating major urban centres;”

- **Crisis of executive formation** which has several deleterious consequences for environmental governance:
 - No legislation being passed updating and implementing EU environmental law.
 - Civil Servants filling the role of Ministers without the power to make high-level decisions (Doherty, 2018) (as mentioned this is addressed somewhat by the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018²³, but these arrangements would seem to an unsatisfactory long-term arrangement).
 - Legislation²⁴ giving Civil Servants the power to make high-level decisions, which was introduced to fill the power vacuum of the executive crisis, creating transparency and accountability issues (Gravey V. , 2018).
 - Lack of a voice for Northern Ireland at a crucial time, in general in the negotiation of Brexit, and in important developments like the Common Frameworks (Gravey, et al., 2018) as civil servants still cannot officially negotiate or represent Northern Ireland in these discussions, even if doing so unofficially.
- **Lack of an independent monitoring environment agency** within Northern Ireland, with the Northern Ireland Environment Agency being situated in a government department (Phinnemore, Interview, 2018) (Gravey V. , 2018) (Muinzer, 2018).
- Problems with cross-border enforcement in the area of environmental crime (Brennan, Hjerp, & Purdy, 2017).
- Cross-Border illegal dumping (Burns, et al., 2018).
- Cross-border fuel laundering.
- Gaps in protected sites designation.

9.6 Dr. Brennan states that in order to have effective environmental protection there needs to be all-island governance and coherent policy in areas like protected sites designation, cross-border crime and waste management (Brennan, 2018). At the moment there are gaps in all these areas caused in part by the lack of joined-up thinking. For example, the section of Carlingford Lough in Northern Ireland is designated as a Special Protection Area (SPA) whilst the section over the border in Ireland is designated as a Special Area of Conservation (SAC) and a Special Protection Area (SPA). Hence Carlingford has the same protection north and south of the border for its bird interest but not for its priority habitats. Clearly there should be one jointly managed SAC in the

²³ Northern Ireland (Executive Formation and Exercise of Functions) Act 2018

<http://www.legislation.gov.uk/ukpga/2018/28/enacted> .

²⁴ Ibid FN 23 above.

whole area. The lack of agreement regarding territorial claims to the border Loughs, Carlingford and Foyle, may also lead to friction and barriers post-Brexit.

9.7 The fear also is that there could be a lowering of standards in the area of the environment after Brexit (D'Arcy, 2017) (Cowell, et al., 2019), in particular because elements of the Brexit campaign were motivated by a de-regulation agenda to get rid of “red tape” (Monbiot, 2019). However, it should also be pointed out there is also the potential for maintaining or even raising of standards, as committed to by Michael Gove in his Green Brexit Agriculture Report (Gove, 2018).

Actual Cross-Border Co-operation

9.8 The GF/BA structure means that the relevant corresponding Ministers in the Irish and Northern Irish executives are responsible for areas of cross-border cooperation, obliging them to assign teams in their departmental portfolios to oversee co-operation relevant to the activities of the NSMC (Phinnemore & Hayward, 2017, p. 18).

9.9 The “Mapping Exercise” Technical Note (Department for Exiting the European Union, 2018) lists a number of matters under the heading of Environment, as well as numerous topics under other areas that have impact on the environment (e.g. under “Agriculture” it lists topics of environmental relevance including pesticides and invasive alien species). It would be beyond the scope of this report to explain each area listed in the Technical Note in detail and how it would be impacted by a hard or soft Brexit (but this could be an area for further research). Instead some examples are explained here to illustrate the challenges of cross-border environmental co-operation and sketch likely impacts on cross-border co-operation:

9.9.1 **River Basin Management:** The Water Framework Directive²⁵ requires management of rivers through entire water basins and is aimed at improving water quality throughout the EU. Many of these water basins cross country and county boundaries. It applies to rivers, lakes, groundwater, and coastal waters. The Directive requires an integrated approach to managing water quality on a river basin basis; with the aim of maintaining and improving water quality. The Directive requires that management plans be prepared on a river basin basis and specifies a structured approach to developing those plans. Cycle 2 identified six River Basin Districts (RBDs) on the island of Ireland. Two of these are shared with Northern Ireland (Neagh Bann and North Western), one is wholly within the state (Ireland) and three are wholly within Northern Ireland (Neagh Bann NI, North East NI and North Western NI). Cycle 1 identified eight RBDs on the island of Ireland for the purpose of

²⁵ The Water Framework Directive (WFD) (2000/60/EC) came into force in December 2000 and establishes a framework for community action in the field of water policy and for the protection of inland surface waters, transitional waters, coastal waters and groundwater.

implementing the Directive. Three of these were shared with Northern Ireland (Shannon, Neagh Bann and North Western), four RBDs were wholly within the state (Eastern, South Eastern, South Western and Western) and one was wholly within Northern Ireland (North Eastern).

- 9.9.2 Development of the river basin management plans has involved a coordinated effort across a wide range of organisations, including a high level of coordination with the authorities in Northern Ireland in relation to the cross-border RBDs.
- 9.9.3 A key requirement of the Directive is public participation and a number of major public consultations have contributed towards development of the plans. The main objectives of the WFD are to maintain the “high and good status” of waters where it exists, prevent deterioration in existing status of waters and to achieve or restore at least “good status” in relation to all waters by 2015. The mechanism to achieve this under the WFD is through the adoption and implementation of River Basin Management Plans (RBMPs) and Programmes of Measures (POMs) for each of the eight identified RBDs.
- 9.9.4 Maintenance of the EU Acquis by the UK Withdrawal Act 2018 should mean that the WFD becomes part of UK domestic law as if it were a domestic instrument, together with the obligation to deal with watercourses on a cross border basis, and the non-deterioration principle. Whether this protection will be maintained and whether there is a risk of lowering of standards later on depends on the nature of the relationship that evolves between the UK and the EU.
- 9.9.5 **Nature/biodiversity, including habitats and birds:** There are a number of important cross-border designated protected sites (ASSIs, SPAs SACs). These include Lough Foyle, Carlingford Lough, Pettigo Plateau and Slieve Beagh.
- 9.9.6 There are nine SACs with marine components the waters off Northern Ireland, including one cross-border site, one site straddling the inshore and offshore regions, and one offshore site. In fact there are two separate Carlingford Lough SPAs, one each in counties Louth and Down²⁶. In Northern Ireland designation of SACs with Marine Components is carried out jointly by DAERA Marine and Fisheries Division, and NIEA Natural Environment Division.

²⁶ <https://www.daera-ni.gov.uk/sites/default/files/publications/doe/Carlingford%20Lough%20citation%20documents%20and%20map.pdf>

- 9.9.7 The introduction of a hard border and/or any potential regulatory divergence post Brexit presents practical and legal problems in the joint management of these sites.
- 9.9.8 **Environmental Funding:** The Environmental Pillar/NIEL joint submission to an Oireachtas Committee highlights the importance to Northern Ireland and the Border Counties of Ireland of the EU Interreg VA Programme 2014-2020 which currently provides funding to: (i) promote cross-border co-operation in the recovery of selected protected habitats and priority species (value: €11m) and (ii) develop cross-border co-operation capacity for the monitoring and management of marine protected areas and species (value: €11m); to improve (i) water quality in shared transitional waters (value: €30m) and (ii) freshwater quality in cross-border river basins (value: €20m) (NIEL & Environmental Pillar, 2018). Northern Ireland benefits from the Common Agricultural Policy, the European Regional Development Fund, the European Social Fund and the European Maritime and Fisheries Fund, as well as the PEACE IV and Interreg programmes. Approximately 8% of the GDP of Northern Ireland comes through EU funds, much of which is spent on cross-border cooperation (Gallagher & O'Byrne, 2017). The EU & UK have committed to maintaining PEACE and Interreg funding to 2020 and to establish a PEACE Plus fund for beyond 2020 (Donohoe, 2018). However, continuity after this point is unclear.
- 9.9.9 As discussed in section 7.2 [SEUPB] above this funding is a major driver of cross-border co-operation (Henderson & McGloin, 2004) (Tannam, 2006).
- 9.9.10 **Other areas of co-operation listed under the “Environment” heading in the mapping exercise are:** All-island pollinator plan, All-island marsh fritillary group, Flood risk management, Lough Erne water level agreement, Strategic environmental assessments; environmental impact assessments; appropriate assessments, Northern Ireland Water/Irish Water knowledge sharing, Mapping data, Geodetic network, Radiation, Wildfire initiatives, All-island fracking, All-island air quality research: Residential Solid Fuel and Air Pollution, Water Quality, Wildlife trade including CITES, Fluorinated gases, Environmental research. Work Programme agreed by Ministers in September 2016: sustainable development; waste/water management; cooperation and exchange of information on marine/bathing/shellfish waters and water sewage services; circular economy; tackling environmental crime; cross border waste management.
- 9.9.11 **Other relevant areas not listed under environment but with environmental implications include:**
- Agriculture: CAP matters, Pesticides, Forestry, Rural Development
 - Planning, Spatial Planning.
 - Energy: The All-Island Single Energy Market
 - Transport infrastructure and public transport

9.10 It is clear that substantial cross-border co-operation has arisen under the GF/BA. However, there is still room for further development of this co-operation. Some examples of areas where environmental co-operation is incomplete are:

- Cross-border environmental crime (Gravey, et al., Northern Ireland: Challenges and opportunities for post-Brexit environmental governance, 2018) (Brennan, Hjerp, & Purdy, 2017).
- Regulatory alignment is not complete because of patchy and fragmentary transposition in the two jurisdictions (InterTrade Ireland, 2011).
- Failures in relation to designation of all qualifying Natura 2000 sites (SPA and SAC) on both sides of the border, or incomplete capture of sites, and failures in relation to management of these.

10. Conclusions on the GF/BA and Environmental Cross-Border co-operation

- 10.1 While the GF/BA did not have the environment as its main focus, it removed any possible objections or impediments, and created a gentle impetus for co-operation. In that sense it is important to see the GF/BA as an enabling agreement, and as can be seen from the “Mapping Exercise”, co-operation has expanded to areas that were not originally envisaged by the Agreement (for example the development of the All-Island Single Energy Market).
- 10.2 The GF/BA co-operation cannot really be forced by legal means, as that would defeat the spirit of the Agreement. Therefore, any co-operation that does occur is largely dependent on the willingness of the various stakeholders in the environmental sphere to come together on co-operative initiatives, or as a result of the driving force of EU legislation, in the case of protected sites designation. It is incumbent on all stakeholders working in this area to direct their efforts in a solution-orientated manner to the issue of post-Brexit environmental co-operation.
- 10.3 Because of the existence of the GF/BA, the EU dedicated a number of funding streams to cross-border co-operation, in many areas including the Environment under the PEACE, LIFE and Interreg programmes, as well as indirectly through the environmental initiatives under CAP. The importance of EU funding streams for maintenance of cross-border co-operation in many areas including the environment, and for the success of the GF/BA, cannot be overstated, but the much of this cross-border funding was as a result of the GF/BA and the EU’s attempts to support it.
- 10.4 Dr. Gravey points out that cross-border co-operation is largely informal and predicated on pragmatic considerations of the need for joint funding applications from the EU funding streams. (Gravey V. , 2018).
- 10.5 This cross-border funding is a huge driver of environmental co-operation and the loss of it would be detrimental to cross border co-operation in this area. The EU has guaranteed the PEACE and Interreg funding streams up until 2020 in the event of a no-deal Brexit (Donohoe, 2018). The UK also committed to replacing these funding streams and those under CAP (UK Government, 2018).
- 10.6 It is through this EU incentivisation of co-operation that the GF/BA was able to “reframe the border as a point for cooperation not conflict” (Phinnemore & Hayward, 2017, p. 22).

11. The GF/BA and Human Rights Law

- 11.1 The GF/BA is also a human rights instrument, guaranteeing that the people of Northern Ireland will have an equivalent level of protection of human rights to those in the South of Ireland, and that the European Convention on Human Rights (ECHR) and a Bill of Rights for Northern Ireland would be effected by the UK (Gallagher, Patrick, & O'Byrne, 2018).
- 11.2 The Bill of Rights was never enacted, but the UK did give effect to the ECHR through domestic legislation in the UK, through the Human Rights Act 1998. There was talk of withdrawing from the ECHR, but it is considered that this would be in breach of the GF/BA, as its implementation was a specific obligation in the Agreement.
- 11.3 The Charter of Fundamental Rights of the European Union was something that gave additional human rights protections to the people of Northern Ireland, but this will be lost as the UK do not plan to convert it to UK law post-Brexit (Gallagher, Patrick, & O'Byrne, 2018, p. 67). However Muinzer is more doubtful that this guarantees a lower level of environmental rights protection than that currently available, citing the lack of robust protection of environmental rights in the case law on the Charter (Muinzer, 2018).
- 11.4 Under the Withdrawal Agreement Protocol on Ireland and Northern Ireland, Irish citizens from Northern Ireland will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland.
- 11.5 The UK has committed to ensuring that, in Northern Ireland, “no diminution of rights is caused by its departure from the European Union” and this is enshrined in the Protocol on Ireland and Northern Ireland.
- 11.6 In its position paper on Northern Ireland, the UK Government promised that people born in Northern Ireland who hold Irish citizenship will still benefit from EU citizenship and rights after Brexit: (Gallagher, Patrick, & O'Byrne, 2018, p. 68).
- 11.7 The continued application of the ECHR to Northern Ireland could provide an avenue of legal redress should environmental de-regulation result in environmental degradation or a reduction of the kind of environmental procedural rights usually facilitated by EIA and SEA law.
- 11.8 The European Court of Human Rights has found that an aspect of Article 8 right to private and family life encompasses the right to live in a home that is not affected by pollution or environmental nuisance (e.g. Lopez Ostra v Spain 1994) and to participate in environmental decision making (e.g. Taskin v Turkey (2004)).

- 11.9 Therefore, removal of any procedural environmental rights, or lowering of standards that results in environmental harm could result in a cause of action for those whose homes are affected by the environmental harm that results.
- 11.10 In the realm of environmental procedural rights the UK will continue to be subject to the Aarhus and Espoo Conventions, and any reduction below the standards guaranteed in those Conventions could result in a claim against the State in the domestic courts, where the provisions of those conventions have been given effect to under domestic law (i.e. where they have already been given effect to through EU law, and that EU law will be part of the retained “Acquis”). Both Conventions also have Compliance Mechanisms that can adjudicate on non-compliance by State Parties with the Convention’s provisions, which may provide some avenue to tackle non-compliance in a de-regulation scenario.
- 11.11 Professor McIntyre from UCC cautions against over-optimistic reliance on the Human Rights aspects of the GF/BA to maintain regulatory alignment. He cites the margin of appreciation that pertains in all human rights law, which has the potential to frustrate enforcement, pointing out that it can be hard to determine when a right has actually been breached. (McIntyre, 2018).
- 11.12 Professor McCrudden from Queens University Belfast also cautions that rights based approaches are not always the best way to tackle political problems, and can form obstacles to flexible negotiations (McCrudden, 2017, p. 6).
- 11.13 It remains concerning that the enforcement of a human rights based environmental right would rely (at least initially while exhausting domestic remedies) on the UK domestic courts, which have not demonstrated a robust approach to protecting human rights (McCrudden, 2017), and have well documented issues with access to justice in environmental matters.

12. Implementation of the GF/BA

- 12.1 A crucial consideration in any discussion of the future of the Good Friday/Belfast Agreement after Brexit is the issue of implementation of the Agreement.
- 12.2 Elements of the Agreement that have yet to be implemented include the Bill of Rights for Northern Ireland (based on the European Convention on Human Rights); an Irish Language Act for Northern Ireland; and the establishment of a Consultative Forum, and an All-Island Consultative Forum (Joint Committee on the Implementation of the Good Friday Agreement, 2017).
- 12.3 The GF/BA bodies comprised important elements of a carefully constructed mechanism, which was designed to balance the highly divided Assembly and Executive structure with inter-related considerations of British-Irish relations and Civic Society engagement (Dybris McQuaid, 2009). However, they have been under-utilised, in large part because of the issues of executive formation that have plagued politics in Northern Ireland since the bringing into force of the Agreement.
- 12.4 **The Consultative Civic Forum**²⁷ is a body set out in Strand 1, designed to allow engagement between the Stormont Assembly and trade union, voluntary and “other” sectors, for engagement on social, economic and cultural issues. The Consultative Civic Forum would appear to be an institution with much potential as a body which could feed into policy making in Stormont. In terms of environmental and cross-border remit, there is nothing in Article 34 which restricts the sectors from which representatives can be taken from, and it is within the power of the First Minister and Deputy First Minister to structure it how they see fit. It was designed to shadow the work of the Assembly but has been allowed to fall into abeyance. Recent proposals are for a much-reduced version of it, the Civic Advisory Panel, which would see original membership of 60 reduced to just six members. There has been clear failure to implement this aspect of the Agreement fully.

²⁷ Article 34 of Strand 1 states: “A consultative Civic Forum will be established. It will comprise representatives of the business, trade union and voluntary sectors, and such other sectors as agreed by the First Minister and the Deputy First Minister. It will act as a consultative mechanism on social, economic and cultural issues. The First Minister and the Deputy First Minister will by agreement provide administrative support for the Civic Forum and establish guidelines for the selection of representatives to the Civic Forum.”

- 12.5 **The Bill of Rights:** The GF/BA provided for the drafting of a Bill of Rights for Northern Ireland²⁸ which would be based on the ECHR but take account of the particular human rights requirements of Northern Irish politics. The Northern Ireland Human Rights Commission began work on the Bill of Rights in 2000. However the Bill of Rights has never actually come to pass. Bill of Rights for Northern Ireland would be effected by the UK (Gallagher, Patrick, & O'Byrne, 2018).
- 12.6 The Bill of Rights was never enacted, but the UK did give effect to the ECHR through domestic legislation in the UK, through the Human Rights Act 1998.
- 12.7 The widely held and accepted view is that the GF/BA has yet to be fully implemented, and as such would seem to provide fertile soil for future cross border co-operation (Joint Committee on the Implementation of the Good Friday Agreement, 2017) (Phinnemore & Hayward, 2017) (D'Arcy M. , Interview, 2018) (Lo, 2018).
- 12.8 This view was supported by academics when interviewed such as (McIntyre, 2018) (Gravey V. , 2018) (Harvey, 2018)(Phinnemore, Interview, 2018).
- 12.9 Professor Harvey posits the persuasive view that the full potential of the GF/BA for cross-border co-operation has yet to be realised, in part because it wasn't necessary to exploit it in the context of EU membership, and that it will come into its own in a post-Brexit scenario (either hard or soft). (Harvey, 2018)
- 12.10 Notable failures of implementation include the Stormont Assembly, and consequently the NSMC and the BIC and the long absence of the BIIC.
- 12.11 These bodies are under-utilised, but as stated by Professor Harvey (Harvey, 2018) they may yet come into their own when Brexit happens, as important fulcrums for developing common policy frameworks in all areas including the environment.
- 12.12 The Bill of Rights and the Consultative Forum are areas that could have a lot of potential to further the agenda of environmental protection.

²⁸ Para 4, "Rights, Safeguards And Equality Of Opportunity: United Kingdom Legislation." The Good Friday/Belfast Agreement 1998.

13. Legal Methods of Enforcing the Agreement

- 13.1 O’Leary states the Agreement is “vulnerable both to post-Agreement bargaining and to legalism” (O’Leary, 1999), implying that attempts to precisely delineate the exact nature of the legal rights and obligations in the Agreement would be damaging to it.
- 13.2 The GF/BA is much more than a mere legal agreement, or set of legal rules. It is an agreement that goes beyond creating certain concrete structures and according strict legal rights.
- 13.3 The view has been espoused that the GF/BA could be amended in various ways such as the deletion of the EU references (Tonge, 2017), and the inclusion of a time-limit for executive formation to avoid situations like the current crisis (O’Leary, 1999). However such views must be balanced by an understanding of the difficulty and danger involved in renegotiating an agreement like the GF/BA, which will likely revive old disputes that had been paved over through the passage of time as the operation of the Agreement became a day-to-day reality (Jack, 2018) (Gallagher & O’Byrne, 2017). This can be seen in the lengthy and gruelling negotiations for the St Andrews Agreement in 2006/2007.
- 13.4 The UK’s obligations in international law, via its commitment in the British-Irish Agreement to uphold the GF/BA, are owed to Ireland (as a State) and the people of Northern Ireland. Article 27 of the Vienna Convention on the Law of Treaties declares that states cannot invoke domestic law - in this case the impact of a Brexit bill - as a basis for failure to undertake the obligations of a treaty.
- 13.5 However, the GF/BA is excluded from the jurisdiction of the International Court of Justice, as part of the terms on which Ireland acceded to the jurisdiction of the Court in 2011 (Department of Foreign Affairs, 2018a) (Harvey, 2018).
- 13.6 The people of Northern Ireland have, under both the GF/BA and established principles of international law, the right to self-determination. This includes the right to legal and political arrangements necessary to ensure economic security in Northern Ireland, whatever these are determined to be, including but not limited to a “special arrangement” with the European Union (e.g. the type of relationship envisaged by the Protocol on Ireland and Northern Ireland in the Withdrawal Agreement).
- 13.7 O’Gorman has charted several options for EU-UK relations beyond the usual ones considered, including Association Agreements such as that concluded with Moldova, which represents a Deep and Comprehensive Free Trade Agreement (DCFTA) (O’Gorman, 2018).

13.8 It seems important the spirit of flexible solution-seeking that resulted in the original GF/BA is maintained in any attempts to seek to reconcile UK withdrawal from the EU with the GF/BA.

14. How these areas are impacted by the Withdrawal Agreement

- 14.1 It has been stated that Brexit is incompatible with the GF/BA, given its basis in the shared assumption of EU membership, but the UK Supreme Court has ruled that the GF/BA and Northern Ireland Act 1998 do not explicitly make continuing membership of the EU a binding obligation of the GF/BA²⁹ (Gallagher & O'Byrne, 2017).
- 14.2 The Withdrawal Agreement³⁰ is an extensive document providing for the UK's relationship with the EU during the transition period (period from 29th March 2019 when the two year Article 50 notice period ends, up to December 2020 when the transition ends, and whatever new trade deal has been negotiated, begins). It provides that the UK and NI stay within the Customs Union and the Single Market and they will apply all EU law during the transition. However, the UK will cease to have a seat at the table during this period, with no representatives in the EU institutions. The Withdrawal Agreement commits both Parties to ensuring that the necessary conditions for continued North-South cooperation are maintained (including on the environment), preserves the Single Electricity Market on the island of Ireland and protects the all-island economy (European Commission, 2018).
- 14.3 The Withdrawal Agreement Protocol on Ireland and Northern Ireland is what is known as the "Backstop". This means it is a set of default conditions which will activate in the event of a failure to reach agreement on these issues in trade negotiations on the future relationship of the UK and the EU. It contains a strong commitment to maintain cross-border co-operation as it currently stands (Article 13), a degree of regulatory alignment necessary for the maintenance of trade, and guarantees that certain principles of EU environmental law will be preserved. It commits to maintaining the current standards of EU Law (Annex 4 and the principle of non-regression), but not for continued linkage of UK standards to EU standards. The principle of non-regression would prove important in the short term for preventing a "bonfire of the regulations" (D'Arcy C. , 2017). It does not require continued regulatory alignment, and makes no provision for matching any future raising of standards in EU law. However, the Political Declaration on Future EU-UK relations commits both parties to "building on" these environmental provisions in the future relationship proper. It is encouraging that all parties to the Brexit negotiations have made repeated commitments to upholding both the GF/BA and the Institutions (McKay, 2019), as does the Withdrawal Agreement.

²⁹ R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] 2 WLR 583, [129].

³⁰ <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration>

- 14.4 A core objective (Article 1(3)) of the Protocol is to “maintain the necessary conditions for continued North-South cooperation.” Article 13, on ‘Other areas of North-South cooperation’, requires the Protocol to be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation, including in the areas of environment, health, agriculture, transport, education and tourism, as well as in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. Crucially, the Protocol provides arrangements for North-South co-operation remain a matter for the Northern Ireland Executive and the Government of Ireland to determine, thereby preserving the integrity of the GF/BA and the institutions such as the North-South Ministerial Council.
- 14.5 However, while the Protocol provides for a high degree of regulatory alignment, many experts hold the view that without the oversight of the European Commission and the CJEU, and given the pre-existing issues with environmental governance in Northern Ireland, some degree of slippage of standards of regulation and enforcement is quite likely. This would lead to an undesirable element of divergence that would place barriers in the way of cross-border co-operation (Jack, 2018) (McIntyre, 2018).
- 14.6 Phinnemore argues that the backstop represents the EU “red line” below which they will not go, and that it is therefore likely to form the baseline in any negotiations on a future relationship (Phinnemore, Interview, 2018). One consequence of this would be that any variation of the agreement needs to offer a higher level of protection for the environment. However this remains a matter of considerable uncertainty.
- 14.7 Customs Union and Single Market membership for Northern Ireland, (i.e. a very high degree of regulatory alignment) would be the ideal context for maintenance of GF/BA environmental co-operation post-Brexit.
- 14.8 The Customs Union/Single Market provisions are temporary placeholders until a full trade deal is negotiated. If the Withdrawal Agreement were to be accepted (which is looking increasingly unlikely), the provisions will pertain from the 29th March 2019 (if the Article 50 notification period is not extended which would preserve the status quo) to the end of the transition period (December 2020 if the transition period is not extended). The Environment provisions in the Ireland/Northern Ireland Protocol (“The Backstop”) are a fall-back in the event that the transition period ends in December 2020 and no future relationship has been negotiated.
- 14.9 Therefore it is difficult to predict the impact of the eventual “Deal” scenario Brexit for environmental regulation in the UK. However, it is likely that due to the evinced commitments on the part of both the UK and Ireland to the integrity of the GF/BA, any deal agreed would protect cross-border co-operation. If it did not, it would constitute a breach of international law.

- 14.10 The UK's Withdrawal Act 2018³¹ commits to maintaining the entirety of the EU Acquis (in Sections 2 - 7) unless and until it is repealed on a case by case basis. It also gives Westminster considerable powers to alter retained EU laws in the areas of competence devolved administrations (Section 12) without the consent of those administrations.
- 14.11 Even if regulatory alignment is maintained, a matter of great concern for actual effectiveness is the loss of the oversight of the Court of Justice of the European Union and the European Commission in its monitoring and enforcement function. The prospect of large fines and findings of non-compliance traditionally has been a great motivator for progressing environmental protection, and in this respect the European Union has been incredibly important in terms of maintaining a high level of environmental protection.
- 14.12 In the event of a trade deal involving Single Market and Customs Union membership for the whole of the UK, or just Northern Ireland, this jurisdiction will cease. If the eventual trade deal involves some kind of EEA membership, this will be replaced by the jurisdiction of the EFTA Court and the EEA Enforcement Mechanism. However, these are not as effective in motivational terms as the hard law mechanisms being lost.
- 14.13 Loss of the Charter of Fundamental Rights will represent a step backwards in terms of protection of environmental rights. Dr. Brennan & Dr. Gravey suggests replacing with a UK wide Charter reproducing the rights in the Charter of Fundamental Rights of the European Union (Brennan, 2018) (Gravey V. , 2018). However Dr. Muinzer takes the view that environmental protections under the Charter are not that well developed in terms of environmental law, and that the ECHR is of much greater importance in terms of environmental rights (Muinzer, 2018).
- 14.14 While there are issues with the "Backstop" in terms of potential for slippage and divergence of environmental regulation, it represents a good option for maintenance of the shared regulatory context that is so critical to continued cross-border co-operation (both in general and in the area of the environment) (D'Arcy & Ruane, 2018).

³¹ European Union (Withdrawal) Act 2018 c.16

15. How these areas are impacted by a “No-Deal” “Hard Brexit”

- 15.1 “Hard Brexit” is used in this context to mean the UK withdraws from the EU on the 29th March 2019 without a deal in place, and without a transition agreement in place to soften the blow (so-called cliff-edge scenario).
- 15.2 The Withdrawal Act 2018 (European Union (Withdrawal) Act 2018) still applies in the event of a no-deal Brexit. It provides for repeal of the European Communities Act 1972 on the 29th March 2019, and commits to maintaining the entirety of the EU Acquis (in Sections 2 - 7) unless and until it is repealed on a case by case basis. It also reverts back all EU law matters to Westminster (Section 12), where those matters were not already part of the devolved competencies.
- 15.3 The UK will presumably revert back to the default of World Trade Organisation law as the basis for their relationship with the EU. Tariffs and Customs Duties will apply, as well as rules of origin, for any UK/NI products being sold into any EU Member State including Ireland. This means checks on goods for compliance with EU rules and monitoring customs, which means some kind of Border will be manifest, even if it is a largely technological one.
- 15.4 Some environmental law will have to be mirrored in UK law in order for its goods to meet required standards for trading-in. Dr. Gravey, Professor Muinzer and Professor McIntyre are of the opinion that this market-orientated driver towards harmonisation of standards will by necessity require maintenance of a certain level of environmental protection (McIntyre, 2018) (Muinzer, 2018) (Gravey V. , 2018). However, whether such market-orientated standards will include important areas such as habitats, Water Framework Directive co-operation, air quality and water quality is a matter of much debate. It probably will include emissions, waste standards, chemicals, products, eco-labelling, and environmental health matters. As Burns et al point out, in a chaotic no-deal scenario, there will be short term disruptions while regulatory gaps are filled (for example with chemicals, the UK will need to both put in place domestic structures and negotiate access to the ECHA before business as usual can resume) (Burns, Gravey, & Jordan, 2018).
- 15.5 Non-tariff barriers may be applicable and have an effect in maintaining standards in certain areas like technical requirements such as licensing, labelling, standards and sanitary and phytosanitary rules (rules designed to protect health and food safety). They also cover requirements on customs inspections and documentation and measures to restrict competition from imports to protect domestic firms. (Intertrade Ireland, 2017)

- 15.6 Professor O’Gorman (O’Gorman, 2018) also points out that the EU is an important norm-creator and that the standards, technical or legislative are often adopted as examples of best-practice by third countries without the need for “encouragement” (for example the widespread adoption of REACH measures in third countries.). Several academics interviewed emphasised the importance of trade related environmental measures as a tool for regulatory alignment, and that deregulation may not automatically occur as fast as expected, or at all, where necessary to preserve trade rights.
- 15.7 Finally Dr. Gravey (Gravey V. , 2018) takes the view that the present UK government has made a strong commitment to an environmental agenda in its “Greening Brexit” paper and its 25 year Environmental Plan (Gravey, et al., 2018).
- 15.8 However, the “hardening” of the border would present a practical obstacle to cross-border co-operation in a variety of areas, and an administrative obstacle, placing bureaucratic barriers in the way of co-operation between Councils and state agencies. It is also likely that significant regulatory divergence and de-regulation in the area of the environment would occur in this scenario (D’Arcy M. , Interview, 2018) (Doherty, 2018) (Lo, 2018) (Burns, Gravey, & Jordan, 2018) (McIntyre, 2018).
- 15.9 There may also be legal impediments in trade-related environmental co-operation areas, such as waste, where any co-operation would possibly require EU sanction. Ireland, as a member of the Customs Union would have no right to negotiate on any trade-related matters with the UK/NI, in the absence of any special arrangements for Northern Ireland.
- 15.10 Ultimately, it is likely that a hard Brexit would be represent a difficulty for continued cross-border environmental co-operation, and a threat to the integrity of environmental protection on the Island of Ireland.

16. Conclusions

- 16.1 The Good Friday/Belfast Agreement has played a significant role in creating and encouraging cross-border co-operation (Harris, 2001). The mandatory areas of co-operation and the complex institutional structures created to make real the co-operation envisaged have had very practical effects in terms of cross-border co-operation. However, it could be said that the bulk of this co-operation is at a top-down high level of governance, and that from a bottom-up perspective not a lot has changed. There are still major governance gaps in the area of cross-border environmental crime (Brennan, Hjerp, & Purdy, 2017) (Brennan C. , Interview, 2018), waste, and a lack of joined up approach to protected site designation and management. On the ground co-operation remains largely unstructured and mainly occurring in response to EU funding ring-fenced for cross-border projects (Henderson & McGloin, 2004) (Tannam, 2006).
- 16.2 More could be done to utilise the structures of the six implementation bodies and the GF/BA institutions (NSMC, BIC, BIIC, Civic Forum, All-Island Civic Forum) to encourage on the ground co-operation.
- 16.3 The failure of full implementation of all of the provisions of the GF/BA means that the full potential of cross-border co-operation has not yet been realised.
- 16.4 Brexit will present a significant challenge to the maintenance of cross-border co-operation currently ongoing. This will stem from:
- 16.4.1 The removal of the shared regulatory context providing opportunities for high level discussion and providing a common basis of rules between the jurisdictions, which is a necessary pre-condition for co-operation. Membership of regulatory bodies like the European Chemicals Agency will likely cease (Macrory R. , 2018). The potential exists for divergence from EU standards, by Westminster, and complicated by the divisions of responsibility between the devolved administrations, who may set their own standards in the areas of devolved competence (Reid, 2017).
 - 16.4.2 The lack of a supra-national body capable of enforcing good regulatory standards through punitive mechanisms where necessary, through the EU Commission infringements procedure and the jurisdiction of the CJEU. (Macrory R. , 2018)
 - 16.4.3 The physical impediments that may be caused by the construction of border infrastructure between Ireland and Northern Ireland would likely will make cross-border co-operation more difficult. It will also likely cause administrative barriers to co-operation at local government level, as well as legal ones.

- 16.5 Therefore, it is likely that Brexit (in any form) will interfere with Good Friday/Belfast Agreement cross-border co-operation and place obstacles in its way, in general, as well as in the area of environmental co-operation.
- 16.6 Potentially these obstacles could be tackled by making greater use of the GF/BA bodies and institutions, using them as a vehicle to maintain policy alignment and regulatory alignment. However, the extent to which it will be legally possible or permissible for Ireland to align with a non-EU country will depend on the features of the eventual relationship between the EU and the UK. Ireland, as an EU Member State, does not have the necessary authority to determine its own environmental standards, and must follow EU standards as a minimum. It seems likely that the only way regulatory and policy alignment can occur through the GF/BA bodies & institutions is if the UK matches developments in Ireland. This of course means matching developments in the EU. This may cast a different dynamic over any attempts to maintain regulatory alignment in the area of the environment, with possible resistance to the UK becoming a “rule-taker” in this area. This may prove problematic in practice, given the background to Brexit and the narrative of “taking back control” (Hilson, 2018).
- 16.7 However, if the UK’s eventual trade relationship with the EU is one of close regulatory alignment, then it is possible that the GF/BA bodies can be used to maintain close alignment in the implementation of what will continue to be largely common standards (EU standards). If the UK does have such a relationship with the EU then the door will still be open to enhanced levels of cross border co-operation on the environment, and for tackling problem areas where more co-operation is required.
- 16.8 The GF/BA guarantees the maintenance of common human rights standards in both Northern Ireland and Ireland. As explained in Section 11 above, this could be utilised by an individual seeking to assert environmental rights drawn from the ECHR case law and the potential (recently recognised by the Supreme Court) for recognition of Constitutional environmental rights in Ireland. This is perhaps the mechanism with the most potential for individual action to maintain regulatory alignment in the area of the environment (which is of course not the same thing as environmental cross-border co-operation, but a precondition for it).

17. Recommendations

- 17.1 The Good Friday/Belfast Agreement, its institutions, bodies and guarantees have never been more important, representing an important locus of cross-border co-operation for environmental matters post-Brexit. Every effort should be made to realise the full potential of the Good Friday/Belfast Agreement, and to achieve full implementation of its structures and institutions, including a Consultative Body with NGOs/Civil Society, as mentioned in Strand 1, and the All-island Consultative Body mentioned in Strand 2. Action should also be taken to institute the Bill of Rights for Northern Ireland provided for in the Agreement.
- 17.2 In this context, and post-Brexit, channels between Dublin and Brussels need to be kept open regarding policy on cross-border co-operation and regulatory alignment (D'Arcy M. , 2018) (Phinnemore, 2018) (Gravey V. , 2018). Irish politicians and NGOs will need to ensure that the issue of environmental cross-border co-operation is kept on the EU's agenda.
- 17.3 The North-South Ministerial Council itself, while once the primary vehicle of cross-border co-operation, is severely undermined by the crisis of executive formation in Stormont. Roles are being continued by civil servants who lack the necessary authority to make decisions on a high-level. Therefore it is argued that for the immediate future, the focus for continued and enhanced co-operation should be on East-West co-operation, as North-South co-operation at a political level is deadlocked by the failure of executive formation.
- 17.4 Brexit will transform the UK from an EU Member State to a third country, necessitating negotiation at a single point source of power and authority between the EU/Ireland and the UK, and creating legal and political obstacles to the kind of North-South political back-channelling with Northern Ireland that could occur naturally in the shared context of EU membership. In this light it is likely that the following two bodies, the British-Irish Council (BIC) and the British-Irish Intergovernmental Conference (BIIC) will become more important loci of cross-border policy alignment. Focus on the following would enhance that East-West Co-operation:
- 17.4.1 Increase emphasis on environment as a work-programme matter for the British-Irish Council.
- 17.4.2 Add environment to the remit of British-Irish Intergovernmental Conference (BIIC).
- 17.4.3 Increase secretariat and funding to the BIIC.
- 17.4.4 Seek assurances from the EU that Ireland will continue to have the ability to conduct the kind of co-operation that it currently has, even if the UK is a third country in a no-deal scenario.

- 17.5 Outstanding and well documented environmental governance issues in Northern Ireland need to be addressed by either the Northern Ireland Executive, should one form, or the UK Government. The most significant of these appears to be the lack of an independent regulator in Northern Ireland.
- 17.6 An over-arching UK-wide Regulator for environmental compliance would provide some much-needed consistency in the area of environmental governance across the UK (Lee, 2017). Dr. Gravey and Dr. Jack suggest a “four plus one” structure might be appropriate, with independent regulators for the devolved administrations, reporting back to a UK-wide regulator (Gravey V. , 2018) (Jack, 2018). There are currently draft legislative proposals for a UK-wide environmental watchdog, but it appears to have limited powers and is applicable only to public bodies³².
- 17.7 This architecture of independent regulation also needs to be mirrored in North-South Relations. In the event that the Common Frameworks become necessary, development of All-Island Common Frameworks should be placed on the agenda of the Good Friday Implementation bodies, and other relevant political institutions.
- 17.8 There is also nothing in the Good Friday/Belfast Agreement that constrains the GF/BA institutions in their potential for cross-border co-operation. A diverse range of options should be considered including an All-Island consultative forum (as provided for in paragraph 19 of Strand 2 – see Section 7 above) with a wide range of stakeholders, feeding into the devolved Government in Northern Ireland, UK Government and Irish Government, and with links to the legislatures in all jurisdictions.
- 17.9 Also, Phinnemore suggests consultative groups set up under the NSMC that feed into the legislatures of Northern Ireland, UK, Ireland and the EU (Phinnemore, 2018), one of which could be focussed on the environment. (Phinnemore, Interview, 2018)
- 17.10 Another possibility proposed by Brennan et al is for an all-island governance mechanism that can hold both governments to account, which they suggest should focus on environmental protection issues. The model of the Aarhus Convention Compliance Committee is suggested (Brennan, Dobbs, Gravey, & Ui Bhroin, 2018, p. 24).
- 17.11 There would appear to be much merit in this suggestion, but this writer would argue for a broader all-island mechanism, charged with monitoring and facilitating cross-border co-operation under the GF/BA generally, not just focussed on environmental issues. This could take the form of a Treaty Body attached to the Good Friday Agreement, or one established by separate Treaty, or by legislative arrangements. It could be charged with ensuring compliance with the GF/BA and identifying and promoting the regulatory changes required to enhance

³² Draft Environment (Principles and Governance) Bill 2018, published on the 19th December 2018 by the Department for Environment, Food & Rural Affairs <https://www.gov.uk/government/publications/draft-environment-principles-and-governance-bill-2018>

cross-border co-operation in both jurisdictions. The environment, as one of the areas of co-operation identified in the GF/BA, would naturally fall within its remit.

- 17.12 Cross-border funding and the work of SEUPB is a huge driver of environmental co-operation and its loss would be detrimental to cross border co-operation in this area. Ensuring that there is no disruption to those funding streams should be high priority.
- 17.13 Political will (rather than legal enforceability) is the lifeblood of the Good Friday/Belfast Agreement, enabling co-operation in every area including the environment. Therefore it is vital that all stakeholders in the Brexit process prioritise the maintenance of this co-operation, and that lobbying efforts are directed towards this. It is also important that the problems arising are approached in an open-minded, imaginative and flexible way, leaving aside divisive mind-sets. Only flexible and innovative solutions can overcome novel politico-legal problems like the ones presented by Brexit in the context of the island of Ireland.
- 17.14 Further research could consider:
- A detailed analysis of cross-border co-operation in each of the areas identified in the “Mapping Exercise” and an in-depth analysis of how each one is affected by the different Brexit scenarios.
 - A review of implementation of the GF/BA and how this could be enhanced.
 - A study of the current functioning of the GF/BA Bodies and how these could be improved in order to enhance cross-border environmental co-operation.
 - How a Consultative Civic Forum reporting to the Northern Ireland Assembly could best be structured to be as inclusive and independent as possible.
 - How an All-Island Civic Forum could be constructed.
 - An exploration of the kinds of mechanisms that could to be developed for ensuring the maintenance of a common regulatory environment between Northern Ireland and the Republic of Ireland in the event of a trade deal between the UK and the EU, and the legal measures necessary to facilitate that.

Interviewees:

I would like to thank the following for giving of their time and expertise to assist in this research by agreeing to be interviewed:

Dr. Thomas Muinzer, Stirling University.

Dr. Ciara Brennan, Newcastle University.

Dr. Viviane Gravey, Queens University Belfast.

Dr. Brian Jack, Queens University Belfast.

Professor Colin Harvey, Queens University Belfast.

Professor David Phinnemore, Queens University Belfast.

Professor Owen McIntyre, University College Cork.

Dr. Roderic O’Gorman, Brexit Institute, Dublin City University.

Anna Lo, Alliance Party, Former Chair of the Environment Committee.

Eamonn Ryan T.D.

Brian Doherty.

Michael D’Arcy, co-author of *Border Crossings: Developing Ireland’s Island Economy* (Gill & Macmillan 1995).

Department of Foreign Affairs and Trade Officials

Academic Review Panel:

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