

The Northern Ireland Protocol: A Long-Term Solution to the Economic, Legal, and Political Impacts of Brexit on Northern Ireland?

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ABSTRACT

The Northern Ireland Protocol is the solution agreed by the European Union and the United Kingdom to the unique problems arising as a result of Brexit on the island of Ireland. The Protocol preserves the “soft” border between Ireland and Northern Ireland and ensures the all-Ireland economy will remain undistorted. In contrast, trade between Northern Ireland and Great Britain is now subject to onerous customs duties and tariffs, as a result of Northern Ireland’s *de facto* continuing membership of the European single market. This article examines the key aspects of the Protocol—economic, legal, and political—and seeks to demonstrate that the Protocol is far from a perfect solution to the situation in Northern Ireland.

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

I. INTRODUCTION

A. OVERVIEW

“‘History,’ Stephen said, ‘is a nightmare from which I am trying to awake.’”¹

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¹ James Joyce, *Ulysses* (Oxford World’s Classics 2008) 34.

As of 2022, it would appear that the nightmare of history has once again descended on Northern Ireland. Ironically, the Northern Ireland Protocol,² one of the causes of the new troubles the region finds itself in, was designed to prevent further violence.³ The Protocol is a unique solution to a unique problem arising from Brexit, keeping Northern Ireland *de facto* aligned with the EU's single market and customs union in the interests of avoiding a hard border on the island of Ireland and preserving the Northern Irish peace process.

This introduction consists of two parts. The first will explain the Brexit process and how the Protocol became a necessary solution. The second will explain the context of the problems in Northern Ireland and why the Protocol was needed to avoid reigniting tensions between its communities.

The United Kingdom of Great Britain and Northern Ireland (UK) voted to leave the European Union (EU) in a referendum on 23 June 2016.⁴ On 29 March 2017, the then UK Prime Minister Theresa May formally notified the then President of the European Council, Donald Tusk, that the UK would invoke Article 50 of the Treaty on European Union (TEU), so beginning a two-year process of negotiations which would culminate in the UK leaving the EU on 29 March 2019.⁵ Two years of negotiations aimed at concluding a withdrawal agreement followed.⁶ The leaders on the European side agreed to a withdrawal agreement on 25 November 2018, whereas the UK Parliament did not vote for the agreement, leading to two extensions of the Article 50 deadline: the first date being 31 October 2019. Complicating this was Theresa May resigning in May 2019, an event brought about by May failing to get enough support in the UK Parliament for the deal she negotiated. Her successor as prime minister, Boris Johnson, negotiated a revised withdrawal agreement and called elections for 12 December 2019, which he won by a significant majority. The UK subsequently withdrew from the EU on 31 January 2020, which was the new date agreed upon after May's resignation.⁷

² 'Revised Protocol on Ireland and Northern Ireland included in the Withdrawal Agreement' (European Commission, 17 October 2019) <https://ec.europa.eu/info/publications/revised-protocol-ireland-and-northern-ireland-included-withdrawal-agreement_en> accessed 13 March 2021.

³ Molly Blackall, 'Northern Ireland's first minister joins calls for calm after Belfast riots' *The Guardian* (London, 3 April 2021) <<https://www.theguardian.com/uk-news/2021/apr/03/northern-ireland-secretary-calls-for-calm-after-belfast-riots>> accessed 15 April 2021.

⁴ Steven Erlanger, 'Britain Votes to Leave EU; Cameron Plans to Step Down' *The New York Times* (New York City, 23 June 2016) <<https://www.nytimes.com/2016/06/25/world/europe/britain-brexit-european-union-referendum.html>> accessed 14 February 2021.

⁵ Stephen Castle, 'UK initiates 'Brexit' and Wades Into a 'Thorny Thicket' *The New York Times* (New York City, 29 March 2017) <<https://www.nytimes.com/2017/03/29/world/europe/brexit-uk-cu-article-50.html>> accessed 19 April 2021.

⁶ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials UK Version* (7th edn, Oxford University Press 2020) 24.

⁷ *ibid* 24–25.

3 *The Northern Ireland Protocol*

The final Withdrawal Agreement⁸ was agreed between the two parties, to which a specific protocol was added, the Northern Ireland Protocol.⁹ The purpose of the Protocol is to avoid a hard border on the island of Ireland, protect the all-island economy and the Good Friday Agreement¹⁰ in all its dimensions, and safeguard the integrity of the EU single market.¹¹ The protocol acknowledges the unique circumstances arising from the UK's withdrawal from the EU on the island of Ireland.

This article shall argue the Northern Ireland Protocol does not amount to a complete solution, particularly with respect to addressing challenges that arise in the UK's internal market and the potential incompatibility of certain aspects with the Good Friday Agreement. Therefore, this article shall adopt a critical stance towards the Protocol as needing reform to be a long-lasting solution to the problems caused by Brexit on the island of Ireland.

This article is divided broadly into three parts: the first part focuses on the Protocol's attempted solution to the economic impact of Brexit on Northern Ireland; the second part focuses on the Protocol's provisions for the continued role of EU law and the CJEU in Northern Ireland; and the third part focusses on the Protocol's attempted solution to the political problems brought about by Brexit and attempts to articulate and offer alternative solutions. Some contextual information relating to why the Protocol was agreed by the EU and the UK and an overview of the relevant legislation will be provided before the article focusses on the main economic, legal, and political issues.

B. CONTEXT OF THE IRISH BORDER QUESTION

A crucial issue in the Brexit negotiations was that of the border between Ireland and Northern Ireland, as Brexit meant Northern Ireland would no longer be part of the territory of the EU, while Ireland remained a member. This meant the need for border checks, customs, and so on, as the border between Ireland and Northern Ireland essentially became an EU external border; however, the problem was that because of Northern Ireland's history of conflict, it was felt that a hard border in this region would antagonise one of Northern Ireland's traditional

⁸ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C-3841/01.

⁹ In international law, a protocol is a treaty that adds to or supplements a pre-existing treaty.

¹⁰ The Belfast Agreement' (*Northern Ireland Office*, 10 April 1998)
<<https://www.gov.uk/government/publications/the-belfast-agreement>> accessed 13 March 2021.

¹¹ The EU-UK Withdrawal Agreement' (*European Commission*, date unavailable)
<https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement_en> accessed 13 March 2021.

communities, the Irish Catholics,¹² who see themselves as Irish, and wish for an all-Ireland independent state. The other traditional community are the Ulster Protestants,¹³ who would prefer Northern Ireland to remain an integral part of the United Kingdom.

Boris Johnson may have dismissed the border dilemma as “the tail wagging the dog”,¹⁴ however, this matter was of profound significance to the citizens of Northern Ireland and Ireland, due to a long history of division, violence, and ethnic hatred between the island’s two traditional communities. The most recent iteration of this centuries-long conflict only formally ended in 1998 with the signing of the Good Friday Agreement, though sporadic acts of violence continue to this day. One of the solutions to the conflict was to allow all persons born in Northern Ireland to choose Irish or British citizenship, or both, if they so wished. A Common Travel Area between the UK and Ireland had existed since the 1920s, meaning no customs or passport checks at the border, though the Troubles¹⁵ meant crossing the border entailed checks from the British and Irish security forces. The withdrawal of most British troops from Northern Ireland in 2007 meant that crossing the border was seamless, a fact no doubt helped by both the UK and Ireland being EU member states. Brexit meant it was not possible to retain this *status quo*, and so all parties to the negotiations regarding the Withdrawal Agreement sought to ensure the UK’s withdrawal from the EU would not result in a “hard border”, that is to say, that it would not result in customs and passport checks.

Membership of the EU and its single market allows citizens, goods, services, and capital originating from the member states to move freely within EU territory.¹⁶ Membership of the customs union means no tariffs or barriers to trade with other members. These two aspects of the Protocol ensure trade on the island of Ireland remains unfettered.

That Ireland and the United Kingdom were both members of the EU allowed what was formerly a hard and militarised border to become an invisible one.¹⁷ During the Brexit negotiations, the UK government decided not to retain membership of the single market. As a consequence, it quickly became apparent that a radical new solution was needed in order to allow the UK to leave the single market and customs union; keep the Irish border free of

¹² Also referred to as ‘nationalists’ or ‘republicans’.

¹³ Also referred to as ‘unionists’ or ‘loyalists’.

¹⁴ Ferghal Blaney, ‘Boris Johnson slammed over ‘tail wagging the dog’ comments on Irish border Brexit issue’ *Irish Mirror* (Dublin, 8 June 2018) <<https://www.irishmirror.ie/news/irish-news/politics/boris-johnson-slammed-over-tail-12668455>> accessed 14 February 2021.

¹⁵ The name commonly given to the most recent iteration of the conflict in Northern Ireland, which lasted from approximately 1968 until 1998.

¹⁶ Nikos Skourtaris, ‘What’s in an Irish Border? Brexit, the Backstop(s), and the Constitutional Integrity of the UK’ (DCU Brexit Institute, February 24 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3543514> accessed 14 February 2021.

¹⁷ *ibid.*

physical infrastructure; and maintain the integrity of the EU's single market and legal order.¹⁸ The Protocol was designed by the EU and the UK to achieve all of those targets.

The next section of this introduction will provide an overview of the relevant legislation from the perspectives of the EU and the UK.

C. AN EXPLANATION OF THE IMPORTANT LEGISLATION

The main EU pieces of legislation, *vis-à-vis* Brexit and Northern Ireland, are the Withdrawal Agreement;¹⁹ the Northern Ireland Protocol;²⁰ and the Trade and Cooperation Agreement (TCA).²¹ The Withdrawal Agreement and the Northern Ireland Protocol were adopted at the end of 2019. They regulate the terms of the UK's withdrawal from the EU. The Protocol is a special appendix to the Withdrawal Agreement regarding Northern Ireland's status after Brexit. The TCA was agreed in December 2020. It shall govern the future relations of the UK as a non-member state with the EU. One of the key provisions of the Protocol is Article 5, which outlines the role for the joint committee. The joint committee consists of representatives of the EU and the UK who, in the event of any issues occurring with the functioning of the Protocol, shall meet and attempt to find an acceptable solution.

From the UK's point of view, there are four principal statutes relating to Brexit: the European Union (Withdrawal) Act 2018,²² which retains EU law in the UK legal system so as to allow legal continuity, the European Union (Withdrawal Agreement) Act 2020,²³ which gives effect in UK law to the revised legal agreement, the United Kingdom Internal Market Act 2020,²⁴ which concerns trade between the different nations of the UK, necessitated by the Northern Ireland Protocol, which is the focus of this article, and the European Union (Future Relationship) Act 2020,²⁵ which implements the December 2020 EU-UK Trade and Cooperation Agreement²⁶ into the UK domestic legal order. These pieces of British legislation shall be mentioned later in the section regarding the role of EU law under the Protocol. The

¹⁸ *ibid.*

¹⁹ Withdrawal Agreement (n 8).

²⁰ Northern Ireland Protocol (n 2).

²¹ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (European Commission, 24 December 2020) <https://ec.europa.eu/info/sites/info/files/draft_eu-uk_trade_and_cooperation_agreement.pdf> accessed 18 April 2021.

²² European Union (Withdrawal) Act 2018 c.16.

²³ European Union (Withdrawal Agreement) Act 2020 c.1.

²⁴ United Kingdom Internal Market Act 2020 c.27.

²⁵ European Union (Future Relationship) Act 2020 c.29.

²⁶ Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2020] OJ L444.

British government flirted with breaking international law in introducing the Northern Ireland Protocol Bill in Parliament. As a consequence of the actions of the British government, trust between the EU and the UK is currently low.

II. THE IMPACT OF BREXIT AND THE PROTOCOL ON THE ECONOMY OF NORTHERN IRELAND

A. NORTHERN IRELAND'S *DE FACTO* MEMBERSHIP OF THE SINGLE MARKET AND CUSTOMS UNION

The document adopted by the EU and the UK regarding the future of Northern Ireland and Ireland's relationship with each other and the EU is titled "The Protocol on Ireland-Northern Ireland." It is attached to the withdrawal agreement. In order to achieve the aims agreed upon regarding the island of Ireland, the parties to the negotiations agreed that Northern Ireland shall *de facto* remain attached to the EU's customs union and its internal market, and committed to its rules and institutions, while the remaining territory of the United Kingdom shall leave these institutions, and EU law shall have no effect in that territory, beyond the date of Brexit. The EU did not insist on such an outcome because of pure altruism. It had an interest in safeguarding its fiscal interests and regulations. Had the border between Northern Ireland and Ireland remained "soft," in the sense that there were no customs or border posts, without measures safeguarding the integrity of the EU's institutions and regulations, there was a risk that goods and persons could have entered the EU without the necessary checks being made. The government of Ireland sat at the table as a negotiator on the side of the EU and had an interest in avoiding a hard border and preserving the peace process.²⁷

The first problem with the Protocol is that it is extremely complicated. While Northern Ireland remains *de facto* within the EU single market and customs union and committed to some, but not all, of the EU's laws, the island of Great Britain does not.²⁸ The Protocol has created uncertainty with regards to Northern Ireland's status. It remains "attached to the EU's customs union but with additions, while it is associated with the EU's internal market but with subtractions."²⁹ Article 4 of the Protocol states in plain English: "Northern Ireland is part of the customs territory of the United Kingdom." Simple enough, it is clear that Northern Ireland

²⁷ Lisa O'Carroll, 'Leo Varadkar: Brexit has undermined Good Friday agreement' *The Guardian* (London, 3 November 2018) <<https://www.theguardian.com/world/2018/nov/03/leo-varadkar-brexit-has-undermined-the-good-friday-agreement>> accessed 27 April 2021.

²⁸ Northern Ireland Protocol (n 2).

²⁹ *ibid.*

would be part of any future trade agreement the UK government chose to conclude, though other aspects of the Protocol complicate things.³⁰ This is an issue as Northern Ireland is subject to the EU law regime; this could potentially be complicated by the UK as a whole entering into a trade agreement which would contradict the Protocol.

An example of the Protocol complicating things would be the rules regarding customs duties. Article 5(1) of the Protocol provides that customs duties shall only be payable on goods moving from Great Britain into Northern Ireland if that good is at risk of being moved into the European Union, “whether by itself or forming part of another good following processing.” Goods arriving from a third country, such as Canada, would also be subject to an EU tariff if they were “at risk”.³¹ This all seems innocuous. The problem is that the burden of proof will be on the importer or trader, who must prove (a) that the goods in question will not be subject to commercial processing in Northern Ireland; and (b) that they fulfil the criteria established by the joint committee in accordance with the fourth subparagraph. These are: (a) the final destination and use of the good; (b) the nature and value of the good; (c) the nature of the movement; and (d) the incentive for undeclared onward movement into the EU, in particular incentives resulting from the duties payable pursuant to paragraph 1. The definition of “commercial processing” is overly broad. “Commercial processing” is considered to be “any alteration [...] or transformation of goods in any way.” Even if commercial processing and end consumption take place entirely within Northern Ireland, there is still the likelihood of having to pay duties. An example would be of a widget maker in Belfast who imports components from an English supplier. This widget maker would now be liable to pay EU customs duties, as by using those components to make widgets he will subject them to a form of processing—it does not matter if the product actually enters the EU or not.³² The definition in (b) has still to be defined and should no definition arise, it will be assumed that all goods in Northern Ireland are at risk of entering the EU. This seems like overreach. This rule preserves the integrity of the EU’s internal market at the expense of the UK’s.³³

³⁰ Alfred Artley and George Peretz, ‘Customs and the Northern Ireland Protocol’ (Monckton Chambers, 17 April 2020) < https://www.monckton.com/wp-content/uploads/2020/04/TJ_2020_Issue1483_Apr_Peretz-002.pdf> accessed 13 November 2020.

³¹ *ibid.*

³² Artley and Peretz (n 30).

³³ Stephen Weatherill, ‘The Protocol on Ireland/Northern Ireland: protecting the EU’s internal market at the expense of the UK’s’ (2020) 45(2) *European Law Review* 222.

Moreover, Great Britain accounted for 60 per cent of all goods imported into Northern Ireland in 2018, more than four times the amount imported from Ireland.³⁴ While preserving the Northern Ireland peace process was one of the EU's stated aims with regards to the Protocol, what the Protocol could do to Northern Ireland's economy is concerning. By hampering its ability to trade with its largest partner, Great Britain, there runs the risk of placing an already deprived region into further economic pressure. While the decision to ensure the border remained as it was prior to Brexit deserves praise, it does seem that the interests of the nationalist population³⁵ were placed above those of the unionists, who favour close political and economic ties with Great Britain. It was not the EU's fault that the British government was ideologically committed to withdrawing from the EU as well as the single market and customs union. Had the entire United Kingdom remained in the customs union and single market, the problem with regards to Northern Ireland being unable to trade with its largest market would not have arisen. It is unfortunate that both the UK and the EU were so committed to their targets—the UK leaving the EU entirely and the EU preserving the integrity of its single market—that it became impossible to reconcile the red lines of the UK and the EU in the negotiations, and the interests of Northern Ireland were undermined.

Article 5(3) of the Protocol reveals that the entirety of EU customs law shall apply in Northern Ireland.³⁶ Although the Preamble to the Protocol,³⁷ Article 4 of the Protocol,³⁸ and Prime Minister Johnson all claim differently,³⁹ Northern Ireland is *de facto* part of the EU's customs territory.

³⁴ Padraic Halpin and Kate Holton, 'Northern Ireland looks south as Brexit takes bite out of UK trade links' (*Reuters*, 23 December 2020) <<https://www.reuters.com/article/us-britain-eu-nireland/northern-ireland-looks-south-as-brex-it-takes-bite-out-of-uk-trade-links-idUSKBN28X0Q3>> accessed 11 January 2021.

³⁵ Namely to prevent a hard border and maintain the all-Ireland economy.

³⁶ Artley and Peretz (n 30).

³⁷ The Preamble states: 'Noting that nothing in this Protocol prevents the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom's internal market;' and 'Recalling that Northern Ireland is part of the customs territory of the United Kingdom and will benefit from participation in the United Kingdom's independent trade policy.'

³⁸ Article 4 of the Protocol provides: 'Northern Ireland is part of the customs territory of the United Kingdom.'

³⁹ See Patrick Daly and Megan Baynes, 'Johnson tells Northern Ireland businesses to 'bin' customs forms' *Belfast Telegraph* (Belfast, 8 November 2019) <<https://www.belfasttelegraph.co.uk/news/northern-ireland/johnson-tells-northern-ireland-businesses-to-bin-customs-forms-38674258.html>> accessed 18 April 2021. Per the article: "Mr Johnson clarified further when he told reporters: 'Northern Ireland and the rest of GB are part of the UK customs territory and there can be no checks between goods operating in one customs territory. We're the UK. We will not be instituting such checks.'"

B. THE ARTICLE 16 SAFEGUARD MECHANISM AND ITS POTENTIAL TO IMPACT THE ECONOMY OF NORTHERN IRELAND

Article 16(1) of the Northern Ireland Protocol provides: “If the application of this Protocol leads to serious economic, societal, or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures, Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.”

Article 16 is a “last resort” provision.⁴⁰ It exists to allow either the EU or the UK to take unilateral action in response to negative effects arising from the Protocol. The safeguard allows the UK and the EU to take unilateral action if the Protocol is leading to “economic, societal, or environmental difficulties.”⁴¹ Another circumstance in which Article 16 may be invoked is when a “diversion of trade” occurs.⁴² A problem with this provision for both parties to the Agreement is that this wording is vague and does not provide a clear example of when invoking Article 16 would be invoked under those criteria.

Article 16 is not a route to the unilateral disapplication of the Protocol.⁴³ Nor is it a “route” to unilateral suspension.⁴⁴ In the event it was triggered, the Protocol would continue to apply, and so would the obligations that derive from it. The process to be followed upon triggering Article 16 is as follows; if either party is considering adopting safeguard measures unilaterally, it must notify the other party “without delay” and through the joint committee. The party must provide all “relevant information,” details of why unilateral action is needed, what the proposed action is, and justification for it.⁴⁵ There is then supposed to be a consultation period where the two parties work out a mutually acceptable solution. If such a unilateral safeguard is adopted, the joint committee must be made aware of it and discuss them within three months with a view to abolishing it as soon as possible. None of this occurred during the brief period Article 16 was invoked by the EU.⁴⁶

⁴⁰ Katy Hayward and David Phinnemore, ‘Article 16 of the Ireland/Northern Ireland Protocol offers no ‘quick fix’ (*London School of Economics*, 14 January 2021) <<https://blogs.lse.ac.uk/europpblog/2021/01/14/article-16-of-the-ireland-northern-ireland-protocol-offers-no-quick-fix/>> accessed 15 February 2021.

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ Hayward and Phinnemore (n 40).

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ Lisa O’Carroll, ‘EU’s article 16 blunder has focused minds on Northern Ireland’ *The Guardian* (London, 4 February 2021) <<https://www.theguardian.com/uk-news/2021/feb/04/eus-article-16-blunder-should-focus-minds-on-northern-ireland>> accessed 15 February 2021.

In early 2021, the EU made an “aborted” attempt⁴⁷ to trigger this safeguard which was reversed within hours after condemnation from the UK.⁴⁸ The decision to trigger Article 16 was made in response to fears that Northern Ireland could be used as a “back door” to get around restrictions and send more supplies of the vaccine to Great Britain.⁴⁹

The EU’s aborted attempt to trigger Article 16 has led to more ambiguity surrounding this provision, as the UK government has seized upon the subsequent controversy as a means of demanding an extension to the post Brexit “grace period”.⁵⁰ A shortage of AstraZeneca COVID-19 vaccine doses would surely constitute an “economic, social or environmental difficult(y)” or perhaps a “diversion of trade” given the European Commission’s suspicions that vaccines were moving from the single market into Great Britain through Northern Ireland, though the problem was that the Commission chose to act on suspicions without any apparent solid evidence.⁵¹

Relations between the EU and the UK were strained in late 2020 by the apparent willingness of the UK government to breach international law and renege on its commitments under the Withdrawal Agreement (during the period in which the Internal Market Bill was passing through Parliament).⁵² The strains were further exacerbated by the EU’s decision to trigger Article 16 in January 2021. Overall, the potential for either side to trigger Article 16 is a very real possibility and a problem which must be overcome in order to make the Protocol work.

C. POSSIBLE SOLUTIONS TO CUSTOMS AND GOODS DISPUTES

The next section will focus on the potential solutions to the issue of customs and goods disputes under the Protocol. Two solutions are offered: one UK wide; the other Northern Ireland only. The latter would be more feasible, as the current British government has expressed its distaste for the entirety of the UK remaining regulatorily aligned with the EU.

⁴⁷ *ibid.*

⁴⁸ ‘What is Article 16 and why did the EU make a U-turn after triggering it?’ (*Sky News*, 31 January 2021) <<https://news.sky.com/story/what-is-article-16-and-why-did-the-eu-make-a-u-turn-after-triggering-it-12202915>> accessed 15 February 2021.

⁴⁹ *ibid.*

⁵⁰ O’Carroll (n 46).

⁵¹ Daniel Boffey and Kim Willsher, ‘EU in U-turn over move to control vaccine exports to Northern Ireland’ *The Guardian* (London, 29 January 2021) <<https://www.theguardian.com/world/2021/jan/29/eu-controls-on-vaccine-exports-to-northern-ireland-trigger-diplomatic-row>> accessed 15 February 2021.

⁵² Hayward and Phinnemore (n 40).

(i) *Solutions to Customs and Goods Disputes: A Potential UK Wide Solution*

There is still uncertainty in some areas with regards to how the Protocol will function.⁵³ However, it is clear from recent events that the EU-UK joint committee and the Court of Justice of the European Union (CJEU) will play a role in resolving disputes and giving clarity to ambiguous provisions of the Protocol. The Protocol has led to checks and controls being imposed on goods moving from Great Britain to Northern Ireland.⁵⁴ The problems the Protocol has had for businesses led to the UK government unilaterally extending grace periods⁵⁵ for food products moving from Great Britain to Northern Ireland—an example of the UK violating the Withdrawal Agreement, and therefore international law.⁵⁶ There is the prospect of non-legal action the EU could take against the UK for failing to honour its commitments. Some EU diplomats have suggested retaliation against the UK through the financial services industry. Presumably this means restricting the access of British financial firms to the EU financial market.⁵⁷

It has already been suggested by commentators that the Protocol does not amount to a permanent “fix” with regards to the issue of goods moving into and out of Northern Ireland.⁵⁸ One example is that of food products. The requirement for Sanitary and Phytosanitary (SPS) checks has disrupted the movement of food products from Great Britain to Northern Ireland. The time required for these checks has had an impact on the food supply in Northern Ireland, with bare shelves in supermarkets now being a common sight. The problems this is causing would suggest the need for a new solution, yet the two existing arrangements the EU has with Switzerland and New Zealand do not seem to be viable as a solution for Northern Ireland.⁵⁹ The agreement Switzerland has with the EU requires Switzerland to adopt all relevant EU legislation to prevent the need for checks. Because the UK has ruled out indefinitely aligning with EU regulations, this model will not be adopted. The New Zealand model would not require

⁵³ Brendan McGurk, ‘Analysis of the Northern Ireland Protocol and its impact on the UK’ (*LexisNexis*, 3 July 2020) <https://www.lexisnexis.com/uk/lexispsl/lifesciences/document/412012/608H-BYT3-GXFD-809N-00000-00?utm_source=psl_da_mkt&utm_medium=referral&utm_campaign=analysis-of-the-northern-ireland-protocol-and-its-impact-on-the-uk> accessed 15 April 2021.

⁵⁴ Raoul Ruparel, ‘How to fix Brexit’s Northern Ireland protocol problem’ (*Politico*, 26 March 2021) <<https://www.politico.eu/article/brexit-northern-ireland-protocol-border-checks-eu-uk-agreement/>> accessed 17 April 2021.

⁵⁵ In the context of law, a grace period is a time period during which a particular rule exceptionally does not apply, or only partially applies.

⁵⁶ Jacopo Barigazzi and Hans von der Burchard, ‘EU countries back legal action against UK over post-Brexit grace period extension’ (*Politico*, 9 March 2021) <<https://www.politico.eu/article/eu-countries-back-legal-action-against-uk-over-post-brexit-grace-period-extension/>> accessed 17 April 2021.

⁵⁷ Ruparel (n 54).

⁵⁸ *ibid.*

⁵⁹ *ibid.*

alignment, but it would acknowledge each party's SPS standards and reduce the percentage of checks required. The EU and the UK should already have reached such an agreement.⁶⁰ Yet, such an arrangement would not solve Northern Ireland's problems, for the issue is the kinds of checks required, not the amount. A new solution is required.

There are two possible solutions: one UK wide, the other specific to Northern Ireland. The UK wide model would require the UK and the EU to conclude a new SPS agreement that would manage the divergence of regulations and limit the need for checks. A precedent in managing diverging standards between the two parties was struck in 2020 by the Trade and Cooperation Agreement (TCA).⁶¹ In the TCA, the UK agreed not to regress⁶² its labour and social employment laws.⁶³ If the UK were to fail to meet its commitments, the EU would be able to take remedial measures, which is enforced and overseen by a panel of experts.⁶⁴ A rebalancing clause is also included,⁶⁵ which in the event of the standards of the UK and the EU diverging, would allow either side to take measures⁶⁶ to manage the divergence of standards. These processes provide a mechanism for managing divergence which can be used elsewhere.⁶⁷ While the mechanisms in the TCA are focussed on avoiding tariffs on goods, they could potentially be applied in the context of checks on goods as well. By transposing these mechanisms to the context of goods, a solution which could potentially fix the problems Northern Ireland is currently going through is available.

This model would be similar to the Swiss model in the particular area of food regulations, but it would potentially be more robust and offer more assurance to the EU, as it has a resolution mechanism in place already, which the Swiss model does not. It also would not require any changes to EU law. The UK would be meeting the EU's legal requirements while gaining the benefits of the agreement, which would be withdrawn if it broke the hypothetical agreement.⁶⁸

⁶⁰ *ibid.*

⁶¹ 'The EU-UK Trade and Cooperation Agreement' (*European Commission*, 31 December 2020) <https://ec.europa.eu/info/reasons-united-kingdom/eu-uk-trade-and-cooperation-agreement_en> accessed 17 April 2021.

⁶² To ensure that its labour and social employment laws did not fall behind EU standards.

⁶³ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2020] OJ L-444, chapter six: labour and social standards, article 6.2(1)-(2).

⁶⁴ *ibid.*, article 6.4(1)-(2).

⁶⁵ *ibid.*, article 9.4.

⁶⁶ 'Rebalancing measures' is a rather broad term, but it essentially means that if the actions of one-party lead to 'material impacts', in this case on labour and social protection, the other side may take proportionate action to restore the balance. An arbitration tribunal has been set up to mediate in potential disputes. See David Glass, 'Brexit update: ESG reporting, rebalancing measures and trade with India' (*Excella Law*, 22 February 2021) <<https://excellalaw.co.uk/excellalaw-blogs/brexit-update-esg-reporting-rebalancing-measures-trade-with-india/>> accessed 17 April 2021.

⁶⁷ Ruparel (n 54).

⁶⁸ *ibid.*

(ii) A Northern Ireland Only Solution

A UK-wide solution would not be politically workable, as the current UK government wishes to remain unaligned with EU standards.⁶⁹ There is an option which would apply to Northern Ireland only. In section B, the concept of goods being “at risk” of being sold in the EU was mentioned. A solution for the issue of agri-foods would be to extend the category of “at risk” goods to include agri-food regulations. If there is no risk of food products being sold in the EU, then they would be exempt from agri-food requirements. This argument is also predicated on the UK and the EU agreeing to extend the Brexit grace period, something which does not seem likely. It would also depend on the use of data to allow firms to prove their goods are only sold in Northern Ireland. This would require some derogation from EU law, but the Northern Ireland Protocol already does this by keeping Northern Ireland in the single market for goods and the customs union but not requiring the other fundamental freedoms. The EU would be wise to address this issue, as would the UK. Both sides agreed that Brexit would “impact as little as possible on the everyday life of communities in both Ireland and Northern Ireland.”⁷⁰

The problem with this argument is that the category of “at risk” goods is very wide.⁷¹ A good is seen as being “at risk” of moving into the EU unless it can be proven that it will not be subject to commercial processing in Northern Ireland and that it meets the criteria drawn up by the joint committee established by Article 164 of the Withdrawal Agreement.⁷² Article 5(2) of the Protocol defines “commercial processing” as any alteration or transformation of goods. An example would be flour imported into Northern Ireland from Great Britain. This flour would be subject to EU customs even if the bread made from it was not intended to be sold outside of Belfast.⁷³ Further, the wording of Article 5(2) reflects that the default position is that duties will have to be paid on goods moving from Great Britain to Northern Ireland, unless it can be proven that the good is not “at risk”. The broad definition of “commercial processing” means⁷⁴ that a Northern Ireland only solution would not be a feasible solution. Overall, the UK wide model would be the better solution for the issue of goods moving between Great Britain and Northern Ireland.

⁶⁹ Kenneth Armstrong, ‘Regulatory autonomy after EU membership: alignment, divergence and the discipline of law’ (2020) 45(2) *European Law Review* 207.

⁷⁰ Preamble to the Northern Ireland Protocol.

⁷¹ Artley and Peretz (n 30).

⁷² Article 5(2) Northern Ireland Protocol.

⁷³ Weatherill (n 33).

⁷⁴ Artley and Peretz (n 30).

D. ARE THE CURRENT ARRANGEMENTS PROPORTIONATE?

A key concept in the law of the EU is the idea of proportionality: whether a measure taken by a member state which derogated from the rights conferred by the Treaties was “not... beyond that which is necessary in order to achieve the objective. In other words, it must not be possible to obtain the same result by less restrictive rules.”⁷⁵ The same question might be asked of certain aspects of the Protocol, particularly with regard to its rules on the movement of goods between Britain and Northern Ireland. The EU must consider whether the current arrangements are proportionate to the risk posed to the single market.⁷⁶ In January 2021, 36,000 point-of-entry certificates were required across the entire EU. Of this total, 5,800 were required for trade between Britain and Northern Ireland, which represents 15 per cent, even though trade between Northern Ireland and Britain constitutes less than 1 per cent of total EU trade with non-EU countries.⁷⁷ Some more statistics showing the scale of the problem: Northern Ireland is processing more paperwork than any EU member state for animal imports; is processing 20 per cent of all CHED-Ps⁷⁸ in the EU; and up to 90 per cent of generic drugs could be withdrawn from Northern Ireland because medicines made in Great Britain have to be licensed separately for use in the region as well as undergo separate checks.⁷⁹

This situation has arisen because of the lack of trust between the EU and the UK because of the UK’s actions (the UK’s strategy to secure concessions from the EU has been to be antagonistic towards the EU).⁸⁰ The Protocol is “the only show in town”, at least while the UK is led by hard-line Brexiters, to protect the EU’s vital interests, but in the future, the EU and the UK will have to consider whether the Protocol is *too* restrictive on trade between Great Britain and Northern Ireland. Since the agri-food checks are proving most problematic, perhaps that will be the first area for reform.

⁷⁵ Case C-288/89 *Gonda* [1991] ECR I-4007, para 15.

⁷⁶ Jess Sargeant, ‘The UK government must take responsibility for making the Northern Ireland protocol work’ (*Institute for Government*, 15 April 2021) <<https://www.instituteforgovernment.org.uk/blog/northern-ireland-protocol-tensions>> accessed 19 April 2021.

⁷⁷ Sam McBride, ‘Unionist leaders unite to go to court over Irish Sea border, arguing it breaches the 1800 Act of Union and 1998 Belfast Agreement’ *News Letter* (Belfast, 21 February 2021) <<https://www.newsletter.co.uk/news/politics/unionist-leaders-unite-to-go-to-court-over-irish-sea-border-arguing-it-breaches-the-1800-act-of-union-and-1998-belfast-agreement-3141841>> accessed 19 April 2021.

⁷⁸ A form for importing animal products.

⁷⁹ Noelle McElhatton, ‘EU Brexit chief says trade friction in Northern Ireland can be sorted but adds the task is ‘massive’ (*Export*, 19 April 2021) <<https://www.export.org.uk/news/561278/EU-Brexit-chief-says-trade-friction-in-Northern-Ireland-can-be-sorted-but-adds-the-task-is-massive.htm>> accessed 19 April 2021.

⁸⁰ Maddy Thimont Jack, ‘Making Lord Frost cabinet minister for EU relations makes sense – and suggests a hostile strategy’ (*Institute for Government*, 18 February 2021) <<https://www.instituteforgovernment.org.uk/blog/lord-frost-brexit-cabinet-minister>> accessed 19 April 2021.

III. THE LEGAL ISSUES ARISING FROM THE PROTOCOL

A. THE CONTINUING ROLE OF EU LAW AND THE CJEU IN NORTHERN IRELAND

Article 12 of the Protocol mandates that the United Kingdom is responsible for ensuring the application of relevant EU law.⁸¹ This, of course, is a risk for the EU, as it means that the EU has outsourced the patrolling of its external border on the island of Ireland to the UK, a third country.⁸² The remainder of Article 12, however, ensures the EU institutions are able to supervise the UK's application of EU law. Articles 12(4) and 12(5) accord the CJEU jurisdiction over the application of key provisions of the Protocol.⁸³ EU actors, including the CJEU, shall retain the powers and jurisdiction accorded to them by the Treaties⁸⁴ in this regard. The Article 267 TFEU preliminary reference procedure shall continue to apply to and in the United Kingdom. This means that individuals who are prevented from benefiting from the UK's enforcement of EU law will have the ability to bring a claim before a domestic court in the United Kingdom, and that court will be required to refer the issue to the CJEU if the relevant criteria are fulfilled.⁸⁵

A preliminary ruling is a ruling by the CJEU on “(a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.”⁸⁶ If, as in the case of *Factortame*,⁸⁷ the CJEU finds that a member state's⁸⁸ legislation conflicts with EU law, the member state will be required to ‘disapply’ such law, though the CJEU does not itself have the power to amend such law. The *Francovich*⁸⁹ principle of state liability may continue to apply in the event that individuals were prevented from benefiting from EU law by the UK's failure to enforce it. Such individuals would have the ability to

⁸¹ Oliver Garner, ‘The new Irish Protocol could lead to the indefinite jurisdiction of the EU Court of Justice within the UK’ (*London School of Economics*, 23 October 2019) <<https://blogs.lse.ac.uk/brexit/2019/10/23/the-new-irish-protocol-could-lead-to-the-indefinite-jurisdiction-of-the-court-of-justice-of-the-european-union-within-the-united-kingdom/>> accessed 15 April 2021.

⁸² *ibid.*

⁸³ Craig and de Búrca (n 6) 779.

⁸⁴ Meaning the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

⁸⁵ Garner (n 81).

⁸⁶ Article 267 TFEU.

⁸⁷ Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] ECR I-2433, para 23.

⁸⁸ The UK is no longer a member state but given that the Northern Ireland Protocol requires UK courts to ask for a preliminary ruling in cases involving the application of EU law in Northern Ireland, in the context of the Northern Ireland Protocol, the requirement for the arbiter to be a court of a member state is null.

⁸⁹ Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italy* [1991] ECR I-5357.

petition a UK domestic court, and the domestic court would then have to submit the question to the CJEU, pending the criteria being fulfilled.⁹⁰

Article 4 of the withdrawal agreement provided for the continuing jurisdiction of the CJEU in Great Britain until the end of the transition period⁹¹ on 31 December 2020. The CJEU now only has jurisdiction on the issue of the rights of EU citizens in Great Britain.⁹² In Northern Ireland, however, the Protocol gives the CJEU the ability to potentially rule upon the actions of UK authorities indefinitely. This power could only be terminated by the Northern Ireland Assembly refusing to consent to its continuing operation beyond 2024 (which is within the realm of possibility given the current political situation in Northern Ireland) or by a future agreement which would supersede the Protocol and the CJEU.⁹³

Differing from the prior withdrawal agreement which Theresa May's government concluded with the EU, the final withdrawal agreement and the attached Northern Ireland Protocol provide for a heightened role for the CJEU (most likely as a result of only Northern Ireland remaining *de facto* attached to the EU's Customs Union and single market rather than the entire UK). The previous withdrawal agreement made provision for a role for the CJEU, however, this would have been mitigated by the EU and UK "engag[ing] in best endeavours"⁹⁴ to prevent the Northern Ireland backstop⁹⁵ coming into force. The CJEU would have had a role only in the event the backstop had to be enforced. The Protocol, however, mandates that the CJEU will have a role for as long as the Protocol remains in force.

It is more likely that litigation will arise under the current agreement⁹⁶ than it would have under the one Theresa May's government negotiated,⁹⁷ this is because whereas under the previous withdrawal agreement, the CJEU would have only been determining whether the UK was complying with customs union rules that the UK had already adopted during membership,

⁹⁰ Garner (n 81).

⁹¹ The transition period was a period when the entirety of the UK (not just Northern Ireland) remained in the EU customs union and single market and followed EU rules.

⁹² Garner (n 81).

⁹³ Article 13(8) Northern Ireland Protocol.

⁹⁴ Garner (n 81).

⁹⁵ The 'backstop' was the solution to the Irish border issue that was negotiated by Theresa May's government with the EU. It was replaced by the Northern Ireland Protocol. The backstop would have kept Northern Ireland in some parts of the EU single market, until the EU and the UK agreed on a long-term solution. The EU and UK customs territories would have operated as one until a long-term arrangement was agreed upon. See Jon Henley, 'Brexit deal: key points from the draft withdrawal agreement' *The Guardian* (London, 14 November 2018) <<https://www.theguardian.com/politics/2018/nov/14/brexit-deal-key-points-from-the-draft-withdrawal-agreement>> accessed 16 April 2021.

⁹⁶ Withdrawal Agreement (n 8).

⁹⁷ 'Progress on the UK's exit from, and future relationship with, the European Union' (*Department for Exiting the European Union*, 14 November 2018) <<https://www.gov.uk/government/publications/progress-on-the-uks-exit-from-and-future-relationship-with-the-european-union>> accessed 16 April 2021.

under the current withdrawal agreement, the CJEU will have to ensure the UK checks goods movements using the criteria established by the joint committee. The fact that these criteria are completely new to both individuals and state actors means that it is likely the CJEU will need to at some point give clarity to questions of law. Furthermore, if the UK were to adopt different regulatory standards from the EU, there would be questions regarding the ability of its authorities to enforce EU law standards in Northern Ireland as well.⁹⁸

There have already been several occasions where the UK government has either flirted with disregarding its commitments under the Withdrawal Agreement and the Northern Ireland Protocol,⁹⁹ or shown a lack of trustworthiness in its conduct during the Brexit process. In late 2019, the UK government considered not requesting the European Council to extend the Article 50 negotiations period, despite domestic UK law requiring it to do so.¹⁰⁰ Exactly one year later, Northern Ireland Secretary Brandon Lewis admitted that the UK Internal Market Bill which was passing through the UK Parliament at the time would “break international law” and go against the Withdrawal Agreement in a “specific and limited way”.¹⁰¹ The Bill would have given government ministers the power to define what state aid needs to be reported to the EU¹⁰² and products that are at risk of being brought into Ireland from Northern Ireland.¹⁰³

The plans of the British government were dropped after the EU and UK were able to come to agreement through the joint committee,¹⁰⁴ but what would happen if the British government were to breach provisions of the Northern Ireland Protocol and ignore the protests of the EU? Article 12 of the Protocol is the starting place.

⁹⁸ Garner (n 81).

⁹⁹ Oliver Garner, ‘A Barrier against the new incoming tide? The UK Internal Market Bill and Dispute Resolution under the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland’ (*UK Constitutional Law Association*, 17 September 2020) <<https://ukconstitutionallaw.org/2020/09/17/oliver-garner-a-barrier-against-the-new-incoming-tide-the-uk-internal-market-bill-and-dispute-resolution-under-the-withdrawal-agreement-and-the-protocol-on-ireland-northern-ireland/>> accessed 16 April 2021.

¹⁰⁰ ‘Brexit extension: PM to ‘test law to limit’ to avoid delay’ (*BBC News*, 8 September 2019) <<https://www.bbc.co.uk/news/uk-politics-49625431>> accessed 16 April 2021.

¹⁰¹ ‘Northern Ireland Secretary admits new bill will ‘break international law’’ (*BBC News*, 8 September 2020) <<https://www.bbc.co.uk/news/uk-politics-54073836>> accessed 16 April 2021.

¹⁰² EU level playing field provisions continue to apply to Northern Ireland, per Article 10(1)-(3) of the Northern Ireland Protocol.

¹⁰³ Daniel Boffey, Jessica Elgot and Heather Stewart, ‘Leaked EU cables reveal growing mistrust of UK in Brexit talks’ *The Guardian* (London, 7 September 2020) <<https://www.theguardian.com/politics/2020/sep/07/leaked-eu-cables-reveal-mistrust-of-uk-motives-in-brexit-talks>> accessed 16 April 2021.

¹⁰⁴ Emer O’Toole, ‘Brexit: Tories remove law-breaking clauses from Internal Market Bill in U-turn’ *The National* (Glasgow, 8 December 2020) <<https://www.thenational.scot/news/18929161.brexit-tories-remove-law-breaking-clauses-internal-market-bill-u-turn/>> accessed 16 April 2021.

B. HOW WILL THE EU ENSURE EU LAW IS ENFORCED IN NORTHERN IRELAND?

It seems the most likely legal solution to disputes regarding EU law in Northern Ireland for the moment will be for the enforcement mechanisms available under EU law to be utilised.¹⁰⁵ Per Article 12 of the Protocol, there would be two mechanisms: the first would allow the European Commission to bring an infringement claim against the UK before the CJEU; the second would allow an individual in the UK to bring a case before a national court. The court would then possibly have to initiate a preliminary reference procedure.¹⁰⁶ The extent to which the second mechanism would operate in UK law is unclear. The British government has already shown a willingness to disregard its obligations under the Protocol. In a legal opinion, the government held that “Parliament’s ability to pass provisions that would take precedence over the Withdrawal Agreement was expressly confirmed in section 38 of the European Union (Withdrawal Agreement) Act 2020, with specific reference to the EU law concept of ‘direct effect’.”¹⁰⁷ The British government wished to eliminate the possibility of relying on the direct effect of the withdrawal agreement provisions.

The UK’s having a dualist¹⁰⁸ legal system raises the possibility of the preliminary reference procedure being suspended.¹⁰⁹ The second paragraph of the legal opinion states clearly: “Clause 45 of the Bill partially disapplies the implementation in UK domestic law of Article 4 WA and the EU law concept of direct effect.”¹¹⁰ How far this “partial” disapplication of direct effect was intended to go is unclear. The objective of this provision is arguably to prevent domestic courts from hearing challenges to the legislation and issuing preliminary references under Article 267 TFEU.¹¹¹ Indeed, the very concept behind direct effect is that the EU Treaties create legal rights which can be enforced by both natural and legal persons before the courts of the EU’s member states.¹¹² There is also the interesting theoretical question

¹⁰⁵ Garner (n 99).

¹⁰⁶ *ibid.*

¹⁰⁷ ‘HMG Legal Position: UKIM Bill and Northern Ireland Protocol’ (*Cabinet Office*, 10 September 2020) <<https://www.gov.uk/government/publications/hmg-legal-position-ukim-bill-and-northern-ireland-protocol>> accessed 17 April 2021.

¹⁰⁸ In international law, each state can choose the relationship between domestic law and international law within its legal system. Two theories exist. A ‘monist’ legal system incorporates international law into the domestic legal order. International law would apply as though it were domestic law. In a ‘dualist’ legal system, international law is seen as the law between states, national law is the law within a state. While international law is binding at the international level, it cannot be binding within the domestic legal system. See Robert Schütze, *European Union Law* (2nd edn, Cambridge University Press 2018) 77.

¹⁰⁹ Garner (n 99).

¹¹⁰ HMG Legal Position (n 107).

¹¹¹ Garner (n 99).

¹¹² Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 13.

regarding whether these rights would be directly effective in a *former* member state. Per Article 12(7)(a) of the Protocol: “The United Kingdom may participate in proceedings before the Court of Justice of the European Union in the same way as a member state” with regards to issues arising from the Protocol. So the answer would be *de jure* “yes”; though how this would play out in practice is up for debate.

C. WHAT IF THE BRITISH GOVERNMENT DISREGARDS THE APPLICATION OF EU LAW?

Given that the withdrawal agreement requires the direct effect of EU law in Northern Ireland and a role for the CJEU, the UK no longer being a member state is irrelevant, though a potential case in the CJEU to provide more clarity would be helpful. The mere fact a country is a member state of the EU does not in itself guarantee compliance with the judgments of the CJEU. In the *Ajos*¹¹³ case, the Danish Supreme Court initiated an Article 267 preliminary reference procedure regarding the compatibility of paragraph 2(a)(3) of the Danish Salaried Employees Act with Directive 2000/78/EC.¹¹⁴ Despite the clear guidance given by the CJEU, the Danish Supreme Court refused to set aside the provision of national law which was incompatible with the Directive, applying the national law instead.¹¹⁵ The Danish court chose to follow this reasoning because it felt that disapplying the domestic legislation in favour of the EU Directive was *ultra vires*,¹¹⁶ as under the Danish constitutional order, the judiciary should not issue a ruling which goes against the intention of the Danish parliament.¹¹⁷

This was a clear violation of the doctrine of primacy of EU law and loyal cooperation of national courts established by the *Costa* ruling.¹¹⁸ National courts setting their own standards for the enforcement of EU law has been an ongoing development throughout the years. For instance, the German Constitutional Court set its own standards for enforcement of EU law in the case of *Internationale Handelsgesellschaft*,¹¹⁹ where it held that it would enforce EU law “so long” as it complied with the fundamental rights guaranteed by the German legal order.¹²⁰

¹¹³ Case C-441/14 *Danske Industri v Rasmussen* [2016] EU:C:2016:278.

¹¹⁴ Directive 2000/78/EC Framework Employment Equality [2000] OJ L303/16.

¹¹⁵ Case no. 15/2014 *Danske Industri (DI) acting for Ajos A/S vs The estate left by A.*

¹¹⁶ Latin for “beyond the powers;” used in the sense that under Montesquieu’s theory of the separation of powers, the judiciary should not play a legislative role by invalidating legislation and so on.

¹¹⁷ Mikael Rask Madsen, Henrik Palmer Olsen and Urška Šadl, ‘Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS’ (*Verfassungsblog*, 30 January 2017) <<https://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/>> accessed 18 April 2021.

¹¹⁸ Case 6/64 *Costa v. ENEL* [1964] ECR 585.

¹¹⁹ BVerfGE 37, 271 (*Solange I (Re Internationale Handelsgesellschaft)*) [1974] 2 CMLR 540.

¹²⁰ Schütze (n 108) 130.

The point is with regards to the Protocol that courts of the member states have shown an unwillingness to enforce EU law over domestic law, so who is to say the courts of a *former* member state will not do the same?

Whether direct effect has been removed is now a moot issue, first because the UK government removed the relevant clauses from the Internal Market Bill.¹²¹ The second reason being even if the UK government were to remove the direct effect of EU law and the ability of a UK court to bring an Article 267 TFEU preliminary reference proceeding, the European Commission still has the power to bring an infringement procedure against the UK before the CJEU as a matter of bilateral international treaty law.¹²²

The act of introducing a bill into the UK Parliament with the offending clauses present was a breach of the international law maxim of *pacta sunt servanda*¹²³ and also a violation of Article 26 of the Vienna Convention on the Law of Treaties.¹²⁴¹²⁵ The outcome if in the future the UK government attempts to breach the Protocol in a similar way would be the commencement of a dispute resolution procedure in the joint committee, which would be established three months after written notification between the parties. In the event the joint committee was unable to find a solution, Article 12 of the Protocol would empower the European Commission to bring an infringement procedure against the UK before the CJEU.¹²⁶

IV. THE POLITICAL PROBLEMS CAUSED BY BREXIT, THE PROTOCOL'S ATTEMPTED SOLUTIONS TO THEM, AND SOME ALTERNATIVE SOLUTIONS

A. WAS THERE A NEED FOR THE BORDER TO BE WHERE IT IS?

The main problem during Brexit with regards to Northern Ireland was the clash of interests between the EU and the UK – there was never an optimal solution, and possibly never will be, to the extraordinarily complex problems brought about by the UK's withdrawal. There was never any solution that would have had no border on the island of Ireland, no border

¹²¹ Which has since been passed as the United Kingdom Internal Market Act 2020 c.27.

¹²² Garner (n 99).

¹²³ Latin for "agreements must be kept."

¹²⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

¹²⁵ Jonathan Deans, 'The Internal Market Bill: a specific and limited controversy?' (2021) 1 Juridical Review 48.

¹²⁶ Garner (n 99).

between Great Britain and Northern Ireland, and the ability for the entire UK to leave the EU single market and customs union.¹²⁷

The phrase “to protect the Good Friday Agreement” may go down as one of those phrases used during Brexit which did not really mean anything, along with “Brexit means Brexit”¹²⁸ and “strong and stable”.¹²⁹ While the Good Friday Agreement did see the withdrawal of British troops from the streets and fields of Northern Ireland, and did mean the border between Ireland and Northern Ireland became “invisible” in the sense there was no longer a military presence there, the border has been open since 1923 because of the Common Travel Area.¹³⁰

As Rory Montgomery, former Irish diplomat, said:

The Good Friday Agreement says either little or nothing about the European Union, about the border between North and South, or about trade within the UK. Therefore, the argument that Brexit or its outworkings formally violate the Agreement is hard to sustain. But Brexit seriously breaches the context and spirit of the Agreement, with very real political and psychological effects. One way or another, its implementation was always going to be disruptive and damaging.¹³¹

The solution to the trilemma did not necessarily have to be the one that was adopted in the end. The Good Friday Agreement was not violated by the act of Britain leaving the EU. The interpretation of the Good Friday Agreement which was presented by the government of Ireland became the widely accepted position and there was no attempt by the British government to articulate an alternative position.¹³²

A “hard border” is not a legal term of art with a widely accepted definition that other terms such as *habeas corpus* or *ultra vires* have. It could have been interpreted differently. For

¹²⁷ Anton Spisak, ‘After Brexit: Northern Ireland and the Future of the Protocol’ (*Tony Blair Institute for Global Change*, 12 March 2021) <<https://institute.global/policy/after-brexit-northern-ireland-and-future-protocol>> accessed 19 April 2021.

¹²⁸ Mark Mardell, ‘What does ‘Brexit means Brexit’ mean?’ (*BBC News*, 14 July 2016) <<https://www.bbc.co.uk/news/uk-politics-36782922>> accessed 19 April 2021.

¹²⁹ Esther Addley and Caroline Davies, ‘Dreadful night’ when Theresa May’s strong and stable fantasy evaporated’ *The Guardian* (London, 9 June 2017) <<https://www.theguardian.com/politics/2017/jun/09/theresa-mays-dreadful-night-strong-stable-fantasy-evaporated>> accessed 19 April 2021.

¹³⁰ ‘Memorandum of Understanding between the UK and Ireland on the CTA’ (*Cabinet Office*, 8 May 2019) <<https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-ireland-on-the-cta>> accessed 19 April 2021.

¹³¹ Rory Montgomery, ‘Protocol problems for both parts of Ireland: North and South’ (*Fortnight Magazine*, April 2021) <<https://fortnightmagazine.org/articles/protocol-problems-for-both-parts-of-ireland-north-and-south/>> accessed 19 April 2021.

¹³² *ibid.*

instance, rather than have the border in the Irish Sea and thus keep Northern Ireland aligned to the single market and customs union, alternative arrangements could have been made to have checks on goods moving between the UK and Ireland some distance away from the actual border. If a land border between Ireland and Northern Ireland was having the economic and social impact the Protocol is having, it would be clear that it would need to be replaced.¹³³ While this may be true, looking at the empirical data makes it clear that more of Northern Ireland's trade is with Britain than with Ireland¹³⁴ and that the Protocol is impacting the supply of essentials like medicines.¹³⁵ From a utilitarian point of view, it would seem a border on the island of Ireland would have made more sense, although in the highly partisan politics of Northern Ireland, it would have been interpreted as favouring unionists over nationalists.

A border on the island of Ireland would have been more pleasing for the EU logistically, as it would have meant that it did not have to entrust its external border to a third country, the UK. While the prospect of checks on goods could potentially have led to tensions within the nationalist community, the Good Friday Agreement, so often cited, does not provide that trade between Northern Ireland and Ireland should be unfettered. That could potentially have been solved in the future with some sort of alignment on SPS standards like the EU has with Switzerland and New Zealand, as Northern Ireland's trade with Ireland is primarily based on agricultural goods.¹³⁶

The present situation with regards to the Irish border was not the only solution, but the result of a hard-line stance adopted by the then Taoiseach Leo Varadkar, which was accepted by the EU and the UK. Had the narrative reflected the reality that the Good Friday Agreement would not have been breached by checks on goods moving between Northern Ireland and Ireland, a solution more acceptable to all concerned parties may have been found.¹³⁷

¹³³ Éilis O'Hanlon, 'Of course unionists are angry, we partitioned their country' *Irish Independent* (Dublin, 11 April 2021) <<https://www.independent.ie/opinion/comment/of-course-unionists-are-angrywe-partitioned-their-country-40299253.html>> accessed 19 April 2021.

¹³⁴ Halpin and Holton (n 34).

¹³⁵ McElhatton (n 79).

¹³⁶ Matthew Ward, 'Statistics on UK trade with Ireland' (*House of Commons Library*, 15 January 2021) <<https://researchbriefings.files.parliament.uk/documents/CBP-8173/CBP-8173.pdf>> accessed 19 April 2021.

¹³⁷ Henry Hill, 'The Northern Ireland Protocol is untenable' (*The Spectator*, 16 April 2021) <<https://www.spectator.co.uk/article/breaking-protocol-northern-ireland-s-brexite-deal-needs-reform>> accessed 19 April 2021.

B. ARTICLE 18 AND ITS POTENTIAL LACK OF COMPATIBILITY WITH THE GOOD FRIDAY AGREEMENT

Article 18 provides a mechanism for the UK to “provide the opportunity for democratic consent in Northern Ireland to the continued application of Articles 5 to 10.”¹³⁸ This means that the UK government will have to seek the consent of the Northern Ireland Assembly, the local devolved legislature, in order for the Protocol’s provisions to be extended beyond 2024.¹³⁹ Articles 5 to 10 cover, respectively, customs and movement of goods; protection of the UK internal market; technical regulations; VAT and excise; the single electricity market; and state aid.

Article 18 of the Protocol provides for “the opportunity for democratic consent in Northern Ireland [...] consistent with the 1998 Agreement.”¹⁴⁰ The 1998 Agreement is an international agreement between the UK and Ireland.¹⁴¹ The “core tenet” of the Agreement, and the context of the reference to democratic consent in the Protocol, is that there should be no change to Northern Ireland’s constitutional status without the consent of the unionist and nationalist communities.¹⁴²

There is great dissatisfaction in Northern Ireland with the Protocol and its *de facto* creation of a border between Great Britain and Northern Ireland, particularly within the unionist community.¹⁴³ If there is a vote to bring the operation of Articles 5 to 10 to an end, then the joint committee will have two years to make recommendations to ensure the avoidance of a hard border.¹⁴⁴ It could even be the case that the joint committee will have to meet to discuss the abolition of the Irish Sea border. It would appear there is much for Brussels to be worried about: it would seem that the Northern Ireland Assembly would have the power to derail the Protocol, if it were so inclined. The role of the joint committee, however, acts as a constraint on the power of the Assembly. The CJEU will continue to have a role to play in matters of interpretation of EU law still in effect in Northern Ireland, and the joint committee will still be

¹³⁸ Northern Ireland Protocol, article 18.

¹³⁹ Colin Harvey, ‘Designing a Special Arrangement for Northern Ireland: the Irish Protocol in Context’ (*Brexit Institute Working Paper Series*, 1 May 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3588415> accessed 16 February 2021.

¹⁴⁰ The 1998 Agreement is the Good Friday or Belfast Agreement.

¹⁴¹ Austen Morgan, ‘The Belfast Agreement: a practical legal analysis’ (*CAIN Web Service*, 2000) <<https://cain.ulster.ac.uk/events/peace/morgan/index.html>> accessed 16 April 2021.

¹⁴² Martin Fletcher, ‘The Northern Ireland riots have exposed Boris Johnson’s reckless complacency’ (*The New Statesman*, 12 April 2021) <<https://www.newstatesman.com/politics/northern-ireland/2021/04/northern-ireland-riots-have-exposed-boris-johnson-s-reckless>> accessed 16 April 2021.

¹⁴³ Clare Rice, ‘Free us’: the DUP’s Northern Ireland Protocol strategy’ (*London School of Economics*, 4 February 2021) <<https://blogs.lse.ac.uk/brexit/2021/02/04/free-us-the-dups-northern-ireland-protocol-strategy/>> accessed 16 February 2021.

¹⁴⁴ *ibid.*

bound by the CJEU's rulings. Overall, this is a prickly provision of the Protocol, which has the potential to make politics in Northern Ireland even more heated, but it would seem the EU can rest easy knowing that its vital interest in securing its border with the UK will be protected by the might of the CJEU.

C. THE POTENTIAL INCOMPATIBILITY OF THE PROTOCOL WITH THE CONSTITUTIONAL ARRANGEMENTS OF NORTHERN IRELAND

The irony of the Protocol is that it was formulated by the EU and the UK with the intention of preventing further violence in Northern Ireland. In April 2021, the cities of Belfast and Derry-Londonderry had some of their worst riots in years. Loyalist paramilitaries have withdrawn their support for the Good Friday Agreement (which brought the most recent iteration of the conflict in Northern Ireland to an end) until the trading arrangements of the Northern Ireland Protocol are removed.

The EU showed a mature approach to the unrest by postponing the legal action it had intended to bring against the UK for unilaterally extending the grace period covering checks on agri-foods moving from Great Britain to Northern Ireland.¹⁴⁵ The violence began as a result of an oversight by both the UK and the EU, however. The two parties committed to preserve peace but did so in a manner which, in the opinion of loyalists, went against the principles of parity of esteem¹⁴⁶ and consent¹⁴⁷ enshrined in the Good Friday Agreement. Indeed, some members of the Democratic Unionist Party (DUP), Northern Ireland's largest unionist party, have prepared legal challenges against the Protocol for this very reason.¹⁴⁸

All of this relates to Article 18, the provision of the Protocol which is supposed to protect the spirit of the Good Friday Agreement through "democratic consent". However, the vote which the Northern Ireland Assembly is supposed to have on the continuing operation of the Protocol is not scheduled until 2024. Considering the volatile atmosphere in Northern Ireland

¹⁴⁵ Alberto Nardelli, 'EU to Delay Brexit Legal Action Amid Northern Ireland Violence' (*Bloomberg*, 9 April 2021) <<https://www.bloomberg.com/news/articles/2021-04-09/eu-to-delay-brexit-legal-action-amid-northern-ireland-violence>> accessed 18 April 2021.

¹⁴⁶ This means that the unionist-loyalist community and the nationalist-republican community must be treated equally and that a majority of voters in both communities must approve of a measure which would have constitutional consequences.

¹⁴⁷ This means that fundamental constitutional change in Northern Ireland can only occur through a referendum. The Good Friday Agreement refers to the consent principle in the context of Northern Ireland leaving the UK and uniting with the Republic of Ireland, though Unionists argue this should also extend to the Protocol.

¹⁴⁸ 'DUP leadership starts challenge against Northern Ireland protocol' *The Guardian* (London, 21 February 2021) <<https://www.theguardian.com/uk-news/2021/feb/21/dup-leadership-starts-legal-challenge-against-northern-ireland-protocol>> accessed 18 April 2021.

as a result of the Protocol,¹⁴⁹ it seems that the best solution would have been to organise a referendum to allow the electorate to have their say on the issue, although the more likely solution now is for the EU-UK joint committee to work on finding a solution together.¹⁵⁰ It seems counter to the spirit of democracy to change the way the economy and politics of a region work *before* giving its citizens an opportunity to vote on it. That is the fault of the UK government¹⁵¹ and not the EU, but they did jointly agree on the Protocol. Indeed, the piece of secondary legislation¹⁵² regarding the vote on the Protocol was the subject of a legal challenge brought in the High Court in Belfast, but which is expected to end up in the UK Supreme Court.¹⁵³ The applicants in the legal challenge argue that the secondary legislation alters “constitutional statutes”¹⁵⁴ such as the Acts of Union 1800¹⁵⁵ and the Northern Ireland Act 1998¹⁵⁶ by removing the cross-community voting mechanism central to the Good Friday Agreement. The plaintiffs argue on five grounds that the Protocol is unlawful: first, that the terms of the Protocol violate the Acts of Union 1800; second, that the Protocol conflicts with the Northern Ireland Act 1998; third, that Article 18 of the Protocol is incompatible with the usual provisions for cross-community voting in the Northern Ireland Assembly (Article 18 mandates a simple majority vote); fourth, that the Protocol is incompatible with Article 3 of the European Convention on Human Rights (ECHR), as Northern Ireland has no way of having any voice in the creation of EU law, yet has to follow it; and fifth, that the Protocol breached Article 50 TEU by providing for the continued application of EU law outside the EU.

The challenge brought by Traditional Unionist Voice (TUV) leader Jim Allister in the High Court of Northern Ireland was rejected, as was the appeal to the Northern Ireland Court of Appeals.

The case will proceed to the United Kingdom Supreme Court. Keegan LCJ of the Northern Ireland Court of Appeals identified the following as the legal questions for the UK

¹⁴⁹ Jonathan Powell, ‘Peace in Northern Ireland is in danger- Johnson’s lies and inaction offer no help’ *The Guardian* (London, 11 April 2021) <<https://www.theguardian.com/commentisfree/2021/apr/11/boris-johnson-posturing-has-put-northern-ireland-fragile-peace-at-grave-risk>> accessed 18 April 2021.

¹⁵⁰ Nardelli (n 145).

¹⁵¹ It is the responsibility of the UK government to decide how Northern Ireland gives consent. The process is legislated for by the Protocol on Ireland-Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020.

¹⁵² *ibid.*

¹⁵³ McBride (n 77).

¹⁵⁴ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [62] (Laws LJ). In this case, Laws LJ stated that ‘constitutional statutes’ such as the Acts of Union are immune from implied repeal, which is a concept in UK constitutional law which holds that where two pieces of legislation contradict each other, the latter Act takes precedence. This principle was approved by the UK Supreme Court in *BH v The Lord Advocate (Scotland)* [2012] UKSC 24 [30] (Lord Hope).

¹⁵⁵ 40 Geo. 3 c.38.

¹⁵⁶ c. 47.

Supreme Court to consider: whether the Court of Appeal erred in law by concluding that (a) Article 6 of the Acts of Union did not prevent the UK Government from effecting the Withdrawal Agreement and (b) that the European Union Withdrawal Act 2018 lawfully modifies Article 6; whether the Court of Appeal erred in law by failing to conclude that the modification of Article 6 constitutes a change in the constitutional status of Northern Ireland, in conflict with the Northern Ireland Act 1998; and whether the Court of Appeal erred in law by concluding that the Protocol lawfully disapplied section 42 of the Northern Ireland Act 1998.¹⁵⁷

*Allister*¹⁵⁸ has the potential to be a landmark case in UK constitutional law; it may mark the first time any court in the UK has had to resolve a conflict between two constitutional statutes. A ruling on the case is not expected until 2023.

There is the argument that the use of the joint committee to resolve these issues is undemocratic in itself: representatives of Northern Ireland did not have a voice in the Protocol which has had profound economic, social, and political effects. Before adopting the Lisbon Treaty, most member states offered their citizens a chance to vote on it. The voters of Ireland rejected it, then gained concessions which then led to the Irish electorate approving the Treaty.¹⁵⁹ The Treaty establishing a Constitution for Europe was not adopted because French and Dutch voters rejected it in referenda.¹⁶⁰

The point of all of this is that it is usually the European way to offer citizens a chance to vote on issues such as these. Article 2 TEU provides that the EU is founded on, amongst others, the value of respect for democracy. It seems counter to this principle the EU was founded on to change the way the economy of Northern Ireland works without giving the people of Northern Ireland a say.

The violence in Northern Ireland has not been caused by the Protocol alone,¹⁶¹ but the decision to hold a referendum on it before it entered into force would have at least allowed it to

¹⁵⁷ Alan Erwin, "Unionist challenge to NI protocol to proceed to UK's Supreme Court" *The Irish Times* (Dublin, 25 April 2022) <<https://www.irishtimes.com/news/crime-and-law/courts/criminal-court/unionist-challenge-to-ni-protocol-to-proceed-to-uk-s-supreme-court-1.4861355>> accessed 24 August 2022.

¹⁵⁸ *Re Jim Allister's application for Judicial Review* [2021] NIQB 64.

¹⁵⁹ 'Ireland backs EU's Lisbon Treaty' (*BBC News*, 3 October 2009) <<http://news.bbc.co.uk/1/hi/8288181.stm>> accessed 18 April 2021.

¹⁶⁰ Patrick Wintour, 'EU scraps timetable for ratifying constitution' *The Guardian* (London, 17 June 2005) <<https://www.theguardian.com/politics/2005/jun/17/eu.politics>> accessed 18 April 2021.

¹⁶¹ According to police sources, the violence was stirred up by criminal gangs in response to a crackdown on their activities. The decision not to prosecute those who organised and attended the funeral of a leading member of the IRA in breach of Covid regulations also played a role. But the belief that the UK government has abandoned Northern Ireland is what is causing a lot of the discontent in the loyalist community. See 'The Guardian view on the riots in Northern Ireland: situation dangerous' *The Guardian* (London, 6 April 2021)

enjoy democratic legitimacy. It is good that even under strained relations the joint committee is able to produce solutions to the problems the Protocol has been going through;¹⁶² however, the need for the people of Northern Ireland to have their say sooner rather than later has become very clear.

V. CONCLUSION

This article has attempted to put forward the case that the Northern Ireland Protocol is in some regards untenable. It has created frictions in trade between Northern Ireland and Great Britain, to the detriment of all members of the community in Northern Ireland. It has pushed Northern Ireland to establish closer trade links with Ireland and the EU. The Protocol has been the cause of much social unrest. Furthermore, its policy on goods moving between Britain and Northern Ireland may protect the single market, but it is disproportionate given that less than 1 per cent of trade between the EU and third countries passes between Britain and Northern Ireland. Whether the CJEU will have much of a role in Northern Ireland is also hard to tell—the current British government has shown a propensity for disregarding its obligations under international law, whether as a negotiating tactic or not. At the end of April 2021, the European Commission paused the legal action it was intending to bring against the UK with an interest in finding a solution to Northern Ireland’s current problems. The latest talks will involve Northern Ireland businesses in an attempt to reach a breakthrough on trading arrangements.¹⁶³ While this may not solve the current unrest in Northern Ireland completely, given that it was caused by more than just the Protocol, it makes for a refreshing change in how EU-UK policy on Northern Ireland has been decided. History has shown that the Northern Irish, regardless of political affiliation, do not appreciate the future of their region being decided without them having a role to play. The recent violence and tensions should be a wakeup call to the EU and the UK about the reality of the situation.

<https://www.theguardian.com/commentisfree/2021/apr/06/the-guardian-view-on-the-riots-in-northern-ireland-situation-dangerous> accessed 18 April 2021.

¹⁶² Editorial comments, ‘Sour lessons from the Union’s first encounters with the UK as a ‘free and sovereign country’ (2021) 58(1) *Common Market Law Review* 1, 9.

¹⁶³ Naomi O’Leary, ‘EU seeks business input over problems with Northern Ireland protocol’ *The Irish Times* (Dublin, 17 April 2021) <<https://www.irishtimes.com/news/world/europe/eu-seeks-business-input-over-problems-with-northern-ireland-protocol-1.4539750>> accessed 19 April 2021.