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Non-diminution, dynamic alignment and cooperation: exploring the potential of the Windsor Framework to protect the environment

Mary Dobbs*
Maynooth University
Alison Hough
Technological University of the Shannon
Orla Kelleher
Maynooth University
Lisa Claire Whitten
Queen's University Belfast
Ciara Brennan
Environmental Justice Network Ireland
Correspondence email: mary.dobbs@mu.ie.

ABSTRACT

Governance arrangements in Northern Ireland (NI) have categorically failed the environment to date, with significant degradation occurring across almost all indicators. Brexit poses fresh challenges, as it impacts a range of environmental standards, rights, safeguards and governance structures internally and on a cross-border basis. The original Protocol on Ireland/Northern Ireland, and subsequent amendments in the Windsor Framework, offered welcome resolution to some of the major NI-related regulatory headaches and uncertainties raised by Brexit. This binding legal framework establishes entirely new governance and regulatory arrangements for NI, uniquely tailored to the historical, political and legal conditions that characterise its devolved and biogeographical shared-island status. Several provisions therein could play a significant role in addressing challenges for environmental governance in NI – and potentially across the island of Ireland.

This article analyses the Windsor Framework's provisions of greatest relevance in the environmental field and that might assist in

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maintaining existing environmental rights, safeguards and standards – in particular, articles 2, 5, 9 and 11 of the Windsor Framework. Of interest are the complementary but differentiated approaches across these provisions, ranging from forms of dynamic alignment (articles 5 and 9), through non-diminution guarantees (article 2) to maintaining the foundations for North–South cooperation (article 11), including how they compare with international human rights non-regression norms. Three aspects are particularly striking: article 2's novel, domestically enforceable, non-diminution mechanism; the complementary, mutually re-enforcing relationship between the 1998 (Belfast/Good Friday) Agreement and the Windsor Framework; and the comparisons between the Windsor Framework's approach and NI's previous relationship with both European Union and Irish environmental law.

Keywords: environmental governance; Windsor Framework; Brexit; environmental standards.

INTRODUCTION

'Brexit', as the process of the United Kingdom (UK) leaving the European Union (EU) is known, requires the unravelling of a decades-long legal, social, economic and political relationship, that had impacted almost every area of life in the UK, and has given rise to highly complex legal and practical problems. These problems are particularly pronounced in relation to the status of Northern Ireland (NI). This is because the arrangements must satisfy the competing demands of allowing NI to completely leave the EU alongside the rest of the UK, but without creating the kind of 'hard' border normally expected at the edge of an entity like the EU. The prospect of a return to a physical hard border on the island of Ireland also raises concerns about the potential breakdown of many years of progress in the peace process and the evolution of cross-border cooperation generally, but also specifically in the area of the environment, which is particularly significant given that the island is a single biogeographical region. Further, substantial concerns arise regarding the potential flowing from Brexit for decreased environmental standards, protections and governance in NI, especially in light of the current state of the environment and NI's record in environmental matters.[1]

The eventually agreed Ireland/Northern Ireland Protocol to the Withdrawal Agreement (hereinafter the Protocol), as later amended

1 Eg Ciara Brennan, Mary Dobbs and Viviane Gravey, 'Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland' (2019) 21(2) European Environmental Law Review 84–110. See further below.

by and renamed the Windsor Framework,[2] was the novel legal and political attempt to resolve the particular challenges posed by Brexit and the island of Ireland. It focuses largely on avoiding a hard border and addressing trade issues and peace, doing so via a variety of mechanisms designed to ensure maintenance of common standards on the island and maintaining conditions for cross-border cooperation established by the Belfast/Good Friday Agreement (hereinafter the 1998 Agreement). In doing so, it highlights the broad significance of the 1998 Agreement to today's governance challenges, bringing a new focus and potential role for it. Although the primary focus of the Windsor Framework is not directly on the environment, considerable provisions are of relevance – including those on trade, human rights and cross-border cooperation – raising the question as to their potential usefulness as tools in this field.

Consequently, there is simultaneously a significant practical need and theoretical interest in identifying and evaluating potential tools to support environmental governance in Northern Ireland and cross-border environmental cooperation on the island – whether in the underutilised 1998 Agreement or the novel Windsor Framework.

This article therefore examines whether, and to what extent the Windsor Framework, in conjunction with the existing provisions in the 1998 Agreement, can provide an avenue to help guard and potentially enhance environmental standards and governance mechanisms, both in NI and on a cross-border basis. It explores the Windsor Framework's novel approaches (in conjunction with the 1998 Agreement) regarding the interrelated issues of standards and cross-border cooperation. To achieve this, the article first outlines the broader foundations for cross-border environmental cooperation in the 1998 Agreement and EU membership and Brexit's impact on this. The remainder of the article then analyses the Windsor Framework and 1998 Agreement and the relevant provisions therein. It sketches out the basis for a generous, purposive interpretation of the provisions in light of principles of treaty interpretation. It then examines in turn articles 5 and 9 of the Windsor Framework, article 2 of the Windsor Framework and, finally, article 11 of the Windsor Framework.

As shall be seen, the provisions take differentiated approaches, ranging from forms of dynamic alignment (articles 5 and 9), through non-diminution guarantees (article 2) to maintaining the conditions for North–South cooperation (article 11). Of particular interest is the unique brand of non-diminution created by article 2 of the Windsor

2 The EU–UK Withdrawal Agreement Joint Decision 1/2023 amended the Protocol, such that, as amended, it would be known as the Windsor Framework. This is the term used throughout this article, except when referring to the original Protocol, as unamended by the Windsor Framework in February 2023.

Framework to support the 1998 Agreement's 'Rights, Safeguards and Equality of Opportunity' (RSEO) section. Article 2, it is argued, encompasses a wide range of environmental human rights and safeguards, including through the 1998 Agreement's references to environmental protection and its commitment to the incorporation of the European Convention on Human Rights (ECHR).

THE 1998 AGREEMENT, BREXIT AND THE ENVIRONMENT IN CONTEXT

This section outlines the foundations provided by both the 1998 Agreement and EU membership for environmental governance in NI and especially cross-border environmental cooperation. While some elements of the 1998 Agreement operated in tandem with the EU frameworks, significant elements were left underutilised due to the availability of EU structures, institutions and mechanisms. Brexit thereby has the potential not just to affect EU-derived environmental governance, but also to impact the operation of the 1998 Agreement in an environmental context, simultaneously creating extra hurdles and demands for its effective functioning.

The challenges in the area of trade were front and centre to the debate and negotiations surrounding Brexit. However, environmental non-governmental organisations[3] highlighted early on that NI leaving the EU created unique issues for the delicate structures of shared environmental governance and cross-border environmental cooperation on the island. These structures arose out of the 1998 Agreement cooperation arrangements which included extensive provision for cooperation on environmental issues.[4] The fabric of environmental governance in both jurisdictions as well as cross-border environmental cooperation came to depend largely upon the supporting structures arising out of EU membership.[5]

The 1998 Agreement is first and foremost a peace agreement; it is also a multi-level political agreement and an international treaty, which was unusual in that it was signed by political parties/stakeholders as

3 Northern Ireland Environment Link and the Environmental Pillar, 'Joint Briefing: Brexit and cross-border environmental cooperation on the island of Ireland' (2017).

4 Alison Hough, 'Brexit, the Good Friday/Belfast Agreement and the environment: issues arising and possible solutions' (A Report Commissioned by the Environmental Pillar in conjunction with Northern Ireland Environment Link 2018).

5 Sharon Turner and Ciara Brennan 'Modernising environmental regulation in Northern Ireland: a case study in devolved decision-making' (2012) 63(4) Northern Ireland Legal Quarterly 509–532.

well as state representatives. It was given some immediate domestic effectiveness in the UK/NI primarily through the Northern Ireland Act 1998, but with supporting provisions in the Human Rights Act 1998, and later in Ireland through the European Convention on Human Rights Act 2003. It was also put to referenda in Ireland and in NI, passing by popular majority in both. This took place after 30 years of 'the Troubles' and against the backdrop of a desire for peace, stability and improved quality of life. Tailored to the specific context of NI, it contains unique provisions on governance mechanisms – with its three Strands regarding NI, North–South relationships and relationships between Ireland and the UK (including its devolved administrations and crown dependencies). Alongside these more institutional elements, there is content on the fields of cooperation, on disarmament, justice etc and key provisions on 'rights, safeguards and equality of opportunity'. The 1998 Agreement is not a comprehensive treatise of rights. Rather it reflects the desire not just for peace in the immediate term, but for a shared or common quality of life and cooperation within and between communities that would ensure peace and harmony in the long-term. As such it should not be thought of in terms of coercive compliance and enforcement, but rather in terms of what it facilitates and enables.

From an environmental perspective, the 1998 Agreement contains numerous important provisions aimed at creating the conditions for cross-border environmental cooperation.[6] The environment (understood therein as 'environmental protection, pollution, water quality, and waste management') is one of the expressly listed areas for cooperation/joint action under Strand 2 and is thereby within the remit of the North–South Ministerial Council (NSMC), but it is also directly relevant to 7 of the 11 other listed areas, for example regarding waterways, agriculture and EU programmes. Likewise, Strand 3 provides for the British Irish Council (BIC) to endeavour to cooperate in a range of areas, including 'environmental issues' and other areas directly relevant to the environment. This is supplemented by the content and environmental gloss that can be applied to the RSEO section of the 1998 Agreement (discussed below).

Since the 1998 Agreement was adopted, significant milestones have been achieved in implementation, including establishment of the devolved institutions specified in Strand 1, the elaborate all-island, inter-governmental and regional governance structures of the NSMC, the BIC, and the British–Irish Intergovernmental Conference. The six cooperation bodies nominated under Strand 2 supervised by the NSMC have been established with varying degrees of success, including the Loughs Agency and Waterways Ireland to undertake relevant

6 Hough (n 4 above).

environmental tasks on a day-to-day basis; the NSMC[7] and BIC[8] have also engaged in considerable discussions and facilitated cooperation across a range of environmental areas.[9] In contrast, the consultative Civic Forum that was to be established regarding economic, cultural and social issues was only briefly realised.[10] In general terms, it is reasonable to conclude that, while the 1998 Agreement has considerable potential regarding the environment, only some elements have been utilised – and these to a limited extent to date.[11] Challenges therefore remain in both achieving full implementation of the breadth of vision of the 1998 Agreement and in achieving high standards of environmental protection in NI – even before one considers the impacts of Brexit. For example, the repeated collapse of the government in NI has undermined the effectiveness of the NSMC (since its members are drawn from the governments in both Ireland and NI) and the other Agreement bodies (as they have similarly suffered from a lack of political leadership and impetus). The fact also remains that much of the cross-border cooperation achieved outside of the structures outlined above was a function of the informal initiative of business, local government and civil society, and has been inherently driven by extensive EU funding for integration made available through the Interreg (and later Peace Plus) funding.[12]

Prior to Brexit, this unmet potential was not a major concern from an environmental perspective – despite being desirable and beneficial. This was because the EU provided broad, strong foundations for shared minimum environmental standards and governance in both Ireland and NI, meaning that full realisation of the 1998 Agreement environmental provisions was not absolutely necessary.[13] These shared EU foundations included a general 'direction of travel' via the continuously developing EU environmental law 'acquis' (including the Treaty on the

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7 Eg as reflected in the NSMC work packages for environmental areas.

8 Eg BIC, 'Home page'; BIC, 'British-Irish Council Annual Report 2017'.

9 Alison Hough, 'The potential of the Good Friday Agreement to enhance post-Brexit environmental governance on the island of Ireland' (2019) (2) Irish Planning and Environmental Law Journal 55–65.

10 CAIN Archive (nd), 'Members of the Civic Forum 2000–2002'.

11 Hough (n 9 above); and Michael D'Arcy and Frances Ruane, 'The Belfast/Good Friday Agreement, the island of Ireland economy and Brexit' (British Academy and Royal Irish Academy 2018).

12 Caroline Creamer and Katy Hayward, 'Research for REGI Committee – impact of Brexit on the development of Irish regions and their cross-border cooperation' (European Parliament, Policy Department for Structural and Cohesion Policies, Brussels 2023); and Katy Hayward and Milena Komarova, 'The border into Brexit: perspectives from local communities in the central border region of Ireland/Northern Ireland' (Report prepared for ICBAN 2019).

13 Hough (n 9 above).

Functioning of the EU (TFEU) objective and Charter principle of a high level of environmental protection and environmental principles; human rights protections; a raft of EU secondary legislation; and the jurisprudence of the Court of Justice of the EU (CJEU), with knock-on effects on domestic case law), the broad EU governance mechanisms (including the European Commission's watchdog role and enforcement by the CJEU) and EU funding (including on a cross-border basis and largely dispensed through the Special EU Programmes Body).

This ensured (in principle) a minimum level of environmental protection across a wide range of areas, as well as facilitating cross-border cooperation, for instance, through regulatory alignment and funding for transboundary projects.[14] In some contexts, the EU mandated cooperation between Ireland and Northern Ireland (and/or the UK as a whole), for instance regarding transboundary river basins[15] and marine bodies,[16] invasive alien species[17] and more generally in the context of environmental impact assessments where there was a chance of significant transboundary impacts.[18]

Notwithstanding the supporting structures incidental to EU membership outlined above, it should not be thought that environmental protection in NI, Ireland or on a cross-border basis was flawless pre-Brexit. The significant environmental governance challenges in NI are well documented and long standing, for example in relation to the 'Cash for Ash' scandal, illegal dumping, ammonia pollution and the lack of an independent environmental agency.[19] Indeed, the UK, NI and Ireland have been the subject of

14 Ciara Brennan et al, Linking the Irish Environment (Report Commissioned by NIEL and IEN 2023).

15 Art 13 of Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy [2000] OJ L327/1.

16 Arts 5 and 6 of Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy [2008] OJ L164/19.

17 Art 22 in particular of Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species [2014] OJ L317/35.

18 Art 7 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L26/1 (as amended).

19 Eg Brennan et al (n 1 above); Ciara Brennan, Peter Hjerp and Ray Purdy, 'Political, economic and environmental crisis in Northern Ireland: the true cost of environmental governance failures' (2017) 68(2) Northern Ireland Legal Quarterly 123–157; and Richard Macrory, 'Environmental law in the United Kingdom post Brexit' (ERA Forum 24 September 2018).

several enforcement actions[20] regarding failure to comply with EU environmental obligations. Furthermore, the state of the environment in both jurisdictions is concerning, for example, as reflected in the assessments of water bodies and protected sites across the island.[21]

However, until now the EU provided valuable standards, governance mechanisms and regulatory alignment as noted. Brexit now challenges this, with it being likely that there will be an increase in governance gaps,[22] a decrease in environmental protections and standards,[23] and increased regulatory divergence across the island[24] – thereby also making it more challenging to cooperate on a cross-border or all-island basis effectively.[25] Indeed, whereas the EU mandates member states to cooperate with each other regarding elements such as transboundary river basins, it only requires best endeavours regarding cooperating with non-member states and obviously imposes no such obligation on non-member states.[26] Significant concerns arise regarding both the future of environmental protection in NI and on an all-island basis as a result of Brexit.

The EU Withdrawal Act 2018 (as amended) (EUWA) addressed some of the immediate concerns through introducing 'retained EU law' as a new legislative category in the UK system. The EUWA essentially provided for the transposition of secondary EU law as it existed at the end of the agreed UK transition period (on 31 December 2020), in slightly adapted manners to adjust for the UK not being an EU member state any more and, for instance, not having access to EU authorisation procedures. In conjunction with the subsequent raft of

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20 Eg see Case C-664/18 *Commission v UK (Limit Values – Nitrogen Dioxide)* ECLI:EU:C:2021:171; and Commission Infringement notification against Ireland for water quality in 2023 – INFR(2007)2238.

21 Environmental Protection Agency, 'Water Quality Indicators 2022' (2023); Department of Agriculture, Environment and Rural Affairs, 'Northern Ireland Water Framework Directive Statistics Report 2021' (9 December 2021); Turner and Brennan (n 5 above); Brennan et al (n 14 above).

22 Eg Maria Lee, 'Brexit and environmental protection in the United Kingdom: governance, accountability and law making' (2018) 36(3) Journal of Energy and Natural Resources Law 351; and Andrew Jordan, Charlie Burns and Viviane Gravey, 'Three Brexit governance gaps no one is talking about' (*Inside Track* 6 December 2017).

23 Brennan et al (n 1 above).

24 Mary Dobbs, Sarah Hamill and Robin Hickey, 'Land law and land use' (2023) 34(2) Irish Studies in International Affairs 149.

25 Ibid; Mary Dobbs and Viviane Gravey, 'Environment and trade' in Christopher McCrudden (ed), The Law and Practice of the Ireland–Northern Ireland Protocol 1st edn (Cambridge University Press 2022); and Brennan et al (n 14 above).

26 William Howarth, 'Brexit and the United Kingdom water environment' (2017) 14(3–4) Journal for European Environmental and Planning Law 294. See art 13 of the Water Framework Directive.

statutory instruments, this helped plug the very large substantive gaps that would have arisen otherwise, but some gaps remained (eg treaty provisions or soft law elements not otherwise provided for by EUWA), slight changes could nonetheless be significant (eg through replacing an external, independent oversight body like the European Commission with one that could entail conflicts of interest like the Department of Agriculture, Environment and Rural Affairs)[27] and without the EU governance mechanisms applying (eg the supervisory and enforcement roles of the Commission and CJEU). The UK also developed measures such as the Environment Act 2021 with its provisions for a policy statement on environmental principles and on the Office for Environmental Protection (OEP), but, while generally welcome, these do not equate to what was present as a member of the EU.[28] For instance, the recent introduction of the OEP in NI does not address the governance gap because its powers are limited (particularly with regard to enforcement), and it suffers from resourcing issues.[29] These variations challenge the effectiveness of environmental governance regimes and are already leading to some divergence, for instance through the inability to compel compliance by the UK or through the loss of the interpretative role of the CJEU. This is exacerbated by the new ability of the UK Government to amend, adapt or even revoke retained EU law – as highlighted by enabling provisions within the Environment Act and strengthened, in particular, by the Retained EU Law (Revocation and Reform) Act 2023. While these changes alone do not *necessarily* pose threats to the environment, there have been some concerning indications of the deregulatory preference (in some parts) of the UK's policy in this area and, irrespective of substance, any divergence poses challenges for cross-border cooperation that is essential in environmental matters on the island of Ireland.[30] Simply put, without the shared objectives, regulatory frameworks and governance mechanisms, regulatory divergence between NI and Ireland will increase and this will impact on the ability to cooperate in environmental matters.

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27 Ciara Brennan and Mary Dobbs, 'Reality bites: the implications of scrutiny-free environmental law reform in Northern Ireland after Brexit' (*Brexit and Environment* 12 March 2019).

28 Eg Helena Horton, 'UK Government "ignoring green watchdog" over air quality rules' *The Guardian* (London 4 August 2023); and Georgina Holmes-Skelton, 'The Government is on the brink of making a mistake over environmental principles' (*Green Alliance Blog* 30 April 2021).

29 See, for instance, regarding the OEP's funding.

30 See, for example, Viviane Gravey and Andrew J Jordan, 'UK environmental policy and Brexit: simultaneously de-Europeanising, disengaging and (re)-engaging?' (2023) 30(11) Journal of European Public Policy 2349–2371.

A need exists to consider what tools might exist to help protect and strengthen environmental standards and governance in NI, including through cross-border cooperation. While there are some relevant components within the EU/UK Trade and Cooperation Agreement (TCA), for example with provisions on animal welfare, sustainable food systems and climate targets of net-zero by 2050,[31] and especially those on non-regression[32] and 'rebalancing measures',[33] these are of limited value;[34] the latter two provisions are found within title XI on the level playing field, focused on impacts on trade and investment, and remain very difficult to enforce.

However, NI (and the island of Ireland as a whole) has two important tools that merit further examination: the underutilised 1998 Agreement with its multifaceted aspirational provisions regarding the environment and cooperation; and the still underexplored Windsor Framework, which contains a range of relevant provisions that may be of assistance. Crucially, these two documents are closely linked, with the Windsor Framework seeking, amongst other things, to uphold the 1998 Agreement in 'all its dimensions'.[35] The remaining sections of this article therefore analyse the shared aims of the two documents, before considering core provisions within the Windsor Framework in conjunction with the 1998 Agreement where relevant.

SHARED AIMS: ENVIRONMENTAL STANDARDS AND TRANSBOUNDARY COOPERATION?

To help understand individual provisions within the Windsor Framework and also its relationship with the 1998 Agreement, it is essential to consider the core purposes of the documents. This draws on the customary principles of international law on treaty interpretation, as reflected in the Vienna Convention on the Law of Treaties (VCLOT), which commence with an examination of the text of provisions but then endorse a purposive interpretation.[36] This was recently acknowledged by the NI High Court in its *Legacy* judgment, where the court stated that it was entitled to take a 'generous and purposive approach' to its interpretation of article 2 of the Windsor Framework and corresponding

31 TCA, pt 2, title I and title X1.
32 Art 7.2 of title XI.
33 Art 9.4 of title XI.
34 Dobbs and Gravey (n 25 above); and Viviane Gravey, 'The Brexit deal and the environment: pretty ambitious yet pretty irrelevant?' (*Brexit Institute News* 16 February 2021).
35 EU–UK Withdrawal Agreement, Protocol, art 1(3).
36 See art 31 of the VCLOT.

provisions in the 1998 Agreement.[37] Consequently, it is valuable to examine the express purposes of the two documents, as well as what information may be gleaned from the general provisions therein.[38]

The central provision is the Windsor Framework's article 1, which outlines the Windsor Framework's objectives as follows:

> 1. This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.
>
> 2. This Protocol respects the essential State functions and territorial integrity of the United Kingdom.
>
> 3. This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North–South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.

This is then complemented by a wide range of recitals in the Preamble, for instance affirming the common goal of protecting the 1998 Agreement 'in all its parts', including cooperation across the island, and likewise 'recalling the commitment of the United Kingdom to protect North–South cooperation and its guarantee of avoiding a hard border'.[39] Of note also is the reference to the EU/UK mapping exercise[40] carried out during the withdrawal negotiations and which demonstrated 'that North–South cooperation relies to a significant extent on a common Union legal and policy framework', with Brexit thereby challenging such cooperation and creating 'the need for this Protocol to be implemented so as to maintain the necessary conditions for continued North–South cooperation, including for possible new arrangements in accordance with the 1998 Agreement'. While the

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37 *Dillon and Others v Secretary of State for Northern Ireland* [2024] NIKB 11 (the *Legacy* judgment) [533]–[535], with the quotation from [535]. See also, for instance, *Angesom: Angesom's (Aman) Application and In the matter of a decision by the Secretary of State for the Home Department and the Human Rights Commission and the Equality Commission Intervening* [2023] NIKB 102.

38 Art 32 of the VCLOT addresses also the question of supplementary means of interpretation, which merits further consideration but is beyond the scope of this article.

39 It should be noted also that there are likewise recitals (worded with somewhat more caveats) about controls at ports and airports in NI, and unfettered market access from NI to the rest of the UK.

40 See Technical Explanatory Note: North–South Cooperation Mapping Exercise. This was a mapping exercise undertaken by the UK (supported by the NI civil service), the European Commission and Ireland, mapping existing formal and informal North–South cooperation on the island of Ireland and the relationship with EU regulatory frameworks.

environment is not expressly noted in this context, the mapping exercise referred to identified 20 environmental and numerous other environmentally relevant regimes and the environment is also (as already stated) an area for North–South cooperation noted explicitly in the 1998 Agreement. Further, the Preamble continued by highlighting the UK's commitment 'to protecting and supporting continued North–South and East–West cooperation across *the full range* of political, economic, security, societal and agricultural contexts and frameworks for cooperation, including the continued operation of the North–South implementation bodies' (emphasis added). This thereby implicitly includes the environmental regimes.

There is clearly a strong basis for arguing that the Windsor Framework aims to support North–South cooperation, including in the environmental field. This point is further supported by the environmental focus points within the 1998 Agreement and also article 11 of the Windsor Framework (discussed below). First, the joint EU/UK mapping exercise, articles 1(3) and 11 of the Windsor Framework, and the 1998 Agreement support the link between North–South cooperation and the environment as discussed. Second, cooperation and working on a cross-border basis is seen in these three documents (the mapping exercise, Windsor Framework and 1998 Agreement) regarding the 1998 Agreement's implementation and within EU law more generally as a foundation for furthering the goals of specific regimes, including environmental protection. For instance, the EU aims to achieve a high level of environmental protection,[41] but may only act in this area (rather than leaving it to the member states) to the extent necessary to deliver effective environmental protection, due to the principles of subsidiarity and proportionality. Further, the language of the NSMC's environmental work package[42] and meeting

41 Art 191 TFEU.

42 Eg NSMC, 'Environment', where 'The Council meets in the Environment Sector in order to make decisions on common policies and approaches in areas such as environmental protection, pollution, water quality management and waste management in a cross-border context.' The work programme includes 'Identification of strategies and activities which would contribute to a co-operative approach to the achievement of sustainable development', 'The development of catchment-based strategies in relation to water quality' and 'The scope for improved waste management in a cross-border context taking account of waste policy in the EU, the UK and Ireland including the promotion of a circular economy'.

minutes[43] reflects the shared understanding that cooperation is to promote environmental objectives and standards. It is clear that there is a substantive goal of environmental protection embedded in the reasons for North–South cooperation that reflects the single epidemiological and biogeographical nature of the island.[44] Third, the Windsor Framework expressly recognises that the EU provided frameworks for the (RSEO) provisions outlined in the 1998 Agreement (which are then protected under article 2 of the Windsor Framework – see below). While the RSEO section remains somewhat ambiguous, there are strong environmental elements found therein, as discussed below.

Together, the combined focus on environmental protection and North–South cooperation across the two documents helps inform the interpretation of the remaining provisions therein. For instance, these demonstrate that there is extensive basis in both the 1998 Agreement and the Windsor Framework to protect environmental standards and rights. This supports the argument that environmental standards and rights are captured within the unique and tailor-made flavour of 'non-diminution' created and made directly enforceable by article 2 of the Windsor Framework, outlined in detail below. However, it also creates an expectation that the Windsor Framework as a whole would help guard and potentially enhance environmental standards and governance mechanisms in NI and on a cross-border basis, as mooted in the introduction above and examined in the subsequent discussion.

ARTICLES 5 AND 9: PROVISIONS FOR DYNAMIC ALIGNMENT

As noted above, concerns arise that Brexit will pose extra challenges for environmental governance and standards across the UK and especially in NI, potentially leading to a decline in environmental protections in NI as well as creating increased regulatory divergence (both intra-UK divergence and divergence between parts of the UK and the EU). Such divergence makes cross-border cooperation much more challenging.

43 NSMC, 'Environment Meeting: Joint Communiqué' (21 October 2020), eg at pt 8: 'Ministers noted the ongoing collaboration between officials in both jurisdictions and submission of joint position papers focusing on a range of holistic clean air, water catchment and nature-based solutions to address future pressures from climate change, support sustainable economic recovery and protect the environment to inform emerging PEACE Plus themes.' And pt 14: 'They also noted the ongoing work in Northern Ireland to tackle plastic pollution and the success of Extended Producer Responsibility (EPR) schemes in Ireland and the opportunities for both administrations to share examples of good practice in this area.'

44 HM Government, 'The Windsor Framework: a new way forward' (2023) para 1.

Consequently, this section considers the potential of articles 5 and 9 of the Windsor Framework to offset the environmental concerns to a limited extent, as they enable a form of dynamic alignment regarding specific EU laws.[45] However, as shall be seen, they only have limited applicability in environmental areas and, while that scope could be expanded, it could likewise be further restricted via articles 13 and 18 of the Windsor Framework – the political will and relationships between the EU and the UK, as well as internally between the UK and NI Governments will be key in practice.

Article 5(4) provides for those EU laws listed in annex 2 to apply in NI, as if NI were still part of the EU.[46] Annex 2, as originally agreed, included 288 EU laws, across a diverse range of areas primarily related to trade in goods. There are some important environmental (or environmentally relevant) examples, such as those on alien and invasive species, trade of endangered species, animal welfare, pesticides, organic food production etc. Significantly, 'the EU will continue to play their supervision and enforcement roles here and CJEU judgments will be applicable, including in light of the environmental [objectives and] principles found in the TFEU'[47] – this is due to articles 12 and 13 of the Windsor Framework[48] and despite the treaty provisions neither applying generally under the Windsor Framework nor being part of EU retained law within the UK. However, most of the laws included within annex 2 are linked to trade/industry[49] and those focused on the environment are very limited when one considers the vast range of EU environmental laws or even the areas identified in the earlier joint mapping exercise regarding North–South cooperation. For instance, there are major, notable gaps regarding areas such as water quality, air quality, nature conservation and, significant in the context of the high levels of agricultural production on this island, nitrates.

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45 See, regarding the continued application of EU law under arts 5 and 9 (pre-Windsor Framework amendments), Viviane Gravey and Lisa Whitten, 'The NI Protocol and the environment: the implications for Northern Ireland, Ireland and the UK' (Environmental Governance Island of Ireland Network Policy briefs 1/2021).

46 In principle, this includes where the EU laws are amended or replaced, courtesy of art 6 of the Withdrawal Agreement and art 13(3) of the Protocol. It can also include new EU laws deemed within the scope of the Protocol – see below regarding art 13(4). It is worth noting that these may now be affected by the Stormont Brake introduced subsequently and discussed below.

47 Ludivine Petetin and Mary Dobbs, *Brexit and Agriculture* (Routledge & CRC Press 2022) 37.

48 Eg arts 12(4), 12(5) and 13(2) of the Protocol.

49 Mary Dobbs, 'Northern Ireland's agricultural quagmire: how to develop a sustainable agricultural policy?' in Irene Antonopoulos et al (eds), *Sustainable Agriculture in Post-Brexit UK* (Routledge 2022).

Article 9 relates to preservation of the Single Electricity Market on the island of Ireland and does similarly, but not identically, with the provisions included in annex 4 of the Windsor Framework.[50] There are fewer laws found here, but some are nonetheless relevant to the environment, for example regarding industrial emissions[51] and greenhouse gases.[52] However, they are only applicable 'insofar as they apply to the generation, transmission, distribution, and supply of electricity, trading in wholesale electricity or cross-border exchanges in electricity'.[53]

Articles 5 and 9 are complemented by other Windsor Framework provisions and especially article 13 (subject to the Windsor Framework's 'Stormont Brake' discussed below). Thus, article 13(3) has the effect that the references in articles 5 and 9 to the EU laws listed in annexes 2 and 4 entail those laws as amended or replaced by the EU. This is further complemented by article 13(4)'s provision for new EU laws, that neither replace nor amend laws listed in the Windsor Framework annexes. Under this, where the EU considers the laws to be within the scope of the Windsor Framework, the EU–UK Joint Committee may (subject to mutual consent) adopt a decision to add these laws to any annex of the Windsor Framework. As Gravey and Whitten have noted,[54] this power has already been used to add the Single Use Plastics Directive[55] (among others) to annex 2.

From an environmental perspective, articles 5 and 9 maintain a minimum level of standards and the applicability of EU governance mechanisms in these limited areas. In light of the EU's general approach to the environment, the treaty objectives and their efforts with the Green Deal, Biodiversity Strategy and so on, one would expect this to be a positive environmental outcome relative to the alternative. Further, due to the continued relevance of ongoing judgments by the

50 Lisa Claire Whitten, Niall Robb and David Phinnemore, 'The single electricity market and the Protocol on Ireland/Northern Ireland' (*Post-Brexit Governance NI* May 2023).

51 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast) [2010] OJ L334/17.

52 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] OJ L275/32.

53 Introduction to annex 4.

54 Gravey and Whitten (n 45 above).

55 Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJL155/1.

CJEU in interpreting EU law[56] and the ability to include EU legislative developments, the Windsor Framework provides the foundations to maintain dynamic regulatory alignment between NI and the EU (in a specified area of relevant laws) and thereby between NI and Ireland – although not guaranteeing it wholesale. Together, these facilitate continued cooperation in the environmental field, which in itself is a valuable tool in ensuring environmental standards. This is complemented by the provisions within article 11 on North–South cooperation discussed below. However, further caveats apply, as discussed in the following subsection.

Subject to the voice of NI: democratic consent and the Stormont Brake

Article 18 addresses the issue of 'democratic consent' and provides for the NI Assembly to vote on the continued application of articles 5–10 of the Windsor Framework on a periodic basis. The first vote is due in December 2024, with votes subsequently every four or eight years.[57] If at any point there is no majority in favour of their continued application, then these specific articles will cease to apply to NI after a period of two years. During this period, the Joint Committee will be tasked with creating recommendations regarding 'necessary measures' that take into account the obligations of the parties to the 1998 Agreement.[58] Such an outcome would have major multifaceted impacts, including on the environment – likely reflecting a harder form of Brexit for NI, removing the regulatory alignment in the areas covered by articles 5 and 9, and also creating much broader issues, for instance, regarding trade restrictions and (at least potentially) physical barriers on the island of Ireland.

Complementing this, the Windsor Framework has introduced a change in the form of the so-called Stormont Brake in article 13 as amended to include the new article 13(3)(a).[59] The change reflects and follows from concerns regarding the obligation for NI to stay dynamically aligned to EU law, as outlined above (eg through amendments and replacements to the laws in annex 2), without NI or the UK having a voice in their shaping or adoption.[60] Article 13(3)(a)

56 Eg art 12(4) of the Protocol.

57 David Phinnemore and Lisa Claire Whitten, 'Democratic consent and the Protocol on Ireland/Northern Ireland' (*Post-Brexit Governance NI* June 2022).

58 Art 18(4).

59 Viviane Gravey and Lisa Claire Whitten, 'New governance for dynamic alignment under the Windsor Framework' (*Brexit and Environment* 8 March 2023).

60 Although, for new laws being added to the annex, since the Joint Committee must agree to this, this effectively gives the UK Government a veto on its application to NI already.

was therefore introduced into the original Protocol by Joint Committee Decision 1/2023 (regarding the Windsor Framework).[61] Decision 1/2023, along with a UK unilateral declaration appended therein,[62] outlines how the Stormont Brake will function.

While a deep investigation of the Stormont Brake is unnecessary for our purposes, some brief points are useful. There are two avenues where it can be used, and the approach varies somewhat between them – only one of these avenues was jointly agreed between the UK and EU, while the other arises from a unilateral legislative initiative in the UK. With regard to the first, where the EU amends or replaces a law listed in annex 2 of the Windsor Framework,[63] NI Members of the Legislative Assembly (MLAs) have two months to raise any related concerns with the UK Government. Any notification of concern made by 30 MLAs from two or more political affiliations must fulfil several criteria, including effectively that it is a necessary measure of 'last resort'[64] and that they can demonstrate that change would have a 'significant impact specific to everyday life of communities in Northern Ireland' which would be 'liable to persist'.[65] Further, in principle, if Stormont were to collapse again, 30 MLAs could still theoretically use the procedure in this context if they could demonstrate that they are 'individually and collectively seeking in good faith to fully operate the institutions',[66] but how remains very unclear despite the references to nominating ministers and 'support for the normal operation of the Assembly'.

Secondly, the UK Government's Command Paper and subsequent domestic legislation address the issue of new acts being added to the Windsor Framework (in any section). Article 13(4) already gave the UK Government a *de facto* veto on the application of any new EU instrument to NI, but the Command Paper now provides for a formal role for the NI institutions within the domestic procedures and thereby a voice in determining if the veto will be used or not.[67] The procedures for this were outlined in the Windsor Framework

61 Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework (2023) (Joint Committee Decision).

62 Ibid annex I: 'Unilateral Declaration by the UK: Involvement of the Institutions of the 1998 Agreement'.

63 However, those listed under subheadings 2–6 of annex 2 of the Protocol, and which concern trade defence instruments/matters, are excluded.

64 Joint Committee decision (n 61 above) annex I, 1(c)(i). See also annex I, 1(c)(iii).

65 Ibid art 2.

66 Ibid annex I, 1(a).

67 HM Government (n 44 above) para 68.

(Democratic Scrutiny) Regulations 2023;[68] and subsequently given effect by the Windsor Framework (Democratic Scrutiny) Regulations 2024.[69] Confirmation of this aspect of the Stormont Brake followed from the restoration of the NI devolved institutions which came in the wake of an agreement by the Democratic Unionist Party (DUP) to end its protest boycott of the same having secured a series of domestic concessions from the UK Government, laid down in the 'Safeguarding the Union' Command Paper, regarding the implementation of the Windsor Framework.[70] Essentially, a UK minister can normally only agree in the Joint Committee to the addition of a new EU act, where the NI Assembly gives its approval (with cross-community consent); if the NI Assembly is not functioning, the UK minister/Government may make their decisions without its approval. Provision is also made for a UK minister to agree to add a new EU act notwithstanding a lack of cross-community consent in the NI Assembly in the event of 'exceptional circumstances'.

Consequently, the two mechanisms provide controls over the applicability and use of a range of provisions, including where relevant to articles 5 and 9. In providing extra powers within NI, they introduce the possibility that the regulatory alignment (dynamic or otherwise) with the EU in some fields like environmental protection might be curtailed. This makes a decrease in environmental standards in NI more likely and also creates further hindrances for cross-border cooperation in the field. However, the mechanisms are challenging to avail of, and the criteria for triggering (in particular) the article 13(3)(a) Stormont Brake are relatively high due to provisions in the Windsor Framework and also the new mechanisms and timelines introduced domestically. This remains the case even since the UK Government's latest concessions (in the 'Safeguarding the Union' deal) to the DUP in early 2024. Overall, while the novelty and significance of the Stormont Brake mechanisms when viewed in the context of other arrangements for non-EU territories' participation in or relationship to the Single Market ought not to be understated, it is also the case that the practical implications of these new arrangements may be less than initially anticipated. Further, if they are deployed, then articles 2 and 11 of the Windsor Framework may provide some slight comfort to those concerned regarding environmental matters.

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68 SI 2023/XX (draft).

69 SI 2024/118.

70 HM Government, 'Safeguarding the Union' (Command Paper 1021 31 January 2024).

ARTICLE 2: UPHOLDING RIGHTS AND SAFEGUARDS IN THE ENVIRONMENTAL CONTEXT?[71]

Article 2 of the Windsor Framework is a truly novel provision,[72] with significant potential as a tool to uphold human rights and safeguards, generally and in the environmental context. It is worth including its wording in full here:

> **Rights of individuals**
>
> 1. The United Kingdom shall ensure that no diminution of rights, safeguards, or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.
>
> 2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.

Article 2(1) thereby creates a non-diminution guarantee that covers the RSEO protected in the 1998 Agreement (which is explored in more detail below), prohibiting any such diminution that results from Brexit ('withdrawal from the Union'). Article 2(2) complements this, by requiring that the UK continues to facilitate relevant 1998 Agreement bodies in their related work. There has been some limited

71 This section is drawn from an extensive research project being undertaken by the authors for the NIHRC on art 2 and the environment. The project expands on the issues herein and other aspects in far greater detail. The aim here is to provide an initial sketch of the potential for art 2 to be utilised in this context.

72 Anurag Deb and Colin Murray, 'Article 2 of the Ireland/Northern Ireland Protocol: a new frontier in human rights law?' (2023) 6 European Human Rights Law Review 608–625.

(but significant) research on article 2 to date,[73] with much still to be explored. Further, there has been some relevant litigation, including the recent *Legacy* and *Illegal Migration Act* judgments of the High Court and also the *SPUC* judgment by the NI Court of Appeal.[74] The latter laid out a six-step test for the application of article 2(1),[75] which has been applied since and can be a useful starting point for considering the provision – we do, however, argue in ongoing research commissioned by the Northern Ireland Human Rights Commission (NIHRC) that a more purposive approach should be taken to the provision than the test would indicate.[76]

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73 Eg Aoife O'Donoghue, 'Non-discrimination: article 2 in context' in Federico Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press 2022); Tamara Hervey, 'Brexit, health and its potential impact on article 2 of the Ireland/Northern Ireland Protocol' (Report on Behalf of the NIHRC March 2022); NIHRC and ECNI, 'The scope of article 2(1) of the Ireland/Northern Ireland Protocol' (Working Paper December 2022); Alison Harvey, 'Human trafficking and article 2 of the Ireland/Northern Ireland Protocol' (Report for the NIHRC March 2022); Sarah Craig and Eleni Frantziou, 'Understanding the implications of article 2 of the Northern Ireland Protocol in the context of EU case law developments' (2022) 73 Northern Ireland Legal Quarterly 65; Sarah Craig et al, 'European Union developments in equality and human rights: the impact of Brexit on the divergence of rights and best practice on the island of Ireland' (Report Commissioned by ECNI, NIHRC and Irish Human Rights and Equality Commission (IHREC) 2022); Sylvia de Mars and Charlotte O'Brien, 'Frontier workers and their families: rights after Brexit' (Report for the NIHRC October 2023); Alison Harvey, 'Article 2 of the Windsor Framework and the rights of refugees and persons seeking asylum' (Report for the NIHRC November 2023); and Deb and Murray (n 72 above).

74 See *Legacy* judgment (n 37 above); *Northern Ireland Human Rights Commission's Application and JR295's Application and In the matter of The Illegal Migration Act 2023* [2024] NIKB 35; and *SPUC v Secretary of State for Northern Ireland (and Others)* [2023] NICA 35, para 54.

75 The court indicated (at para 54) that for a breach of art 2(1) to occur, there must be: '(i) A right (or equality of opportunity protection) included in the relevant part of the Belfast/Good Friday 1998 Agreement is engaged. (ii) That right was given effect (in whole or in part) in Northern Ireland, on or before 31 December 2020. (iii) That Northern Ireland law was underpinned by EU law. (iv) That underpinning has been removed, in whole or in part, following withdrawal from the EU. (v) This has resulted in a diminution in enjoyment of this right; and (vi) This diminution would not have occurred had the UK remained in the EU.'

76 The test's set of criteria provides a useful starting point for consideration of the scope of art 2(1) and specifically for establishing when a right or safeguard falls within art 2(1) but, if taken narrowly, it could unnecessarily and restrictively rule out rights or safeguards that are actually included within art 2(1). It may be possible to resolve this textual conflict through a very broad interpretation of the criteria, in a manner that would achieve coherence with the Protocol's provisions and intentions. But great care should be taken with the test. For further detail, see the commissioned research for the NIHRC once published.

This section focuses primarily on two elements of article 2(1): a) the nature of the non-diminution guarantee; and b) the potential applicability in the environmental context (based on the scope of the RSEO section, and related to steps (i), (ii) and (iii) of the *SPUC* test). It remains a brief outline, with far more extensive arguments detailed by the authors in ongoing research for the NIHRC.

Non-diminution guarantee

Article 2(1) constitutes an unqualified obligation to ensure 'no diminution' 'results from' Brexit. The requirement to ensure 'no diminution' occurs is not conditional on the degree or gravity of any diminution, but rather the obligation is absolute.[77] Hence, referring to it as a 'non-diminution guarantee'. A simple comparison is to be made between what protections were present (or ought to have been present)[78] in NI as a result of EU membership at the time of Brexit and the protections present subsequently: if there is any diminution (of a relevant RSEO) that would not have happened but for Brexit, then this would indicate an infringement of the provision. This does not equate to the obligation of continued alignment,[79] dynamic or otherwise, discussed in the context of articles 5 and 9 above. The UK is not obliged to update laws in parallel or even to maintain precisely the same measures – flexibility regarding changes in approach exists in principle, provided that there is no actual diminution.[80]

However, it also contrasts with the non-regression or non-retrogression principles as typically found in international human

77 This appears to be an absolute obligation, contrasting with the more flexible concept of non-regression, eg Northern Ireland Office's 2020 explainer on art 2 at pt 7, stating that the provision is 'preventing *any* reduction' (emphasis added), Northern Ireland Office, 'Commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: what does it mean and how will it be implemented?' (nd). See also, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Discussion Paper on Brexit' (Discussion Paper on behalf of IHREC January 2018) 12; and O'Donoghue (n 73 above) 94, noting that '[n]on-diminution has a singular meaning' and does not permit any 'backward movement'.

78 This has the potential thereby to address situations where NI/the UK had faulty implementation or enforcement of EU protections at the time of Brexit and also to encompass the evolving interpretations by the CJEU of EU law, since these are statements/interpretations of existing law. See on the latter point, Craig and Frantziou (n 73 above) 67–68.

79 A limited exception does apply regarding specific anti-discrimination laws listed in annex 1 of the Protocol.

80 Eg NIHRC and ECNI (n 73 above) para 4.8. It must, however, be noted that changes in approach could increase regulatory divergence (eg across the island of Ireland) and that could in itself lead to diminutions in RSEOs in practice.

rights treaties[81] (and other international treaties or agreements with environmental provisions)[82] in two main ways. First, the apparent absolute nature of non-diminution is in marked contrast to the usual approach to non-regression, where concepts such as national sovereignty, subsidiarity and a margin of appreciation act as a limiter and provide some flexibility to states in complying with their obligations.[83] For instance, the International Union for Conservation of Nature (IUCN) World Commission on Environmental Law stated in its 2016 World Declaration on the Environmental Rule of Law that 'States ... shall not allow or pursue actions that have the *net effect* of diminishing the legal protection of the environment or of access to environmental justice'[84] (emphasis added). While the approach to non-regression can vary and be found in stronger terms on occasion,[85] nonetheless it tends not to mandate absolute adherence.[86] This is similarly reflected in the EU/UK trade and cooperation level playing-field provisions, where we discover that the obligation regarding non-regression relates to *overall* levels of protection of the environment.[87] Second, the arrangements in the Windsor Framework including the non-diminution arrangements are made directly enforceable in the domestic courts. The EUWA as amended incorporates it into domestic law and provides arrangements for the NIHRC and Equality Commission for Northern Ireland (ECNI) to take proceedings to prevent diminution in a public sense, and also to assist those affected by diminution to take proceedings, or to take proceedings on their behalf.[88] This also includes the provision in section 10 of the EUWA (as amended)[89] explicitly protecting existing arrangements for cross-border cooperation and the arrangements in the 1998 Agreement.

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81 Eg Nicholas Bryner, 'Never look back: non-regression in environmental law' (2022) University of Pennsylvania Journal of International Law 555.

82 Eg Andrew D Mitchell and James Munro, 'No retreat: an emerging principle of non-regression from environmental protections in international investment law' (2019) 50 Georgetown Journal of International Law 625–708.

83 Lauren Helfer and Erik Voeten, 'Walking back human rights in Europe?' (2020) 31(3) European Journal of International Law 797–827.

84 IUCN World Declaration on the Environmental Rule of Law (2016).

85 Eg see the environmental non-regression clause in the North American Free Trade Agreement 1994, art 1114, para 2, 17 December 1992, 32 ILM 289.

86 Helfer and Voeten (n 83 above).

87 TCA, pt 2, title XI, art 7.2(2), read in conjunction with art 7.1.

88 Northern Ireland Act 1998, ss 78A–D.

89 European Union (Withdrawal) Act 2018 as amended, s 10.

Applicability in an environmental context? The significance of the RSEO section of the 1998 Agreement

Article 2(1)'s scope is largely determined by the section on RSEO in the 1998 Agreement.[90] It is important to note at the offset that, while the *SPUC* test only refers to rights and 'equality of opportunity protection', article 2(1) itself and the corresponding section in the 1998 Agreement expressly refer also to safeguards. The inclusion of safeguards is recognised in the subsequent *Angesom* judgment in October 2023.[91] Crucially, the RSEO section encompasses a range of environmental rights and safeguards, including through explicit reference to the environment, spatial planning, ECHR rights and human rights in general. This is clearly demonstrated by consideration of individual components within the section and also through examining it as a whole in context.

The RSEO section is a standalone human rights guarantee. Under the further subheading 'Human Rights' it provides:

> The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm *in particular* [emphasis added]:
>
> - the right of free political thought;
> - the right to freedom and expression of religion;
> - the right to pursue democratically national and political aspirations;
> - the right to seek constitutional change by peaceful and legitimate means;
> - the right to freely choose one's place of residence;
> - the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
> - the right to freedom from sectarian harassment; and
> - the right of women to full and equal political participation.

A strong case exists to look beyond these listed rights, including through taking a generous and purposive interpretation of the section,

90 Implicitly, the RSEO must likewise have received some support via EU membership, since art 2(1) focuses on a diminution that results from Brexit. Further, the *SPUC* judgment considers it necessary that there be a NI measure giving effect to the RSEO and that such a measure be underpinned by EU law (and therefore that the EU should have competence in the matter) – which would further restrict the scope of applicability. This is developed and critiqued in our commissioned research for the NIHRC, but is beyond the scope of the discussion herein.

91 *Angesom* (n 37 above) [86].

including the term 'civil rights', as adopted by the High Court in its *Legacy* judgment.[92] Thus, the language of the section itself is broad and inclusive (eg the use of the words 'human rights' as opposed to just 'civil rights' in the subheading and the use of 'in particular' in the main body of text), indicating that the section protects more than just the rights listed. The international human rights law concept of the indivisibility of human rights[93] supports the notion that, if the listed rights in the RSEO section are to be given effect to in a meaningful way, they are likely to require other supporting and complementary rights/safeguards like environmental rights/guarantees of a healthy environment. Another justification for a broad reading of rights and safeguards under the RSEO section is an 'eco-systems' approach – which emphasises the interrelated nature of all aspects of ecosystems and therefore the environment, as well as the contribution of ecosystem services.[94] For instance, protecting hedgerows not only protects birds, but also soil and water quality, including for drinking water or for fish and thereby for food and economic activity. Rights regarding life or economic activity can therefore be considered contingent on a healthy, sustainable and resilient environment.[95] The idea that the RSEO section was only the starting point for human rights protections in NI, and would develop further, is also supported by both the RSEO section on the incorporation of the ECHR into NI law and the section which envisages an (as-of-yet unrealised) NI Bill of Rights.[96] These general comments are complemented by a range of specific elements within the RSEO section.

First, we can identify express environmental safeguards in the RSEO section, for example via the obligation on the UK Government to develop a regional development strategy, 'protecting and

92 *Legacy* judgment (n 37 above) para 535.

93 For a recent example, see UN Committee on the Rights of the Child, General Comment No 26 (2023) on children's rights and the environment, with a special focus on climate change, point 13.

94 Eg see Millennium Ecosystem Assessment, *Ecosystems and Human Well Being: Synthesis Report* (Island Press 2005); and the EU's Biodiversity Strategy for 2020.

95 Eg recital 5 of the Council Directive 2009/147 on the Conservation of Wild Birds [2009] OJ L20/7 (2009 Wild Birds Directive) states: 'The conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the Community's objectives regarding the improvement of living conditions and sustainable development.'

96 Of note, the UN Human Rights Committee has expressed concern about 'the lack of significant progress in the development of the Bill of Rights in Northern Ireland': see UN Human Rights Committee, 'Concluding observations on the eighth periodic report of United Kingdom of Great Britain and Northern Ireland', adopted by the Committee at its 140th session (4–28 March 2024) CCPR/C/GBR/CO/8 (advance unedited version) para 4.

enhancing the environment', as well as 'developing the … resources of rural areas'. Second, this is complemented by a range of implicit environmental procedural rights. For instance, the right to freedom of political thought, the right to pursue democratically national and political aspirations, and the right to seek constitutional change by peaceful and legitimate means might be understood as democracy and public participation-oriented rights. It is evident that procedural environmental rights – which are important tools for promoting and strengthening environmental democracy[97] – could be seen as a subset of the democracy and public participation-oriented rights listed in the RSEO section. Other aspects such as the right of equal opportunity in all social and economic activity regardless of demographics like race, religion or disability can similarly encompass environmental elements. Third, it is possible to identify indirectly incorporated environmental rights via other texts like the ECHR. The 1998 Agreement committed the UK Government to incorporating the ECHR into domestic law and providing remedies for breaches of the Convention. The Irish Government was required to take comparable steps in its jurisdiction to ensure at least equivalent human rights protections as would pertain in Northern Ireland. This culminated in the UK Human Rights Act 1998 and the Irish European Convention on Human Rights Act 2003, which both provide a conduit through which the ECHR enters these respective dualist legal systems.

The ECHR itself does not explicitly guarantee a right to a healthy environment.[98] However, the European Court of Human Rights (ECtHR) has developed an extensive body of case law on environmental degradation by 'greening' existing Convention rights.[99] Environmental pollution or degradation cases are usually heard by the ECtHR under articles 2 (right to life) and 8 (right to respect for home, private and family life) of the Convention. The ECtHR has identified several positive obligations – principally under articles 2 and 8 – in the environmental

97 Emily Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Hart 2020) 146.

98 *Kyrtatos v Greece* App No 41666/98 (Judgment of the First Section of 22 August 2003) [52]; *Hatton and Others v the United Kingdom* App No 36022/97 (Judgment of the Grand Chamber of 8 July 2003) [96].

99 Council of Europe, *Manual on Human Rights and The Environment* 3rd edn (Council of Europe Publishing 2022) [34]; see also: Katharina Franziska Braig and Stoyan Panov, 'The doctrine of positive obligations as a starting point for climate litigation in Strasbourg: the European Court of Human Rights as a Hilfssheriff in combating climate change?' (2020) 35 Journal of Environmental Law and Litigation 261, 266–269. Note also the recent ruling of the ECtHR in *Verein Klimaseniorinnen Schweiz and Others v Switzerland* App No 53600/20 (ECtHR, 9 April 2024) where the Grand Chamber extended, and adapted, its existing environmental case law to climate change.

field, including procedural and substantive obligations.[100] These range from procedural obligations around granting access to environmental information,[101] guaranteeing public participation[102] and granting access to justice[103] to substantive obligations like a duty to put in place legislative and administrative frameworks to minimise environmental risk by regulating the licensing, setting-up, operation and control of hazardous activities[104] and monitoring and ensuring compliance with these rules.[105] While states enjoy a wide margin of appreciation in the context of environmental harms at the ECHR level,[106] as noted above, this does not seem to be the case for environmental rights incorporated indirectly via the 1998 Agreement and now protected under article 2(1) of the Windsor Framework; for an infringement of such environmental rights under article 2(1), there simply needs to be a diminution of such a right as a result of Brexit.

Before or on Brexit day, the right to life and respect for private and family life were not just protected (and given effect to) in NI by the ECHR but also by the EU Charter of Fundamental Rights[107] – including applying to EU and domestic (environmental) measures where within the scope of EU law.[108] Article 52(3) of the Charter provides that corresponding ECHR and Charter rights are to be given the same meaning and scope. A strong argument can therefore be made that a 'greened' right to life and respect for private and family life should be afforded at least the same level of protection under EU human rights law as the ECtHR has done in its environmental degradation case

100 Braig and Panov (n 99 above). This list is an adapted and shortened version of Braig and Panov's summary of positive environmental obligations under the ECHR.

101 *Guerra v Italy* App No 14967/89 (Judgment of the Grand Chamber of 19 February 1998).

102 *Hatton* (n 98 above); *Taşkin et al v Turkey* App No 46117/99 (Judgment of the Third Section of 10 November 2004).

103 *Taşkin* et al (n 102 above). Arts 6 and 13 are usually relevant to the right of access to justice.

104 *Öneryıldız v Turkey* App No 48939/99 (Judgment of the Grand Chamber of 30 November 2004) [89]–[90]; *Tătar v Romania* App No 67021/01 (Chamber judgment of 27 January 2009).

105 *Branduse v Romania* App No 6586/03 (Judgment of 7 April 2009).

106 *Hatton* (n 98 above) [97].

107 Art 2 of the Charter guarantees the right to life and art 7 guarantees the right to respect for private and family life.

108 Art 51(1) of the Charter confirms that the Charter is addressed to member states when 'they are implementing EU law' or 'acting within the scope of EU law' as it has been understood. This provides for broad applicability of the Charter in the field of environmental protection, as the EU is the source of most NI environmental law.

law.[109] The 'added value' of reliance on the EU Charter pre-Brexit would have been that it would have come with the full gamut of EU law remedies, including disapplication of the offending national law and state liability.[110]

Consequently, and considering the extensive contribution of the EU to NI environmental standards and governance (including due to the significant oversight and enforcement roles by the European Commission and CJEU)[111] and the real potential for diminutions in these,[112] as well as the changes in the role of the Charter, there also opens up the potential for diminutions in relevant RSEOs as a result of Brexit.[113] Key, obvious examples that could trigger diminutions in relevant RSEOs (eg the right to life or procedural rights) would include changes to air quality, water quality or procedural protections and structures, but scope exists to encompass a much wider range of changes.

While not equating to alignment, article 2(1)'s non-diminution guarantee is a practical and focused expression of the Windsor Framework's broad commitment and purpose outlined in article 1 to maintaining the conditions necessary for cooperation in all areas and upholding the 1998 Agreement in all its dimensions. This is complemented by article 2(2), which is designed to continue to facilitate the related work of bodies set up pursuant to the 1998 Agreement. This has the potential to impose obligations on the UK, for instance,

109 Suzanne Kingston, Veerle Heyvaert and Aleksandra Cavoski, *European Environmental Law* (Cambridge University Press 2017) 166.

110 Tobias Lock, 'Human rights law in the UK after Brexit' (2017) (Nov Supp) Public Law (Brexit Special Extra Issue 2017) 117; Joelle Grogan, 'Rights and remedies at risk: implications of the Brexit process on the future of rights in the UK' (2019) Public Law 683, 689; Catherine Barnard, 'So long, farewell, auf wiedersehen, adieu: Brexit and the Charter of Fundamental Rights' (2019) 82 Modern Law Review 350, 365; Tobias Lock, Eleni Frantziou and Anurag Deb, 'The EU Charter of Fundamental Rights in Northern Ireland' in this special issue (488–521).

111 Eg Brian Jack, 'Environmental law in Northern Ireland' in Stephen McKay and Michael Murray (eds), *Planning Law and Practice in Northern Ireland* (Routledge 2017) 154–155.

112 Eg in the context of the UK generally (although art 2 only applies to NI): Lee (n 22 above).

113 It should be flagged that the criteria for applying art 2(1) do not end there. Whether per the provision itself or the *SPUC* test, some further elements are required. The provision requires that any diminution must 'result from' Brexit, indicating that there was some degree of protection due to EU membership (eg through laws, institutional or governance structures, or funding) and that the diminution would not have occurred 'but for' Brexit. The *SPUC* test and broader judgment includes focus points on EU competence and 'underpinning' EU law, which are not expressly found within art 2(1) and may prove too restrictive – especially considering the justifications for a 'generous and purposive' interpretation, but even on a textual basis.

regarding facilitating the work of the Loughs Agency, the Waterways Ireland body and the NSMC where it relates to the environment – both in NI and on a cross-border basis. Those obligations could be multifaceted, including adequate funding,[114] political and legal support, and minimising regulatory divergence – since regulatory divergence would lead to increased burdens and challenges for the cross-border cooperation[115] that underpins the roles of the 1998 Agreement bodies. The role of the Commissions noted in article 2, along with the 'constant review' by the Joint Committee under article 11(2) discussed below, will prove essential here in identifying the needs and gaps for the 1998 Agreement bodies to undertake their 'related work' – especially where the RSEO element intertwines with North–South cooperation.

ARTICLE 11: FOUNDATIONS FOR CONTINUED COOPERATION?

This section considers article 11, entitled 'other areas of North-South cooperation', which is core to the aim of continued North–South cooperation enshrined in both the Windsor Framework and the 1998 Agreement. It has the potential to help address ongoing difficulties that arise post-Brexit, as new challenges for cross-border cooperation manifest. Its interactions with the remainder of the Windsor Framework, in particular articles 13 and 18, here are crucial, as the relationship between legal mechanisms and political will is placed in the spotlight.

The main obligation outlined in article 11(1) is to implement and apply the Windsor Framework 'to maintain the necessary conditions for' such cooperation, 'including in the areas of the environment' and other environmentally relevant areas. Yet in doing so it refers to articles 5 to 10, which are characterised by significant gaps in environmental areas – despite the joint mapping exercise highlighting such areas in advance of the adoption of the original Protocol. It is therefore necessary to consider the implications of article 11(1) for other provisions in the Windsor Framework, and also to consider possibilities under article 11, besides an interpretation of the provisions (including article 11 itself)

114 Eg Northern Ireland Office's 2020 explainer on art 2 at pt 30 (n 77 above); O'Donoghue (n 73 above) 99; and Colin Murray and Clare Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72 Northern Ireland Legal Quarterly 1, 28.

115 Eg S Clerkin, 'Working cross-border in nature conservation with regard to different designations, structures and management' (2020) 15 Journal of Cross Border Studies in Ireland 111–122; Hough (n 9 above); and Brennan et al (n 14 above).

wherever possible to facilitate such cooperation. These issues are covered in the latter half of article 11(1) and 11(2).

The second sentence of article 11(1) confirms that the UK 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'. Although this is restricted by the phrase 'other areas',[116] it nonetheless could encompass other non-environmental but environmentally relevant areas and also more general governance elements or structures supported in the 1998 Agreement. For instance, an argument could be made to support the establishment of the civic forum enabling cross-border and all-island stakeholder engagement. Further, if there are environmental matters that previously have not been the subject of North–South cooperation, arguably these could also be developed via this provision, for example in the context of soil or climate. However, this remains of limited value, especially as the UK and Ireland have this potential irrespective of any provision in the Windsor Framework.

The main element to consider is the review mechanism under article 11(2). This provision requires that the Joint Committee 'keep under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North–South cooperation'. Further, the Committee 'may make appropriate recommendations to the Union and the United Kingdom in this respect, including on a recommendation from the Specialised Committee'.[117] Therefore, if the Joint Committee considers that the Windsor Framework's implementation or application does *not* maintain the necessary conditions for North–South cooperation, presumably in the areas listed in article 11(1) including the environment, then it may make non-binding recommendations to the EU and the UK.

These recommendations are not limited in scope, focus or nature – other than to be 'appropriate'. They therefore could, for instance, include recommendations to amend annexes (eg those relevant to articles 2, 5 or 9 of the Windsor Framework discussed herein), including through adding a wide range of EU environmental laws to any of the Windsor Framework annexes. Since the 1998 Agreement provides for North–South cooperation in environmental matters and this cooperation has been largely enabled, governed and sometimes mandated by EU

116 Thereby excluding those listed in the first sentence, including the environment.

117 The role of the Specialised Committee is important here, as this provides a formal pathway for the NSMC 1998 Agreement Implementation Bodies and Commissions, responsible for overseeing art 2 of the Protocol, to engage and feed into the Joint Committee's review and recommendations. The relationship of the Specialised Committee with the other bodies is provided for by art 14 of the Protocol.

law to date, there is a strong argument to be made that the 'necessary conditions' include continued, dynamic regulatory alignment and/or equivalent – especially in light of the Windsor Framework's related objectives, including to protect the 1998 Agreement in all its dimensions.

Although any such recommendations would not be binding on the UK or the EU, the parties are nonetheless bound by the general objectives of the Windsor Framework and by the obligations outlined in article 11(1). If the Joint Committee considers in light of its 'constant review' that the necessary conditions are not being met, and hence propose an 'appropriate recommendation', this would indicate that to not adopt such a recommendation would in itself breach article 11(1) unless a suitable alternative option could be identified. The non-binding recommendation would thereby nonetheless play a very weighty role that could indicate that the Windsor Framework would be breached if a recommendation were not adopted.

The relationship here with the democratic consent (article 18) and Stormont Brake (article 13) provisions is important, multifaceted and ambiguous. As discussed above, the (UK law-based, article 13(4) related strand of the) Brake could be used to prevent the addition of new EU laws to the Windsor Framework annexes and thereby their application in NI. Further, following the periodic reviews, NI could vote to disapply articles 5–10 of the Windsor Framework, which would counteract any addition of new laws. In this respect, however, it is notable that article 11 is not within the scope of the article 18 democratic consent mechanism. It follows that, even in the event of a vote in the NI Assembly in favour of disapplication of articles 5–10 of the Windsor Framework, the EU and UK acting together in the Joint Committee would still be obliged to accommodate article 11 commitments regarding 'necessary conditions' in any proposals they would make regarding how the objectives and remaining provisions of the Windsor Framework were to be upheld. However, of note, for the Stormont Brake prong that addresses new EU laws, the UK Government's Command Paper, and related legislation, provides, as noted above, that they may override the Brake and approve the application of the new EU laws in the case of 'exceptional circumstances'. What these circumstances entail is unclear, but arguably they should, in view of the overarching (article 1(3)) objectives of the Windsor Framework, include significant impairment to the foundations for North–South cooperation; notably, however, the emphasis in the relevant section of the implementing instrument emphasises the importance of avoiding any 'new regulatory border[s] between Great Britain and Northern Ireland' and does not state corresponding concern for regulatory

borders that would consequentially be created on the island of Ireland in the event of any adoption or non-adoption of a new EU act.[118]

The democratic consent provision does not have a similar internal criterion, which begs the question of whether there are any constraints on its application – since a disapplication of articles 5–10 would clearly undermine the 'necessary conditions for North–South cooperation', in conflict with article 11(1) and also the core objectives of the Windsor Framework. While article 1(1) states that the 'Protocol is without prejudice to … the principle of consent', that was in relation to the constitutional status of Northern Ireland, which is related to but different from the nature of the 'democratic consent' provision in article 18. Consequently, article 1(1) does not provide a legal justification for enabling either article 13 or article 18 to breach article 11(1) or article 1(3). This is not to say that article 18 could not be used, but the Joint Committee's subsequent recommendations over the two-year period would necessarily have to offset any challenges posed by the disapplication of articles 5–10, which would be a Herculean task.

Therefore, articles 13 and 18 could provide some limiters for the role of the recommendations in article 11(2), but while bearing in mind the persistent obligation under article 1(3), and reflected once more in article 11(1), 'to maintain the necessary conditions for continued North–South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions'. Overall, article 11 introduces considerable flexibility and a foundation for restoring and enhancing the conditions for North–South cooperation, including in environmental matters. However, on a practical basis and in light of the current failure to incorporate within annex 2 the majority of EU environmental regimes identified in the mapping exercise, it seems unlikely that the Joint Committee or the UK and the EU are going to suddenly jump at the opportunities provided by this provision. Nonetheless, the provision provides important avenues for reviewing the situation and resolution of any issues that might arise and, where problems do gradually emerge due to regulatory divergence, this might provide motivation to act.

CONCLUSIONS

Brexit poses additional significant challenges to an already problematic approach to environmental governance which has existed in NI and on a cross-border basis to date. Although undeniably flawed, the previous laws and governance structures gained many of their strengths from

118 UK SI 2024/118, s 18.

EU membership, which provided foundations for minimum standards, rights, and protections, including by facilitating and mandating cooperation across the EU and on the island of Ireland. It thereby also supported the provisions within the 1998 Agreement, even while obviating the necessity to fully exploit the potential of the mechanisms therein. However, Brexit fundamentally changed that relationship – removing the basis for what amounted to strict, enforceable (at least in principle) obligations of continued alignment and duties regarding cooperation across the full and extensive breadth of EU environmental law. Increased regulatory divergence and a decline in environmental protection have now become a very real possibility. The Windsor Framework provides several avenues that might help address and mitigate these potential negative consequences, both in Northern Ireland and on a cross-border or all-island basis, in a manner that reflects a new, multifaceted relationship with both the EU as a whole and Ireland.

The Windsor Framework's objectives outlined in article 1 include 'to maintain the necessary conditions for continued North–South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions'. This draws in the various facets of the 1998 Agreement and provides a basis to help further develop its potential, especially in light of a generous, purposive interpretation as supported by the NI High Court in its *Legacy* judgment. Articles 2, 5, 9 and 11 of the Windsor Framework are the key mechanisms for helping achieve the Windsor Framework's objectives and could provide avenues to maintain some environmental standards and protections in NI, as well as maintaining the 'necessary conditions' for North–South cooperation – which could even be through new, alternative mechanisms not in existence prior to Brexit, but contemplated by the 1998 Agreement, for example a civic forum or even a Bill of Rights. However, it is the manner in which they might do so that is truly fascinating, with their complementary but differentiated approaches as noted.

The relevant dynamic alignment obligations in articles 5 and 9, which require keeping pace with the regulatory measures specified in the relevant annexes 2 and 4, are the closest to the obligations and relationships inherent in continued EU membership. By continued alignment with the EU (and thereby Ireland also), the EU's high level of environmental protection is embedded, cross-border cooperation is enabled and regulatory divergence is limited. They also provide for a very precise, specific version of the international law norm of non-regression/progressive realisation in international human rights law. However, these two articles are limited and circumscribed in their application, including through their application to a very limited number of environmental laws as noted, and now with the additional

threat of the Stormont Brake hanging over them.

Significantly, and in contrast, the non-diminution guarantee created in the Windsor Framework's article 2 is a unique and tailored mechanism. While it clearly draws on the concepts of non-regression/retrogression originating from international human rights law, it is a very different expression of that norm. By prescribing 'no diminution' and creating domestic enforcement mechanisms for both individuals and selected bodies such as the NIHRC, it is clear that the intention is to create a high degree of maintenance of the wide range of rights, safeguards and equalities covered by the 1998 Agreement's guarantees. It remains to be seen how the provision will continue to be interpreted by the courts in NI/UK, but this provision may thereby go some way to prevent the problems with environmental governance that persisted even throughout EU membership from worsening through further downward deregulatory pressure. More generally it also provides further support to the 1998 Agreement's implementation of the ECHR in Northern Ireland.

Finally, article 11 and its mechanisms for reviewing and potentially ensuring the foundations for continued cooperation on a North–South basis, read with article 1, provides a further basis not only for justifying expansive interpretations of existing provisions or even adding further laws within the scope of articles 2, 5 and 9, but also for introducing new, alternative mechanisms (eg perhaps those foreseen but left undeveloped by the 1998 Agreement) and even potentially controlling the Stormont Brake's application.

Together, these four provisions (read with article 1) create a new framework for the relationship between NI and the EU and Ireland – one that is not just based (purely) on continued alignment grounded in EU law, but instead combines in varying degrees and areas the three elements of continued alignment, non-diminution and continued cooperation. In particular, where one fails or is not upheld satisfactorily, the non-diminution guarantee and the mechanisms for reviewing the challenges for continued cooperation will be essential to maintaining existing environmental rights, safeguards and standards. In doing so, the 1998 Agreement and the Windsor Framework likewise forge a strong connection, with the two mutually re-enforcing each other as most obviously reflected in articles 1, 2 and 11.

A caveat should be flagged, which relates to the potential response of both courts and politicians. The above discussion highlights the significant potential of these provisions and is a reasonable interpretation, especially based on a purposive interpretation of the two documents – as justified under principles of treaty interpretation and recognised by the NI High Court. However, there is no guarantee

that the courts will be as flexible as this might suggest, as indeed reflected by both the *SPUC* test[119] and the treatment of article 2(2) in the *Legacy* case.[120] This may indicate a reticence to follow through with the purposive approach on all fronts. Further, considerable tensions and disputes have arisen regarding the Windsor Framework and its implementation to date, as well as a reluctance to add further EU laws to the annexes – this would indicate challenges in fulfilling the potential of articles 11 and 13 (vis-à-vis the scope of articles 5 and 9), which are largely dependent on political will. Nonetheless, the restoration of Stormont, the improvement in relationships (reflected in the creation of the revised Windsor Framework), the latest concessions to the DUP and the potential for a different UK Government that may have a more positive attitude towards the EU may also facilitate uptake of these provisions.

Overall, Brexit creates fresh concerns for environmental protection in NI and across the island of Ireland, where standards and governance are already flawed and contested. The Windsor Framework introduces new political and legal avenues, including for challenging the Joint Committee, UK Government or EU for failure to comply with their obligations under the Windsor Framework, individual action for breach of rights thereby bringing a new legal reality and frame to the ambitions and content of the 1998 Agreement. Consequently, the Windsor Framework has the potential to not merely preserve and protect existing environmental standards, protections and governance (including on a cross-border/all-island basis), but to enhance these. How these will function in practice remains to be seen but, given the myriad concerns about declining environmental quality in Northern Ireland and on the island of Ireland more generally, they will undoubtedly be tested in the near future.

119 This test reflects the current legal understanding of the NI courts, as highlighted by the *Illegal Migration Act* judgment.

120 *Legacy* judgment (n 37 above) [614]–[625].