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Brexit and Strand Three of the 1998 Agreement: The Three Faces of East-West

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Abstract

Under Strand Three of the 1998 Belfast ‘Good Friday’ Agreement, institutions were set up to promote the ‘harmonious and mutually beneficial development’ of the ‘totality of relationships’ between the peoples and governments of Ireland and the UK, including its devolved administrations and Crown Dependencies. According to the text of the 1998 Agreement this ‘east-west’ dimension was to have two elements with corresponding institutions: an intergovernmental one reflected in the British-Irish Intergovernmental Conference (BIIC) and an interjurisdictional one reflected in the British-Irish Council (BIC). These Strand Three institutions were designed to provide fora for, respectively, intergovernmental cooperation on ‘non-devolved Northern Ireland matters’ in the case of the BIIC and information exchange and cooperation ‘on matters of mutual interest within the competence of the relevant Administrations’ in the case of the BIC. Nowhere in the 1998 Agreement text is the concept of ‘east-west’ used to refer to relations between Northern Ireland and Great Britain. Yet, in the wake of Brexit, and in the midst of controversy over the implications of the Protocol on Ireland / Northern Ireland, relations between Great Britain and Northern Ireland (GB–NI) have been newly framed as ‘east-west’. The creation of this new discursive face of ‘east-west’ relations marks an important, but little discussed, impact of Brexit on the political and constitutional landscape of the UK and Ireland. Against this backdrop, this article considers the impacts of Brexit, and the Protocol, on three faces of ‘east-west’ relations—the BIIC, the BIC and, newly, GB–NI—and discusses their implications for the future of Strand 3 institutions and the ‘totality of relationships’ they represent.

Keywords: Brexit, Northern Ireland, United Kingdom, Ireland, European Union

Introduction

‘[The] Protocol has damaged the East-West element of our delicate political settlement, and this has gravely undermined North-south [sic] relations.’—Sir Jeffery Donaldson, 28 February 2022¹

IN PURSUIT OF peace, the 1998 Belfast ‘Good Friday’ Agreement (hereafter 1998 Agreement) embraced ‘constructive ambiguity’ on issues that were at the centre of conflict in Northern Ireland for decades. By setting up a delicately balanced system of multilevel government, underpinned by political and

constitutional guarantees, the 1998 Agreement enabled ongoing disagreements between nationalists and unionists to be managed by means of democracy, rather than violence.

What is termed the ‘principle of consent’ underpins the 1998 Agreement. This principle refers to a series of statements regarding the constitutional status of Northern Ireland that are made in the opening sections of the two parts of the 1998 Agreement—the Multi-Party Agreement (MPA) and the British-Irish Agreement (BIA). Signatories to both recognise ‘the present wish of the majority of the people of Northern Ireland’ is to remain in the UK but, if that wish changes, ‘it is for the people of the island of Ireland alone ... to exercise their right of self-determination on the basis of consent ... to bring about a united Ireland.’² The UK and Ireland governments agree: to exercise any sovereign power held

¹J. Donaldson, ‘Sir Jeffery: NI should not be used as a pawn in a diplomatic chess match’, mydup.com, 28 February 2022; <https://mydup.com/news/sir-jeffrey-ni-should-not-be-used-as-a-pawn-in-a-diplomatic-chess-match> (accessed 2 April 2022).

at any time in respect to Northern Ireland with ‘rigorous impartiality’, to recognise the birth right of people in Northern Ireland ‘to identify themselves and be accepted as Irish or British, or both’, regardless of the constitutional status of Northern Ireland; and to introduce legislation necessary to recognise the constitutional status of Northern Ireland in the event of any future change in that status.³ In UK law, the principle of consent is recognised in the Northern Ireland Act 1998 which states: ‘Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section’.⁴

Based on the ‘principle of consent’, the 1998 Agreement made provision for three new ‘strands’ of government in Northern Ireland. Strand One provided for the creation of new democratic institutions—the Northern Ireland Assembly and the Northern Ireland Executive—to which powers were devolved on the basis of power sharing between nationalists and unionists, underpinned by rights-based guarantees. Strand Two provided an all-island or north-south dimension through the North-South Ministerial Council (NSMC) and North-South Implementation Bodies to enable cooperation between the Irish government and the Northern Ireland Executive. Strand Three provided an inter-governmental or east-west dimension through the creation of the British-Irish Council (BIC or Council), designed to facilitate relations between Ireland, the UK, its regions and Crown Dependencies; and the bilateral, British-Irish Intergovernmental Conference (BIIC or Conference) to preserve and strengthen relations between the governments of the neighbouring states. While the whole trinitarian architecture of the 1998 Agreement was to be ‘interlocking and interdependent’, the dual provision for Strand Two north-south institutions and Strand Three east-west institutions served as a particularly symbolic recognition of the equal legitimacy of, respectively, nationalists’ national identity as Irish and political aspirations to join Ireland, and unionists’ national identity as British and

political aspirations to remain part of the UK; this was constructive ambiguity at its finest.

As a result of the still-unfolding process of the UK’s withdrawal from the EU—Brexit—many unionists and loyalists in Northern Ireland believe that the ‘delicate’ political settlement achieved by the 1998 Agreement has been fundamentally undermined.⁵ The Protocol on Ireland / Northern Ireland (hereafter the Protocol) is a legal text, agreed as part of the terms of withdrawal for the UK from the EU, which makes differentiated arrangements for Northern Ireland.⁶ By setting out measures to avoid the need for a hardening of the Ireland–Northern Ireland land border, the Protocol requires that new checks and controls are carried out on goods moving between Great Britain and Northern Ireland (GB–NI); this is believed by many unionists and loyalists to be an affront to their British identity and a threat to the position of Northern Ireland within the UK. Amid ongoing controversy over the Protocol, GB–NI relations and arrangements have begun to be framed as ‘east-west’ in the language of politicians and officials in both Belfast and London. From the perspective of the 1998 Agreement text, this discursive shift is an innovation. As this article argues, along with fundamentally changing the context in which established Strand Three institutions must now operate, the development of this new discursive face of ‘east-west’ relations is an additional indicator of the profound impact Brexit has had on relations across ‘these islands’.⁷

In the context of the (at least perceived) disruption wrought by Brexit on the trinitarian architecture of the 1998 Agreement, this article presents an analysis of its impact on institutions established under Strand Three. It is structured as follows: section one sets the scene with an account of the interplay between

⁵Donaldson, ‘NI should not be used as a pawn’.

⁶European Union (EU), Official Journal (OJ), *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement)* L29, 31 January 2020, pp. 7–187; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.029.01.0007.01.ENG&toc=OJ%3AL%3A2020%3A029%3AFULL (accessed 17 August 2022).

⁷1998 Agreement: BIA, Preamble.

³1998 Agreement: BIA, Article 1(v) and (vi).

⁴Northern Ireland Act 1998, c.47: s1(1).

east-west relations, Brexit, and the Protocol; section two assesses the impact of Brexit, and the Protocol, on (1) intergovernmental east-west relations and the BIIC; (2) inter-jurisdictional east-west relations and the BIC; as well as (3) the (new) intra-UK face of east-west relations between GB–NI. In concluding, section three reflects on the future of Strand Three institutions and the ‘totality of relationships’ they represent.

Setting the scene

Brexit and the east-west dynamic

The decision of the UK to withdraw from the EU catalysed a paradigm shift in British-Irish relations. For decades, the UK and Ireland had been on similar and complimentary trajectories—in legislative and policy terms—through their joint participation in the ‘ever closer union’ project of European integration. Diplomatically, prior to the UK’s referendum on EU membership in 2016, relations between the two states had ‘never been better’.⁸ The success of the Queen’s visit to Ireland in 2011 was the (literal) crowning glory of a long and historic process of incremental improvement of relations between the two polities. Politically, as co-guarantors of the 1998 Agreement, the two governments had settled into a *modus operandi* whereby issues regarding Northern Ireland tended to be managed bilaterally and consensually. In the period immediately preceding the UK’s EU referendum, the often-fragile situation in Northern Ireland had been marked by relative stability. The Northern Ireland Assembly election cycle of March 2016 had, for example, displayed signs of ‘normalisation’ in the post-conflict politics of the place. Then came Brexit. In the process that followed the 52 per cent majority Leave vote, the UK and Ireland found themselves on opposite sides of the UK–EU negotiating table and, crucially, adopting divergent positions on the complex and contested issue of arrangements for Northern Ireland, and its land border with Ireland, after Brexit.

Following prolonged and protracted negotiations, the UK and EU (eventually) agreed the *Protocol on Ireland / Northern Ireland* which, in

⁸HM Government, ‘Northern Ireland and Ireland’, position paper, 2017, p. 63.

its own terms, sets out arrangements necessary to address the ‘unique circumstances’ on the island of Ireland in the context of Brexit.⁹ Under its terms, Northern Ireland remains part of the UK customs territory but must apply the EU customs code, EU VAT rules, EU Single Market regulations for goods, EU state aid rules and EU regulations related to electricity supply and energy markets.¹⁰ In addition, Irish citizens living in Northern Ireland are guaranteed ‘no diminution’ in their EU citizenship rights and the Protocol enables Northern Ireland to remain a recipient of EU ‘PEACE and INTERREG’ funding.¹¹ Although now a third country in EU law terms, the UK government is, under the Protocol, responsible for ensuring those EU rules and regulations that it makes applicable are properly implemented in Northern Ireland, albeit with three new joint UK and EU bodies—the Joint Committee, the Specialised Committee, and the Joint Consultative Working Group—also being established to oversee and manage the Protocol’s implementation.¹²

The provisions of the Protocol are unprecedented in both the UK and EU legal orders. From an EU perspective, the Protocol outsources management of the EU Single Market for goods to a third country. From a UK perspective, the Protocol introduces new barriers to trade within its internal market. This latter effect—the creation of a so-called ‘Irish Sea border’—has been the cause of considerable controversy. Since the Protocol came into force on 1 January 2021 the UK has accused the EU of adopting an overly legalistic approach to its implementation, particularly when it comes to moving goods between Great Britain and Northern Ireland. On the other hand, the EU has accused the UK of renegeing on commitments made in a binding international legal text owing to its unwillingness to implement the Protocol fully or in good faith. The disagreement lingers on. Talks that had been ongoing between the UK and EU on the Protocol have, at the time of writing (August 2022), broken down after the UK government

⁹EU, *Withdrawal Agreement*, Protocol, Article 1(3).

¹⁰*Ibid.*, Articles 4, 5, 8, 9, 10.

¹¹*Ibid.*, Preamble; Article 2.

¹²EU, *Withdrawal Agreement*, Article 164; EU, *Withdrawal Agreement*, Protocol, Articles 14–15.

introduced draft legislation that would, if enacted, give powers to UK ministers to disapply large sections of the Protocol in domestic law. In response, the EU has launched and relaunched infringement proceedings against the UK for failure to uphold its commitments under the Withdrawal Agreement through non-implementation of the Protocol.

Meanwhile, in Northern Ireland, the implementation of the Protocol has, so far, generated a concerning degree of political destabilisation. Anger over the Protocol was one of the causes of ten days of violent rioting in April 2021 at interface areas of Belfast and Derry/Londonderry. A campaign of organised public protests against the Protocol continues, but these events have been small in size and largely without incident. Alongside public protests, a cross-party group of unionist politicians initiated judicial review proceedings against the UK government's decision to implement the Protocol which, they argued, was unlawful on the grounds of its incompatibility with provisions in the 1998 Agreement regarding cross-community consent, and with the Acts of Union 1800 regarding its effect on intra-UK trade.¹³ So far, the appellants in *Allister and Others* have been unsuccessful; the challenge is, however, indicative of the extent of grievance felt by politicians across the unionist spectrum. Lack of progress, on the part of the UK government, in achieving removal or significant amendment to the Protocol was cited by the Democratic Unionist Party (DUP) as justification for its decision to withdraw from the Northern Ireland Executive in February 2022, thereby collapsing devolved government in Northern Ireland in advance of Assembly elections that took place on 5 May 2022. Neither the Northern Ireland Assembly nor the (would-be new) Executive have yet been restored because of the ongoing refusal of DUP MLAs to participate.

In view of the political and legal significance of the Protocol for post-Brexit Northern Ireland, it is worth reviewing what provisions it makes, or does not make, for the east-west dynamic of the 1998 Agreement, before going on to consider its implications, as part of Brexit, on Strand Three institutions.

The Protocol and the east-west dynamic

Avoiding a physical hardening of the land border between Ireland and Northern Ireland was a shared aim of the UK and the EU during negotiations on the terms of UK withdrawal. As a result, there was a particular focus on Strand Two of the 1998 Agreement throughout the process. By comparison, Strand Three received less attention; this alone is an important finding. Since their establishment, the operation of Strand Three institutions has been irregular and their substantive role in terms of policy has decreased—in part, owing to greater devolution of powers to institutions set up under Strand One. As a consequence, when faced with the complex, unprecedented process of Brexit, strategies to manage the decoupling of north-south political and legal integration emerged as a more pressing priority than those required to manage the decoupling of east-west political and legal integration—simply because the former was more developed.

Comparative inattention on Strand Three is reflected in the Protocol text. East-west relations are mentioned just once in the Protocol and Strand Three institutions—the Conference and Council—are not mentioned explicitly. In the text, ‘the United Kingdom’ recalls its enduring commitment ‘to protecting and supporting continued North-South and East-West cooperation across the full range of political, economic, security, societal and agricultural contexts’.¹⁴ As the sole explicit reference to east-west cooperation in the Protocol text it is notable that this is a unilateral UK commitment.

While none of the provisions of the Protocol specifically mention east-west cooperation via Strand Three institutions, these are covered by overarching commitments in the text of the Protocol regarding: ‘arrangements necessary ... to protect the 1998 Agreement in all its dimensions’.¹⁵ The ‘enduring nature’ of the bilateral relationship between the UK and Ireland is also recognised in several provisions and, most specifically, as discussed in the following section, in Article 3 regarding the continuation of the Common Travel Area (CTA).

¹³*Allister and Others* [2022], Northern Ireland Court of Appeal (NICA) 15.

¹⁴EU *Withdrawal Agreement*, Protocol, Preamble, r15.

¹⁵*Ibid.*, Article 1(3).

In addition to the already noted statement of the Protocol's objective regarding protection of 'all dimensions' of the 1998 Agreement (in Article 1(3)), the text makes two other inclusive references to the 1998 Agreement. In Article 2(2) the UK commits to 'continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement'; the qualifier 'related' is important when considering Strand Three as Article 2 concerns the preservation of rights-based legal protections set out in the 1998 Agreement. In this area, the work of Strand Three institutions is not as significant as institutions established under Strands One and Two. It is therefore not likely that this provision could be used judicially to protect an area of east-west cooperation. The third and final inclusive reference is in Article 18(4) which states that the Joint Committee 'may seek an opinion from institutions created by the 1998 Agreement' regarding the necessary measures in the event of the Northern Ireland Assembly voting to disapply Article 5 to 10 of the Protocol via the 'democratic consent mechanism'. Notably, this provision does not *necessitate* the Joint Committee to seek an opinion from any or all of the 1998 Agreement institutions. In view of the membership of Strand Three institutions, including the Irish Government, other UK devolved administrations and Crown Dependencies, it is unlikely that Article 18(4) would be used to give primacy to an opinion of Strand Three institutions even if they were asked. While Strand Three institutions are clearly incorporated into broad commitments to protect all dimensions of the 1998 Agreement and are implicitly referred to by inclusive references to its institutions, it is also the case that the context in which those references are made suggests that the perspectives of Strand Three institutions are, or would be, less influential than Strand One or Strand Two institutions, or rights-bodies on matters concerning the Protocol. This is not, however, to suggest that Strand Three has been weakened by the Protocol, notwithstanding that dedicated provisions are not as substantive as for Strands One and Two. By reaffirming the 1998 Agreement in a new international treaty, the legal status of Strand Three institutions have been reinforced along with all other dimensions.

In view of the lack of provisions specifically dedicated to Strand Three institutions, the *direct* impact of implementing the Protocol is unlikely to be of immediate significance and will largely depend on the way in which general commitments to the 1998 Agreement are interpreted and applied. However, as analysis in the next section demonstrates, the comparative inattention granted east-west institutions during UK–EU negotiations and in the Protocol may have *indirectly* provided fresh momentum for their existence in the post-Brexit era and has arguably catalysed a bolstering and diversification of the relations they represent.

Assessing the impact

Intergovernmental east-west relations and the British-Irish Intergovernmental Conference

The impact of Brexit and the Protocol on the intergovernmental east-west relations and institutions is somewhat paradoxical. The prospect of UK withdrawal from the EU and the consequential decoupling of the two states, in law and policy terms, seems to have created fresh impetus for the BIIC as an institution. Yet, at the same time, the negotiation process put severe strain on diplomatic relations between the governments of the UK and Ireland, making greater cooperation via Strand Three politically more challenging. Furthermore, the legal implementation of Brexit has introduced a new route for the management of non-devolved Northern Ireland issues which were previously the sole or primary purview of the 1998 Agreement co-guarantor governments. The consequences of this latter impact are likely to become clearer in time.

From January 2017 until January 2020, the Northern Ireland Executive and Assembly were not sitting. In July 2018, the BIIC met in plenary for the first time since February 2007. At the July 2018 Conference, the UK and Irish Governments 'reiterated their strong support for the Belfast/Good Friday Agreement and subsequent agreements' and 're-affirmed their shared commitment to all of the political institutions' it established, to 'securing the effective operation of power-sharing devolved government in Northern Ireland', and to the

consequential resumption of the NSMC and Northern Ireland participation in the BIC ‘at the earliest opportunity’.¹⁶ The July 2018 Conference also ‘considered the strength’ of the bilateral relationship and agreed that the ‘high levels’ of existing cooperation ‘needed to be maintained and, where possible, strengthened following the departure of the United Kingdom from the European Union’. To this end, officials were asked to come forward with proposals for future east-west cooperation. At the next plenary meeting of the BIIC in November 2018, a number of possible models for maintaining and strengthening bilateral cooperation after Brexit were discussed and it was agreed that new structures ought to enable ministers and officials ‘to continue to engage both formally and informally’ and maintain ‘the spirit of cooperation that has been engendered ... in an EU context’.¹⁷ Again, officials were asked to take forward work in this area with a view to presenting ‘ambitious’ proposals at a future meeting. The two governments also reaffirmed their shared commitment ‘to continue working closely together in full accordance with the three-stranded approach’ provided for in the 1998 Agreement at both meetings that year.¹⁸

The Conference met again in plenary in May 2019. Further commitments were made to ensure ‘the current high level of bilateral cooperation’ would be maintained and strengthened after UK withdrawal from the EU. Ministers present reviewed the progress made by officials on the matter and ‘requested further proposals for new, reinvigorated and regular opportunities for future co-operation’.¹⁹ At the May 2019 Conference, the UK and Ireland governments signed a *Memorandum of*

Understanding (hereafter ‘MOU’) on the operation of the CTA in which they reaffirmed their ‘shared commitment’ to protect the CTA and associated reciprocal rights and privileges, agreeing to ‘reinforce the excellent and highly valued cooperation that already exists’.²⁰ The MOU set out shared commitments and understandings regarding arrangements for the CTA and reciprocal rights of British and Irish citizens in regard to free movement, right to reside, right to work, access to healthcare, social security rights, access to social housing, access to education and voting rights. The MOU also provided for greater oversight of CTA arrangements by providing for the establishment of a group of senior officials dedicated to monitoring its operation. The MOU is not legally binding, however. The UK and Ireland jointly committed to taking ‘any necessary legislative steps’ to give effect to CTA rights and privileges, including any relevant ‘bilateral agreements that may be entered into now or in the future’.²¹ The hypothetical prospect of additional bilateral agreements related to the CTA, or to Strand Three intergovernmental cooperation more generally, ought to be understood in light of relevant provisions in the Protocol and the new constraints on bilateral initiatives, post-Brexit.

The intergovernmental east-west relationship between the UK and Ireland is accommodated, most explicitly, by Article 3 of the Protocol. Article 3 permits the UK and Ireland to ‘continue to make arrangements between themselves relating to the movement of persons between their territories (the “Common Travel Area”)), provided they ‘fully respect’ the rights of natural persons conferred by EU law. Importantly, Article 3(1) allows for arrangements regarding the CTA narrowly defined as relating to the movement of persons rather than as regards the reciprocal rights and privileges associated with the CTA, broadly

¹⁶Cabinet Office, *Joint Communiqué of the British-Irish Intergovernmental Conference*, 25 July 2018; https://cain.ulster.ac.uk/issues/politics/conference/biic_2018-07-25_communique.pdf (accessed 20 April 2021).

¹⁷Ibid.

¹⁸Cabinet Office, *Joint Communiqué*, July 2018; Cabinet Office, *Joint Communiqué*, November 2018.

¹⁹Department of Foreign Affairs, *Joint Communiqué of the British-Irish Intergovernmental Conference*, 8 May 2019; <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2019/may/joint-communicue-of-the-british-irish-intergovernmental-conference.php> (accessed 20 April 2021).

²⁰*Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and Associated Reciprocal Rights and Privileges*, 8 May 2019, para. 2; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800280/CTA-MoU-UK.pdf (accessed 2 March 2021).

²¹Ibid., para. 14.

defined, including the right to work, reside, access healthcare, access social security, access education and vote, and so on. By contrast, Article 3(2) of the Protocol addresses a broader definition of the CTA by acknowledging ‘rights and privileges associated’ with it and contains a commitment on the part of the UK to ‘ensure’ that these rights ‘can continue to apply without affecting the obligations of Ireland under Union law’. Under Article 3, therefore, onus is placed on post-Brexit UK governments to avoid divergence from EU law, or any other action that would lead to the erosion of the CTA, broadly defined (as it is in the MOU), to include the full array of reciprocal rights and privileges afforded UK and Irish citizens in each other’s states.

In the post-Brexit era, for Ireland to agree any new bilateral arrangement with the UK covering areas of exclusive EU competence (such as customs, level playing field matters, or fisheries) it would first need EU approval; a provision of the European Council Decision regarding the Withdrawal Agreement makes this clear. According to Article 4 of the Council Decision, Ireland, Cyprus, or Spain could, in future, receive authorisation from the European Council to negotiate bilateral agreements with the UK in areas of exclusive EU competence on the basis of a ‘duly justified request’.²² The criteria for ‘due justification’ requires that the relevant EU Member State shows that the bilateral agreement proposed is: ‘necessary for the proper functioning’ of arrangements set out in, respectively, the Protocol, the Protocol on Sovereign Base Areas of the UK in Cyprus, or the Protocol on Gibraltar; appears to be ‘compatible with Union law’; and would not risk an EU external action objective or be ‘otherwise prejudicial to the Union’s interests’.²³ The Council Decision also provides for European Commission oversight of related negotiations and states that authorisation from the European Council may be

conditional on the ‘inclusion in or removal from the [bilateral] agreement in question of any provision ... where necessary’ to ensure consistency with the criteria outlined.²⁴ What this means is that, *if* the UK and Ireland wanted to sign a new bilateral agreement that incorporated areas of exclusive EU competence, the process would be conditional on EU authorisation, which would be forthcoming only if deemed ‘duly justified’ to achieve the ‘proper functioning’ of the Protocol. While, at present, the likelihood of Article 4 of the Council Decision being initiated is slim, its existence serves to underline the extent to which UK withdrawal from the EU has changed the legal environment in which east-west intergovernmental relations now operate.

A further example of Brexit’s impact on the intergovernmental east-west dynamic relates to the arrangements for managing issues pertaining to Northern Ireland and the settlement of related disputes. Since the 1998 Agreement was signed, its implementation has relied heavily on the ‘solemn commitment’ of its co-guarantor governments to ensuring as much.²⁵ British-Irish intergovernmental cooperation and diplomatic engagement has been the primary mechanism for the resolution of disputes between political parties in Northern Ireland that have threatened, or disrupted, the operation of the 1998 Agreement institutions, particularly Strand One. As a consequence of Brexit, however, a mechanism *outside* UK-Ireland bilateralism has been introduced through which disagreements pertaining to Northern Ireland must now be settled; this is best demonstrated with reference to a specific example—the controversy over the United Kingdom Internal Market (UKIM) Bill.

As already noted, Brexit placed severe strains on British-Irish relations owing to the sharp divergence of the two governments’ positions regarding, in particular, arrangements for Northern Ireland. Existing bilateral tensions were, however, exacerbated during the UK transition period following a UK government proposal to break international law by renegeing on aspects of the Protocol via the UKIM Bill. Following partial resolution of UK concerns during UK-EU negotiations, the

²²EU, OJ, *Council Decision (EU) 2020/135 of 30 January 2020 on the Conclusion of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, L29, 31 January 2020, pp. 1–6, Article 4(1); <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32020D0135> (accessed 17 August 2022).

²³*Ibid.*, Article 4(1)(a)(b)(c).

²⁴*Ibid.*, Article 4(2).

²⁵1998 Agreement, Strand 3, British-Irish Intergovernmental Conference (BIIC) (2).

UK government ultimately removed the law-breaking clauses before the UKIM Bill became law. While the whole UKIM Bill episode damaged the level of trust between the governments of the UK and Ireland—the latter strongly opposed the actions of the former—its resolution arguably demonstrates a more fundamental shift in the means available for managing disputes concerning ‘non-devolved Northern Ireland matters’ (1998 Agreement S3(5)) which were, previously, the sole purview of the BIIC. The fact that an international disagreement over Northern Ireland, of interest to Ireland, was resolved *not* by British-Irish bilateral diplomacy, but by the UK-EU Joint Committee, underlines a significant indirect implication of the Protocol’s implementation, namely, that protection of ‘the 1998 Agreement in all its dimensions is no longer only a ‘solemn commitment’ on the part of the British and Irish governments; the EU now also has a role as ‘protector’ of those aspects of the 1998 Agreement that fall within the scope of the Protocol.²⁶

Interjurisdictional east-west relations and the British-Irish Council

In the immediate aftermath of the UK’s EU referendum, the prospect of UK withdrawal from the EU led to renewed cooperation between the UK’s devolved administrations, Crown Dependencies and the Irish government via the British-Irish Council. There followed a brief hiatus following the collapse of the Executive and dissolution of the Assembly in January 2017. However, summit meetings resumed from 2018 onwards.

On 22 July 2016, an extraordinary summit meeting of the BIC was convened. The purpose was to ‘consider the outcome’ of the UK’s EU referendum and ‘[reflect on] the implications for each individual British Irish member association’.²⁷ Those in attendance included the First Minister of Scotland, First Minister of Wales, the First and deputy First Ministers of Northern Ireland, the Taoiseach and Irish Minister for Foreign Affairs and Trade and, for the UK government, the Secretary of State for Wales, the Secretary of State for Northern Ireland and a

junior minister from the Department for Exiting the European Union. At the July 2016 meeting, the Council identified ‘priority areas’ for work in the context of Brexit, namely, ‘the economy and trade, the CTA, relations with the EU and the status of all citizens affected’.²⁸ The list bore strong resemblance to a similarly purposed one developed at a meeting of the NSMC two weeks prior.²⁹ Those present at the July 2016 meeting also ‘reaffirmed the importance’ of the BIC and agreed it ‘should be fully utilised’ in light of Brexit.³⁰ The next BIC summit meeting took place on 25 November 2016. Ministers provided updates on their activities regarding the UK’s exit from the EU with particular reference to relations between the member administrations; and it was noted that arrangements to ‘strengthen engagement’ had been put in place across a (slightly expanded) list of priority sectors: ‘agriculture, agri-food and fisheries industries, economy and trade, free movement of goods and people, the CTA and relations with the EU’.³¹ The November 2016 Council reiterated its commitment to ‘facilitating harmonious and mutually beneficial relationships among the people of these islands as set out in the 1998 Agreement’.³²

According to the 1998 Agreement, the Council ought to hold two summits annually and meet regularly at sectoral level. The collapse of Strand One institutions resulted in a brief pause in BIC meetings, with only one summit meeting held in 2017. However, the regular bi-annual scheduling resumed in 2018. There were, therefore, five meetings of the Council during the formal process of UK withdrawal from the EU at which Northern Ireland was not politically represented. At each of the five meetings, the Council received an update on political developments in Northern Ireland and stated member administrations ‘looked forward to the restoration of the devolved institutions in

²⁸Ibid.

²⁹North-South Ministerial Council (NSMC), ‘PAPER NSMC P1 (16) JC North-South Ministerial Council Twenty-Second Plenary Meeting, 4 July 2016.

³⁰BIC, *Communiqué*, 22 July 2016.

³¹BIC, *Communiqué*, 25 November 2016.

³²Ibid.

³³BIC, *Communiqué*, 10 November 2017, BIC, *Communiqué*, 22 June 2018; BIC, *Communiqué*, 9 November 2018; BIC, *Communiqué*, 28 June 2019; BIC, *Communiqué*, 15 November 2019.

²⁶EU, *Withdrawal Agreement*, Protocol, Article 1(3); 1998 Agreement, Strand 3: BIIC (2).

²⁷British-Irish Council (BIC), *British-Irish Council Communiqué Extraordinary Summit*, 22 July 2016.

Northern Ireland’³³ Summit Communiqués note that ministers present updated one another on activities related to the UK’s exit from the EU, with particular reference to the themes identified at the 2016 summits. Under the Protocol, arrangements for Northern Ireland across all the priority areas identified are newly distinct. It is significant, therefore, that throughout UK–EU withdrawal negotiations, discussions on these issues at the Council were missing Northern Ireland voices.

At the two 2019 Summits, the Council reflected on the twentieth anniversary of its establishment and ‘agreed that twenty years on, the Council remained a valued strand of the Belfast–Good Friday Agreement’, describing its function as a forum that offered ‘ministers and officials regular opportunities to exchange information, discuss, consult and co-operate on matters of mutual interest within the respective competencies of the eight Member Administrations’, and which therefore ‘continued to positively strengthen the links and relationships between the people of these islands’.³⁴ The emphasis of the Council on the importance of its work, despite a Northern Ireland absence, arguably indicates its renewed significance as a forum for cross-jurisdictional coordination in the post-Brexit era wherein divergence between its member administrations in relevant areas is guaranteed.

Under the 1998 Agreement, the mandate of the BIC is to ‘exchange information, discuss, consult and use best endeavours to reach agreement on co-operation’ on any matters of mutual interest within the competence of the relevant administrations.³⁵ Implementation of Brexit and the Protocol presents a challenge for the pursuit of the Council mandate because one of its immediate effects is to enable significant divergence between BIC member administrations. At present, across the eleven priority work sectors of the BIC, the most common form of activity amounts to the sharing of best practice. While any future divergence ought not, therefore, prevent the continued operation of the BIC, it does have the potential to undermine its utility by introducing the possibility that best practice identified in member administrations outside the EU (governments of the UK,

Scotland, Wales, the Isle of Man and the Channel Islands) or aligned with aspects of the EU *acquis* (Northern Ireland) cannot be replicated by those inside the EU (Ireland) or vice versa.

Echoing the impacts of Brexit and the Protocol on the operation of the Conference, the effect on the Council is also paradoxical—on the one hand, the prospect of UK withdrawal from the EU appears to have catalysed renewed use of the BIC as a forum for cooperation; on the other hand, the practice of UK withdrawal has also made the type of cooperation envisaged in the 1998 Agreement more difficult.

Intra-UK, GB–NI relations and the new discursive face of east-west

Neither the 1998 Agreement nor the 1998 Act use the term ‘east-west’. Since 1998, however, ‘east-west’ has been employed in academic, political and public discussion of the 1998 Agreement to refer to institutions established under Strand Three, and the relationships they represent. Following the negotiation of arrangements to address the ‘particular circumstances’ of Northern Ireland in the context of UK withdrawal and arising out of controversy that surrounds the implementation of those arrangements agreed in the Protocol, the language and concept of ‘east-west’ has taken on a new and more expansive guise.³⁶ After the Protocol came into effect on 1 January 2021, papers and statements produced by both the UK government and Northern Ireland unionist representatives started to use ‘east-west’ to refer to relations and arrangements between Great Britain and Northern Ireland.³⁷ Although a linguistic rather than

³⁶HM Government, *The United Kingdom’s Exit from, and Partnership with, the European Union*, 2 February 2017, para. 4.10.

³⁷N. Dodds, in *House of Lords Debates*, Vol. 813, ‘UK government Union capability’, 1 July 2021; Donaldson, ‘NI should not be used as a pawn’; J. Donaldson, ‘Jeffery Donaldson—The Protocol on Ireland/Northern Ireland: the DUP perspective’, 24 February 2022; <https://www.youtube.com/watch?v=FHMJumflnuM> (accessed 2 April 2022); DUP, ‘DUP Written Evidence IIO0025—Introductory inquiry into the operation of the Protocol on Ireland / Northern Ireland’, 14 June 2021; D. Frost and B. Lewis in HM Government, ‘Northern Ireland Protocol: the way forward’, July 2021.

³⁴BIC, *Communiqué*, 28 June 2019; BIC, *Communiqué*, 15 November 2019.

³⁵1998 Agreement, MPA, Strand 3.

legalistic point of analysis, this new discursive face of 'east-west' relations is both symbolically important and also notable for what it suggests about the fissures that have emerged in UK political unionism as a consequence of Brexit and the Protocol.

The timing of the emergence of the new concept of 'east-west' in UK government language is worth noting. Writing in the forward to a UK Command Paper, Cabinet Office Minister, Lord David Frost, and Secretary of State for Northern Ireland, Brandon Lewis, stated their willingness to 'ensure that East-West processes are calibrated based on genuine risks, by removing undue frictions on goods remaining within the United Kingdom'.³⁸ Notably, the content of the relevant Command Paper, *Northern Ireland Protocol: the Way Forward*, went on to focus ostensibly on arrangements and relations between Great Britain and Northern Ireland. In the text, Strand Three of the 1998 Agreement was described as: 'the relationships between the UK and Irish governments, between their various jurisdictions, and the broader links between Northern Ireland and Great Britain as part of one United Kingdom'.³⁹ The italicised characterisation does not reflect the 1998 Agreement text. Moreover, the idea that Strand Three relates to links between Northern Ireland and Great Britain is not supported by descriptions used earlier by the UK government during withdrawal negotiations; a position paper published in 2017 stated:

Strand 3 of the Agreement deals with East-West cooperation, recognising the importance of the strong relationship between the UK government and Irish government and between their various jurisdictions. *This is in addition to the internal UK links between Northern Ireland and Great Britain that are part of Northern Ireland's status as an integral part of the United Kingdom.*⁴⁰

The difference between the 2017 and 2021 Command Papers is subtle, but significant: in the earlier paper, GB–NI relations are set apart

as distinct from Strand Three; in the later paper, GB–NI relations are incorporated into the UK government description of Strand Three of the 1998 Agreement.

For Northern Ireland unionist politicians, the new concept of 'east-west' tends to be employed in the course of critiques about the impact of implementing the Protocol on intra-UK trade and is also often linked to the idea of destabilisation, or failure, of the 1998 Agreement architecture. By way of demonstration: in evidence submitted to a House of Lords Committee, the DUP stated that by requiring 'costly, complex and disproportionate customs and regulatory barriers for goods moving between *Great Britain and Northern Ireland*' the Protocol had 'dealt a damaging blow to historic *East-West trading relationships*'.⁴¹ Addressing the 1998 Agreement more explicitly, the DUP's Lord Dodds stated that 'the Belfast agreement has been breached as far as protection of the third strand of relationships, namely *the east-west dimension*'.⁴² Expressing similar sentiment, as quoted in the introduction, DUP leader Sir Jeffery Donaldson has described the damaging effect of the Protocol on 'the East-West element' of the 'delicate political settlement' established by the 1998 Agreement and argued that north-south relations have been 'gravely undermined' as a result.⁴³ The link between use, on the part of unionist political leaders, of 'east-west' as a descriptor of GB–NI relations and the idea of 'damage' or 'breach' to the 1998 Agreement indicates that this discursive shift arises out of anger and a sense of betrayal over the differentiation of Northern Ireland in the Protocol. Arguably, therefore, while only a relatively minor change in the use of a term that is well-established in political lexicons across 'these islands', the development of the new face of 'east-west' relations is symptomatic of a fundamental shift in the political typography of the UK that may prove to be one of the most significant of all Brexit impacts.

³⁸Frost and Lewis in 'NI Protocol: the way forward'.

³⁹HM Government, 'NI Protocol: the way forward', *emphasis added*.

⁴⁰HM Government, 'Northern Ireland and Ireland', position paper, 2017, *emphasis added*; <https://www.gov.uk/government/publications/northern-ireland-and-ireland-a-position-paper> (accessed 21 August 2022).

⁴¹DUP, 'Written evidence' (IIO 0025), *emphasis added*.

⁴²Lord Dodds, 'UKG Union Capability', HL Deb., Vol 813, 21 July 2021, *emphasis added*.

⁴³Donaldson, 'NI should not be used as a pawn'; Donaldson, 'The DUP perspective'.

Conclusion

Brexit has had a profound, and paradoxical, impact on the ‘totality of relationships’ envisaged in Strand Three of the 1998 Agreement. The UK’s decision to withdraw from the EU appears to have to provided fresh momentum for use of the British-Irish Intergovernmental Conference and the British-Irish Council as vehicles of east-west cooperation. However, the legal and policy implications of Brexit also introduce the possibility, and probability, of significant divergence within and between member administrations of both the Conference and the Council, thereby making the kind of cooperation envisaged in the text of 1998 Agreement much more difficult. The political ramifications of a paradigmatic shift and decline in relations between the co-guarantor governments of the 1998 Agreement, begotten by the Brexit process, are very likely to constrain bilateral relations and initiatives in the short to medium term. However, they may also lead to greater formalisation of British-Irish bilateralism, via official agreements or legal texts, as a counterbalance to the decline in diplomatic relations.

The process of UK withdrawal and its outcomes—in particular, the Protocol—led to

a new understanding of relations between Great Britain and Northern Ireland as ‘east-west’. Although only a change in the language of, primarily, UK government ministers and unionist representatives in Northern Ireland, this new discursive face of ‘east-west’ relations arises from, and is indicative of, the newly differentiated position Northern Ireland has in the post-Brexit UK. For this reason, it may prove to be among the most significant impacts of Brexit on the ‘totality of relationships’ provided for in the 1998 Agreement in the longer term.

Although often framed as a single moment or event, Brexit is a process; one that is, arguably, ongoing. It is perhaps wise, therefore, to end with the caveat that *so far*, the impact of Brexit on Strand Three of the 1998 Agreement has been multifaceted and profound, but its full effects are still unfolding. So, we best all keep watching.

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