

North-South Cooperation in the Post-Brexit Era: *A Complex and Contingent Future*

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Introduction

The withdrawal of the United Kingdom from the European Union – Brexit¹ – catalysed a paradigm shift in arrangements for North-South cooperation on the island of Ireland. Post-Brexit, the two jurisdictions – Ireland and Northern Ireland² – no longer share the legal and policy scaffolding that came with joint EU membership. That scaffolding had played a significant role in making possible the cross-border and all-Island “consultation, cooperation and action” in areas of “mutual interest” to those “North and South”³ on the island of Ireland, envisaged and provided for in the *1998 Belfast/Good Friday Agreement*⁴. As this article explores, in the absence of shared EU law frameworks, North-South cooperation in the post-Brexit era is more legislatively complex and politically contingent than ever. For the same

reasons, it can be argued that efforts to preserve and develop it have never been more critical.

A specific focus of UK-EU negotiations in 2017 through 2019 was ensuring *necessary conditions* were maintained for continuing North-South cooperation. As a result, after much political drama, the UK and EU concluded a Withdrawal Agreement that included a *Protocol on Ireland/Northern Ireland*. The stated purpose of the *Protocol* is to set out arrangements to “address the unique circumstances on the island of Ireland” in the context of UK withdrawal from the EU, and more specifically:

- “to maintain the necessary conditions for continued North-South cooperation”;
- “to avoid a hard [land] border”; and
- to “protect the 1998 Agreement in all its dimensions”.⁵

Whether or not the *Protocol* could, or even should, meet these objectives is a contested issue.

So far, the implementation of the *Protocol* has been deeply politically divisive due to the implications of its arrangements to avoid a hard *land* border on the movement of goods across (what is now called) the Irish Sea border between Great Britain and Northern Ireland (GB-NI). Many in the unionist and loyalist tradition perceive this Irish Sea border as a violation of their British identity and a threat to the position of Northern Ireland in the UK.

Additionally, despite both parties agreeing on its content, the *Protocol* has been the source of considerable controversy between the UK and the EU. Since it came into force on 1 January 2021, the UK has accused the EU of adopting an overly legalistic approach to implementing the *Protocol*, particularly regarding arrangements for moving goods between GB-NI. On the other hand, the EU has accused the UK of reneging on commitments made in a binding international legal text due to an unwillingness to implement the *Protocol* fully and a propensity to take unilateral action.

The debate, and the acrimony, continue.

At present, Northern Ireland is without a fully functioning government due to the resignation of the Democratic Unionist Party (DUP) First Minister in February in protest against the *Protocol* and the refusal of the party to support the election of a Speaker to the Northern Ireland Assembly nor form

a Northern Ireland Executive in the wake of May elections for the same reason. Furthermore, talks that had been ongoing between the UK and EU on the *Protocol* have broken down as the UK government introduced draft legislation that would, if enacted, give powers to UK ministers to disapply large sections of the *Protocol* in domestic law. In response, the EU has launched and relaunched infringement proceedings against the UK for failure to uphold its commitments under the Withdrawal Agreement through non-implementation of the *Protocol*.

With all of this high-drama ongoing, much of the (extensive) political, media and academic debate about the *Protocol* has, so far, focused on its so-called *East-West* impacts, meaning on trade and relations between Great Britain and Northern Ireland. Comparatively, less attention has thus been given to its implications on North-South trade and relations, notwithstanding their prominent role in UK-EU withdrawal negotiations and indeed in the text of the *Protocol* itself; this paper goes some way to redressing the balance. Focusing on existing legal provisions, the paper provides an early assessment of the extent to which the “necessary conditions”⁶ for North-South cooperation do, or do not, still exist in the post-Brexit era, including as a direct consequence of the *Protocol*.

In terms of structure, Section One sets out the origins of North-South cooperation and its role in UK-EU negotiations. Section Two considers relevant provisions of the *Protocol* in some detail. Building on this, Section Three assesses the sufficiency or otherwise of those provisions concerning pre-Brexit North-South cooperation and identifies any ‘gaps’ that exist in the post-Brexit context. The Conclusion explores the future of North-South cooperation given the newly contested politics surrounding it and the complex, potentially changing legal provisions for its maintenance and development.

Section One: The problem

Strand two of the 1998 Agreement

North-South cooperation on the island of Ireland is the focus of strand two of the *1998 Agreement*.

Strand two established a North-South Ministerial Council (NSMC) to “bring together those with executive responsibilities” in Ireland and Northern Ireland to:

...develop consultation, co-operation, and action within the island of Ireland – including through implementation on an all-island and cross-border basis – on matters of mutual interest within the competence of the Administrations, North and South.⁷

The *1998 Agreement* provided for the establishment of *implementation bodies* to help facilitate North-South cooperation. It specified twelve areas where cooperation could take place while also allowing for other areas to be considered and agreed upon in future via the NSMC.

| | | |
|----------------------|---------------------------|---------------------------|
| Agriculture | Health | Tourism |
| Aquaculture & marine | Inland fisheries | Transport |
| Education | Relevant EU programmes | Urban & rural development |
| Environment | Social security / welfare | Waterways |

Table 1: Twelve areas for cooperation

Brexit’s border problem

Avoiding a hard border was a shared aim of both the UK and the EU at the outset of negotiations; however, the ‘problem’ of the border was defined differently by the two negotiating parties.

On the UK side, the problem was narrowly understood as mitigating the need for physical checks or controls on goods crossing the 500km borderline demarcating the boundary of the UK nation. A problem that was in keeping with an ideal of national sovereignty and narratives of border control that had underpinned the *Leave Campaign*; its result was a negotiating position that sought “technical solutions” to achieve a “goods border” on the island of Ireland “that is as seamless and frictionless as possible”.⁸ However, such a narrow understanding of the problem sits somewhat uncomfortably with the *1998 Agreement*, which envisaged the removal of border infrastructure and a more holistic transformation of “the totality of relationships”⁹ North-South and East-West to diminish the significance of physical borderlines. The UK’s proposal to address “the full spectrum of North-South and East-West cooperation” in a “bold and ambitious Free Trade Agreement”¹⁰ in future relationship negotiations relied on splitting the task of protecting the *1998 Agreement* across two sets of negotiations and agreements.

On the EU side, by contrast, avoiding physical checks or controls on the land border was understood as just one aspect presented by the “unique circumstances” on the island of Ireland that would require “flexible and imaginative solutions ... *including* with the aim of avoiding a hard border”,¹¹ While underlining a need to avoid a physical hardening of the land border, the EU also emphasised:

1. “... the very specific and interwoven political, economic, security, societal and agricultural ... frameworks on the island of Ireland”;¹² and
2. The need to protect North-South cooperation “across all the relevant sectors”¹³ in the withdrawal negotiations.

In the first phase of negotiations, the EU position for protecting the *1998 Agreement* ‘in all its parts’ *in the withdrawal agreement* prevailed. However, an apparent change in the UK position can be attributed to the outcomes of a joint exercise to map existing North-South cooperation and determine the extent to which this relied on EU legal or policy frameworks or the *1998 Agreement*.¹⁴ Findings of the ‘mapping exercise’ identified 142 areas of North-South cooperation, 54 of which were classified as ‘directly underpinned by or linked’ to EU legal or policy frameworks, 42 as ‘partially underpinned by or linked’ and 46 as ‘not underpinned or linked to’ EU legal or policy frameworks. Three things were, therefore, clear:

1. North-South cooperation had expanded significantly since 1998;
2. This expansion had been facilitated by joint EU membership of Ireland and the UK; and
3. Existing areas of North-South cooperation were uniquely exposed to the outworking of Brexit.

Joint Report | Backstop | Protocol

Findings from the North-South mapping exercise were reflected in the UK-EU Joint Report that concluded the first phase of withdrawal negotiations.

In the text, the UK, under Theresa May’s premiership, held to its preference to address the “substantial challenges to the maintenance and development of North-South cooperation”¹⁵ ... through the overall EU-UK relationship”¹⁶ but committed in the interim to “maintain full alignment with those rules of the Internal Market and Customs Union which, now or in future, support

North-South cooperation, the all-island economy and the protection of the *1998 Agreement*".¹⁷

The inclusive language regarding *future cooperation* and the *all-island economy* amounted to a UK commitment in principle to dynamic alignment with the EU of the kind required to facilitate ongoing cooperation on the island of Ireland. If realised, this would have allowed for the continuation of post-1998 all-island integration, as envisaged by the EU, rather than simply mitigating the need for physical checks on goods at the border, as originally envisaged by the UK government.

Fast-forward through some tense months of more UK-EU negotiations and the emergence of the so-called *Backstop* Protocol. The ill-fated first version of the Withdrawal Agreement, concluded by the EU and UK under May in November 2018 but never ratified, upheld the prior UK commitment to dynamic alignment, per paragraph 49 of the Joint Report. Importantly, its provisions were designed as a minimal framework to operate alongside the "bold and ambitious" free trade agreement (FTA) that the May government intended to conclude.¹⁸ In this way, the Backstop Protocol amounted to a compromise between the respective UK and EU starting positions regarding the nature of the border problem. It reflected an EU understanding of a need to protect North-South cooperation broadly understood yet provided for the UK's preferred strategy of doing so *primarily* through the future relationship agreement. Although the Backstop Protocol was designed to "maintain the necessary conditions for continued North-South cooperation",¹⁹ it was only meant to do so "unless and until"²⁰ the UK and EU concluded an agreement to supersede it "in whole or in part" using "best endeavours".²¹

This context is vital. Those provisions that related directly to maintaining conditions for North-South cooperation in the Backstop Protocol²² on an insurance policy basis are almost identical to those set out in the *Protocol* (Articles 5-11)²³ despite the latter being agreed on a fundamentally different premise regarding its longevity and comprehensiveness. Rather, the text of the *Protocol* still reflects the logic of a minimal framework insurance policy to avoid a physical hardening of the border on the island of Ireland by facilitating cross-border trade in goods while allowing the full spectrum of current and future North-South cooperation to be more comprehensively addressed through a 'deep and special' UK-EU future relationship agreement of a kind that was not agreed.

This is why, despite being an explicit objective of the text, and as Section Two demonstrates, the *Protocol* does not *alone* provide the necessary conditions for continued North-South cooperation.

Section Two: The Protocol

The Protocol and the North-South dynamic

Provisions of the *Protocol* that specifically address strand two of the 1998 *Agreement* fall into two categories:

1. Those that facilitate cross-border trade in goods, thereby avoiding any need for physical infrastructure at the land border; and
2. Those, broadly understood, that aim to maintain the necessary conditions for North-South cooperation.

Together they reflect a compromise between the starting positions of the UK and the EU. As this section sets out, provisions in the first category (Articles 5-8; 10) are more comprehensive and legally enforceable than those in the second (Articles 9; 11).

Cross-border trade in goods: Articles 5-8 and 10

The UK and EU sought to avoid any need for physical infrastructure on the land border between Ireland and Northern Ireland. However, this shared objective had to be balanced with the EU's aim of securing its single market and customs union and the UK's goal of leaving the EU single market and customs union without dividing the UK's internal market. To reconcile these three seemingly incompatible aims, the *Protocol* sets out a 'constructively ambiguous' balance between the:

1. *de jure* position of Northern Ireland remaining within the UK customs territory (Article 4) and internal market (Article 6); and
2. *de facto* position of Northern Ireland, which is treated as part of the EU customs union and single market for trade in goods (Article 5) with related provisions for the:
 - i. Recognition of technical regulations, assessments, certifications and authorisations (Article 7);
 - ii. Payment of VAT and excise with respect to goods (Article 8); and
 - iii. Application of EU state aid rules to any trade subject to the Protocol (Article 10).

This balance met the negotiating objectives of both sides at the time.

It avoided the need for a hard border by ensuring continued cross-border trade in goods. Additionally, it allowed Northern Ireland to remain entirely in the UK internal market while simultaneously securing the EU single market by necessitating new checks and controls on goods moving GB–NI *as if* Northern Ireland was part of the EU single market for goods.

Northern Ireland's *de jure* status as part of the UK customs territory (Article 6(1)) also formally safeguarded the UK customs territory's legal integrity. However, at the same time, the *de facto* requirement for applying the EU customs code and EU-derived regulations on goods entering Northern Ireland from the rest of the UK created, in effect, a GB–NI trade border regarding goods as the default arrangement.

As set out in the introduction, debates are ongoing about the legitimacy and longevity of these *Protocol* aspects designed to avoid the need for a physical hardening of the land border on the island of Ireland. This being so, it is perhaps worth recalling that Articles 5-8 and 10 of the *Protocol* arose from a shared UK-EU negotiating aim and an agreed compromise between aims that were not shared. Any new system or future approach – including one arising from the *Northern Ireland Protocol Bill* legislation – will have to contend with the same objectives and geographic, legal, and economic realities that led to the *Protocol*.

Necessary conditions for North-South cooperation: Articles 9 and 11

Outside of enabling cross-border trade in goods to continue, Article 11 of the *Protocol* addresses 'other areas' of North-South cooperation as follows:

1. Consistent with the arrangements set out in Articles 5 to 10, and in full respect of Union law, this *Protocol* shall 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.

In full respect of union law, the United Kingdom and Ireland may continue to make new arrangements that build on the provisions of the *1998 Agreement* in other areas of North-South cooperation on the island of Ireland.

2. The Joint Committee shall keep under constant review the extent to which the implementation and application of this *Protocol* maintains the necessary conditions for North-South cooperation. The Joint Committee may make appropriate recommendations to the union and the United Kingdom in this respect, including on a recommendation from the specialised committee.²⁴

The wording of the first paragraph is important. By requiring the implementation and application of the *Protocol* in a manner conducive to ongoing North-South cooperation, Article 11(1) *appears* to offer a broad and dynamic safeguard for the kind of “consultation, cooperation and action within the island of Ireland” envisaged in the *1998 Agreement*.²⁵ Looks can be deceiving. An implicit premise of the language used in Article 11(1) is that there are no ‘necessary conditions’ for North-South cooperation that are extraneous to the *Protocol*, but this is not the case. Indeed, as the next section demonstrates, the 2017 mapping exercise identified EU legal and policy frameworks relevant to all of the areas listed in Article 11 and which are not guaranteed elsewhere in the *Protocol*.

Additional to Article 11, North-South cooperation regarding electricity generation, transmission and distribution is granted specific protection under Article 9 of the *Protocol*. Ensuring the preservation of the single electricity market was an objective shared by the UK and EU; it was also one of the few that had cross-party support in Northern Ireland.²⁶ Under Article 9 and Annex 4, seven EU acts are to apply in Northern Ireland “insofar as they apply to the generation, transmission, distribution, and supply of electricity, trading in wholesale electricity or cross-border exchanges in electricity” (Annex 4 *added*);²⁷ those provisions relating to retail markets and consumer protection “shall not apply” and any other acts referenced in the EU laws listed do not otherwise apply “unless it is a provision governing wholesale electricity markets which applies in Ireland and is necessary for the joint operation of the single wholesale electricity market” on the island of Ireland.²⁸ Article 9, therefore, provides a robust legal foundation for North-South cooperation in electricity markets and allows for discretionary and dynamic alignment in the area. As the next section details, the same is not so in other areas of cooperation.

Section Three: The Gaps

Protocol vs mapping exercise

Comparing the list of EU laws that the *Protocol* makes applicable to the UK in respect of Northern Ireland and the EU laws listed in the mapping exercise of 2017 allows an initial assessment of the extent to which the *Protocol* meets its stated objective regarding North-South cooperation.

The answer is, in short, ‘*could do better*’. Table 2 summarises that while the *Protocol* fully covers some areas of North-South cooperation identified in the mapping exercise, others are only partially covered, and others are not covered.

| COVERED | PARTIALLY COVERED | NOT COVERED |
|---|---|---|
| Food Safety Promotion Board | SEUPB; PEACE IV programme; INTERREG funding | Child protection |
| Cooperation & Working Together | Biodiversity | Commercial vehicle roadworthiness enforcement & concerted checkpoints |
| Tuberculosis (TB) & Brucellosis (BR) Working Group | Border People Project | Vehicle and driver safety checks |
| Organs and Tissues | Loughs Agency; Waterways Ireland | Cabotage |
| Movement of medicines, devices, and healthcare goods | Cross-border Enterprise Rail Service | Motor Insurance |
| North-South Dairy International Trade Working Group | Operation of cross-border taxis | Driver and Vehicle Licensing |
| Convention on International Trade in Endangered Species | Major emergencies and A&E planning cooperation | International Authorisations for bus & coach services |
| Fish health & aquaculture | North-West Cancer Centre; All-Island Congenital Heart Disease Network; Middletown Centre for Autism Ltd | Ferries |
| Management of eel stocks on the Erne | Mutual Recognition of professional qualifications for doctors & clinicians | Road Haulage |
| Single Electricity Market | Export Licensing Controls (dual-use goods, military goods) | Water pollution and water catchment work; Water quality; Water regulation |
| Chemicals Regulation | Teacher qualifications & professional development | Common Agricultural Policy |
| Invasive Alien Species; Control of Epizootic | | All-Island Pollinator Plan |
| | | Air quality issues |
| | | Strategic Environmental Assessment |

| | | |
|---|---|---|
| Diseases | Plant health & regulatory checks for quarantine pests; Transmissible Spongiform Encephalopathies & Animal By-Products | River Basin Management Plans |
| DAERA/DAFM Equine Liaison Group | | Flood Risk Management |
| Equine Industry Strategy | Animal health & welfare working groups | Habitats and Wild Birds Directive |
| Veterinary public health and trade meetings | Checks on third country products of animal origin; Checks on products of animal origin | All-Ireland Marsh Fritillary Group |
| North-South Working Group on Veterinary Medicines | Checks on Live animals | EU LEADER cooperation |
| Regulation and enforcement of animal health and welfare & public health legislation | Checks on food not of animal origin | EURES Cross Border Partnership |
| Fuel Fraud; Firearms, Offensive Weapons | Waste Management [ii] | Benefit fraud cross-border cooperation |
| Checks on Civil Explosives | Natural Gas | Irish Language Broadcasting |
| National Museums North-South Cooperation; Cultural Goods | Road network | Mobile Roaming |
| Non-commercial movement of Pets | Intertrade Ireland | Cross-border cooperation on criminal justice matters (including work of Organised Crime Task Force) |
| Customs (including data-sharing) | Engagement & Information Exchange DAERA & DAFM | All-Island Public Procurement Steering Group |
| Market surveillance of goods; Excise Fraud | Invest NI & Enterprise Ireland cooperation | Landscape Monitoring |
| Checks on Intellectual Property Rights | Environmental protection reporting and research | |
| Import Licensing Controls | Sport; Statistics | |
| Relief from safety and security declarations | Cross-border academic partnerships (in agriculture) | |
| Waste Management [i] | | |
| Mutual Recognition of AEOs; Transit of Goods; Road Network; VAT – Information Sharing | | |

Table 2: The Protocol and areas of North-South cooperation identified in the 2017 mapping exercise

Note: Areas identified in the 2017 mapping exercise for which all of the EU law instruments cited are also contained in the *Protocol* and its Annexes are categorised as ‘covered’ (green); those areas for which *some* of the EU law instruments cited are also contained in the *Protocol* and its Annexes are categorised as ‘partially covered’ (yellow); and those areas for which none of the EU law instruments cited are also contained in the *Protocol* and its Annexes are categorised as ‘not covered’ (red).

Those areas fully covered by the *Protocol* include, for example, North-South cooperation concerning:

- Customs.
- Market surveillance of goods.
- Regulation of animal health and welfare.
- The cross-border movement of medicines, medical devices, and organs for transplant.

In these areas, the *Protocol* provides for the continued application in the UK in respect of Northern Ireland of all the EU legal acts cited in the mapping exercise as facilitating cooperation, either directly or indirectly. Those areas that are partially covered, where the *Protocol* includes only some of the EU legal acts cited as directly or indirectly facilitating cooperation, include, for example:

- The operation of cross-border taxis and rail services.
- Cross-border cooperation in education.
- The work of three Implementation bodies: Waterways Ireland, the Loughs Agency and the Special EU Programmes Body (SEUPB).

Those areas not covered by the *Protocol* and for which none of the EU legal acts cited as facilitating cooperation in the mapping exercise are in the scope of the *Protocol*, include, for example:

- Driver and vehicle licensing;
- International authorisations for bus and coach services;
- The mutual recognition of professional qualifications; and
- The management and regulation of water resources.

Overall, a comparison of the mapping exercise and the *Protocol* shows that, notwithstanding its objective, the *Protocol* currently maintains only *some* of the pre-Brexit ‘necessary conditions for continued North-South cooperation’ post-Brexit, not all.

The New Normal

So, where does this leave us?

Following Article 11(2), gaps in the *Protocol*’s scope *could* be addressed through its ‘implementation and application’. For example, the UK-EU Joint Committee could, as part of its ‘constant review’ of the extent to which implementation and application of the *Protocol* does maintain the conditions necessary for North-South cooperation, may make ‘appropriate recommendations’ to the UK and the EU that lead to changes to the *Protocol* for that purpose. The Specialised Committee, established under Article 14 of the *Protocol*, could also play a role here. One of its tasks is to “examine proposals concerning the implementation and application of [the] Protocol from the NSMC and North-South Implementation bodies”.²⁹ On which basis, the Specialised Committee could make recommendations to the Joint Committee.³⁰

These provisions create an avenue – from strand two institutions to the Specialised Committee to the Joint Committee and then to the UK and the EU – for *potential* developments regarding the extent to which the implementation and application of the *Protocol* maintain the necessary conditions for North-South cooperation. For the moment, this analysis concludes that, in defending the conditions for North-South cooperation, the *Protocol* on its own is not currently up to the task. Notwithstanding the possibility of a future change in political weather, it is also the case that ongoing political controversy over the *Protocol* make it very unlikely that the ‘gaps’ it leaves in respect of North-South cooperation will be addressed through its architecture – at least not in the immediate future.

It is perhaps worth stating here that the *Protocol* is not the only, nor even the primary, means by which North-South cooperation on the island of Ireland can develop post-Brexit. Following the second subparagraph of Article 11(1), the UK and Ireland “may continue to make arrangements that build on the provisions of *the 1998 Agreement* in other areas of North-South cooperation” provided that these respect EU law obligations. This returns us to where we started: the *1998 Agreement*. Strand two institutions remain

the primary vehicle by which North-South cooperation exists and can continue to develop post-Brexit, albeit in more challenging, less-than-ideal conditions.

Conclusion: A complex and uncertain future

With the decoupling of the legal and policy trajectories of the UK and Ireland that resulted from Brexit, North-South cooperation entered a new paradigm.

As this article has set out, the *Protocol* only partially fulfils its aspiration regarding North-South cooperation. It provides the necessary conditions for *some* North-South cooperation to continue – namely for cross-border trade in goods (Article 5 and 7, 8 and 10) and energy markets and electricity supplies (Article 9) – but the coverage is not comprehensive. Moreover, a comparison between areas of North-South cooperation identified in the 2017 mapping exercise and the *Protocol* reveals post-Brexit ‘gaps’ in the legal and policy frameworks that, pre-Brexit, relied on EU laws deriving from shared UK and Irish membership of the EU.

North-South cooperation in areas *not* covered by the *Protocol* is, in many cases, still ongoing. In the post-Brexit era, the legal and policy frameworks supporting these areas of cooperation are necessarily more complex. This is because the ‘necessary conditions’ for North-South cooperation in areas not covered by the *Protocol* are now contingent on the degree of complementarity of legal and policy developments across a range of different jurisdictions and in different contexts; including: in the UK (as a whole); in Northern Ireland (as a devolved region); between Ireland and Northern Ireland; between the UK and Ireland; between the UK and the EU; within the EU; and within Ireland (as an EU Member State).

Overall, the post-Brexit environment for North-South cooperation is inherently complex and contingent; therefore, those ‘necessary conditions’ for its continuation are much less certain.

Against the background of a more complex, less certain future for North-South cooperation, the UK government’s recent introduction of draft legislation that would grant UK ministers extensive discretionary powers to disapply aspects of the *Protocol* in domestic law could be seismic. If passed unamended, the *Northern Ireland Protocol Bill* would mean, in effect, that the UK would unilaterally ‘turn off’ large sections of the *Protocol*, including

those designed to facilitate the continued free movement of goods (Article 5; 7, 8-10) and energy and electricity (Article 9) on the island of Ireland. Under the *Northern Ireland Protocol Bill*, Article 11 of the *Protocol* is among three provisions that are ‘protected’ from amendment by the powers otherwise granted to UK ministers to change the domestic legal effect of the *Protocol*.

However, as this analysis has demonstrated, Article 11 offers only an ‘in principle’ requirement for the *Protocol* to be implemented and applied to facilitate ongoing North-South cooperation. If divorced from other provisions that maintain ‘necessary conditions’ for certain areas of North-South cooperation (i.e., Articles 5 and 7-10), Article 11 is denuded of its potential legal effect.

What this means is that, if the *Northern Ireland Protocol Bill* becomes law, those areas of pre-Brexit North-South cooperation that are currently covered or partially covered by the *Protocol* will no longer be guaranteed as the EU legal scaffolding – identified as necessary in UK-EU negotiations and provided for in the *Protocol* – would no longer be guaranteed to exist on both sides of the winding 300km land border. For North-South cooperation, the legal enactment of the *Northern Ireland Protocol Bill* would therefore be extremely damaging. Unfortunately, at the time of writing, it does appear likely that the upcoming parliamentary term in Westminster will see a *Northern Ireland Protocol Act* becoming part of domestic law. In such a scenario, the EU has indicated a willingness to take decisive retaliatory action against the UK up to and including the suspension of the UK-EU Trade and Cooperation Agreement, thereby triggering a *trade war* between the two sides.

For those living inside the recently (in)famous borders of Northern Ireland, this most recent nadir in relations between the UK and the EU suggests storms ahead. However, regardless of what legal provisions do or do not exist for post-Brexit Northern Ireland this time next year, its ‘unique circumstances’ arising from its geography, economy and history will persist and therefore need to be accommodated.

In no other time since the *1998 Agreement* has the future of North-South cooperation ever been less certain; this is also why the need for its continuation has never been more urgent.

Here’s hoping.

Endnotes

- ¹ Short for '[Great] British + Exit' the neologism 'Brexit' could be said to be a misnomer inasmuch as the term implicitly excludes Northern Ireland. While this linguistic inaccuracy is notable, the term 'Brexit' is used here to refer to the process of the UK's withdrawal from the EU as it has come to be commonly understood.
- ² Language used to refer to the two polities on the island of Ireland can be varied and contested. For clarity, here and throughout the self-referent titles – Ireland and Northern Ireland – employed by respective executive authorities in both jurisdictions are used.
- ³ 1998 Agreement, Strand Two: para. 1.
- ⁴ Terminology regarding the 1998 Agreement also varies; use of the title 'Belfast Agreement' tends to be more associated with the Unionist/Loyalist tradition while use of the 'Good Friday Agreement' tends to be more associated with Nationalist/Republican tradition. For clarity, here and throughout, the shorthand '1998 Agreement' is used.
- ⁵ Official Journal (2020) *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*. [L29 31 January 2020 p. 7–187]: Protocol: Article 1(3).
- ⁶ *Ibid.* Protocol: Article 11(1).
- ⁷ 1998 Agreement, Strand Two: para. 1.
- ⁸ HM Government (2017) 'The United Kingdom's exit from, and partnership with, the European Union', 2 February.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf: p.49.
- ⁹ 1998 Agreement, Strand Two: para. 1.
- ¹⁰ HM Government. 2017b, August 16. 'Northern Ireland and Ireland: position paper'.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf, p.21.
- ¹¹ European Council. 2017, April 29. 'European Council (Art. 50) guidelines for Brexit negotiations' EUCO XT 20004/17. *europa.ec*: para 11.
- ¹² European Commission. 2017, May 22. 'Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union' 21009/17 BXT 16 ADD 1. *europa.ec*: 1.
- ¹³ *Ibid.*: 3.
- ¹⁴ Three documents were released that set out the findings of the joint 2017 Mapping Exercise; the most detailed of which is the UK government 'Scoping Document' only published in 2019 following a successful freedom of information request – it is

available here: <https://www.parliament.uk/globalassets/documents/commons-committees/Exiting-the-European-Union/17-19/Correspondence/UK-Government-scoping-document-1.pdf>. (Accessed 31 July 2022).

- ¹⁵ Joint Report of Negotiators. 2017, December 8. 'Joint report from the Negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union' *europa.ec.eu*: p. 47
- ¹⁶ *Ibid*: 49.
- ¹⁷ *Ibid*: 43; 49, added.
- ¹⁸ HM Government. 2017b, August 16. 'Northern Ireland and Ireland: position paper' *assets.publishing.service.gov.uk*: p. 65.
- ¹⁹ Official Journal. 2019. *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* [C661 19 February 2019 p.1 – 184]: [Backstop] Protocol: Article 1(3).
- ²⁰ *Ibid*: Article 1(4).
- ²¹ *Ibid*: Article 2(1).
- ²² *Ibid*: Articles 6(2); 7-13.
- ²³ OJ 2020. Withdrawal Agreement, Protocol: Article 5-11.
- ²⁴ *Ibid*: Article 11.
- ²⁵ 1998 Agreement, Strand Two: para. 1.
- ²⁶ See: Executive Office 2016, August 10. 'Letter to the Prime Minister' *executiveoffice-ni.gov*; and Hayward, K. and Whitten, L. (2018) 'What is Northern Ireland saying about Brexit – key slides' *qpol.qub.ac.uk*.
- ²⁷ OJ 2020. Withdrawal Agreement, Protocol: Article 9, Annex 4.
- ²⁸ *Ibid*. Annex 4.
- ²⁹ *Ibid*: Article 14(b).
- ³⁰ *Ibid*: Article 14(e).