



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

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**Executive
Summary**

A report commissioned by the
Environmental Pillar in conjunction with
Northern Ireland Environment Link

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Environmental Pillar
working for a sustainable future



Northern Ireland
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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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Introduction

1. This report was commissioned by the Environmental Pillar and Northern Ireland Environment Link (NIEL) in order to explore the impact Brexit will 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 can have in maintaining this co-operation post-Brexit.
2. To answer this question a mixture of desk-based study and interviews were used. This executive summary presents the main findings and recommendations, but the full report can be found at: <https://nienvironmentlink.org/cmsfiles/Brexit-GFA-report-FULL.pdf>
3. Throughout this executive summary the sections of the main report, on which the conclusions displayed here are based, are placed in bold text in brackets.
4. The matters in this report are correct as of December 2018.

The Good Friday Agreement: Implementation, Character and Enforcement

5. The “Good Friday Agreement” or “Belfast Agreement” (hereinafter GF/BA) as the 1998 peace agreement is colloquially known, played a pivotal role in settling the 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 **[Section 3]**. This was done through the treaty bodies such as the North-South Ministerial Council (hereinafter NSMC) **[Section 4]** and the related bodies, Intertrade, Waterways Ireland, the Food Safety Promotion Body, the Loughs Agency, SEUPB (Special EU Programs Body - distributes EU funding) and the Language Body) **[Section 7]**. The Agreement also sought to bring about co-operation between Ireland and the United Kingdom (through the British Irish Council (BIC) **[Section 5]** and the British-Irish Intergovernmental Conference (BIIC) **[Section 6]**).
6. While the political structures of the Assembly attempted equality by institutionalising difference (Hilson, 2018), the GF/BA envisaged public participation structures that would create the room for growth of other more neutral identities (Bell V. , 2004) (Dybris McQuaid, 2009). The Civic Consultative Forum, designed to feed into the Assembly and its policy making, was one such body, providing a voice for community groups and NGOs. Unfortunately, it has been barely utilised (Bell V. , 2004) (Bell V. , 2004a) and now is proposed to be drastically scaled back (Foster, 2016). Another such body referenced in Article 19 of Strand 2 was the All-Island Consultative Forum, run jointly by the administrations north and south of the border. This provision has never been given effect. **[Section 3.12, Section 7.1]**
7. 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. 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 **[Section 8]**.
8. The failure to fully implement the provisions of the GF/BA means that the full potential of cross-border co-operation has not yet been realised.
9. The Good Friday Agreement is an enabling agreement, meaning that nothing in its provisions would act as a barrier to enhanced co-operation **[Section 9, Section 10]**. The GF/BA supports and provides the impetus for cross-border co-operation in the area of the environment, but the EU regulatory framework provides the context that allows it to happen. However, in terms of enforceability under international law, there are issues with lack of forum for such disputes due to restrictions on its justiciability before the International Court of Justice **[Section 13]**.

10. The Agreement is also a human rights agreement and it seems that rights under it may be enforceable through mechanisms for enforcement of ECHR rights, insofar as locus standi and other qualifying requirements are met. This includes certain procedural environmental rights [Section 11].

The GF/BA and the Environment

11. The Good Friday/Belfast Agreement nominated 12 areas for cross-border co-operation and included in these was the environment. The NSMC has an explicit environmental remit as does the BIC. The BIIC could easily acquire one as it determines its own work program. Of the cross-border bodies established under the agreement, many of them have environmental aspects to their programs of work. SEUPB channels Interreg funding which funds many environmental cross-border initiatives. The Loughs Agency and Waterways Ireland both have explicit environmental objectives. Therefore, enhancing environmental protection through cross-border co-operation is a core aspect of the GF/BA.
12. This emphasis on environmental protection in the GF/BA was perhaps in part a response to the long history of failure to meet basic standards of environmental protection in Northern Ireland. The reasons for this have been explored at length in the literature on the subject (Brennan, Hjerp, & Purdy, 2017) (Turner, 2009), and include its status as a post-conflict society, the many failures in executive formation, and the lack of an independent environmental regulator [Section 2], [Section 9]. The poor track record for environmental governance in Northern Ireland, and failure to implement existing regulatory measures, gives rise to a concern that if Brexit should lead to regulatory divergence downward then the actual gap in environmental protection will be much greater on the ground than the gap on paper.

The GF/BA, the EU and Brexit

13. GF/BA cross-border co-operation was enhanced and made possible by the shared context of EU Membership. The “Mapping Exercise” Technical Note (Department for Exiting the European Union, 2018) lists over 150 areas of co-operation and around 30 of those are directly under the heading of the environment (like River Basin Management, environmental funding, or radiation management). There are also quite a few more areas with environmental implications, such as agriculture, pesticides and invasive species management, or public transport [Section 9].
14. EU funding programs which specifically sought to enhance cross-border co-operation, such as the PEACE, LIFE and Interreg funding programs, have been a major driver of cross-border co-operation (Henderson & McGloin, 2004) (Tannam, 2006) [Section 7].

15. “Brexit” as UK Withdrawal from the European Union is known represents an obvious challenge to the framework of co-operation created by/because of the GF/BA. It threatens to undermine the environmental integrity of the Island of Ireland in a number of ways [Section 9]:

- **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, given that the EU has been a big driver in the area of environmental regulation in Northern Ireland (Cowell, et al., 2019) (Turner, 2009). 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). This may lead to de-regulatory pressure through market competition (D’Arcy, 2017) (Cowell, et al., 2019) (Monbiot, 2019). The removal of this shared regulatory and legal context may result in practical and administrative barriers to cross-border co-operation.
- **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 function 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, LIFE funding) which have been acknowledged to be a very important driver of cross-border co-operation (Henderson & McGloin, 2004) (Tannam, 2006).
- **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 cause 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.

16. 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.

Conclusions:

17. 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, but in particular in the area of environmental co-operation.
18. 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 member will depend on the features of the eventual relationship between the EU and the UK. Ireland, as an EU member, 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 prove problematic in practice, given the background to Brexit and the narrative of “taking back control” (Hilson, 2018).
19. 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.
20. The GF/BA guarantees the maintenance of common human rights standards in both Northern Ireland and Ireland **[Section 11]**. This could provide a potential avenue for enforcement of some of the commitments in the GF/BA, where they impact on an individual’s right to a clean and healthy environment, by asserting environmental rights drawn from the ECHR case law and the recent recognition of Constitutional environmental rights in Ireland **[Section 11, Section 16]**. There is potential for this to be used to maintain regulatory alignment in some aspects of the environment (which is of course not the same thing as environmental cross-border co-operation, but a precondition for it).

Recommendations:

21. 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 Civic Consultative Body with NGOs/Civil Society, as mentioned in Strand 1, and the All-island Consultative Body mentioned in Strand 2. This would provide opportunities for a greater diversity of voices in the decision-making processes of the Assembly in Northern Ireland and the Oireachtas in Ireland, which would allow room for environmental issues to be placed and kept on the agenda at this crucial time.
22. 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 at a high-level. 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.
23. 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.
24. 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).
25. 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)).
26. 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 GF/BA, 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 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.

27. Cross-border funding and the work of SEUPB is a huge driver of environmental co-operation and the loss of it would be detrimental to cross border co-operation in this area. Ensuring the future of those funding streams should be high priority.
28. 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 advocacy 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.
29. 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 GFA/BA and how this could be enhanced.
 - A study of the current functioning of the Good Friday/Belfast Agreement 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:

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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.

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Academic Review Panel:

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