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Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland

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Out of the Frying Pan, Into the Fire?

Environmental Governance

Vulnerabilities in Post-Brexit Northern Ireland

Abstract

Environmental governance in Northern Ireland has been highly problematic and the subject of intense criticism. Since the collapse of the devolved government in January 2017, environmental policy development and urgently needed processes of environmental governance reform have stagnated. Combined with the continuing uncertainty surrounding Brexit, this situation has the potential to exacerbate an already challenging governance context and the severe environmental consequences of political inaction are already becoming clear. This article will reflect on how future environmental governance arrangements in Northern Ireland might develop in light of both distinctive local challenges and reforms that have been proposed for other parts of the UK post-Brexit. Its central theme is the potential for the distinctive environmental governance vulnerabilities present in Northern Ireland to be compounded by Brexit. It concludes that a process of reform centred on the development of common frameworks, underpinned by environmental objectives, principles, rights and duties and enforced via meaningful accountability mechanisms would help strengthen environmental protection even where the political will or power is lacking. Such a process of reform could help address both existing environmental problems and potential environmental governance gaps posed by Brexit, as well as providing valuable lessons for other jurisdictions facing major environmental governance reform or contending with the practical implications of governance without a functioning government.

1. Introduction

Brexit and the on-going debates surrounding the border on the island of Ireland have placed a spotlight on Northern Ireland, its complex politics and its fraught structures and systems of government.¹ With

¹ An unprecedented level of academic attention has focused on the political and legal complexities of Northern Ireland and Brexit. See for example, C. Murray, S. de Mars, A. O'Donoghue and B. Warwick, *Bordering two unions: Northern Ireland and Brexit* (Bristol University Press, 2018); M.C. Murphy, *Europe and Northern Ireland's Future* (Agenda Publishing, 2018).

concerted political, public and media attention suddenly scrutinising the performance of the devolved government, environmental governance is emerging as an area replete with both historical and on-going failures. Strikingly, despite almost three decades of sustained criticism and numerous, detailed proposals for reform,² many of the problems identified in scrutiny reports written as far back as 1990 persist today. Recurrent themes include delayed modernisation of environmental legislation and policy, failure to implement environmental law and policy in practice, failure to take meaningful enforcement action in the face of serious non-compliance with environmental law, the post-hoc granting of permissions for on-going illegal activities, a lack of transparency and accountability and an unaddressed risk of political interference in environmental decision-making.³ Recent years have also seen significant public scandals surrounding environmental governance failures. The most prominent of these has been the Renewable Heat Incentive (RHI) debacle. This involved the alleged manipulation of green energy subsidies (designed to promote the uptake of wood-pellet burning boilers) for profit at the cost of an estimated £490 million to the Northern Ireland taxpayer and has resulted in the ‘death of the green energy industry in Northern Ireland’.⁴ Other recent examples include the discovery of one of Europe’s biggest illegal dumps (known as the ‘Mobyuoy Superdump’),⁵ a complete failure to implement testing for diesel emissions for the last twelve years⁶ and the granting of retrospective permissions for hugely damaging illegal sand and gravel extraction from Lough Neagh, one of Northern Ireland’s most internationally significant nature conservation sites.⁷ An emerging scandal relating to the granting of

On-going research projects examining this issue include the Economic and Social Research Council funded *Brexit Law NI*, <https://brexitlawni.org>.

² The first detailed investigation into environmental issues in Northern Ireland was undertaken by the House of Commons Select Committee on the Environment and highlighted major problems across almost all aspects of environmental governance. House of Commons Environment Committee, ‘Environmental Issues in Northern Ireland’ HC (1990-91) 39 (London: HMSO), (the ‘Rossi’ Report). This was followed by a series of reports from a range of scrutiny bodies, including: Northern Ireland Audit Office (NIAO), *Control of River Pollution in Northern Ireland* (HC 1997–98, 693); NIAO, *Areas of Special Scientific Interest* (HC 2003–2004, 499); NIAO, *Northern Ireland’s Waste Management Strategy* (HC 2005–06, 88); House of Commons NIAC, *Waste Management Strategy in Northern Ireland* (HC 2004–05, 349-1); Northern Ireland Assembly PAC, *Control of River Pollution in Northern Ireland* (Third Report 2001) <http://archive.niassembly.gov.uk/public/reports/report3-00r.htm>; Criminal Justice Inspection (CJI), *Enforcement in the Department of the Environment* (2007) <www.cjini.org/getattachment/6e35e56d-68e5-41d3-b099-c33586abf0dd/Enforcement-in-the-Department-of-Environment.aspx>; CJI, *Enforcement in the Department of the Environment Northern Ireland: A Follow Up Review of Inspection Recommendations* (2011) <www.cjini.org/CJINI/files/d7/d71473bc-2dc9-4ff5-b957-d410ff851852.pdf> 9; CJI, *A Review of the Northern Ireland Environment Agency’s Environmental Crime Unit* (2015) <www.cjini.org/getattachment/776ee5fc-b3c0-4759-8fbc-18a72a8f31e5/A-review-of-the-Northern-Ireland-Environment-Agency.aspx> 35. Overarching independent reviews have also been undertaken, notably R. Macrory, *Transparency and Trust: Reshaping Environmental Governance in Northern Ireland* (UCL Press, 2004); T. Burke, G. Bell and S. Turner, *Foundations for the Future: The Review of Environmental Governance* (2007) www.ukela.org/content/doclib/135.pdf; and more recently R. Purdy and P. Hjerp, *Review of Environmental Governance in Northern Ireland* (2016) <https://www.nienvironmentlink.org/cmsfiles/Environmental-Governance-NI-Ecocentric-Final-Report-2016.pdf>.

³ C. Brennan, R. Purdy and P. Hjerp ‘Political, economic and environmental crisis in Northern Ireland: the true cost of environmental governance failures and opportunities for reform’ (2017) 68(2) NILQ 123.

⁴ T. Muinzer, ‘Incendiary Developments: Northern Ireland’s Renewable Heat Incentive and the Collapse of the Devolved Government’ (March/April 2017) 99 UKELA E-Law 18. The RHI Inquiry chaired by Rt Hon Sir Patrick Coghlin is due to report in 2019, <https://www.rhiinquiry.org>.

⁵ C. Mills, *A Review of Waste Disposal at the Mobyuoy Site and the Lessons Learnt for the Future Regulation of the Waste Industry in Northern Ireland* (Mills Report, DOE 2013); and C. Brennan, ‘The Enforcement of Waste Regulation in Northern Ireland: Deterrence, Dumping and the Dynamics of Devolution’ (2016) 28(3) JEL 471.

⁶ C. Spackman and G. Grandjean, ‘MOT diesel test not performed in NI for 12 years’ (BBC, 26 September 2018), <https://www.bbc.co.uk/news/uk-northern-ireland-45643031>.

⁷ C. Macauley, ‘Lough Neagh sand-dredging: Minister ‘wrong’ (BBC, 28 June 2017), <https://www.bbc.co.uk/news/uk-northern-ireland-40429162>.

subsidies for anaerobic digesters threatens to dwarf even the RHI debacle in terms of potential fraud and manipulation of green energy schemes and is now the subject of an investigation by the Northern Ireland Audit Office.⁸ Notwithstanding the astounding extent of these governance failures, the devolved government has been unwilling or unable to change the trajectory of problematic environmental decision-making despite constant reminders from environmental pressure groups and an extensive range of official scrutiny reports.⁹

While these well-documented failures pose a significant risk of serious, irreversible consequences for the environment (Northern Ireland's and beyond), they now also have the potential to be amplified and exacerbated dependent on the nature of Brexit. Currently environmental governance is based on a system of multilevel governance,¹⁰ with shared competence between the EU and the individual Member States and, via devolution, thereby Northern Ireland. The EU provides a substantial body of environmental law, including minimum standards and approaches that Northern Ireland may build upon. It also supports a wide range of important governance functions, such as the formulation of new policy – from setting long-term objectives to developing specific standards – to the evaluation of existing ones,¹¹ as well as critical enforcement and accountability functions.¹² The EU has therefore provided the foundations for environmental governance across the UK, including in Northern Ireland. These foundations are now threatened by Brexit, which may lead to a patchy legal system and considerable governance gaps.¹³ In light of Northern Ireland's already problematic experience, this has the potential to undermine the entire governance system - with profound consequences for Northern Ireland's environment. In addition, the potential risk of increased regulatory divergence north and south of the Irish border also poses serious political problems for the UK as a whole. On the one hand, the cost of managing a degraded environment and its consequences has the potential to be economically crippling.¹⁴ On the other hand, the impact of substandard governance performance in the context of the environment may also influence success in terms of negotiating (or delivering on) an EU exit deal, especially given the potential impacts on cross-border trade and the need for maintenance of a level playing field with the Republic of Ireland and beyond.¹⁵ The fact that the 'backstop' and the importance of preventing the UK gaining a competitive advantage through the potential reduction of environmental

⁸ C. Macauley, 'Auditor calls for an investigation into anaerobic digester subsidies' (BBC, 15 November 2018), <https://www.bbc.co.uk/news/uk-northern-ireland-46213976> and C. Macauley, 'Top NI auditor to investigate over green energy scheme claims' (BBC, 21 December 2018) <https://www.bbc.co.uk/news/uk-northern-ireland-46650410>

⁹ For a summary of the findings of these scrutiny reports see Brennan et al, n.3.

¹⁰ On EU multilevel governance generally, see: L. Hooghe and G. Marks, *Multi-level Governance and European Integration* (Rowman & Littlefield, 2001).

¹¹ A. Jordan, C. Burns, V. Gravey (2017) 'Three Brexit governance gaps no one is talking about', <https://greenallianceblog.org.uk/2017/12/06/three-brexit-governance-gaps-no-one-is-talking-about/>.

¹² M. Lee, 'Accountability for Environmental Standards after Brexit', (2017) 19(2) ELR 89.

¹³ M. Lee, 'Brexit and environmental protection in the United Kingdom: governance, accountability and law making', (2018) 36(3) *Journal of Energy & Natural Resources Law*, 351.

¹⁴ Brennan et al, n.3.

¹⁵ C. Brennan, M. Dobbs, V. Gravey and A. Uí Bhroin, *Policy Paper: The Future of Environmental Governance in Northern Ireland*, (July, 2018) https://www.brexitenvironment.co.uk/wp-content/uploads/dlm_uploads/2018/07/Environmental-Governance-in-NI-Policy-Paper-final-V3.pdf.

standards post-Brexit have occupied such a prominent place in the on-going Brexit negotiations is testament to the gravity that should be afforded to these issues.¹⁶ Northern Ireland environmental governance failure must therefore be addressed not merely for its own enhancement, but also in light of its broader impacts.

However, Northern Ireland is now caught between the pincers of an uncertain and chaotic Brexit process and the complete collapse of the devolved government and power-sharing arrangements. No clear political leadership can be identified and Northern Irish policy and law-making has stagnated. As a consequence, the environmental governance reforms that have been sought repeatedly in Northern Ireland, and which remain necessary, are now unlikely in the foreseeable future.¹⁷ There is thus an urgent need for specific environmental governance mechanisms that will not only help remedy the legacy of decades of environmental neglect, but also copper-fasten Northern Irish environmental governance in the context of likely future political vacuums or where competing objectives threaten environmental protection. This article investigates the unique environmental governance vulnerabilities emerging in Northern Ireland in the wake of the UK's decision to leave the EU and in light of the volatile devolved political context, and potential means to address these. It will firstly explore the governance implications of the current decision-making vacuum which has been triggered by the collapse of the devolved government. It will then highlight distinctive aspects of the existing system which make the already-problematic governance of the environment in Northern Ireland much more vulnerable to the political volatility and uncertainty created by Brexit. Finally, this article will consider three key issues which will be central to any future reforms designed to address such challenges. the need to develop common frameworks which establish and maintain formal environmental governance cooperation and minimal environmental standards and approaches both on the island of Ireland and with Great Britain (GB) the need to enshrine environmental principles (and related concepts) preferably within these frameworks or in a separate instrument such as an overarching environmental charter, and the vital importance of developing robust enforcement and accountability mechanisms. Unless meaningful reform is undertaken as a matter of urgency, environmental governance failures will not only result in continued environmental degradation, but will persist in creating significant economic risks and political challenges for decades to come.

2. Decision-making in a political vacuum

A central consideration for Northern Ireland's governance of any issue must be the collapse of the devolved government January 2017, with the subsequent lack of political power to legislate or make policy decisions. It is fitting that, given the apathy shown towards environmental governance by some

¹⁶ European Commission, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018*, (2018) https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf.

¹⁷ Despite numerous attempts to restore the devolved government, at the time of writing talks processes have failed.

political parties within Northern Ireland, it was the failure of the then First Minister (Arlene Foster, Democratic Unionist Party (DUP)) to step down pending a full investigation into her role in the scandal surrounding the mismanagement of the RHI green energy scheme which prompted the resignation of the late Deputy First Minister (Martin McGuinness, Sinn Fein) and the consequent collapse of the Executive.¹⁸ Although RHI was the ‘straw that broke the camel’s back’,¹⁹ the scandal emerged at a time of increasing political tensions surrounding the Irish language, marriage equality and fundamental differences in opinion relating to Brexit and the DUP’s support for the Leave campaign in the EU referendum. The difficult task of re-establishing any degree of trust between the main political parties and restarting the Executive has been massively complicated by Brexit, the DUP’s on-going (albeit tenuous) confidence and supply arrangement with the Conservative government and disputes surrounding the future nature of the Irish border.²⁰ In the long term, this raises significant questions about the governability and sustainability of Northern Ireland as a political entity. In the short term, important decision-making processes – including those regarding the environment – have essentially ground to a halt. Given the abysmal environmental record of the devolved government, its collapse may not, *prima facie*, appear to be any great loss to environmental protection efforts. However, the day-to-day realities of the almost record-breaking period of time without a functioning government are stark, and extend far beyond environmental governance to (for example) health, education, reparations for historical victims of abuse, development of the North-South electricity interconnector, investment, transport, and public appointments.²¹ In the context of the environment however, three key, and increasingly controversial examples stand out and have proven pivotal in unpicking the practical implications of governance without a government. These scenarios, respectively, demonstrate the limitations of civil service powers, the difficulties posed by piecemeal or delayed action/inaction and the consequences of hesitancy in preparing for Brexit.

The first example relates to the on-going saga of a £240 million waste incinerator, which was designed to plug a very significant gap in Northern Ireland’s waste disposal strategy but which ran into substantial opposition from both environmental groups and residents of Mallusk, Co. Antrim where it was due to be installed.²² Aside from the clearly problematic environmental consequences of either granting or not granting planning permission for the installation of the incineration facility, the decision-making process and how the courts have responded in the consequent appeals have had much wider

¹⁸ The joint nature of the Office of First and Deputy First Minister (OFDFM) means the resignation of either First or Deputy First Minister will result in the *de facto* collapse of the devolved government.

¹⁹ C. Page, ‘Stormont: All you need to know about NI’s latest political crisis’, (BBC, 16 January 2017), <http://www.bbc.co.uk/news/uk-northern-ireland-38612860>.

²⁰ E.g. J. Stone, ‘Brexit causes surge in support for united Ireland, poll finds’, (The Independent, June 2018), <https://www.independent.co.uk/news/uk/politics/brexit-united-ireland-referendum-northern-border-uk-yougov-poll-a8389086.html>.

²¹ G. Moriarty, ‘Northern Ireland on verge of new world record – for no government’ (Irish Times, 7 August 2018) <https://www.irishtimes.com/news/politics/northern-ireland-on-verge-of-new-world-record-for-no-government-1.3587841>.

²² G. McKeown, ‘New report casts doubt on need for £240m Co Antrim incinerator facility’, (Irish News, 27 April 2018), <http://www.irishnews.com/business/2018/04/27/news/new-report-casts-doubt-on-need-for-240m-co-antrim-incinerator-facility-1315063>.

implications.²³ The upshot of the Court of Appeal's ruling that civil servant decision-making in the incinerator case was unlawful in the absence of a minister, was ultimately to lead to the creation of legislation temporarily enabling individual senior civil servants to make decisions in the public interest and also to pushing back the requirement to hold Assembly elections until at least 26th March 2019.²⁴ This clearly has very significant consequences in the context of a contentious shift away from a devolved government towards potentially UK direct rule. However, the new legislation does little to fill an increasingly yawning gap in accountability for decision-making in Northern Ireland. Nor does it facilitate substantive policy or legislative changes, both of which are necessary now – especially in the context of the environment.

The second issue is clearly highlighted via the management of the illegal 'superdump' discovered at Mobuoy in 2015.²⁵ Created by individuals operating behind a mask of legitimacy in a licensed recycling facility, the dump is in close proximity to the River Faughan (a tributary of the River Foyle, which supplies drinking water to the surrounding area) and is either adjacent to or within numerous designated nature conservation sites – notably the River Faughan and Tributaries Special Area of Conservation (SAC).²⁶ It has been estimated that approximately a million cubic metres of waste has been illegally disposed of at the Mobuoy Road site, equivalent to filling around four hundred Olympic-sized swimming pools.²⁷ The inaction on beginning site remediation due to decision-making paralysis is now actually creating further environmental risks and potentially increasing existing levels of contamination.²⁸ Additionally, the complications created by the delays to political decision-making are now snowballing. The prosecutions for the dumping itself are yet to be scheduled. There is on-going legal wrangling about an enforcement notice forcing the removal of waste issued by the Planning Appeals Commission and there is also a civil suit being brought by one affected landowner.²⁹ Northern Ireland's failure to regulate the waste sector in general is also currently subject of an infraction complaint made by Friends of the Earth NI to the European Commission.³⁰ This fiasco not only

²³ Ibid.

²⁴ The Court of Appeal case took place in July 2018; see *Buick's (Colin) Application as Chair Person of NOARC 21*, [2018] NICA 26. In October 2018, the UK Secretary of State for Northern Ireland (Karen Bradley) introduced the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 to the House of Commons and subsequently came into force on the 1st November 2018. In January 2019, the UK Supreme Court in *Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (No 2) (Northern Ireland)* [2019] UKSC 1 decided that the issues raised in the Arc21 incinerator ruling case should be handled in the North-South electricity connector case, which was heard before Belfast High Court in February 2019. The High Court decided that the decision to grant approval for the North-South Interconnector in the absence of a minister was wrong.

²⁵ See Mills, n.5 and DAERA, n.d. *The Mobuoy Road Waste Project*, <https://www.daera-ni.gov.uk/articles/mobuoy-road-waste-project>.

²⁶ Green Party NI, 'Drinking water fears a reminder that Mobuoy dangers remain', 30 September 2017, <http://www.greenpartyni.org/drinking-water-fears-a-reminder-that-mobuoy-dangers-remain>. See also <http://jncc.defra.gov.uk/protectedsites/sacselection/sac.asp?EUcode=UK0030361> for details on the features which have led to the Special Area of Conservation designation.

²⁷ DAERA, n.d., n.25.

²⁸ C. McAuley 'Government's 'lack of joined up thinking' on illegal dump criticised', (BBC, 27 October 2017) <https://www.bbc.co.uk/news/uk-northern-ireland-41775317>.

²⁹ Ibid. See Planning Appeal Commission (PAC) References 2015/E0050 and 2015/E0052.

³⁰ Friends of the Earth (FoE) have confirmed that infraction cases have been initiated by the Commission against the UK in relation to Northern Ireland but have not reached any formal litigation stage. Further complaints have also been made by FoE

demonstrates the real environmental harm that can arise from an absence of proper decision-making processes, but is also a direct consequence of decades of weak enforcement of environmental law and a lack of political leadership in pushing for reforms that might curb the extent of this weakness.

The third key issue relates directly to Northern Ireland's preparations (or lack thereof) for environmental governance post-Brexit – which contrasts starkly with processes currently being undertaken in other parts of the UK and in the Republic of Ireland.³¹ There has been some significant civil service activity, e.g. the Department of Agriculture, Environment and Rural Affairs (DAERA) has worked with their counterparts across the UK and politicians in Westminster and has set up four stakeholders groups on rural affairs, agriculture and trade, environment and fisheries – and these groups have persisted after the collapse of Northern Ireland's Executive.³² Bringing together a wide variety of stakeholders, these groups have worked with DAERA on identifying policy priorities (sent to the Department of Environment, Food and Rural Affairs (DEFRA) in London) and in some cases developing more detailed plans.³³ However, this activity has, until now, primarily focused on agriculture, and aspects of environmental governance with direct links to agriculture. For example, DAERA finally caught up with Wales, Scotland and England in organising an informal consultation (a public engagement) on its proposals for a future agricultural policy framework in August 2018 and publish the resulting document.³⁴ However, even this occurred only after considerable pressures from stakeholders and Westminster to publish the document.³⁵ While detailed plans have been produced for how environmental governance might look in Scotland, England and Wales (dependant on the EU exit deal), no equivalent processes have (thus far) been undertaken in Northern Ireland.³⁶ This creates a significant risk that Northern Ireland will simply 'copy over' arrangements made for England, which will, by their very nature, not be tailored to the distinctive challenges faced in this jurisdiction.³⁷ Fundamentally, there

in relation to breaches regarding nitrates and ammonia in autumn 2018. Email from James Orr, Director of Friends of the Earth Northern Ireland, 20 February 2019.

³¹ E.g. Scottish Government, *Environmental Governance in Scotland on the UK's withdrawal from the EU*, May 2018, <https://www.gov.scot/Publications/2018/06/2221/6>; National Assembly for Wales, CCERA Committee, *Environmental governance arrangements and environmental principles post-Brexit*, June 2018, <http://www.assembly.wales/laid%20documents/cr-ld11622/cr-ld11622-e.pdf>; DEFRA, *Environmental Principles and Governance after EU Exit*, consultation, May 2018, <https://consult.defra.gov.uk/eu/environmental-principles-and-governance>; Department of the Taoiseach, Ireland, *Government Statement on Brexit Preparations*, https://www.taoiseach.gov.ie/eng/News/Government_Press_Releases/Government_Statement_on_Brexit_Preparations.html and Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2019, No.14 of 2019, <https://www.dfa.ie/brexit/getting-ireland-brexit-ready/governmentcontingencyactionplan/> and <https://www.dfa.ie/media/dfa/eu/brexit/brexitcontingency/No-Deal-Brexit-Contingency-Action-Plan-December-18.pdf>

³² DAERA, *Northern Ireland Future Agricultural Policy Framework: Stakeholder Engagement*, 1st August 2018, section 1.2.1, https://www.daera-ni.gov.uk/sites/default/files/consultations/daera/NI%20Future%20Agricultural%20Policy%20Framework%20-%20Stakeholder%20Engagement%20-%20FINAL_0.pdf.

³³ Ibid.

³⁴ Ibid.

³⁵ E.g. this was a central topic of discussion in the oral evidence by Wes Aston, Mary Dobbs and Viviane Gravey in Northern Ireland Affairs Committee (NIAC), Oral evidence: Brexit and Northern Ireland: Agriculture, HC 939 6 June 2018 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/northern-ireland-affairs-committee/brexit-and-northern-ireland-agriculture/oral/84884.html>.

³⁶ DAERA, n.32.

³⁷ Historically, there is a well-known and problematic practice of directly replicating Westminster's environmental legislation into Northern Irish environmental law with minimal local input. Brennan et al, n.3, 133. Examples are already beginning to

has been little or no formal consideration of what the implications will be for Northern Ireland environmental law and governance should the EU frameworks, principles and accountability mechanisms no longer apply. Coupled with Northern Ireland's legacy of environmental neglect and a complete absence of devolved decision-making, Northern Ireland is now particularly vulnerable to Brexit and without the ability to respond internally to the urgent need for reformed domestic policies, legislation and governance structures.

3. Brexit-related risks and vulnerabilities

3.1 'Taking back control' of environmental governance

While the repatriation of competences from the EU was a key tenet of the Vote Leave campaign, the task of 'taking back control' of inherently intertwined areas such as the environment (to whatever degree a final EU exit deal might allow) is incredibly complex³⁸ – both at an EU and internal UK level. This has been clearly reflected in the on-going debates over the EU Withdrawal Agreement and UK common frameworks.³⁹ Central questions relevant across all four UK jurisdictions include the extent to which control should be kept in Westminster vis-à-vis the devolved administrations; the extent to which control should be kept in the four executives vis-à-vis their legislatures and vis-à-vis stakeholders; and finally the extent to which international cooperation can be pursued – an issue which is clearly particularly relevant to the need to address shared challenges on the island of Ireland. Taking back control is thus not only reshaping the UK's relationship with the EU, but also questioning UK constitutional dynamics, in particular intra-UK intergovernmental relations.⁴⁰ There are now serious questions about how Brexit will thus affect a predominantly devolved issue like the environment, particularly in light of the removal of existing EU common frameworks (i.e. the EU environmental *acquis*, common to all EU Member States). There is the need to respect the devolution agreements, however this must be balanced against the risk of facilitating too great a degree of legal and regulatory divergence – and especially enabling divergence 'downwards' from existing environmental standards.

emerge which clearly illustrate this risk, e.g. proposed changes to the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 (as amended), undertaken via Westminster in the absence of a devolved government largely replicate those proposed for England and Wales. However, because Northern Ireland does not have a regulator independent of a central government department, changes that seem relatively innocuous may create potentially serious conflicts of interest and imbue the NIEA with significantly more discretion in relation to environmental decision-making than regulators in England, Scotland or Wales. This is discussed *infra* in section 4.3.

³⁸ M. Sandford and C. Gormley-Heenan, 'Taking Back Control', the UK's Constitutional Narrative and Schrödinger's Devolution', (2018) *Parliamentary Affairs* 1.

³⁹ Ibid. Also, e.g. A. Paun, 'Common UK Frameworks after Brexit', *SPICE Briefing* 18-09, 2nd February 2019, <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2018/2/2/Common-UK-Frameworks-after-Brexit/SB%2018-09.pdf>; V. Gravey and C. Reid, 'Taking back and sharing control? Brexit and the common environmental frameworks', *Brexit and Environment*, 12th March 2018, <https://www.brexitenvironment.co.uk/2018/03/12/common-environmental-frameworks>; and T. Eddington, 'Brexit: What do Theresa May's Tory enemies object to in the deal?', (BBC News, 16th November 2018), <https://www.bbc.com/news/uk-46214526>.

⁴⁰ R. Minto et al 'A Changing UK in a Changing Europe: The UK State between European Union and Devolution', (2016) 87(2) *Political Quarterly*, 179; and The Centre for Cross-border Studies, Briefing Paper 5: The Impact of Brexit on Devolution in Northern Ireland (2018) <http://crossborder.ie/site2015/wp-content/uploads/2019/01/Devolution-Briefing-Paper-Final-2.pdf>.

Dealing with the devolved governments can still be considered a relatively new phenomenon for the UK government. Following devolution in the late 1990s, the Joint Ministerial Committee (JMC) was established as a forum to bring together all four governments — but it remained a weak institution with no statutory underpinning, no formal decision-making power, or fixed schedule, meaning that ‘the effectiveness of the JMC is very much open to question’.⁴¹ Most formations of the JMC have fallen into disuse – with the notable exception of the JMC Europe, which met regularly ahead of Council of the EU meetings to discuss areas of EU decision-making impacting on devolved competence.⁴² Instead, intergovernmental relations within the UK have been mainly bilateral, government to government instead of four UK nations together, and mainly mundane, happening ‘below the political radar, as officials deal with day-to-day matters’.⁴³ This can be attributed to a number of factors including political congruence within GB until 2007 (under Labour majorities) and a focus within Northern Ireland on maintaining the fragile government structures set up under the Good Friday/Belfast Agreement⁴⁴ (GFBA).⁴⁵ Even despite ten years of political incongruence in GB post-2007 and very limited institutional cooperation, UK intergovernmental relations were, until the mid-2010s characterised by very little conflict. Beyond the humdrum of frequent, official-to-official interactions, conflicts were also limited due to party political strategies – on the one hand, the Welsh and Scottish nationalists sought to ‘build up a benign reputation for collaborative government’⁴⁶ and, once in power the Conservative Party sought not to stress their limited or non-existent roots in the devolved nations. Hence, it has been argued that ‘neither the UK government nor the devolved governments have seen political benefits in a path that priorities conflict over cooperation in the intergovernmental arena’.⁴⁷

However, this apparent lack of conflict on a political level coexisted with a deepening of policy divergence across the four nations, especially in areas of Europeanised competence. In policy areas such as agriculture or the environment, ‘the EU dimension provide[d] a structure of opportunities to embed and develop institutional and policy competencies in the case of devolved government’.⁴⁸ Ambitious governments in Wales and Scotland seized this opportunity to go beyond the EU baseline – in waste management and renewable energy respectively – while Northern Ireland did not.⁴⁹ Instead, as

⁴¹ J. Hunt & R. Minto, ‘Between intergovernmental relations and paradiplomacy: Wales and the Brexit of the regions’, (2017) 19(4) *British Journal of Politics and International Relations*, 647 at 650.

⁴² Institute for Government, *Devolution after Brexit*, April 2018, <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6070-Devolution-After-Brexit-180406-FINAL-WEB-FINAL.pdf>.

⁴³ J. Gallagher, ‘Intergovernmental Relations in the UK: Co-operation, Competition and Constitutional Change’, (2012) 14(2) *The British Journal of Politics and International Relations*, 198 at 200.

⁴⁴ *Ibid.*

⁴⁵ The Northern Ireland Peace Agreement, 1998, <https://peacemaker.un.org/uk-ireland-good-friday98>.

⁴⁶ R. Parry, ‘The Civil Service and Intergovernmental Relations in the Post-devolution UK’, (2012) 14 *The British Journal of Politics and International Relations*, 285 at 287.

⁴⁷ W. Swenden & N. McEwen, ‘UK devolution in the shadow of hierarchy? Intergovernmental relations and party politics’, (2014) 12 *Comparative European Politics*, 488 at 506.

⁴⁸ A. Cole & R. Palmer, ‘Europeanising devolution: Wales and the European Union’, (2013) *British Politics*, 379 at 393.

⁴⁹ C. Burns *et al*, *Environmental policy in a devolved United Kingdom*, (2018), <https://www.brexitenvironment.co.uk/wp-content/uploads/2018/10/BrexitEnvUKReport.pdf>.

noted above, Northern Ireland's implementation of EU law has been rife with delay, errors and non-compliance. But despite its many failings, devolved implementation did offer the opportunity for further North/South cooperation, especially in the context of the GFBA and the inclusion of the environment as an area of cooperation for Northern Ireland and the Republic of Ireland.⁵⁰ This has resulted in several examples of practical cooperation, including the joint implementation across the island of Ireland of the EU's flagship Water Framework Directive⁵¹ and the rollout of a joint response to the threat of invasive species.⁵²

However, the EU referendum result has now placed intergovernmental relations in the UK under severe strain, reflected in devolved governments' responses to the referendum. Both the Welsh⁵³ and Scottish⁵⁴ governments published their own Brexit plans in the winter of 2016-2017 – calling for continued membership of the Single Market and Customs Union either for the UK or for their respective nations only, and in the case of the Welsh government, for the replacement of the JMC by an EU-inspired Council of Ministers. No similar plans were issued by the Northern Ireland Executive – the only joint statement on Brexit is a letter from August 2016 to Theresa May, signed by both the First Minister and deputy First Minister and outlining significant concerns particular to Northern Ireland – specifically the border with the Republic of Ireland, business competitiveness, energy security, the absence of EU funding programmes and a range of issues relating to the agri-food sector.⁵⁵ While a JMC (European Negotiations) was established to help feed devolved priorities into the UK Brexit negotiation position, it failed to meet between February and October 2017, a critical period in which the Prime Minister started the Article 50 process. This gap underlined the complete control of the UK government over the JMC, and its monopoly in convening meetings (or, crucially, choosing not to). When the JMC (European Negotiations) finally met again in October 2017, its conclusions set out the need to agree 'Common Frameworks' to underpin public policies after Brexit. These frameworks could take the form of "common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition",⁵⁶ grounded in political or legally binding UK-wide agreements. Most notably for Northern Ireland, this declaration stated that the Common Frameworks could be either UK-wide or GB-wide and would have to comply with the GFBA.

⁵⁰ Brennan et al, n.3.

⁵¹ 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.

⁵² V. Gravey et al, Northern Ireland: Challenges and opportunities for post-Brexit environmental governance, (2018), The UK in a Changing Europe, <http://ukandeu.ac.uk/wp-content/uploads/2018/10/Northern-Ireland-challenges-and-opportunities-to-post-Brexit-environmental-governance.pdf>.

⁵³ Welsh Government, *Securing Wales' Future*, 2017, https://beta.gov.wales/sites/default/files/2017-01/30683SecuringWales'Future_ENGLISH_WEB.pdf.

⁵⁴ Scottish Government, *Scotland's Place in Europe*, 2016, <http://www.gov.scot/Resource/0051/00512073.pdf>.

⁵⁵ Letter from Arlene Foster and Martin McGuinness to Theresa May, 10th August 2016, <https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/Letter%20to%20PM%20from%20FM%20%26%20dFM.pdf>.

⁵⁶ JMC Conclusions 16.10.2017
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

The subsequent list of frameworks published by the UK Cabinet Office in March 2018 highlights the imbalance of priorities for the UK government and raises significant concerns for environmental protection. Out of 153 areas of devolved competences affected by Brexit, 24 would require legislative frameworks, 82 would require non-legislative, political agreements and in 49 areas devolved governments would be free to diverge.⁵⁷ A clear prioritisation in protecting a UK single market and facilitating trade is reflected in the common frameworks. In contrast, while one of the bases for Common Frameworks agreed in October 2017 was to “enable the management of common resources”, the Cabinet list possesses huge environmental gaps. Water is considered as not requiring any frameworks, whilst Air Quality and Biodiversity would only require political agreement. The obvious transboundary nature of these issues – part of what makes them ‘common resources’ – appears forgotten. The list’s limited nature highlights the potential for shifts in environmental governance after Brexit. The current EU environmental frameworks are protected from conflicting political will and objectives at both devolved and UK levels, even where interacting with reserved powers. However, whilst the JMC’s work highlights the potential to develop common frameworks within the UK, the current proposals are highly limited. Further, the list’s creation is heavily centralised in Westminster without adequately addressing more regional concerns. This is particularly problematic in Northern Ireland – where environmental governance faces very distinctive challenges such as managing cross-border environmental risks (with a non-UK country which it currently shares EU common frameworks with), the involvement of groups with paramilitary links in environmental crime, dealing with the legacy of past neglects and political disinterest in environmental issues.⁵⁸ It also fails to recognise potential future challenges which may arise, dependent on the nature of the UK’s exit deal. For example, disparities in control relating to waste regulation between Northern Ireland and the Republic of Ireland in the early 2000s, coupled with differing rates of landfill tax, led directly to the creation of a black market in illegal transboundary shipments of waste.⁵⁹ The fact that this regulatory divergence occurred even within the parameters of existence of EU frameworks (in this case the waste directive and transboundary shipments of waste) demonstrates the vast potential for further, problematic divergence should those frameworks be removed.⁶⁰ In future there may be no regulatory alignment on the island of Ireland, no enforced cooperation as currently required regarding river basins or nature protection for instance, and no clear governance mechanisms for enabling engagement in cross-border decision-making and litigation. The proposed common frameworks areas simply do not address these challenges,

⁵⁷ Cabinet Office, *Frameworks Analysis*, 2018 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/686991/20180307_FINAL_Frameworks_analysis_for_publication_on_9_March_2018.pdf. The discrepancy in numbers is due to a couple of areas appearing under more than one heading.

⁵⁸ S. Turner and C. Brennan, ‘Modernising Environmental Regulation in Northern Ireland: A Case Study in Devolved Decision Making’ (2012) 63 NILQ 509.

⁵⁹ Brennan, n.5; and S. Cave (2016) ‘Background paper on Waste Management in Northern Ireland’, Northern Ireland Assembly Research and Information Service Briefing Paper <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2016-2021/2017/aera/1017.pdf>.

⁶⁰ House of Lords EU Committee (2016) Brexit: UK-Irish relations <https://publications.parliament.uk/pa/ld201617/ldselect/lddeucom/76/76.pdf>.

both in light of their apparent preferences for political cooperation *a priori* and their current scope (limited to within the UK).

3.2 Lowering standards and diluted principles and objectives

In addition, Northern Ireland's environmental governance record raises a host of questions about the kind of divergence that might occur if the UK were no longer bound by EU standards. This has become an issue of concern across the UK,⁶¹ but has particular resonance in Northern Ireland given its history of failures coupled with a pronounced political antipathy (and at times hostility) towards prioritising environmental concerns. Currently the EU provides a body of law that sets minimum standards and approaches that Member States, including the UK and its devolved governments, are obliged to transpose, implement and enforce. Although divergence is possible to some extent, minimum standards and objectives set at EU level must be met. Thus, Northern Ireland can vary its approach to a certain degree, but there is, at present, a regulatory baseline that is also shared by the rest of the UK and the Republic of Ireland. This includes requirements of cross-border cooperation as noted above.

Furthermore, EU environmental law is underpinned by the objectives of sustainable development⁶² and a high level of protection of the environment, complemented by principles such as prevention, precaution, polluter pays, proximity and integration.⁶³ These objectives and principles simultaneously guide and restrict Northern Ireland's actions in this field. Beyond influencing the creation of policy and legislation, their role in the UK and EU courts' teleological/purposive interpretation of the legislation is crucial,⁶⁴ as demonstrated for example in the definition of waste⁶⁵ or through the courts' interpretation of Article 6(3) of the Habitats Directive in light of the precautionary principle to require an appropriate assessment unless it is established beyond reasonable doubt that there will be no significant effects posed.⁶⁶ This has also impacted upon the Northern Irish courts and environmental governance, as reflected in the Court of Appeal's approach in *Felix O'Hare*⁶⁷ where the court adopted the Court of Justice of the EU's (CJEU's) reasoning and its purposive interpretation in light of the 'high level of protection of the environment based on the precautionary approach' to provide for 'a wide interpretation of the categories of waste'.⁶⁸ It is also worth noting that the Aarhus principles regarding access to environmental information, public participation in environmental decision-making and access to justice in environmental matters⁶⁹ can also play a fundamental role in ensuring good governance and helping

⁶¹ C. Reid, 'Brexit and the future of UK environmental law', (2016) 34 *Journal of Energy and Natural Resources Law* 407.

⁶² Article 3(3) TEU.

⁶³ Articles 11 and 191 TFEU.

⁶⁴ *Champion, R (on the application of) v North Norfolk District Council & Anor* [2015] UKSC 52 (22 July 2015); and *C-6/04 Commission v UK* [2005] ECR I-09017.

⁶⁵ *R v Jones (Evan)* [2011] EWCA Crim 3294.

⁶⁶ *C-6/04 European Commission v United Kingdom* [2005] ECR I-9017, para 54.

⁶⁷ *Department of the Environment and Heritage Service v Felix O'Hare & Co Ltd and James Phillips t/a Phillips Contracts*, [2007] NICA 45, [2008] Env L.R. 28.

⁶⁸ *Ibid*, at 13 and 16.

⁶⁹ Derived from the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 25 June 1998,

strengthen compliance.⁷⁰ This is reflected in the increasingly important role of Northern Ireland public interest groups in challenging environmental decision-making through the exercise of these principles and the rights stemming from them.⁷¹ Overall, these objectives and principles thereby strengthen existing environmental law and facilitate its evolution by the courts across the EU, including in Northern Ireland.

Left to its own devices, there is good cause for concern that the devolved government (should it re-emerge from this period of collapse) in Northern Ireland would prove unwilling, or unable to maintain environmental standards, their implementation and enforcement post-Brexit. Even when there has been a devolved government *in situ*, there has been little political will to prioritise environmental concerns and the nature of flawed environmental governance mechanisms within Northern Ireland makes self-driven creation and implementation of environmental law and policy highly unreliable. The situation of the contaminated land regime is a prime example of this, where Northern Ireland created a statutory framework to address this issue in 1997,⁷² but never commenced the relevant provisions that sit gathering dust. Of particular concern is that the DUP, who by a small margin remain the largest party in Northern Ireland, have in the past adopted an almost aggressive stance towards environmental protection.⁷³ This has been demonstrated on numerous occasions, not least in the appointment of an ardent climate-sceptic (Sammy Wilson) as Minister for the Environment⁷⁴ or former first Minister Arlene Foster's rejection of the need for an independent environmental regulator – despite a tidal wave of evidence indicating the urgent need for this crucial structural reform.⁷⁵ Even if the DUP were no longer the largest party, the nature of power-sharing in Northern Ireland means that they may still hold the environmental portfolio or could use the controversial petition of concern process to effectively veto issues considered to relate to cross-community matters.⁷⁶ Consequently, there is little hope for a 'Green Brexit' from Northern Ireland if it is reliant on its own devolved government. Whilst no panacea,⁷⁷ the continued presence of EU environmental standards, objectives and principles has been able to provide

<http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>. E.g. R. Caranta, A. Gerbandy and B. Müller, *the Making of a New European Legal Culture: the Aarhus Convention*, (Europa Law Publishing, 2018).

⁷⁰ E.g. Case 664/15 *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation*, ECLI:EU:C:2017:987; M. Lee and C. Abbot, 'The Usual Suspects? Public Participation and the Aarhus Convention', (2003) 66:1 *The Modern Law Review* 80; and J. Darpö, 'Article 9.2 of the Aarhus Convention and EU Law' (2014) 11:4 *Journal for European Environmental and Planning Law* 367; B. Toth, 'Public Participation and Democracy in Practice – Aarhus Convention Principles as Democratic Institution Building in the Developing World', (2010) 30:2 *Journal of Land, Resources and Environmental Law* 295; and M. Dellinger, 'Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law', (2012) 23:2 *Colorado Journal of International Environmental Law and Policy*, 309.

⁷¹ This issues is discussed further *infra*, but see e.g. *Alternative A5 Alliance's Application for Judicial Review*, [2013] NIQB 30; and *Friends of the Earth Ltd's Application for Judicial Review* [2016] NIQB 91.

⁷² Waste and Contaminated Land Order (NI) 1997.

⁷³ T. Greene, 'An unhealthy environment – the DUP, environmental policies and Brexit', Open Democracy UK, 12th February 2018, <https://www.opendemocracy.net/uk/tommy-greene/unhealthy-environment-dup-environmental-policies-and-brexit>.

⁷⁴ L. Stewart, 'Sammy Wilson, the Northern Ireland Minister at odds with the world's climate experts in Copenhagen', (Belfast Telegraph, 8th December 2009), <https://www.belfasttelegraph.co.uk/news/environment/sammy-wilson-the-northern-ireland-minister-at-odds-with-the-worlds-climate-experts-in-copenhagen-28505862.html>.

⁷⁵ Turner & Brennan, n.58 at 517 and 520.

⁷⁶ *Ibid*.

⁷⁷ E. Scotford, *Environmental Principles and the Evolution of Environmental Law*, (Hart, 2017), chapters 4 and 6., discussing the varying role of environmental principles within EU law.

some counterweight to the devolved government's problematic approach to environmental considerations through imposing requirements on the politicians or regulatory bodies and through purposive interpretation. Although Northern Ireland will still be bound by the UK's international law obligations,⁷⁸ Brexit now threatens to remove the important environmental safety net provided by membership of the EU to date.

3.3 An absence of enforcement and accountability

The third element to consider is accountability and the enforcement of environmental law and there are two strands to this particular vulnerability in Northern Ireland. Firstly, an internal domestic record of particularly weak enforcement of environmental rules and secondly, the consequent need to ensure that the devolved government is held to account for failures in this regard. In terms of the first strand, declining environmental quality and successive scandals involving environmental criminality have led to a sense that the rule of environmental law has not been effectively enforced and that the structural arrangements for delivering this core regulatory function are not fit for purpose. Recurrent issues on a practical level include: the highly-criticised performance of the Northern Ireland Environment Agency (NIEA) in ensuring proper implementation of environmental law; problems with prosecution of breaches of environmental law by both the NIEA and the Public Prosecution Service (PPS); and the level of penalties/sentences in environmental prosecution being insufficient to deter non-compliance with environmental law.⁷⁹ These issues have been well documented both in academic analyses and in a litany of highly-critical scrutiny reports over the last thirty years. However, on a structural level critiques have coalesced around NIEA's position within a central government department (DAERA) and the need for an independent environmental regulator in order to prevent the development of accountability gaps and to ensure that the rule of environmental law is not subject to political interference.⁸⁰ With no meaningful reform occurring despite overwhelming evidence indicating its necessity, the second core issue – the need for government accountability for weak environmental decision-making has become increasingly important.

Although internal accountability mechanisms do exist within Northern Ireland's governance system, it is questionable as to how effective these have been in holding the devolved government and the civil service to account. While scrutiny of environmental decision-making has been undertaken by (for example) the Northern Ireland Audit Office (NIAO), the Criminal Justice Inspection (CJI) and also by the Northern Ireland Assembly Environment Committee, the subsequent findings of these reports have,

⁷⁸ C. Reid, 'Brexit and the Devolution Dynamics' (2017) 19 ELR 3-5.

⁷⁹ A detailed exploration of the history of environmental governance failures in Northern Ireland up until 2017 can be found in Brennan et al (n 3) and detailed analysis of issues with the prosecution of environmental non-compliance is available in C. Brennan, *The Enforcement of Environmental Regulation in Northern Ireland: A Story of Politics, Penalties and Paradigm Shifts?* (PhD thesis, Queen's University Belfast 2013).

⁸⁰ Turner & Brennan, n.58.

to some extent at least, been ignored.⁸¹ The minimal credence given to internal scrutiny criticism means that overarching EU accountability mechanisms have taken on an enhanced importance in holding the devolved government to account. On the one hand, membership of the EU initially requires that any domestic penalties for breaching relevant EU environmental law be effective, proportionate and dissuasive.⁸² However, a further central element that has proven crucial for environmental governance in Northern Ireland is the potential for the Commission to take actions against Member States for breach of EU law and for the CJEU to impose financial penalties.⁸³ Although characterised as slow-moving and imperfect,⁸⁴ the accountability and enforcement mechanisms designed to ensure EU law is transposed and implemented throughout Member States have played an important coercive role in ensuring that the devolved government has at least attempted to achieve some level of compliance.⁸⁵ Crucially, since the Northern Ireland Act 1998, the devolved government rather than Westminster is liable for the potentially crippling cost of any financial sanctions imposed for breaches of its EU law obligations.⁸⁶ The resulting threat of financial sanctions has forced the devolved government to take action on a number of occasions, for example in the context of illegal dumping of waste across the Irish border.⁸⁷ Dependent on the final Brexit deal, these important accountability and enforcement functions may be lost in part, or in their entirety.⁸⁸ Future environmental governance in the UK (and especially Northern Ireland given its past enforcement difficulties) will therefore require not merely principles as discussed above, but also processes and structures to replicate or replace these important fail-safes, and to ensure environmental decision-making is accountable and environmental rules are effectively enforced. In Northern Ireland, this will require reform not only to internal approaches to enforcement and to the processes for holding government to account at a domestic level – but will also clearly require some overarching mechanism to ensure that the devolved government (should it be reinstated) is implementing, enforcing and ultimately upholding the rule of environmental law at a systemic level.

4. From ‘quick fixes’ to long term solutions

⁸¹ Brennan et al, n.3, at 134.

⁸² Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, [2008] OJ L328/28.

⁸³ The European Commission can initiate infringement proceedings against member states that have failed to fulfil a Treaty obligation, including referral to the Court of Justice of The European Union who have the power to impose financial penalties (Art 258-260 TFEU). See, e.g. G. Faulkner, ‘Fines against member states: An effective new tool in EU infringement proceedings?’ *Comparative European Politics* (2016) 14(1), 36-52.

⁸⁴ M. Hedemann-Robinson, *Enforcement of European Union Environmental Law*, 2nd Edition (Routledge: London, 2015); R. Lee, ‘Always Keep a Hold of Nurse: British Environmental Law and Exit from the European Union’ (2017) 29 JEL 155.

⁸⁵ B. Jack, ‘Environmental Law in Northern Ireland’ in S. McKay and M. Murray, *Planning Law and Practice in Northern Ireland* (Routledge, 2017), 154-155.

⁸⁶ Office of the Deputy Prime Minister, Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government Scottish Ministers and the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee (Cm 5420, 2001) para B4.25.

⁸⁷ J. Mulgrew, ‘Republic of Ireland’s Illegal Waste Sent Back’ *Belfast Telegraph* (Belfast, 24th August 2011) <http://www.belfasttelegraph.co.uk/news/environment/republic-of-irelands-illegal-waste-sent-back-28649887.html>.

⁸⁸ UKELA, *Brexit and Environmental Law Enforcement and Political Accountability Issues*, (2017), <https://www.ukela.org/content/doclib/317.pdf>.

4.1 Designing common frameworks

Without an operating devolved government, Northern Ireland essentially must rely on the UK government to consider its interests and its particular needs in the design and governance of common frameworks which will replace the EU frameworks when the UK leave the EU. Unfortunately, there is little indication (beyond a general commitment to upholding the GFBA and the need to address the backstop) that this has entered the consciousness of the UK government – whose focus to date has been on developing an approach for, primarily, England.⁸⁹ Ahead of Brexit, a number of ‘quick fixes’ are needed to avoid confusion concerning what rules still apply and what institutions still have oversight.⁹⁰ Central to this endeavour to date is the EU Withdrawal Act (EUWA)– a large copy-pasting exercise, aiming to deliver continued legal certainty post-Brexit. The EUWA sets out how control will be taken back in practice – and creates a holdover pattern: devolved ministers will see the requirement to act within remits of EU law amended to cover the remits of retained EU law, and be given limited powers to amend legislation compared to UK ministers. It attempts to avoid ‘regulatory gaps’ by providing for a new legal foundation for existing domestic law implementing EU Directives, transposing EU Regulations that are currently directly applicable into UK law, and providing for the application of existing judgments by the CJEU. The UK is also attempting to adapt the law to manage references to EU processes, e.g. assessments by the European Food Safety Authority or reporting to the EU Commission. However, the EUWA’s narrow understanding of the *acquis* (transposed Directives, Regulations and existing judgments) leaves a number of gaps open, most notably in relation to principles and governance arrangements (see below). This is acknowledged by Section 8 of the EUWA, which is a controversial ‘Henry VIII clause’ designed to enable the relevant UK government ministers to address ‘deficiencies’ for two years post-Brexit. In the context of environmental law this is particularly problematic as it is clear that substantial uncertainties surround the future direction of UK environmental law and policy, and will continue to do so for years post-Brexit.

Crucially, the EUWA promotes a ‘common’ UK approach being determined in Westminster, by the UK Parliament or, with the use of Henry VIII powers, the UK government. However, while centralisation may be necessary to ensure clarity in the Brexit delivery process, this should be considered an interim solution. Environmental protection is a devolved issue within the UK and should predominately rest with the devolved jurisdictions. Critically, the four UK nations need to be able to work together on tackling shared environmental challenges, to adopt and implement common frameworks, without these being imposed from above/Westminster. The current tensions around ‘power grabs’ undermine cooperation to tackle shared environmental challenges.⁹¹ This is reflected in the very limited number of

⁸⁹ E.g. DEFRA, n.31, which applies to England and reserved matters only.

⁹⁰ Evidence submitted by Colin Reid (et al.) to Scottish Parliament Finance and Constitution Committee (August 2018) http://www.parliament.scot/S5_Finance/Inquiries/Brexit_and_Environment_Academics.pdf.

⁹¹ S. Morris and S. Carrell, ‘Tories using Brexit to grab back devolved powers, say ministers’, (The Guardian, 26th February 2018), <https://www.theguardian.com/politics/2018/feb/26/tories-using-brexit-to-grab-back-devolved-powers-say-ministers>.

common frameworks identified by the JMC; as noted above, out of 153 areas identified where pre-existing frameworks in the form of European Directives are legally binding across the entire EU, legislative frameworks were deemed necessary for only 24 areas. Further these are only internal UK frameworks, with any regulatory alignment or cooperation frameworks with the Republic of Ireland being contingent currently on the eventual relationship with the EU and any approved Withdrawal Agreement. This raises concerns of both the risk of a ‘race to the bottom’ and the potential for divergences with subsequent negative externalities via transboundary effects. This has further knock-on effects, as it becomes more difficult to cooperate cross-border as divergence increases. While both Wales and Scotland have shown their environmental credentials in the past, their efforts could potentially be undermined by English policies to roll-back environmental standards – and, in the absence of shared policies, it would be much easier for Northern Ireland to further downgrade its environment.⁹² Consequently, greater consideration is needed of common frameworks (and avenues through which they might be achieved) for the UK and Northern Ireland, whether at a domestic UK level or in conjunction with the Republic of Ireland.

Firstly, a foundation based in a broad conceptualisation of subsidiarity, grounded in a bottom-up approach, could be considered more legitimate from the perspectives of both effectiveness and democracy. Environmental competence should be devolved – to the regional, or local level – unless and until meeting agreed policy objectives require coordinated action at a higher level of governance, e.g. at the level of the UK.⁹³ Secondly, in light of proportionality and as stated in the October 2017 JMC communiqué, different levels of constraints can be imagined – from no frameworks and full divergence within the remits of international agreements to political agreements between governments and legislative frameworks. Thirdly, a common UK approach could be reached in a cooperative, intergovernmental manner, with the four administrations agreeing to work together on an issue, under the watchful eye of their respective legislatures. This is the approach put forward by the Welsh Government, which supports the replacement of the JMC with a new UK Council of Minister, based on the EU template.⁹⁴ Fourthly, building on and expanding upon the list of rationales for common frameworks agreed in October 2017,⁹⁵ variegated geometries of frameworks could be pursued. These geometries may fit within the geography of these islands – GB-wide on the one hand, North/South cooperation on the other – or conversely be built on shared policy objectives, political will to pool resources and see ad-hoc cooperation between Northern Ireland and Wales or Scotland on specific

⁹² C. Burns, et al., n.49.

⁹³ M. Dobbs, ‘Attaining Subsidiarity-Based Multilevel Governance of Genetically Modified Cultivation?’ (2016) 28(2) JEL 245.

⁹⁴ Welsh Government, n.53.

⁹⁵ Principle 1 of the Communiqué states that: ‘Common frameworks will be established where they are necessary in order to: enable the functioning of the UK internal market, while acknowledging policy divergence; ensure compliance with international obligations; ensure the UK can negotiate, enter into and implement new trade agreements and international treaties; enable the management of common resources; administer and provide access to justice in cases with a cross-border element; safeguard the security of the UK.’

policy areas. Such an approach would enable two or more frameworks to overlap over Northern Ireland, thereby continuing both North/South cooperation *and* limiting UK-wide or GB/NI divergence, e.g. minimum standards for water quality could be maintained throughout the UK, while allowing Northern Ireland and the Republic of Ireland to continue to jointly implement the EU's Water Framework Directive (and its retained copy in Northern Ireland).

4.2 Enshrining environmental principles and related precepts

Whether in common frameworks or simply in Northern Irish law, Northern Ireland has a clear need for maintaining and developing minimum standards and approaches to environmental protection. As noted above, the EUWA will attempt to fill this need temporarily through retaining much of EU derived law, but it leaves gaps, returns control to the devolved jurisdictions eventually (enabling divergences) and does not provide for the future evolution of environmental law. Common frameworks as outlined above are crucial for Northern Ireland in a post-Brexit scenario and could help in ensuring the continued existence and creation of environmental standards, but such frameworks would likely be quite sparse and take extended periods to create or amend. Further, this still leaves potential for a restrictive interpretation by Northern Irish politicians, regulators, courts or individuals that would undermine environmental protection. Something extra is needed to ensure that Northern Ireland itself acts to protect the environment and does not undermine the situation further – at all stages of environmental governance.

One potential vehicle for achieving this could be an Environmental Charter, inspired by, but going beyond, documents such as the 2004 French Environmental Charter.⁹⁶ It could encompass binding fundamental environmental precepts to guide and direct Northern Ireland environmental governance, going beyond the core objectives and principles to also encompass rights and duties (see the Table below). However, it is clear that the UK's approach for England, and to a limited extent for the rest of the UK,⁹⁷ as outlined in the Environment (Principles and Governance) Bill⁹⁸ is considerably flawed⁹⁹ and no such creature, despite the real possibility that it may provide the basis of the Northern Irish approach in the absence of the devolved government.¹⁰⁰

⁹⁶ D. Marrani, 'Reinforcing environmental rights: the French charter for the environment', (2015) 25 *European Journal of Fundamental Rights* 383. This was given constitutional status in 2005: *Loi constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement (JORF n°0051 du 2 mars 2005 page 3697)*.

⁹⁷ Whilst the proposed provisions on principles are to apply to the entirety of the UK, it is only in relation to the actions of UK ministers – this automatically limits the applicability to Northern Ireland since environmental protection is devolved.

⁹⁸ Draft Environment (Principles and Governance) Bill, CM9751, December 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf. This builds upon Section 16 of the EUWA and also DEFRA's consultation on Environmental Governance and Principles, n.31.

⁹⁹ M. Dobbs, 'Environmental principles in the Environment Bill', *Brexit and Environment*, 30th January 2019, <https://www.brexitenvironment.co.uk/2019/01/30/environmental-principles-environment-bill/>; and M. Lee and E.A.K. Scotford, 'Environmental Principles After Brexit: The Draft Environment (Principles and Governance) Bill', working paper, 30 January 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3322341.

¹⁰⁰ n.37.

As required by Section 16 of the EUWA, the Environment Bill provides in clauses 1-4 for the creation by the Environment Secretary of a policy statement on environmental principles, as well as providing some indicators of their range, role and effect. However, whilst the use of primary legislation as a vehicle for incorporating requirements to engage with the principles is welcome and provides weight to their status and role domestically, the considerable reliance upon the use of the policy statement is concerning – especially as the government is to have regard to the statement itself and not the principles within the eventual legislation.¹⁰¹ The statement is to outline the principles’ interpretation and application, yet need not address policies that the Secretary deems irrelevant (beyond those automatically excluded in the Bill)¹⁰² and can be revised by the Secretary at any time.¹⁰³ This could enable the UK to water down the principles substantially or control the ability of the courts to engage effectively with the principles. Legislation suffers from its own flaws, but the reliance on the policy statement undermines the principles and leaves them hostage to fortune.

Further, the Bill is considerably limited in range.¹⁰⁴ Clause 2 defines the principles as meaning the core traditional environmental principles (prevention, precaution, proximity/source, and polluter pays), alongside the 3 Aarhus principles (access to environmental information, public participation in environmental decision-making and access to justice in environmental matters), and environmental integration. It also includes sustainable development as a principle, although the accompanying Information paper notes the potential to incorporate it as an overarching objective in the final Bill.¹⁰⁵ However, it includes no other principles or objectives, such as a high level of protection, environmental improvement, good governance principles or principles regarding cross-border cooperation and prevention of transboundary harm. Further, the versions included in the Bill are somewhat limited in scope and nature, e.g. through not referring to human health also or Clause 2 simply saying ‘the precautionary principle so far as relating to the environment’. They also reflect older versions of the principles, whereas there is potential to develop or adopt more innovative, progressive principles.

In light of Northern Ireland’s environmental history, the land border with the Republic of Ireland and extra pressures and uncertainties posed by Brexit, Northern Ireland needs to go beyond the Environment Bill and indeed beyond what is included within even EU law currently – it needs to be able rely on a suite of relevant fundamental precepts (objectives, rights, principles and duties) to prevent further environmental degradation and also help rectify existing problems. In this context, a central principle to include for Northern Ireland would be one of non-regression – to act as an environmental guarantee

¹⁰¹ O.W. Pedersen, ‘Post-Brexit environmental accountability and enforcement – Who is afraid of the courts?’, (2018) 20(3) ELR, 133.

¹⁰² Dobbs, n.99.

¹⁰³ Pedersen, n101.

¹⁰⁴ Dobbs, n.99.

¹⁰⁵ DEFRA, ‘Information paper on the policy statement on Environmental Principles’, December 2018, p.13, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766299/env-bill-information-paper.pdf.

preventing further degradation. The *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* published in November 2018¹⁰⁶ (EU Withdrawal Agreement, EUWA) includes this as a principle that would bind both the EU and the UK for the duration of the transition period when a single customs territory would exist, supported by the four core environmental principles.¹⁰⁷ However, whilst covering ‘law, regulations and practices’, this relates to a list of issues that is quite extensive, but exhaustive – reflected in the aim that this will promote a ‘level playing field’ and is not simply for the sake of environmental protection. Further, whether this apparent willingness to maintain environmental standards that parallel those set down by the EU will persist is as uncertain as the fate of the Draft Agreement itself;¹⁰⁸ it simply highlights the potential for either party or indeed individual Member States/devolved jurisdictions to undermine environmental protection to gain a competitive advantage if the agreement is not approved by the UK or if no similar principle or objective is included in the documents governing subsequent relations. It is therefore crucial to adopt non-regression as a domestic objective applying to environmental protection across the board - irrespective of any eventual trade agreement. However, non-regression is still limited in its nature and further objectives and principles will be required for Northern Ireland. By incorporating objectives such as a high level of protection and sustainable development within a Charter domestically, Northern Ireland would be adopting valuable aims to drive future Northern Ireland environmental policy and law post-Brexit, as well as encouraging continued regulatory alignment with the EU and the Republic of Ireland – which would help address cross-border issues and also questions of a ‘level-playing field’ in the context of continued trade, whether in the scope of the current EU Withdrawal Agreement or otherwise.

A wide range of environmental and general governance principles is open to Northern Ireland for adoption, which can help drive purposive approaches, support public interest litigation or otherwise bolster environmental protection. For instance, principles of accountability, transparency and due process in conjunction with the Aarhus principles could help enable environmental NGOs in bringing crucial litigation to protect the environment. Some principles will become of particular importance for Northern Ireland post-Brexit, where they deal with power allocation (e.g. subsidiarity)¹⁰⁹ or cross-border issues (e.g. avoidance of transboundary harm¹¹⁰ or cross-border cooperation).¹¹¹ Consequently, Northern Ireland should reflect on the full spectrum available and adopt a broad range of principles. Regard must also be given to the fact that numerous variations of these principles exist – 19 versions of

¹⁰⁶ European Commission, n.16.

¹⁰⁷ European Commission, n.16, Annex 4, Part 2, Article 2.

¹⁰⁸ C. Reid, ‘Environmental Commitments in the Withdrawal Agreement’, *Brexit and Environment*, 15th November 2018, <https://www.brexitenvironment.co.uk/2018/11/15/environment-withdrawal-agreement/>.

¹⁰⁹ Dobbs, n.93; A. Engel & L. Petetin, ‘International obligations and devolved powers – ploughing through competences and GM crops’, (2018) 20(1) ELR 16.

¹¹⁰ Established in ‘Trail Smelter Arbitral Decision’, (1941) 35 *American Journal of International Law* 684, at 716-7.

¹¹¹ E.g. the 1999 UNECE Convention on Environmental Impact Assessment in a transboundary context (Espoo Convention) generally, including assessments for potential transboundary harm and providing for further multilateral or bilateral cooperation: http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf.

the precautionary principle alone have been catalogued.¹¹² Bearing in mind Northern Ireland's legacy and also the flexible nature of these principles, Northern Ireland should strive to incorporate strong, broad and ambitious versions.¹¹³ For instance, the precautionary principle could be adopted in a fashion that proactively calls for protective measures where potential threats exist in the context of uncertainty, rather than simply justifying them. In doing so, sufficient detail will be required within legislation to avoid the principles being watered down or bypassed, whilst not creating an 'iron cage' and undermining the advantages that their flexibility provide.¹¹⁴ Care should also be undertaken to avoid these principles being captured by the government in order to curtail their use by the courts.¹¹⁵

Northern Ireland should also consider incorporating both procedural (e.g. rights to a fair trial and effective remedy) and substantive (e.g. right to a private life or right to a clean and healthy environment) rights¹¹⁶ within the Environmental Charter. If present as enforceable rights, they could act as effective tools to promote environmental protection. Many of the procedural rights in particular exist currently in Northern Ireland – including via the EU Charter of Fundamental Rights, the European Convention of Human Rights (ECHR), the Aarhus Convention and the Human Rights Act 1998. However, the EU sources may no longer be applicable post-Brexit, future adherence to the ECHR is not guaranteed (membership of the EU mandates membership of the ECHR) and existing rights in even the Human Rights Act may be undermined. It is also worth highlighting that, despite incorporating the Aarhus principles, the Environment Bill would not enable individuals or NGOs to continue to rely upon them as rights – as they are left as unenforceable concepts intended to drive policy rather than grant rights.¹¹⁷ Even with continued adherence to the ECHR, a shift away from the Aarhus Convention in particular would have significant impacts as the procedural rights vary in role, depth and strength across the different documents.¹¹⁸ Further, whilst the existing regime includes substantive rights such as the right to a private life,¹¹⁹ which has been raised regarding environmental matters,¹²⁰ it currently does not expressly encompass specific substantive environmental rights, such as a right to a clean environment.¹²¹ Considering that Northern Ireland has such a poor legacy of environmental protection,

¹¹² P. Sandin, 'Dimensions of the Precautionary Principle' (1999) 5 *Human and Ecological Risk Assessment* 889.

¹¹³ See the discussion and tables in Brennan et al, n.15.

¹¹⁴ M. Dobbs, 'Flexible Rationality: Legitimising the Precautionary Principle?', Presentation at the UK IVR Conference, Sheffield, November 2017.

¹¹⁵ Pedersen, n101.

¹¹⁶ E.g. A. Boyle, 'Human Rights or Environmental Rights? A Reassessment', (2007) 18:3 *Fordham Environmental Law Review*, 471. It would also be possible to consider the inclusion of nature rights, e.g. the right to standing of trees as outlined in C.D. Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects', (1972) 45 *Southern California Law Review* 45. See also, R. Carnwath, 'Human rights and the Environment', (2018) Justice Human Rights Law Conference, 10 October 2018, London, <https://www.supremecourt.uk/docs/speech-181010.pdf>. However, consideration of such rights is beyond the scope of this article.

¹¹⁷ Lee and Scotford, n.99, p.10.

¹¹⁸ B. Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention', (2018) 30: 1 *Journal of Environmental Law*, 1.

¹¹⁹ E.g. Schedule 1, Article 8 of the Human Rights Act; and Article 8 of the ECHR.

¹²⁰ E.g. *Hatton and Others v United Kingdom* (2002) 34 EHRR 1 regarding Heathrow airport.

¹²¹ Carnwath, n, 116.

incorporating these rights domestically could be a crucial step to resolve the existing deficits¹²² and to avoid further degradation.

However, incorporation of a broad range of objectives, principles and rights is of little use unless done in an effective manner that recognises contextual considerations. In the EU, the approach to these has varied,¹²³ but generally a positive environmental political will, obligations upon the EU institutions incorporated into the Treaties, duties of loyalty upon Member States, and a pro-active Court of Justice of EU with its teleological approach¹²⁴ have spread and strengthened the role of objectives and principles. However, these contextual factors are not replicated in the UK or indeed Northern Ireland and their absence heightens the challenges for achieving the full potential of the objectives, principles and rights. In the draft Environment Bill, principles are directed simply at UK governmental ministers who must ‘have regard to’ them – via the policy statement. This is despite the current role of objectives and principles across the whole of environmental governance, including in the purposive approach, and knowing that such phrasing is ambiguous and soft, granting excessive discretion to decision-makers, especially in the context of judicial review¹²⁵ and enabling duties to be ignored and limited.¹²⁶ There is a clear risk that if no corresponding duties are incorporated, then the Secretary of State’s erroneous belief expressed in July 2018 that principles do not form part of the law¹²⁷ may materialise. These flaws are intensified for Northern Ireland, where for instance enforceable obligations against lax or unhelpful state bodies could compel compliance. If the objectives, principles and rights outlined above are to have any meaningful influence, clear and forceful corresponding duties must also be incorporated. These duties must be imposed on all actors to strive to achieve the relevant environmental objectives, abide by the relevant principles and respect the relevant rights when developing, implementing or enforcing any relevant law or policy.

Northern Ireland clearly needs to go beyond the Environment Bill on all fronts – the Environment Bill is simply too limited and weak, ‘undermin[ing] or misconstrue[ing] key features’ of environmental principles as they exist currently.¹²⁸ Embedding such fundamental precepts (objective, principles, rights and duties) within binding law for Northern Ireland would help strengthen existing environmental law and provide the basis for future developments, thereby helping to prevent further slippage and ameliorate the current situation. Incorporating this as an Environmental Charter for Northern would further strengthen environmental protection through providing an underpinning ‘grundnorm’. If this

¹²² O. Pedersen, ‘A Bill of Rights, Environmental Rights and the UK Constitution’, (2011) 3 *Public Law*, 577 at 593.

¹²³ E.g. regarding principles see Scotford, n.77, chapter 4.

¹²⁴ For a critical discussion of literature on whether the Court of Justice of the EU is activist or not, see A.A. Lorens, ‘The European Court of Justice, More than a Teleological Court’ (1999) 2 *Cambridge Yearbook of European Legal Studies* 373.

¹²⁵ Environmental Audit Committee, *The Government’s 25 Year Plan for the Environment*, HC 803, 24 July 2018, <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/803/803.pdf>.

¹²⁶ E.g. Select Committee on the Natural Environment and Rural Communities Act 2006, *The countryside at a crossroads: Is the Natural Environment and Rural Communities Act 2006 still fit for purpose?*, HL 99, 22 March 2018, <https://publications.parliament.uk/pa/ld201719/ldselect/ldnerc/99/99.pdf>.

¹²⁷ <https://www.parliamentlive.tv/Event/Index/4df40b59-f1d4-4fe8-aa61-49f66c072fab>.

¹²⁸ Lee and Scotford, n.99.

were extended via a common framework to the UK as a whole and/or the island of Ireland, this would strengthen it further politically and legally – key issues to address would be how it would be formulated and what level of commonality or divergence would be appropriate.¹²⁹ It is however acknowledged that achieving political agreement for an Environmental Charter for even Northern Ireland would be highly challenging. To deliver one for the island of Ireland would raise the political and constitutional challenges significantly, although there is the potential for it to be considered in the context of the GFBA and the support for all-island cooperation in environmental protection.

Proposed Precepts		
Examples of Types	Proposed Environmental Charter – potential content	Environment Bill
Objectives	<ul style="list-style-type: none"> • Sustainable development • High level of protection • Non-regression • Improvement of the environment 	<ul style="list-style-type: none"> • N/A currently – potential to adapt sustainable development.
Core (traditional) environmental principles	<ul style="list-style-type: none"> • Prevention • Precaution • Polluter pays • Rectification at source • Environmental integration 	<ul style="list-style-type: none"> • Prevention • Precaution • Polluter pays • Rectification at source • Environmental integration • Sustainable development (weaker, narrow versions at times)
Aarhus principles	<ul style="list-style-type: none"> • Access to environmental information, • Public participation in environmental decision-making • Wide and effective access to justice regarding environmental matters. <p>(to be incorporated as principles conferring enforceable rights as per EU approach; strengthening the nature of access in light of the Wednesbury test)</p>	<ul style="list-style-type: none"> • Access to environmental information, • Public participation in environmental decision-making • Access to justice regarding environmental matters. <p>(not rights – to influence policy and law development)</p>

¹²⁹ For discussions on this relating purely to rights, see Pedersen, n.122.

Cross-border cooperation principles	<ul style="list-style-type: none"> • International cooperation and collaboration • Avoiding transboundary harm (to be incorporated as over-arching principles – applying to internal and external UK borders) 	<ul style="list-style-type: none"> • N/A. • Obligations under international law remain.
General governance principles	<ul style="list-style-type: none"> • Proportionality • Subsidiarity (broader version, rather than the simple EU version, to address devolution issues) • Effective deterrence • Good governance principles, e.g. transparency, accountability, effectiveness, and equality. 	<ul style="list-style-type: none"> • N/A • Found to varying extents in general domestic law.
Rights	<ul style="list-style-type: none"> • Substantive human rights such as a right to a clean and healthy environment. • Rights regarding due process, fair trial & effective justice. • Rights of future generations, beyond sustainable development. • Potential to consider ‘rights of nature’ 	<ul style="list-style-type: none"> • N/A • No substantive human rights directly regarding the environment in domestic law. • Relevant rights to privacy, life, due process, fair trial etc found in domestic law, e.g. the Human Rights Act.
Duties	<ul style="list-style-type: none"> • Duty to strive to achieve the relevant environmental objectives; • Duty to undertake tasks in light of all relevant environmental principles/base all actions on such principles; • Duty to respect relevant rights. 	<ul style="list-style-type: none"> • Minimal duty on UK Government ministers to ‘have regard to’ the principles in developing policy.

4.3 An Independent Environmental 'Watchdog' and enhanced use of judicial review

Questions about how to fill the compliance and accountability gaps that will emerge across all parts of the UK post-Brexit are currently being considered by the UK government, the Scottish and Welsh devolved governments, NGOs and academics.¹³⁰ However, the political vacuum in Northern Ireland has thus far prevented official consideration of these crucial issues at a devolved level.¹³¹ Despite laudable efforts to prepare for Brexit by the Northern Ireland civil service (albeit initially focused primarily on agricultural policy),¹³² it is therefore unlikely that any well-developed proposals tailored to the distinctive local environmental context will emerge by 'Brexit-day' in March 2019. This creates a heightened risk that proposals produced for other parts of the UK, or the UK as a whole, will simply be extended to Northern Ireland without any meaningful consideration of how they will work in that context. Given the well-documented and distinctive difficulties that have been experienced in Northern Ireland to date, this has the potential to be very problematic. An aggravating factor is the fact that the proposals which have emerged from the UK government thus far (which are designed to apply to England and Wales in the first instance) have been the subject of significant criticism and have been deemed by many commentators as unsuitable for any part of the UK.¹³³ Although the EUWA and the draft Environment Bill provide further commitments which to some extent mitigate these concerns, as discussed above the fate of this agreement and any legislation stemming from it remain shrouded in uncertainty.¹³⁴

The creation of an 'independent environmental watchdog' is one of two central pillars in DEFRA proposals, now reflected in the draft Environment Bill in the form of the proposed Office for Environmental Protection (OEP). This was initially committed to in November 2017 by the UK Secretary of State, Michael Gove, in response to concerns that Brexit would lead to lowering environmental standards and a 'bonfire of anti-pollution protections'.¹³⁵ The commitment was then enshrined in the EUWA in June 2018, providing for the proposed watchdog to take proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a minister of the Crown is not complying with that environmental law.¹³⁶ Considering it fundamental to delivering a 'Green Brexit', the UK Government intends that the new watchdog's central role will be

¹³⁰ E.g. UKELA, n.88.

¹³¹ However, in July 2018 a high-level workshop was hosted at Queen's University Belfast, which brought together around 50 stakeholders to debate the future of environmental governance in Northern Ireland. This workshop resulted in a policy paper (n.15) and submission to the DEFRA consultation on environmental governance and principles, available at https://www.brexitenvironment.co.uk/wp-content/uploads/dlm_uploads/2018/08/Brennan-Dobbs-Gravey-Ui-Bhroin-submission-to-DEFRA-Environmental-Governance-Consultation.pdf.

¹³² E.g. via the consultation relating to the Northern Ireland Future Agricultural Policy Framework, <https://www.daera-ni.gov.uk/consultations/northern-ireland-future-agricultural-policy-framework> and (n 32).

¹³³ B. Moore, 'Environmental principles and governance: Brexit and Environment's key messages' (2018) <https://www.brexitenvironment.co.uk/2018/08/14/environmental-principles-governance-brexit-environments-key-messages/>

¹³⁴ European Commission, n.16.

¹³⁵ C. Baynes, 'Government to set up environmental watchdog to deliver 'green Brexit', says Michael Gove', (Independent, 12th November 2017), <https://www.independent.co.uk/news/uk/politics/michael-gove-environment-secretary-green-brexit-andrew-marr-show-european-union-a8050626.html>.

¹³⁶ EUWA s16(1)(d).

to: provide independent scrutiny/advice relating to environmental law and policy; respond to complaints surrounding the delivery/implementation of environmental law; and hold Government publicly accountable where its implementation of environmental law has failed, exercising enforcement powers where necessary.¹³⁷ Ultimately, the Government explicitly intends that this authority will replace the functions of the European Commission and CJEU (although it will not act as a court). However, as more detail on post-Brexit plans have emerged in the draft Environment Bill, issues arise in terms of the territorial extent of the proposed OEP, its ‘independent’ nature and the scope of its remit and powers.

Although initially unclear as to the extent to which the proposed watchdog might operate with regards to the devolved governments, the draft Environment Bill and accompanying documents provided further detail.¹³⁸ In the first instance, the UK Government’s direct responsibilities extend only to England and to ‘reserved matters’, which vary slightly under the Scottish, Welsh and Northern Ireland devolution settlements.¹³⁹ By extension this therefore establishes the initial limits of the proposed OEP’s responsibilities. Although the UK government has thus been careful to avoid ‘stepping on the toes’ of the devolved administrations who have had jurisdiction over most environmental matters for over twenty years, the often cross-cutting nature of environmental considerations means that (as discussed above in the context of common frameworks) there is likely to be a need for some centralised enforcement and accountability mechanisms to replace the controls currently provided by the EU. As certain cross-cutting issues will clearly move beyond reserved matters and into the realms of devolved responsibilities this has already become a politically contentious matter.¹⁴⁰ While the UK government has committed to exploring ways in which final proposals can be co-designed with the devolved governments,¹⁴¹ this has the potential to be extremely challenging – particularly with regard to the establishment of an overarching enforcement authority. Reid has pointed out that the divergent starting points in terms of environmental governance planning in England, Wales, Scotland and Northern Ireland mean that the emergence of ‘any collaborative and co-designed structure for the UK as a whole’ is unlikely in the near future.¹⁴² It is difficult to imagine how a process involving ‘co-design’ could operate in Northern Ireland given the seemingly intractable political deadlock currently preventing restoration of the devolved government.

¹³⁷ DEFRA, n.31.

¹³⁸ Draft Environment (Principles and Governance) Bill, (n 98)

¹³⁹ Draft Environment (Principles and Governance) Bill 2018, Explanatory Notes, 39. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766849/draft-environment-bill-governance-principles.pdf#page=39

¹⁴⁰ Reid, n.78.

¹⁴¹ C. Reid, All in it together – but not yet? Devolution in the Environment Bill (2019)

<https://www.brexitenvironment.co.uk/2019/01/20/devolution-in-the-environment-bill/>

¹⁴² Reid, *ibid.* The final nature of the ‘backstop’ in the UK’s exit deal could also potentially play a role, with the UK Government acknowledging that if the backstop is required, ‘the UK and EU will not reduce their respective levels of environmental protection below those in place at the end of the implementation period’, <https://www.gov.uk/government/publications/draft-environment-principles-and-governance-bill-2018/environment-bill-policy-paper>.

The proposed ‘independent’ nature of the OEP has also met with some scepticism, rooted in part in concerns surrounding the erosion of the funding and independence of existing environmental oversight bodies such as Natural England and the Environment Agency in England and the perceived inability of these agencies to carry out their remit fully due to this erosion.¹⁴³ Meanwhile, as noted above, criticism of Northern Ireland’s current arrangements for delivering environmental regulation have for decades coalesced around the NIEA’s lack of independence and consequent problems that this arrangement has created.¹⁴⁴ These considerations must be taken into account in the nature and design of any future accountability mechanisms to ensure credibility. Given the extremely turbulent political context in Northern Ireland, the need for an environmental regulator at arms-length from the devolved government is now arguably even more crucial. This need has intensified given that some proposed legislative changes post-Brexit could confer enhanced powers on Northern Ireland’s DAERA and in the process both create and exacerbate conflicts of interest.¹⁴⁵ More complex questions about accountability and the need for urgent reforms to the structure of Northern Ireland’s existing governance structures, (regardless of the development of a new watchdog) clearly emerge when the prospect of a return to direct rule from Westminster in the continued absence of a devolved government is considered. This is now a very real possibility given the complete collapse of relations between Northern Ireland’s main political parties amid increasing acrimony relating to Brexit and the ‘backstop’.¹⁴⁶

The new body’s remit and powers have also been the subject of criticism, with significant concern surrounding the watchdog’s role as set out in DEFRA’s consultation document and subsequent publications.¹⁴⁷ These proposals appeared to fall far short of the UK Government’s promises to replace the EU enforcement mechanisms with a body ‘with real bite’,¹⁴⁸ essentially because the enforcement powers which the government has proposed to grant to the new body appear to be wholly insufficient. In particular, criticism has been directed towards the lack of any provision to levy fines and a lack of clarity surrounding the ability to take legal action against the government if it failed to implement environmental standards.¹⁴⁹ This has prompted concerns that a failure to establish a watchdog with meaningful enforcement powers could therefore create a very substantial gap between what EU

¹⁴³ House of Lords Select Committee on the Natural Environment and Rural Communities Act 2006 ‘The countryside at a crossroads: Is the Natural Environment and Rural Communities Act 2006 still fit for purpose?’ (2018) Report of Session 2017–19, 31.

¹⁴⁴ Turner & Brennan, n.58.

¹⁴⁵ For example, The Conservation (Natural Habitats, etc.) (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 grant additional powers to DAERA NI as the final arbiter in the interpretation of the Regulation and in determining overriding public interest in approving planning applications for projects which will have an adverse effect on protected Habitats. The effect of this change would be to enshrine absolute power in one body which has a demonstrably problematic record of delivering effective habitat protection, see Brennan et al n 3.

¹⁴⁶ E.g. DUP and Sinn Fein blame each other as power-sharing impasse milestone reached (Belfast Telegraph, 28 August 2018) <https://www.belfasttelegraph.co.uk/news/northern-ireland/dup-and-sinn-fein-blame-each-other-as-power-sharing-impasse-milestone-reached-37260805.html>

¹⁴⁷ DEFRA, n.31.

¹⁴⁸ Baynes, n.135.

¹⁴⁹ A. Jordan & B. Moore, ‘Could fines be the green watchdog’s sharpest teeth?’, *Brexit and Environment*, 12th July 2018, <https://www.brexitenvironment.co.uk/2018/07/12/fines-green-watchdogs-sharpest-teeth>.

membership currently delivers (i.e. the ability of the European Commission to take legal action against non-compliant Member States before the CJEU) and what could emerge post-Brexit.¹⁵⁰ However, the Draft Withdrawal Agreement demonstrates a willingness from at least part of the current UK government to agree to imbue a watchdog (operating at a UK-wide level) with more substantial powers e.g. the ability to conduct inquiries, the power to request information and, importantly, the right to initiate legal actions before the courts.¹⁵¹ Despite these assurances, the draft Environment Bill published late in 2018 assuages concerns to only a limited extent.¹⁵² Lee has highlighted the particularly restrictive threshold created by the fact that in the current draft, even non-binding ‘enforcement’ action can only be instigated in response to a ‘serious’ ‘failure to comply’ with ‘environmental law’, in addition to the continued absence of the ability for the OEP to issue legally binding decisions.¹⁵³ Given the difficulties in achieving compliance in Northern Ireland (both at an internal domestic level and with overarching EU standards more generally), there is a clear need for any kind of oversight body with UK-wide jurisdiction, or that might potentially be at least extended in the interim to Northern Ireland, to have very robust enforcement powers to ensure Northern Ireland’s devolved government and regulatory bodies are held to account for any failure to achieve compliance and uphold standards. This requirement must however be balanced against the potential for increased internal UK political discord as a result of threats of enforcement action from a UK-wide body such as the OEP against the devolved governments.

The second key strand of DEFRA’s proposal revolves around the possibility of judicial review playing an enhanced role in holding government decision-makers to account with regards to environmental decision-making. However, three inter-linked problems with relying on the ordinary judicial review process to replace the EU accountability mechanisms must be considered. Firstly, the potentially prohibitive costs associated with bringing a judicial review continue to fall short of the UK’s obligations under the Aarhus Convention (of which the UK will remain a signatory post-Brexit)¹⁵⁴ and exist in sharp contrast to the EU citizen complaint procedure that allows anyone to alert the European Commission to a possible infringement free of charge.¹⁵⁵ Although the UK government has reported

¹⁵⁰ O. Pedersen, ‘A new post-Brexit environmental watchdog: The importance of context’, *Brexit and Environment*, 10th July 2018, <https://www.brexitenvironment.co.uk/2018/07/10/new-post-brexit-environmental-watchdog-importance-context>.

¹⁵¹ European Commission, n.16, Annex 4, Part 2, Article 3.

¹⁵² Maria Lee, Eloise Scotford and Ole Pedersen, ‘Expert Roundtable: The Environment (Principles and Governance) Bill (2019) <https://www.brexitenvironment.co.uk/2019/01/14/expert-roundtable-environment-principles-and-governance-bill/>

¹⁵³ Maria Lee, ‘Working Paper: The new Office for Environmental Protection: Scrutinising and enforcing environmental law after Brexit’ (2019) https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=869755.

¹⁵⁴ In *Royal Society for the Protection of Birds Friends of the Earth Ltd & Anor v Secretary of State for Justice the Lord Chancellor* [2017] EWHC 2309 (Admin), the High Court instructed the UK government to review the operation of the 2013 Environmental Costs Regime as a result of changes created by the Civil Procedure (Amendment) Rules (SI 2017/95) as well as the system for allocating costs in relevant private nuisance proceedings in order to ensure compliance with the Aarhus Convention and protect those taking environmental legal action in England and Wales. The need to do so was reiterated by the Aarhus Compliance Committee in September 2017, as set out in *Decision VI/8k of the Meeting of the Parties on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention*.

¹⁵⁵ https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/how-make-complaint-eu-level/submit-complaint_en.

some progress towards addressing this compliance deficit,¹⁵⁶ concerns remain surrounding a range of issues associated with the current costs regime in England and Wales, as well as in Scotland.¹⁵⁷ In Northern Ireland, some helpful reforms to the Environmental Costs Protection Regime¹⁵⁸ have occurred in recent years following consultation by the Northern Ireland Department of Justice and this may pave the way for more extensive use of this avenue by NGOs and activists.¹⁵⁹ This increased reliance on judicial review as a means of challenging environmental decision-making is a process that has already begun in Northern Ireland, through a recent series of high profile judicial reviews pursued by individual activists supported by Friends of the Earth Northern Ireland.¹⁶⁰ This is arguably a strategy developed in direct response to the accountability vacuum that has developed over decades and in particular since the collapse of the devolved government. However, despite the increase in environmental judicial reviews being brought before the courts in Northern Ireland, NGOs continue to express significant concerns relating to issues surrounding reciprocal caps, the exclusion of private law cases and prohibitively expensive own costs.¹⁶¹ Therefore, the costs implications and the consequent financial pressure that a future reliance on judicial review may place on personal litigants and environmental pressure groups clearly have the potential to create a financially inaccessible system.¹⁶² The omission of the Aarhus requirement that public access to environmental justice should not be ‘prohibitively expensive’ from the Draft Withdrawal Agreement and the EUWA is therefore highly significant for all parts of the UK.¹⁶³

A second issue with judicial review relates to its unsuitability in terms of resolving issues through discussion and negotiation, which has to-date been an important arbitration function of the European Commission’s role.¹⁶⁴ This is connected to the idea that there is a judicial reluctance to interfere in environmental decision-making as a result of ‘the dynamics between the ‘political’ nature of

¹⁵⁶ Department for Environment, Food and Rural Affairs, First progress report on the implementation of decision VI/8k, https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence_with_the_Party_concerned/frPartyVI8.k_01.10.2018_first_progress_report.pdf

¹⁵⁷ Client Earth, the RSPB and Friends of the Earth raised concerns in October 2018 that despite some clarifications and ongoing reviews, the UK position relating to England and Wales appears to represent an express decision not to address the recommendations made by the Aarhus Compliance Committee in Decision VI/8K (and, prior to that, Decision V/9n), see Comments on the Party concerned’s first report from the communicant of communication ACCC/C/2008/33 (Client Earth) and observers (RSPB and Friends of the Earth), https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence_with_communicants_and_observers/frCommC33Obs_31.10.2018/fromCommC33ObsVI.8k_31.10.2018.pdf.

¹⁵⁸ See, Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017.

¹⁵⁹ Department of Justice, Consultation on proposals to revise the costs-capping scheme for certain environmental challenges (2016) <https://www.justice-ni.gov.uk/consultations/consultation-proposals-revise-costs-capping-scheme-certain-environmental-challenges>

¹⁶⁰ For example, the challenge to the A6 upgrade brought by Chris Murphy. See, Friends of the Earth NI, *The Lough Beg wetlands and the A6 road*, (2017) <https://cdn.friendsoftheearth.uk/sites/default/files/downloads/lough-beg-wetlands-a6-road-103190.pdf>

¹⁶¹ See Client Earth, RSPB and Friends of the Earth, n157.

¹⁶² C. Day, *Emperor Gove’s New Clothes*, 16th May 2018, <https://markavery.info/2018/05/16/guest-blog-by-carol-day>.

¹⁶³ Reid, n.108.

¹⁶⁴ UKELA, n.88.

environmental law and the legal focus of judicial review'.¹⁶⁵ In the EU system, CJEU preliminary references are useful because the CJEU was not concerned with whether its judgments were considered contrary to government policy or not and it was obliged to answer the specific questions referred. There is a risk post-Brexit that domestic courts may avoid deeply scrutinising environmental decision-making because it is considered to be too political in nature. This reticence may be particularly problematic regarding controversial Northern Irish issues – as demonstrated in a range of other areas in the past.¹⁶⁶ This reticence would be further heightened due to the general approach to the standard of review in judicial review cases. It is well-established that whilst the UK courts will examine and control procedural elements relatively strictly, when it comes to substantive judicial review (or review of the merits) the courts are considerably more reluctant to probe in too much detail.¹⁶⁷ Due to a combination of recognising the expertise of regulators and other decision-makers, as well as respecting the separation of powers and the administrative arm of the State, the courts only undertake limited substantive review as highlighted by the *Wednesbury* line of cases.¹⁶⁸ This is to the point that only decisions that are 'egregiously unreasonable' are likely to be overturned on the substance of the decision.¹⁶⁹ This is currently the subject of a complaint under the Aarhus Convention, as failing to meet the requirements of access to justice.¹⁷⁰

In addition, although environmental principles are clearly justiciable in both a UK and EU context (as discussed above), the inclusion of a commitment to develop a policy statement to aid interpretation of principles post-Brexit could indicate an attempt on the part of government to limit the potential scope of subsequent judicial interpretation of principles.¹⁷¹ This limitation could stymie the ability of the courts to develop a body of, what Pedersen describes as a unique 'UK environmental principles jurisprudence'.¹⁷² Finally, recent research has found that the courts find against claimants challenging administrative environmental law decisions by a higher margin than in other areas of administrative law, albeit with variations dependent on the court and the public authority being challenged.¹⁷³ This issue should also be borne in mind when considering the degree to which judicial review can ultimately 'plug' the accountability gap in the environmental context.

5. Conclusion

This article has focussed on the significance of Northern Ireland's vulnerabilities in the context of environmental governance, and how these have been amplified by Brexit. The formal UK-EU Brexit

¹⁶⁵ O. Pedersen, 'A Study of Administrative Environmental Decision-Making Before the Courts', (February 1, 2018), JEL, forthcoming.

¹⁶⁶ G. Anthony, *Judicial Review in Northern Ireland*, 2nd edn (Hart Publishing: Oxford 2014), Ch 4.

¹⁶⁷ Lee, n.13.

¹⁶⁸ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

¹⁶⁹ Lee, n.13, at 357.

¹⁷⁰ Communication ACCC/C/2017/156, <https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2017156-united-kingdom.html>.

¹⁷¹ Pedersen, n101.

¹⁷² *Ibid.*

¹⁷³ Pedersen, n.165.

negotiations started when UK Prime Minister May triggered Article 50 in March 2017 – two months after the collapse of the Northern Ireland Executive. Northern Ireland thus now finds itself in a ‘paradoxical’ situation – on the one hand occupying a focal point in Brexit negotiations dominated by talks of borders and backstops,¹⁷⁴ but remaining underrepresented in domestic discussions about governance after Brexit and with senior civil servants now making decisions in lieu of Ministers.¹⁷⁵ Without an operational Executive, Northern Ireland cannot itself undertake urgently needed reforms, develop policy or push for either its own solutions or tailored versions of English or UK-wide proposals for environmental governance post-Brexit.¹⁷⁶ The result is unprecedented policy stagnation, a worrying lack of preparedness for Brexit and a highly unbalanced and unsustainable reliance on the civil service.

In the absence of a devolved government, responding to these distinctive vulnerabilities should now be a priority for both the UK and Irish governments – both of whom have substantial (albeit underappreciated) vested interests in preventing the further degradation of Northern Ireland’s environment. The draft Withdrawal Agreement appears to indicate that both the European Union and the UK support a Green Brexit¹⁷⁷ and recognise the need for better environmental governance in Northern Ireland. Hence, Annex 4, Part 2 calls for both non-regression (Article 2) and the establishment of a UK-wide body, or bodies for the ‘monitoring and enforcement of environmental protection’.¹⁷⁸ However, these proposals are insufficient for Northern Ireland in terms of either rectifying existing environmental governance deficits or indeed addressing the potentially significant governance gaps posed by Brexit. Similarly, the Environment Bill does not go far enough, either for England or for the rest of the UK and particularly not for Northern Ireland. As outlined above, Northern Ireland has need for a range of varied common collaborative frameworks within the UK and also with the Republic of Ireland. An Environmental Charter for Northern Ireland incorporating binding environmental precepts to drive policy and law-making and guide purposive interpretation could help ensure standards are maintained post-Brexit. Regardless of the nature of the legal and policy instruments which may emerge post-Brexit, it is essential that these are implemented and enforced through effective, independent monitoring bodies with robust powers to ensure accountability and compliance. The obvious challenge however is how to achieve such reform in the current political context. Despite the extra powers temporarily granted to Northern Ireland civil servants in late 2018, they do not have the legal capacity or political legitimacy to initiate any major innovations in this context. Ultimately, either a reconstituted Northern Ireland government will be required to instigate these reforms or Westminster will need to act more directly on Northern Ireland’s behalf. Neither of these options seems likely at the time of writing.

¹⁷⁴ Gravey et al, n.52.

¹⁷⁵ The Newsletter, Last people left running NI now hamstrung after deciding not to appeal sweeping court verdict 30 July 2018 <https://www.newsletter.co.uk/news/last-people-left-running-ni-now-hamstrung-after-deciding-not-to-appeal-sweeping-court-verdict-1-8583672>.

¹⁷⁶ NIAC, n.35.

¹⁷⁷ Reid, n.108.

¹⁷⁸ European Commission, n.16, Annex 4, Part 2, Article 3.

Consequently, meaningful environmental governance reform is currently ‘on ice’ unless, and until, the seismic political shifts enveloping Northern Ireland, the UK and the EU result in a more stable, but drastically altered political (and possibly constitutional) reality. Ironically, if such reforms were to take place, it would be a small but significant step that could facilitate current Brexit negotiations and help mitigate the possible consequences for environmental governance in the absence of political will or powers in the future.