



The Centre for
Cross Border Studies

Briefing Paper

The Belfast/Good Friday Agreement and (post-Brexit) cross-border environmental cooperation

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Introduction

This Briefing Paper,¹ which forms part of the Centre for Cross Border Studies' ongoing work into the potential consequences of the UK's withdrawal from the European Union for North-South and cross-border cooperation,² has been prompted by the April 2019 publication of an important report commissioned by the Environmental Pillar in conjunction with Northern Ireland Environment Link.³ Authored by Alison Hough, "Brexit, the Good Friday/Belfast Agreement and the Environment: Issues arising and possible solutions"⁴ focuses on a framework that has not only provided the Centre for Cross Border Studies (CCBS) with one of its core policy pillars since its foundation,⁵ but has also been central to CCBS's approach to Brexit. This Briefing Paper, therefore, is intended as a statement of support for the report commissioned by the Environmental Pillar and Northern Ireland Environment Link, highlighting areas of commonality between what it sets out and CCBS's own concerns.

Hough's report sets out to answer two interrelated questions:

"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 [will] the Good Friday/Belfast Agreement have in maintaining this co-operation post-Brexit?" (p.4)

Although Hough's report focuses on a specific issue, the nature of these questions recalls CCBS's own overarching responses to Brexit and the Belfast/Good Friday Agreement. In the run-up to the 2016 UK referendum on EU membership, and in collaboration with Cooperation Ireland, CCBS considered how Brexit might impact the operation and future development of North-South and cross-border cooperation under Strand 2 of the 1998 Agreement.⁶ However, in the wake of the UK's decision to leave the EU, and as the first phase of the negotiations on the UK's withdrawal got underway, CCBS published a Briefing Paper in which it argued how "the 1998 Belfast/Good Friday Agreement should not be viewed simply as a problem to be overcome during the negotiations [...],

¹ This Briefing Paper was authored by Anthony Soares, CCBS Acting Director, supported by Maína Coroller, CCBS intern.

² This work has included two Briefing Paper series ("Brexit and the UK-Ireland Border" and, in collaboration with Cooperation Ireland, "The EU Referendum Briefing Papers"), as well as numerous other publications and appearances before parliamentary committees. For more of our Briefing Papers, see <http://crossborder.ie/category/research-and-policy/policy/briefings/>; for our submissions to parliamentary committees see <http://crossborder.ie/category/research-and-policy/policy/consultation-responses/>.

³ The Environmental Pillar "is made up of national environmental non-governmental organisations (NGOs) who work together to represent the views of the Irish environmental sector" (see <https://environmentalpillar.ie/>). Northern Ireland Environment Link (NIEL) is "the networking and forum body for organisations interested in the natural and built environment of Northern Ireland" (see <https://www.nienvironmentlink.org/aboutus/index.php>).

⁴ Alison Hough, "Brexit, the Good Friday/Belfast Agreement and the Environment: Issues arising and possible solutions" (April 2019), <https://nienvironmentlink.org/cmsfiles/Brexit-GFA-report-FULL.pdf> [last accessed 21/05/2019].

⁵ The other core pillar orientating CCBS's policy direction in relation to cross-border cooperation is the EU's Cohesion Policy.

⁶ See in particular Centre for Cross Border Studies and Cooperation Ireland, EU Referendum Briefing Papers, Briefing Paper 2, "The UK Referendum on Membership of the EU: Potential Constitutional Consequences" (2016), <http://crossborder.ie/site2015/wp-content/uploads/2016/03/EU-Referendum-Briefing-Paper-2.pdf>.

but also as a potential ‘flexible and imaginative’ solution to the maintenance of post-Brexit relations”.⁷

Additionally, Hough’s report expresses another concern shared by CCBS, which is the absence of adequate platforms for civic dialogue. Brexit has amplified that absence, not least as Northern Ireland continues to experience a period without a functioning Assembly or Executive. The current failure in the operation of the political institutions under Strand 1 of the 1998 Agreement, and how this is perhaps at least partially caused by an equivalent and more longstanding failure to support structures for civic participation – such as the Civic Forum – was repeatedly highlighted by community groups from both jurisdictions on the island of Ireland that took part in CCBS’s “Bringing the Agreement Home: In all its parts” project.⁸ Similarly, the need to provide adequate structures enabling cross-border and cross-jurisdictional civic dialogue has also become an issue of concern for those participating in CCBS’s “Towards a New Common Chapter” project,⁹ and one that is being raised with political representatives across these islands.

What follows, therefore, is a brief overview of what the report commissioned by the Environmental Pillar and Northern Ireland Environment Link sees as the main impacts of Brexit on cross-border environmental cooperation under the Belfast/Good Friday Agreement, and how the 1998 Agreement may provide the necessary means to maintain post-Brexit relations. We will then examine in further detail the issue of platforms for civic dialogue before assessing the recommendations put forward by the Hough report.

Impacts of Brexit on cross-border environmental cooperation

As in so many other areas, the potential consequences of the UK’s departure from the European Union threaten to place obstacles in the way of the kind of cross-border cooperation that would otherwise make every sense in the context of the island of Ireland. This logic is perhaps especially apparent when it comes to environmental concerns as Alison Hough makes clear in her report:

“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” (p.5).

According to Hough, however, Brexit “threatened to undermine the environmental integrity of the island of Ireland in a number of ways” (p.5), including:

⁷ Centre for Cross Border Studies, “‘Flexible and Imaginative Solutions’: The 1998 Belfast/Good Friday Agreement as a framework for post-Brexit relations within and between these islands” (June 2017), p.1, <http://crossborder.ie/site2015/wp-content/uploads/2017/07/Brexit-GFA-19.07.2017-revised.pdf>.

⁸ This project was funded by the Irish Department of Foreign Affairs and Trade’s Reconciliation Fund. For a general overview of the project, see <http://crossborder.ie/bringing-agreement-home-parts/>, and for a summary of the All-Island Dialogue that concluded the project’s series of workshops, see <http://crossborder.ie/bringing-agreement-home-parts-island-dialogue-event/>.

⁹ For an overview of the “Towards a New Common Chapter” project, which has been funded by the Joseph Rowntree Charitable Trust, the Community Relations Council, and the Department of Foreign Affairs and Trade’s Reconciliation Fund, see <http://crossborder.ie/towards-a-new-common-chapter/>.

- by giving rise to regulatory divergence where once the EU had provided a shared regulatory context, with the potential for less coherent environmental regulation and governance across the island of Ireland;
- resulting in the loss of the supra-national governance structures of the EU, particularly the Court of Justice of the European Union, which “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” (p.6);
- signifying the potential loss of streams of funding provided by the EU for environmental cross-border cooperation; and
- introducing physical and regulatory barriers to cross-border cooperation.

The potential Brexit represents for the introduction of obstacles to cross-border cooperation due to regulatory if not physical barriers, as well as the loss of dedicated streams of funding, have been among the concerns raised repeatedly by the Centre for Cross Border Studies. Some of those concerns were summarised as follows:

“Crucially, through the United Kingdom’s and the Republic of Ireland’s EU membership, the European Union’s legal regime has profoundly shaped the practical possibility for cross-border cooperation. As such, cross-border cooperation is neither simply a specific feature of Northern Ireland’s peace agreement, nor is it one of regional devolution. Instead, it is a phenomenon of multi-level governance, equally embedded in the UK’s internal constitutional arrangements, in the arrangements made by the 1998 international Belfast/Good Friday Agreement, and in wider EU law. By de-coupling Northern Ireland from EU legislation and policy (while these continue to apply to the Republic of Ireland), Brexit creates a major challenge to the conditions for, and the practice of, cross-border cooperation”.¹⁰

In her report Alison Hough also highlights how the areas of cooperation under the Belfast/Good Friday Agreement “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” (p.10). As a result, not only has Strand 2 of the 1998 Agreement meant there are environmental sectoral meetings of the North South Ministerial Council and that implementation bodies such as Waterways Ireland and the Loughs Agency hold the environment as one of their concerns, but under Strand 3 the environment has also been a sectoral area of the British Irish Council since 1999.

Hough further notes in relation to Brexit’s potential impact on environmental cross-border cooperation, however, that “While some have commented that the UK leaving the EU may weaken the [Good Friday/Belfast Agreement], pointing to the references to EU membership within the text in support of this [...], the references to the EU are quite oblique, importing the assumption of EU membership but neither relying on nor requiring it” (p.25). This leads the author to suggest “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” (p.25). The critical question is “Whether issues external to the Agreement such as changes to the border affects their operation

¹⁰ Centre for Cross Border Studies, Brexit and the UK-Ireland Border Briefing Paper Series, “Briefing Paper 5: The Impact of Brexit on Devolution in Northern Ireland” (January 2019), pp.8-9, <http://crossborder.ie/site2015/wp-content/uploads/2019/01/Devolution-Briefing-Paper-Final-2.pdf>.

[which] depends entirely on the nature of the post-Brexit relationship between the EU and UK” (p.25).

Prior to the 2016 referendum on the UK’s membership of the EU the Centre for Cross Border Studies also suggested a vote in favour of leaving would not of itself make the Belfast/Good Friday Agreement redundant, as long as there was political consensus – particularly in Northern Ireland – to apply any necessary modifications in order to ensure its continued operability across all of its constituent parts. However, not only is it unlikely that such a political consensus could be found in the current context, but the UK Government’s approach to its withdrawal from the EU (leaving the EU’s Customs Union and Single Market) has also increased the risk of critically undermining the areas of cross-border cooperation – including environmental cross-border cooperation – set out in the 1998 Agreement, as the Centre for Cross Border Studies has previously highlighted:

“With the UK outside the EU’s Single Market and Customs Union, it is difficult to conceive of any future UK-EU trading agreement capable of maintaining the current status of the totality of relationships – North-South *and* East-West – set out in the 1998 Agreement. Even if a future UK-EU agreement were able to avoid a “hard” border with physical infrastructure, it is unlikely that this would imply the total absence of any customs procedures for cross-border trade (North-South and/or East-West) or post-Brexit regulatory, policy and rights divergence inhibiting North-South and East-West relations”.¹¹

Maintaining post-Brexit relations with the 1998 Agreement

In her report Alison Hough rightly identifies the significance of the structures created by the Belfast/Good Friday Agreement in safeguarding cross-border cooperation, including environmental cross-border cooperation, in the post-Brexit context, as long as that significance is recognised and enabled. On the question of recognition, the author states:

“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” (p.48).

Indeed, it should be added that as one of its co-guarantors the UK Government should have no hesitation in showing the necessary political will to ensure no impediments to cooperation under the 1998 Agreement are introduced as a result of withdrawal from the EU. Instead, institutions such as the North South Ministerial Council and the British Irish Council should be revitalised as invaluable platforms for post-Brexit cooperation. Thus, “rather than the 1998 Agreement being regarded simply as a problem to be solved during the negotiations [...] it can become a potential solution to the challenges posed by Brexit to future relations within and between these islands”.¹²

Hough summarises this by stating that while “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,

¹¹ Centre for Cross Border Studies, Brexit and the UK-Ireland Border Briefing Paper Series, “Briefing Paper 4: The Belfast/Good Friday Agreement and the negotiations on the UK’s withdrawal from the EU” (August 2018), pp.16-17, <http://crossborder.ie/site2015/wp-content/uploads/2018/08/Briefing-Paper-4.pdf>.

¹² Centre for Cross Border Studies, “Flexible and Imaginative Solutions”, p.4.

as well as in the area of environmental co-operation [...] 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” (p.45). By fully exploiting the structures created by the 1998 Agreement to avoid post-Brexit divergences that would otherwise undermine it, Hough concludes this “would enhance environmental protection” (p.23).

Recognition of the inherent value of the bodies and institutions established by Strand 2 of the 1998 Agreement is apparent within the Protocol on Ireland/Northern Ireland that forms part of the Withdrawal Agreement negotiated by the UK Government and the European Union in November 2018.¹³ Article 16 in particular sets out how the Specialised Committee will “examine proposals concerning the implementation and application of this Protocol from the North-South Ministerial Council and North-South Implementation bodies set up under the 1998 Agreement”. If the Protocol were ever to come into effect, it would furnish the North South Ministerial Council and the implementation bodies with a potentially significant role in ensuring that, as Article 13(1) states, the Protocol is “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”. This is, of course, in a possible context where the two jurisdictions on the island of Ireland – one of which will remain a Member State of the EU – will need to ensure North-South cooperation continues unhindered post-Brexit while the UK and the EU pursue a trade agreement sufficiently comprehensive to safeguard North-South relations under Strand 2 of the Belfast/Good Friday Agreement.

However, the Protocol’s focus on the North South Ministerial Council and the implementation bodies created under Strand 2 of the 1998 Agreement is indicative of how the UK Government’s approach to its withdrawal from the EU has resulted in a solution that fails to properly encompass Strand 3 of the same Agreement. Whereas the Protocol imbues the Strand 2 bodies and institutions with the importance they rightly merit, there is no equivalent recognition of the potentially vital role the British Irish Council, for example, could play in the post-Brexit context. Although when the draft Withdrawal Agreement was published the Centre for Cross Border Studies acknowledged it came “closest to providing a legally binding framework” to maintain the conditions for North-South cooperation and avoid a “hard” border,¹⁴ it went on to highlight its limitations:

“The Protocol on Ireland/Northern Ireland in the draft Withdrawal Agreement of November 14th represents the best deal on offer for Northern Ireland that safeguards against a ‘hard’ border on the island and protects North-South cooperation. As it presently stands, however, the Protocol does not protect the totality of existing socio-economic relations within and between these islands, notably the East-West dimension, of the 1998 Belfast/Good Friday Agreement. Although primarily concerned with the “unique circumstances on the island of Ireland”, the Protocol could have more fully

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

¹⁴ Centre for Cross Border Studies, “Centre for Cross Border Studies Statement on draft Agreement on the withdrawal of the United Kingdom from the European Union” (20 November 2018), p.1, <http://crossborder.ie/site2015/wp-content/uploads/2018/11/CCBS-Statement-on-draft-EU-Withdrawal-Agreement-of-14-November-2018.pdf>.

integrated the institutions created under Strand 3 of the 1998 Agreement, in recognition that some of the “unique circumstances” on the island of Ireland arise from its relations with Great Britain. However, we also recognise the difficulty in this, given the UK’s decision to leave the Single Market and Customs Union” (p.3).

Similarly, Alison Hough also notes in her report how “there are issues with the ‘Backstop’ in terms of potential for slippage and divergence of environmental regulation”, but concludes “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)” (p.41). Moreover, Hough is of the view that “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” (p.40). Of course, if such membership were to be extended to the UK as a whole then – as the Centre for Cross Border Studies maintains – cooperation under Strand 3 of the 1998 Agreement would also be facilitated post-Brexit, thus safeguarding the totality of relations the Agreement represents.

What is of crucial importance, however, is how Alison Hough correctly identifies the institutions and bodies created under the Belfast/Good Friday Agreement as holding enormous potential for ensuring continued cross-border cooperation. An institution such as the British Irish Council, which not only brings together the Irish and UK Governments, but also the devolved administrations of Scotland, Wales and Northern Ireland, as well as the Isle of Man and the Channel Islands, will not cease to exist as a result of Brexit, and can therefore play a significant role in maintaining positive relations going forward. But for that potential to be realised, not only do all administrations across these islands – and particularly the UK Government – need to recognise the importance of these bodies and institutions, they must also fully assume their involvement in the 1998 Belfast/Good Friday Agreement, and how it is not an obstacle to Brexit requiring resolution, but rather a framework for post-Brexit relations within and between these islands on which we must build.

Realising the full potential of the 1998 Agreement: The Civic Dimension

The Centre for Cross Border Studies recently completed the implementation of a project entitled “Bringing the Agreement Home: In all its parts”. Funded by the Department of Foreign Affairs and Trade’s Reconciliation Fund, the project’s overarching objective was to “provide an accessible analytical review of the Good Friday Agreement and subsequent related agreements, as well as a series of workshops and an ‘All-Island Conversation’ to inform and engage community organisations on the island of Ireland about the provisions of the agreements and the institutions and bodies they created”.¹⁵ A concern repeatedly raised by those taking part in the workshops and “All-Island Conversation” as part of the project was the perceived reluctance of political representatives to see the development of platforms for civic society dialogue, and how such platforms would have provided essential means of communicating communities’ views as the UK shapes its withdrawal from the EU, particularly in the absence of a functioning Northern Ireland Assembly and Executive, and therefore of a functioning North South Ministerial Council.

¹⁵ See <http://crossborder.ie/bringing-agreement-home-parts/>.

In light of this, and of the Centre for Cross Border Studies' own concerns, we fully endorse Alison Hough's comments on the 1998 Agreement and the opportunities for civic engagement. In her report the author not only highlights the failure to reconstitute the Northern Ireland Civic Forum established under Strand 1 of the Belfast/Good Friday Agreement but whose work was interrupted with the collapse of devolution in 2002; she also points to the continued absence of an all-island consultative forum whose creation had been suggested under Strand 2 of the Agreement. In terms of the former, Hough notes how the "Civic Forum would appear to have a lot of potential as a body which could feed into policy making in Stormont", and how it could become "a useful tool for focussing on issues of environmental cross-border co-operation" (p.18), leading her to conclude:

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 (pp.18-19).

Similarly, in terms of the formation of all-island consultative forum as suggested by Strand 2 of the Agreement, Hough is of the view that "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" (p.19).¹⁶ The failure to reconstitute the Northern Ireland Civic Forum, to create an all-island consultative forum, and to deliver a Bill of Rights for Northern Ireland represent the "failure of full implementation of all of the provisions of the GF/BA" which, according to Hough, "means that the full potential of cross-border co-operation has not yet been realised" (p.44). The impending context of Brexit makes the implementation of these provisions all the more urgent.

Indeed, reflecting on suggestions made by other academics on how certain consultative and governance mechanisms should be introduced in order to ensure post-Brexit cross-border environmental cooperation and the upholding of environmental protection standards, although Hough offers her agreement in principle, she continues by stating:

"[T]his 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 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" (pp.47-48).

Conclusion

Whether or not there is a need for a "Treaty Body" as suggested by Hough, the potentially turbulent context into which these islands are entering require the full implementation of the Belfast/Good Friday Agreement, as only then will we have the tools available to ensure the totality of relations encompassed by the Agreement are not undermined by whatever form the UK's departure from the

¹⁶ It is important to note that although Hough is correct in stating that the 1998 Agreement "does not command" (p.19) the creation of an all-island consultative forum, the 2006 St Andrew's Agreement states: "The Northern Ireland Executive would support the establishment of an independent North/South consultative forum appointed by the two Administrations and representative of civil society" (paragraph 22), <https://www.gov.uk/government/publications/the-st-andrews-agreement-october-2006>.

EU eventually takes (or whether it leaves the EU at all). Many of those tools already exist, although perhaps not always fully exploited or properly valued by the governments and administrations across these islands. Others, such as the Northern Ireland Civic Forum, have vanished in their original form, or have failed to materialise, as in the case of the all-island consultative forum. These platforms for civic dialogue within and across these islands represent a vital means of repairing strained relations between communities, and their continued absence will result in the potential continued existence of formal structures such as the British Irish Council lacking the lifeblood of cooperation on the ground.

Indeed, in light of views expressed by community groups across these islands participating in the Centre for Cross Border Studies' "Towards a New Common Chapter" project and the resulting "New Common Charter for Cooperation Within and Between these Islands",¹⁷ we would propose the addition of another dimension to the platforms for civic dialogue already outlined. Whereas the Belfast/Good Friday Agreement created the Northern Ireland Civic Forum as part of Strand 1 and suggested the creation of an all-island consultative forum under Strand 2, there was no equivalent body envisioned under Strand 3. Thus, while the British Irish Council provides an opportunity for dialogue and cooperation between the administrations across these islands, there is no similar structure for civic society. The provision of such a structure would ensure cross-community and cross-border dialogue and cooperation operating in line with all three strands of the 1998 Agreement.

Alison Hough suggests that "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" (p.48). The Centre for Cross Border Studies is in full agreement with this, and would stress that the 1998 Belfast/Good Friday Agreement is the existing framework with the flexibility and capacity for innovation required to maintain the totality of relations within and between these islands. We would hope, therefore, that this is fully recognised as political parties in Northern Ireland are involved in talks on restoring the Assembly and Executive, and as the UK Government and UK political parties continue to search for a means of resolving the current impasse on leaving the EU.

¹⁷ For more on the "Towards a New Common Chapter" project, funded by the Joseph Rowntree Charitable Trust, the Community Relations Council, and the Department of Foreign Affairs and Trade's Reconciliation Fund, as well as the New Common Charter, see <http://crossborder.ie/towards-a-new-common-chapter/>.