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From oven-ready to indigestible: the Protocol on Ireland/Northern Ireland

C R G Murray*
Newcastle University
Correspondence email: colin.murray@newcastle.ac.uk

ABSTRACT

Boris Johnson repeatedly presented the EU/UK Withdrawal Agreement to the UK electorate as an 'oven-ready' deal amid campaigning for the December 2019 general election. Subsequent events, however, have illustrated just how much of the deal remained to be worked out before the Protocol on Ireland/Northern Ireland could actually be put on the table in the way Johnson sold the dish to the electorate, and the degree to which its implementation (the spell in the microwave, as Johnson extended his metaphor) would be contingent upon the progress of the EU/UK Future Relationship negotiations. This article examines the fissures which rapidly emerged between the UK and the EU over significant elements of the Protocol, and whether Johnson's deal was inherently more unstable than the deal negotiated by his predecessor Theresa May. It explores how these profound divisions over its terms prevented the implementation of the Protocol as drafted and what might be left of the Protocol in the wake of the Northern Ireland Protocol Bill.

Keywords: Brexit; EU/UK Withdrawal Agreement; Northern Ireland; implementation; enforcement.

INTRODUCTION

Whereas the autumn of 2019 saw Boris Johnson renegotiate the EU–UK Withdrawal Agreement's Protocol on Ireland/Northern Ireland (PINI)[1] at the eleventh hour, by the autumn of 2020 his Government had embarked upon the first of its efforts to strip out 'unworkable' parts of that same Protocol, efforts which have outlasted his premiership. The Protocol having been the centrepiece of his 2019 election campaign, Downing Street set about distancing Johnson from the compromises inherent in his deal, on the basis that '[i]t was agreed

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1 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (30 January 2020).

at pace at the most challenging political circumstances to deliver on a clear political decision of the British people'.[2] In the words of David Frost, Johnson's Chief Negotiator and subsequent cabinet colleague, Theresa May had 'blinked first' in negotiations, leaving Johnson to pick up the pieces. This accusation drew an angry repost from one of May's senior advisors that her Government had been responsible for 95 per cent the finalised deal, a suggestion which might, ironically, have helped Johnson's efforts to deflect responsibility.[3]

This article addresses two of the questions which have emerged from this imbroglio. The first is the extent to which Johnson's Government was responsible for a significant change to the Withdrawal Agreement's Protocol on Ireland/Northern Ireland, rather than some not-so-subtle rebranding of the politically toxic notion of a 'backstop' arrangement for the consumption of Eurosceptic MPs. It compares the Johnson Protocol's trade arrangements for Northern Ireland with how the May Protocol's backstop would have operated, an arrangement which her advisers maintain 'was as close as it would get to something that tried to respect all perspectives on threading the needle of Brexit and the Good Friday Agreement'.[4] In doing so, it highlights the changes which resulted from the diplomatic manoeuvrings in the early months of Johnson's premiership and their impact on the workability of the Protocol. Second, having explored the nature of Johnson's deal, this article details how the resultant arrangements came under sustained pressure when efforts were made towards their implementation. It explores why the Protocol's terms applicable to customs declarations, to the processing of goods movements, to the risk of onward movement of goods into the EU Single Market and to the application of state aid rules became anathema to the UK Government. This combination of intractable issues poses the question of whether any amount of mitigation of the Protocol's terms will ever provide a stable basis for managing Northern Ireland's post-Brexit governance.

BACK TO FRONT (STOP)

From May to Johnson

The main shifts between the May and Johnson deals relate to the trading arrangements regarding goods and product standards which

2 E O'Toole, 'Downing Street officials admit last year's Brexit deal was signed in a rush' *The National* (9 September 2020).

3 J Eglot, 'UK's chief Brexit negotiator has "brass neck", says former May aide' *The Guardian* (London 6 September 2020).

4 UK in a Changing Europe, Brexit Witness: Joanna Penn (Brexit Witness Archive nd) 20.

would be applicable to Northern Ireland after Brexit. Their respective deals are conditioned by the EU's proposals for managing trade in goods in Northern Ireland post-Brexit.[5] Once the UK and EU had agreed in principle that special arrangements would be made to avoid trade barriers on the land border between Ireland and Northern Ireland in December 2017, in March 2018 the EU Commission produced backstop proposals by which Northern Ireland would be subject to separate post-Brexit trading and product rules from the remainder of the UK if other measures for maintaining an open land border could not be put in place (either through a Future Relationship Agreement or the development and deployment of open-border technology).[6] These proposals provoked an outraged response from Northern Ireland's largest Unionist party, the Democratic Unionist Party (DUP), as they would carry with them the likelihood of trade barriers between Northern Ireland and the rest of the UK. Reliant upon the DUP for her Commons majority, Theresa May asserted that the EU's proposals for Northern Ireland represented a compromise of the UK's 'constitutional integrity' that no UK Prime Minister could contemplate.[7] Her challenge became finding a basis for an agreement which would square the UK Government's December 2017 commitments with its pledges to Unionism.

Theresa May's deal with the EU, published in November 2018, reconceived of the backstop as an arrangement with implications for the whole of the UK, and not just Northern Ireland, if at the end of the transition/implementation period either a deal on the future UK–EU relationship sufficient to ensure an 'invisible' border on the island of Ireland had not been reached, or if alternate arrangements preventing a need for border checks between Ireland and Northern Ireland had not been developed. This version of the backstop would have ensured that Northern Ireland would align with the EU in terms of both customs and the Single Market's regulatory arrangements for goods, and that the UK as a whole would align in terms of customs processes. It provided for what was characterised as a swimming-pool model for UK–EU relations post Brexit; Northern Ireland would be in the deep end in terms of its alignment with the rules of the EU Single Market for goods, and Great Britain would be in the shallower end, and

5 See C McCrudden, 'Introduction' in C McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) 1, 5.

6 EU Commission, Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 35, PINI, para 4. See K Hayward, '"Flexible and imaginative": the EU's accommodation of Northern Ireland in the UK–EU Withdrawal Agreement' (2021) 58 International Studies 201.

7 Theresa May MP, HC Deb 28 February 2018, vol 636, col 824.

would thereafter be able to diverge further in the future. This room for manoeuvre proved unacceptable to many Northern Ireland Unionists; they could see the connections holding Northern Ireland and Great Britain together becoming more attenuated once the new trading arrangements bedded in. Notwithstanding their prominent repetition of Unionist concerns, of greater significance to many Eurosceptics within the Conservative Party was that a Withdrawal Agreement which would default to arrangements enmeshing the whole of the UK in a customs union with the EU would fail to provide for a sufficiently clear separation of the UK from the EU; 'we may find ourselves legally obliged to be stuck in a customs union without end'.[8] Not only did they successfully resist parliamentary approval for her deal, but May was forced to resign in May 2019.

If May's deal was at least an effort to address the UK Government's conflicting commitments, the Johnson deal rests upon a legal sleight of hand. Under it, the UK as a whole would leave the EU Customs Union, but Northern Ireland would continue to apply customs arrangements and tariffs which align exactly with those of the EU and remains bound by Single Market rules with regard to goods. Under article 4, Northern Ireland would formally be part of the UK customs territory, paying lip-service to Johnson's insistence that a 'sovereign united country must have a single customs territory'.[9] For all practical purposes, however, article 5 ensures that, from the end of the Brexit transition/implementation period, Northern Ireland will be treated as if it were legally part of the EU's Customs Union and Single Market for goods. This brings with it further contradictions. In requiring that Northern Ireland applies the Union Customs Code, including arrangements whereby goods leaving Northern Ireland for Great Britain, and thereby leaving the reach of the EU Single Market, article 5 means that these movements would have to be subject to an exit summary declaration and its associated costs.[10] This sits uneasily alongside article 6 of the Protocol, which states that '[n]othing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market', and Boris Johnson's glib assertions that any such paperwork could be thrown in the bin did little to provide clarity. The Protocol therefore treats Northern Ireland as though it was part of the Single Market for the purposes of trade in goods, maintaining dynamic alignment between Northern Ireland law and some 300

8 Edward Leigh MP, HC Deb 21 February 2019, vol 654, col 1692.

9 Reuters, 'PM Johnson: no Irish border posts, but will need checks somewhere' (1 October 2019).

10 EU Regulation 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), art 271.

pieces of EU law.[11] The Withdrawal Agreement Act 2020 allows for this legislative task to be undertaken either through Westminster or the Northern Ireland Assembly. This approach to dynamic alignment largely overlaps with the backstop's proposed arrangements that Northern Ireland law would remain aligned with EU law on goods, sanitary and phytosanitary (SPS) controls, value-added tax (VAT) and state aid, which would have placed the jurisdiction in the deep end of the alignment swimming pool.[12]

The Johnson Protocol, moreover, left much to be determined in the Withdrawal Agreement's Joint Committee, including the question of whether goods being shipped from Great Britain to Ireland were 'at risk' of onward movement into the EU, necessitating checks. Under the Protocol, the EU Commission has the capacity to oversee the UK's implementation of these commitments (including EU state aid rules) and to mount enforcement actions where it believes these rules are being breached.[13] The Court of Justice of the European Union (CJEU), moreover, retains jurisdiction over disputes under the trade and goods regulation elements of the Protocol,[14] and the UK's domestic courts are obliged to follow relevant CJEU jurisprudence insofar as it is relevant to the application of EU law under the Protocol.[15] Private actors are therefore able to rely upon these Protocol commitments in litigation even where the Commission does not pursue potential breaches.[16] This package was not a resurrection of a form of Northern Ireland-only backstop; it was much more opaque in terms of how it would actually operate in practice, but gave the EU control over key mechanisms for managing this process, such as the risks posed to its Single Market by goods movements. It was also, explicitly, not an 'insurance' option; for the EU it represented a shift 'from the logic of a backstop to a permanent solution'.[17]

All of these terms carried with them the potential for friction as moves were made to implement the Protocol. For the DUP, these arrangements created an even more obvious fissure in the Union than the terms of Theresa May's deal that they had worked so assiduously to

11 See L C Whitten in this edition: NILQ 73(S2) 37–64.

12 Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (25 November 2018) PINI, art 6, 8 and 9, 12.

13 Withdrawal Agreement (n 1 above) PINI, art 12(4)–(5).

14 Ibid PINI, art 12(4).

15 Ibid PINI, art 13(2). This is a more extensive obligation than provided under the Withdrawal Agreement (n 1 above) art 4.

16 European Union (Withdrawal Agreement) Act 2020, s 5, inserting European Union (Withdrawal) Act 2018, s 7A.

17 UK in a Changing Europe, Brexit Witness: Stefaan de Rynck (Brexit Witness Archive 1 & 15 March 2021) 29.

undermine. Unlike the backstop, which was avowed to be a last resort, these arrangements were to take effect immediately at the conclusion of the Withdrawal Agreement's implementation/transition period and could last indefinitely. This sort of ploy has long characterised the UK's relationship with the Europe Project. The European Communities Act 1972, after all, was deliberately unclear as to the degree to which parliamentary and national sovereignty were abridged by the UK's membership of the then-European Economic Community (EEC). Indeed, section 2 of the Act was so opaque on the transfer of law-making authority over specific competences to the EEC that it took the UK's domestic courts the best part of two decades to unpack the resultant hierarchy between EU law and measures enacted by Westminster. The feat of conjuration necessary to persuade Parliament to pass the Withdrawal Agreement was beyond Theresa May. The EU had closely observed how ineffectively she had presented the economic benefits of the Agreement she had struck to Parliament, and the way any concessions that they did make in the form of assurances that the backstop was not a trap, significant in terms of any future 'good faith' arguments over its application, got sucked into a narrative that 'there is no ultimate unilateral right out of this arrangement'.[18]

There had to be a dreaded backstop before it could be made to disappear, and given that she was so closely associated with backstop arrangements which would cover the whole of the UK, May was never going to be able to distract from their being reconstituted. And given that arrangements covering the whole of the UK had become bound up in her account of what was necessary to safeguard the integrity of the UK, there was no evidence that she could support such a shift. Given that Johnson's disappearing act was so brazen, the audience, predominantly the Eurosceptic wing of the Conservative party,[19] had to desperately want to believe the backstop had indeed disappeared. And as for the distraction necessary to grab that audience's attention, this was provided by the consent arrangements involving the Northern Ireland Assembly which Michel Barnier described as the 'democratic cornerstone' of the revamped Protocol.[20] Although May had sought this insertion into the deal, imploring EU leaders that 'the EU has to make a choice too' if it is to secure a deal,[21] the EU was

18 Geoffrey Cox MP, HC Deb 12 March 2019, vol 656, col 188.

19 The efforts to disguise the Protocol's impact were notably unsuccessful in Northern Ireland; see D Henig, 'Balancing regulation, devolution, and trade: a global issue rendered acute in Northern Ireland' (2021) 16 Journal of Cross Border Studies in Ireland 177, 189.

20 S Fleming, J Brunsden and M Khan, 'No 10's concessions in race to break Brexit deadlock' *Financial Times* (London 17 October 2019).

21 T May, PM speech in Grimsby (*Gov.uk* 8 March 2019).

never going to entrust such a concession to a Prime Minister whose administration was evidently tottering and who had no credibility with this audience.[22] This concession, constrained though it undoubtedly was by the requirement of cross-community support in the Assembly to end the Protocol's trade terms, was thus made to Johnson instead of May, in the knowledge that he had chutzpah to spare to perform this feat. The backstop covering the whole of the UK was gone. And, with a UK electorate weary of the saga of Brexit and eager for the relief of the 'oven-ready' deal Johnson promised, the 2019 general election was long over before attention turned to the extent of the up-front arrangements for Northern Ireland which had replaced it.

Storing up trouble

That Johnson's version of the Northern Ireland Protocol was ever accepted by Parliament is thus much more about how it was sold, particularly in the December 2019 general election campaign which generated Johnson's sizeable Commons majority, than about its quality as a legal instrument, given that its trade and product arrangements amounted to a jumble of opaque and apparently contradictory provisions which ultimately proved unimplementable in its agreed form. These difficulties open up the counterfactual discussion, in light of the series of crises which have befallen Johnson's Protocol, as to whether Theresa May's version of the deal would have provided a more stable platform for Northern Ireland after Brexit.

From the DUP there has been little remorse over the role it played in rendering May's deal unacceptable to Parliament, even if this paved the way to the Johnson Protocol. Indeed, for Nigel Dodds her deal led to the same end point, if by a slightly more circuitous route:

> The May backstop contained a regulatory border in the Irish Sea in exactly the same way as the protocol. Mrs May said that the rest of the UK would just tag along and keep its laws in step with the EU. That was not legally enforceable under the treaty and, politically, the Tory party would never have accepted such a scenario, as was demonstrated in the many rejections of her backstop by her own party. Likewise, the May backstop had Northern Ireland in EU customs union rules with a temporary add-on of Great Britain being tacked on. That would never have survived under May's successor, even if it had squeaked through her own party.[23]

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22 Interviews with key EU Brexit negotiators also indicate that it was only after Johnson took office that the UK Government presented a legal scheme for the consent mechanism; de Rynck (n 17 above) 29.

23 S Breen, 'DUP rejects suggestion party should have agreed to Theresa May's backstop' *Belfast Telegraph* (21 January 2021).

The first of these claims relates to product standards, and, for all that at-border customs checks were prevented under May's backstop arrangements, there remained considerable scope for regulatory divergence between Great Britain and the EU Single Market rules which would be applicable to Northern Ireland after Brexit. The outline document on the EU–UK Future Relationship which accompanied May's deal recognised that the negotiations would encompass a 'spectrum of different outcomes',[24] leaving unstated that only complete alignment between Great Britain and the EU would altogether negate the need for checks on movements between Great Britain and Northern Ireland. Given that the sentiment of the Conservative Party was so opposed to maintaining deep regulatory alignment between Great Britain and the EU, in Dodds' reckoning there was no possibility of an agreement on the Future Relationship which would avoid the creation of new regulatory barriers affecting Northern Ireland.

May's Protocol, therefore, would have been subject to many of the same pressure points as Johnson's rework, had it been agreed by the UK Parliament and had the UK Government subsequently become determined to disrupt its operation. Indeed, the opportunity to agree and thereafter unpick a deal which he would have had no ownership over must have appealed to Johnson, given that he voted with the Government when it attempted to gain acceptance for May's Protocol on 29 March 2019, after the Prime Minister had indicated that she would resign even in the event that her deal was passed.[25] May's Protocol, however, could have slowed efforts towards this end, given that only deep regulatory alignment for the UK as a whole would have prevented the backstop from coming into effect. Johnson would openly recognise this in his own negotiations with the EU:

> [T]he backstop acted as a bridge to a proposed future relationship with the EU in which the UK would be closely integrated with EU customs arrangements and would align with EU law in many areas. That proposed future relationship is not the goal of the current UK Government.[26]

Particular elements of the backstop, such as customs alignment, would have also negated concerns over the need for construction of new customs infrastructure at ports covering movements between Great Britain and Northern Ireland which lingered throughout the Future Relationship negotiations. The backstop was, taken as a whole, clearer in the terms of its operation than the Johnson Protocol; it would come

24 Department for Exiting the European Union, Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom (25 November 2018) para 28.

25 F Elliot, 'May vows to resign' *The Times* (London 28 March 2019).

26 Boris Johnson, Open Letter to Jean-Claude Juncker (2 October 2019).

into effect, if necessitated by the absence of a technological solution, to cover any shortfall regarding goods movements resultant from the Future Relationship negotiations. It would not have depended on the simultaneous negotiation of 'at risk' goods before the Joint Committee and the terms of the Future Relationship, the latter on a truncated timeframe given the delays in ratifying the Withdrawal Agreement. This lack of disguise, however, made the backstop a more difficult sell; its operation was intelligible on the face of its terms. As it was, there would be no concerted effort towards making the Protocol work and to engage in collaborative troubleshooting of issues as they inevitably arose as new trading rules took effect. Instead, the UK Government's efforts towards unpicking the 2019 deal have unfolded in several phases.

AND THEN IT FELL APART

Recrimination

In the early months of 2020, Brexit was far from done. The operation of article 5 of the Protocol still needed to be determined through the Withdrawal Agreement's committee processes, alongside the Future Relationship negotiations. The outcome of both of these processes would determine how the Protocol would function in practice. The shine, moreover, was beginning to wear off Johnson's 'brilliant'[27] deal, as more attention was given to the extent of the concessions that the UK Government had made to the EU. Johnson's Government thus found itself under considerable pressure from within the Conservative Party to wrap up the Future Relationship negotiations by the end of 2020, notwithstanding the exigencies of the Covid-19 pandemic response.[28] It also gave an early indication of the extent to which it did not regard the Protocol's terms as fixed in the *New Decade, New Approach* deal to restart power-sharing in Northern Ireland, in which it highlighted its 'aim to negotiate with the European Union additional flexibilities and sensible practical measures across all aspects of the Protocol that are supported by business groups in Northern Ireland and maximise the free flow of trade'.[29] Ministers might have insisted that Future Relationship negotiations 'will be undertaken without prejudice and with full respect to the Northern Ireland protocol',[30]

27 'General Election 2019: Johnson insists no NI–GB goods checks after Brexit' (*BBC News* 8 December 2019).

28 See C Murray and C Rice, 'Into the unknown: implementing the Protocol on Ireland/Northern Ireland' (2020) 15 Journal of Cross Border Studies in Ireland 17, 22.

29 New Decade, New Approach (8 January 2020) 48.

30 Michael Gove MP, HC Deb 27 February 2020, vol 672, col 469.

but the two processes would become increasingly connected. The UK Government thus set about laying the groundwork for the coming confrontation with the EU. Geoffrey Cox, as Attorney General, might have been supportive of Brexit, but he had also demonstrated an uncomfortable willingness to draw attention to the legal limitations which the Withdrawal Agreement placed upon Government policy. His replacement by Suella Braverman would ensure that legal advice around the Withdrawal Agreement would facilitate the Government's policy objectives.

The first clashes between the EU and UK over the implementation of the deal related to the relatively innocuous subject matter of the European Commission Office in Belfast. The UK Government, notwithstanding the Protocol stating that EU representatives would have functions within Northern Ireland,[31] announced that the Commission's Office in Belfast would have to close.[32] This skirmish signalled what was to come; the UK Government, eager to deflect from the terms it had agreed in the redrafted Protocol, sought to achieve 'victories' over the EU which would provide visible symbols of Brexit taking effect. The UK Government refused to undertake any construction of new customs facilities in Northern Ireland,[33] although it did, *sotto voce*, acknowledge that the expansion of some port facilities would be necessary to handle 'agri-food checks and assurance'.[34] It justified its 'minimum possible bureaucratic consequences' approach to implementing the Protocol on the basis that the Protocol's trade provisions 'might only be temporary'.[35] These provisions, however, were not temporary; they were event-limited. And the event in question, a majority vote in the Assembly supporting their termination (to be held four years after the transition/implementation period ends), as required under article 18 of the Protocol,[36] was always likely to be a high hurdle to cross given the position of the Northern Ireland parties towards the Protocol. The argument as to how the EU would go about monitoring the implementation of the Protocol was rolled into the developing disagreements over how the Protocol was to be applied in the Joint Committee. The issue of exit declarations under the EU customs code continued to conflict with Johnson's promises concerning

31 Withdrawal Agreement (n 1 above), PINI art 12(2).

32 T Connelly, 'UK refuses EU request for Belfast office' (*RTE* 1 April 2020).

33 Cabinet Office, *The UK's Approach to the Northern Ireland Protocol* (2020) CP 226, para 32.

34 Ibid para 34.

35 Ibid para 16.

36 See G Anthony, 'The Protocol in Northern Ireland law' in McCrudden (ed) (n 5 above) 118, 124.

movement of goods from Northern Ireland to Great Britain.[37] The lack of a definition of 'at risk' goods within article 5, moreover, had been a pragmatic decision at the time of the Withdrawal Agreement; pushing this difficult question down the road and onto a technocratic body enabled the deal to be concluded and ratified. The issue, moreover, would only become live insofar as the UK did not agree regulatory alignment for Great Britain with the EU product standards. But as it became clear that Johnson's negotiating team was pushing for the broadest possible scope for regulatory divergence from the EU, these questions took on renewed significance. Under the terms of article 5 of the Protocol, however, the EU believed that it could withstand this pressure safe in the knowledge that its terms set out that all goods were presumed to be at risk of onward movement through Northern Ireland into the Single Market unless they fell within an agreed exemption.

In September 2020 the UK Government took the dramatic step, under the Internal Market Bill, of making legislative proposals which, if enacted, would conflict with some of the Protocol commitments which it had come to regret relating to exit procedures for goods moving from Northern Ireland to Great Britain and state aid.[38] The EU threatened to walk away from Future Relationship negotiations unless this threat of what the Northern Ireland Secretary admitted was a breach of the UK's commitments was lifted. At this point, however, Johnson harnessed some of the ambiguous drafting of the Protocol's terms to attempt to redirect the narrative away from his administration's willingness to breach its commitments:

> The EU is threatening to carve tariff borders across our own country, to divide our land, to change the basic facts about the economic geography of the United Kingdom and, egregiously, to ride roughshod over its own commitment under article 4 of the protocol, whereby 'Northern Ireland is part of the customs territory of the United Kingdom'.[39]

This bombast encouraged the DUP to believe that Johnson was working to 'undo some of the damage done by the withdrawal agreement',[40] but was also met by calls for 'rigorous implementation'[41] of the Protocol from Sinn Féin, the Social Democratic and Labour Party, the Alliance Party and the Green Party. Much as the latter phrase would come to be used by the DUP to present these parties as committed to a rigid approach to the Protocol without due regard to its impact on the

37 EU Committee, The Protocol on Ireland/Northern Ireland (2020) HL 66, para 150.

38 Internal Market Bill 2020, cls 42 and 43.

39 Boris Johnson MP, HC Deb 14 September 2020, vol 680, col 44.

40 Sammy Wilson MP, HC Deb 14 September 2020, vol 680, col 67.

41 D Young, 'NI Protocol must be honoured, pro-remain parties demand' *Belfast Telegraph* (7 September 2020).

ground in Northern Ireland, their joint position was a reaction against the UK Government's willingness to take unilateral action in the face of its international law commitments. In truth, no one yet knew what the practical implementation of the Protocol would involve because it was impossible to assess how it would interact with the outcome of the Future Relationship negotiations.

Rapprochement

The showdown over the Internal Market Bill was not resolved until December 2020, in the dying days of the Brexit implementation/transition period. Agreement was reached on the practical arrangements for EU officials overseeing the UK's management of the Single Market's trade boundaries, excluding export procedures for goods moving from Northern Ireland to Great Britain and over controversial aspects of the operation of the Protocol's state aid rules. With these issues addressed, the UK Government withdrew the controversial clauses from part 5 of the Internal Market Bill, which it was in any event struggling to get through the House of Lords. Both parties recognised that there was no viable way to apply EU rules regarding medicinal products at the end of the transition/implementation period without undermining the operation of public healthcare in Northern Ireland, and so an extended grace period was put in place to allow space for a legal solution to be developed. Furthermore, a series of three-to-six month grace periods were agreed with regard to the checks and documentation required to move food products and particularly chilled meat products from Great Britain to Northern Ireland. These would have been some of the most onerous checks which would have accompanied the introduction of the Protocol, with the EU closely regulating food safety and provenance within the EU market and the issue having received particular scrutiny since the 2013 horsemeat scandal.[42]

These grace periods were essential; so stark was the change in trading rules that the UK Government knew would come into effect at the end of December that a strict application of the Protocol's terms would have resulted in an unrealisable burden of checks on movements of food products between Great Britain and Northern Ireland which would have seriously disrupted trade as a whole. There was also no Joint Committee agreement to exclude broad categories of goods from being treated as being at risk of subsequent movement from Northern Ireland into the EU Single Market (beyond limited exemptions where there was no possible economic benefit, in terms of avoiding tariffs, in using Northern Ireland as a 'back door' into the Single Market). Both sides appreciated that the Protocol's terms made trade divergences

42 See C Barnard and N O'Connor, 'Runners and riders: the horsemeat scandal, EU law and multi-level enforcement' (2017) 76 Cambridge Law Journal 116.

inevitable, especially because the Trade and Co-operation Agreement (TCA) that was then being finalised would include no arrangements for ongoing UK–EU SPS alignment. The health certification and chilled meat extensions were billed by Michael Gove as a period in which processes and supply chains could be adjusted, 'to ensure that supermarkets are ready'.[43] But there remained a gulf between what Gove was presenting to Parliament as the prospect of 'limited and proportionate SPS checks'[44] and the reality of operating an EU external frontier for goods.

The Protocol has thus never been implemented as agreed; it was subject to changes to the operation of its agreed terms before they even entered effect. Even if some, and likely most, of the December 2020 adjustments could have been quietly agreed through the normal workings of the Joint Committee, the UK Government projected the narrative that such brinkmanship 'helped to concentrate minds'.[45] This proposition, however, has sustained a repetitive cycle of post-Brexit confrontations with both the UK and the EU becoming locked in an antagonistic relationship over the application of the Protocol's complex trade rules. The entry into force of the Protocol was always going to produce dislocations, but for many retailers and hauliers the first weeks of 2021 were miserable. Businesses knew the terms by which the Protocol would operate and the extent of the agreed grace periods with only a matter of days to spare before the end of the implementation/transition period.[46] For large businesses, this required a herculean process of adapting supply chains and getting accustomed to new processes for trading goods from Great Britain into Northern Ireland. Some smaller businesses concluded that, in the midst of a pandemic, trading with such a small market was not worth the required adjustment in the short term.

Within days of the Protocol taking effect the DUP was using these predictable (and predicted) trade dislocations which attended the thin post-Brexit trade deal to agitate for the UK Government triggering article 16 of the Protocol and putting in place emergency adjustments to the Protocol's operation. Then, at the end of January 2021, the UK Government seized upon the outrage generated by the EU's moves towards using article 16 to establish export controls on the notional movement of Covid-19 vaccines from the EU into Northern Ireland

43 Michael Gove MP, HC Deb 9 December 2020, vol 685, col 854.

44 Ibid col 851.

45 Committee on the Future Relationship with the European Union, *Oral Evidence: Progress of the Negotiations on the UK's Future Relationship with the EU* (17 December 2020) HC 203, Michael Gove MP, Q1112.

46 A Jerzewska, 'The Irish Sea customs border' in C McCrudden (ed) (n 5 above) 207, 209.

to present the EU Commission with a shopping list of additional adjustments to the Protocol's operation. The EU might have quickly backtracked, but it highlighted several of the challenges that it would continue to face. The Protocol obliges the EU to handle sensitive areas of law-making and law application in the Northern Ireland context, which for all its complexity is of little economic importance in the context of the entire Single Market for goods. It must do so in the face of opposition to the Protocol arrangements from the Unionist parties in Northern Ireland and from a UK Government which was not a collaborator in making these complex rules work, but a major neighbouring competitor economy set on a path of divergence. EU missteps were thus almost inevitable, as was the resultant instrumentalisation of those missteps to advance UK Government efforts to redraw the boundaries of the Protocol.

Half life

The EU's January 2021 blunder produced, for the UK Government, an entirely 'new situation' around the Protocol, characterised by 'unsettledness'.[47] Seizing on the opportunity, it announced unilateral extensions to the grace periods applicable under the Protocol which it had agreed only three months previously.[48] In other circumstances this action might have drawn questions as to the UK Government's failure to foresee that longer grace periods would be necessary, but the vaccines debacle gave the UK Government considerable political cover in pursuing its goal of stripping parts out of the Protocol. The assumption will have been that, still reeling from the vaccines debacle, the EU would either accept these adjustments or respond with token gestures. In the end, the latter would involve a stop-start enforcement action and a short-term delay to the TCA ratification process. The UK Government presented itself as having Northern Ireland's business interests at heart and would in due course brush off Commission enforcement proceedings as churlish and misguided as Unionist tensions over the Protocol rose in Northern Ireland ahead of the summer marching season.[49] The EU Commission, in an effort to restore its reputation for careful action with regard to Northern Ireland, suspended its enforcement action and invited renewed talks with the UK Government over its outstanding difficulties with the Protocol. Instead, the UK Government pivoted once again. Having been

47 European Scrutiny Committee, 'Oral evidence: the UK's new relationship with the EU' (17 May 2021) HC 122, Lord Frost, Q81.

48 Viscount Younger of Leckie, HL written Statement 811 (3 March 2021).

49 Northern Ireland Office, *Northern Ireland Protocol: The Way Forward* (2021) CP 502, para 26.

talking for months about the need to address 'teething problems'[50] and 'barnacles'[51] preventing the Protocol from working effectively, in July 2021 the UK Government sought to upend the Protocol's terms.

The Command Paper reflected a high point in Lord Frost's influence over the UK Government's approach to relations with the EU. It was premised on the position that the Protocol's impact on Northern Ireland, in terms of societal upheaval and trade dislocation, had been so detrimental that the conditions existed for the UK to undertake emergency measures on the basis of article 16 of the Protocol.[52] If the EU did not agree to a fundamental reworking of the Protocol, the Command Paper therefore indicated that the UK Government would take unilateral steps to effect a sweeping series of changes to its terms. In terms of goods movement, the proposals outlined separate arrangements for goods moving between Great Britain and Northern Ireland and for goods movements through Northern Ireland into Ireland.[53] In terms of goods production, the Paper proposed a dual regulatory regime, with businesses in Northern Ireland opting to produce goods to EU standards or the standards necessary to place goods on the UK internal market.[54] As a result of these changes, the paper proposed that VAT rules could operate on the basis of the UK system[55] and that the oversight function of the CJEU could be brought to an end.[56]

The UK Government made these demands in the knowledge that the EU had publicly repeated that it would not renegotiate the Protocol; in other words that much of this agenda was unacceptable. This paper was thus about painting the EU as intransigent. Following the launch of the Command Paper, the UK Government's arguments about the Protocol underwent a profound shift. Complaints about the Protocol's implementation, and the lack of 'immensely sensitive handling' of its operation by the EU,[57] began to be accompanied by the suggestion that the deal was inherently flawed and had been forced upon the Johnson Government by its need to secure a deal in the face of parliamentary opposition to its policy in the Autumn of 2019 and boxed in by the concessions made to the EU by Theresa May's Government. For Lord Frost, 'we inevitably still operated within the intellectual and political

50 Boris Johnson MP, HC Deb 13 January 2021, vol 687, col 290.

51 L O'Carroll, 'Brexit: Johnson says UK trying to cut "ludicrous" Northern Ireland checks' *The Guardian* (London 20 April 2021).

52 Northern Ireland Office (n 49 above) para 29.

53 Ibid para 48.

54 Ibid para 58.

55 Ibid para 54.

56 Ibid para 68

57 Lord Frost, 'Foreword' in R Crawford, *The Northern Ireland Protocol: The Origins of the Current Crisis* (Policy Exchange 2021) 7.

framework set by the Joint Report'.[58] The space for negotiation over the Protocol's operation narrowed as the UK Government's efforts seemed to be increasingly directed towards repudiation of the deal. Alongside this confrontational policy, the DUP set out its policy of escalating withdrawal from Northern Ireland's post-1998 governance arrangements in light of the Protocol's operation, feeding into the UK Government's claims of societal disruption.[59]

The Command Paper was launched in the final days before the summer recess. Westminster and Brussels emptied, and little appeared to happen. In September, the UK Government casually announced, in a written statement, the open-ended extension of the existing grace periods restricting the application of Protocol checks.[60] The Commission did not respond, in line with the Command Paper's pretext for discussions over the Protocol that the EU 'should agree a "standstill" on existing arrangements, including the operation of grace periods in force, and a freeze on existing legal actions and processes, to ensure there is room to negotiate without further cliff edges'.[61] The EU then went further and put a suite of proposals on the table to overhaul the operation of the Protocol. The matter of how EU rules would impact on the supply of medicine had effectively been parked during the protracted Protocol negotiations, with the EU agreeing an extended grace period in 2020 to allow the problem to be addressed once the supply issues were fully understood. This did not stop senior UK Government figures, led by Lord Frost, presenting the issue as a major challenge for the Protocol's operation; 'aspects that are simply unsustainable in the long-term for any Government responsible for the lives of its citizens — like having to negotiate with a third party about the distribution of medicines within the NHS'.[62] The first of the EU proposals thus compromised on the product compliance checks it would require for medicines moving from Great Britain, provided they were for use only in Northern Ireland.[63] Second, on SPS checks, the EU proposed to simplify paperwork and reduce the volume of checks for retail goods that are moving into Northern Ireland from Great Britain which will be sold in Northern Ireland. Any mode of transport from Great Britain carrying such retail goods, such as a container, would

58 Ibid 6. He has further elaborated his position that the Protocol was shaped 'by relative UK weakness and EU predominance in the Withdrawal Agreement negotiations'; Lord Frost, 'Foreword' in G Gudgin, *The Island of Ireland: Two Distinct Economies* (Policy Exchange 2022) 6.

59 J Donaldson, 'Now is the time to act' (La Mon Hotel, Belfast 9 September 2021).

60 Lord Frost, HL Written Statement 257 (6 September 2021).

61 Northern Ireland Office (n 49 above) para 77.

62 Frost (n 57 above) 7.

63 EU Commission, Protocol on Ireland and Northern Ireland – Non-Paper – Medicines (2021) para 9-25.

only have to fill in a single Export Health Certificate. Documentary checks would also be digitised. Product movements that are prohibited under EU law, such as those of sausages, could continue, but would need to satisfy EU production requirements and be accompanied by documentation. These adjustments would be subject to greater labelling requirements and enhanced monitoring, and the proposals provided for a safeguard clause if products were found to be crossing into Ireland.[64] Beyond these measures to address products covered by the grace periods, the assumption which underpinned the EU proposal was that the level of checks required by a reformed Protocol would very much depend on UK Government policy; the extent to which the UK chooses to maintain alignment with EU regulatory standards for Great Britain will determine the level of checks necessary on goods moving from Great Britain to Northern Ireland. Third, on customs checks, the EU proposed revisiting the 'at risk' of moving into the EU category of goods to reduce its scope, and reducing customs formalities for goods not deemed to be at risk of onward movement, although much of the scope of these proposals remained to be fleshed out.[65] Finally, on the issue of engagement by Northern Ireland institutions and stakeholders in the development of EU law applicable under the Protocol, the EU proposals indicate that greater deliberation is possible within the Withdrawal Agreement's structures but did not go so far as to offer pre-legislative consultation to Northern Ireland's representatives.[66] This series of proposals is based upon the premise of mitigating the Protocol as agreed, not starting over with an entirely new model for Northern Ireland's post-Brexit trade rules, and it therefore did not engage with many of the UK's priorities, such as VAT rules, state aid or the role of the CJEU.

The UK Government struggled to formulate an immediate response to this package of reforms. Indeed, having set up the pretext for triggering article 16, the axe never seemed to fall. A series of crises distracted the UK Government from bringing about this confrontation with the EU each time that it seemed on the cusp of doing so. The fallout over the Government's unsuccessful attempts to prevent the suspension of Owen Paterson for 'egregious' breaches of the MP's code of conduct[67] ate up weeks of the political agenda, to be followed

64 EU Commission, Protocol on Ireland and Northern Ireland – Non-Paper – Sanitary and Phytosanitary (SPS) Issues (2021) para 8-13.

65 EU Commission, Protocol on Ireland and Northern Ireland – Non-Paper – Customs (2021) paras 21–26.

66 EU Commission, Protocol on Ireland and Northern Ireland – Non-Paper – Engagement with Northern Ireland Stakeholders and Authorities (2021) para 9-23.

67 House of Commons Committee on Standards, 'Mr Owen Paterson' (26 October 2021) HC 797, para 212.

by the breaking of the Party-gate scandal which would overshadow the remainder of Johnson's premiership. Every time the prospect of invoking article 16 loomed, one of these distractions consumed Johnson's attention and Lord Frost was obliged to inform Parliament that the Government was going to let negotiations run for a further 'short number of weeks'.[68] And then, in February 2022, the looming war clouds over Eastern Europe wrested the EU and the UK Government's attention away from the dreary steeples of Fermanagh and Tyrone. Not even the DUP collapsing the Northern Ireland Executive could persuade the UK Government to undermine the necessary EU–UK cooperation in the days and weeks after Russia's invasion of Ukraine. Technical talks over the Protocol stopped, on the pretext that they should not overshadow the pre-Assembly election campaigning in Northern Ireland, but also because of the need to focus energies on Ukraine. There had also been a significant change in personnel in that Lord Frost, the loudest proponent of using article 16, had resigned from his post in December 2021. In his wake, ministers concluded that notwithstanding the apparent breadth of article 16's terms, and the legal cover it potentially provided as a mechanism within the Protocol itself, the UK Government was always going to find it difficult to justify many of its Command Paper objectives as proportionate adjustments necessary to address live issues with the Protocol's operation. And, as a result, the Protocol continued to function in a sort of half-life. Paterson, Party-gate and Putin postponed the predicted reckoning, but these distractions did not sustain it in its original form. Instead, by creating a protracted crisis, these delays have extended the uncertainty around the Protocol. With the ongoing uncertainty over trade rules and product standards, it inevitably became more of a challenge to do business in Northern Ireland, and with this uncertainty any prospect of a Protocol dividend was lost.

Destruction?

In April 2022, immediately before the Northern Ireland Assembly elections, the UK Government began to flag a new approach, based around fresh legislation to deny domestic legal effect to large parts of the Protocol, with ministers giving new life to the dubious narrative that the UK had 'signed it [the Protocol] on the basis that it would be reformed', and that 'there comes a point where we say: "You haven't reformed it and therefore we are reforming it ourselves"'.[69] Having trailed this development with scant regard to the niceties ordinarily observed during an election period, the then Foreign Secretary Liz

68 Lord Frost, HL Deb 10 November 2021, vol 815, col 1720.

69 European Scrutiny Committee, 'Oral evidence: regulating after Brexit' (20 April 2022) HC 1262, J Rees-Mogg, Q26.

Truss introduced the Northern Ireland Protocol Bill to the Commons within weeks of the election results being announced.

In terms of justification, the UK Government has returned to its persistent refrain, going back to the transition/implementation period, that the Protocol must be reformed because it does not command cross-community consent within Northern Ireland. That Brexit did not command cross-community consent and that the Protocol was a painstakingly negotiated construct which attempts to mitigate some of the impacts of Brexit on Northern Ireland is left unmentioned. The precise nature of the supposed breach of the 1998 Agreement remains unclear. The UK Government explicitly accepted that the December 2020 Joint Committee amendments meant that the Protocol protects the 1998 Agreement 'in all its dimensions'[70] and has actively defended litigation against the Protocol as compliant with the 1998 Agreement.[71] Cross-community consent, under the Agreement and its implementing legislation, specifically relates to decisions within the Northern Ireland Assembly, and not to the operation of international treaties concluded by the UK Government.[72] The published summary of the Government's legal advice therefore side-stepped such claims and instead asserted that the EU has been so dogmatic in the application of the Protocol's trade and goods regulation provisions that it has undermined power-sharing.[73] This position, however, is just as difficult to sustain. It flies in the face of the consistent DUP opposition to the Johnson Protocol from the point at which it was first published.[74] The EU, moreover, has repeatedly agreed reworks to the Protocol's operation, with regard to exit declarations and state aid in December 2020, in acquiescing to the UK's grace period extensions in the summer of 2021 and in legislating for its proposed solution to the problem of medicine supply in April 2022.[75] If the Protocol is more challenging to operate in practice than some had at first hoped, this is in large part the result of the limited nature of the TCA, which saw the UK Government prioritise its capacity for divergence in Great Britain from EU food, agriculture and

70 Joint Statement by the Co-chairs of the EU–UK Joint Committee (Brussels 8 December 2020).

71 For a summary of these, successful, arguments, see: *In re Allister* [2022] NICA 15, [87].

72 Northern Ireland Act 1998, s 4(5) and s 42.

73 Foreign, Commonwealth and Development Office, 'Policy Paper: Northern Ireland Protocol Bill: UK Government Legal Position' (13 June 2022).

74 See, for example, J Donaldson MP, HC Deb 21 October 2019, vol 666, col 272.

75 Directive 2022/642/EU amending Directives 2001/20/EC and 2001/83/EC as regards derogations from certain obligations concerning certain medicinal products for human use made available in the United Kingdom in respect of Northern Ireland and in Cyprus, Ireland and Malta.

product standards. The UK Government's choices are at the root of the supposed 'peril that has emerged' for Northern Ireland.[76]

Brexit has brought with it inevitable dislocations for the Northern Ireland economy, but there remains very little hard data, as opposed to anecdote, in the public domain on the nature and extent of the supposed divergences which have specifically resulted from the Protocol, with even its detractors acknowledging that 'it is unclear how the Protocol has impacted NI's trade'.[77] Even if such data were available, this would support the use of the trade protection provision within the Protocol, article 16. Not only has there been no UK Government move to take the steps necessary to invoke article 16,[78] this provision does not have sufficient reach to support a wholesale disapplication of Protocol obligations on a permanent basis.[79] It is furthermore untenable for the UK Government to invoke the doctrine of necessity, based on a legal position that it 'has no other way of safeguarding the essential interests at stake than through the adoption of the legislative solution',[80] when its own conduct has contributed to the situation, and when it has made no effort to use the article 16 mechanism for addressing such societal concerns.[81] The UK Government's loss of interest in article 16, however, had left the DUP exposed to rival parties in the 2022 Assembly election campaign, compounding what it regarded as the betrayal of the Withdrawal Agreement. The party had become so distrustful of the UK Government's *bona fides* that it refused to reengage with power-sharing processes in Northern Ireland notwithstanding the publication of the new legislation.[82] The Bill, on its face, would appear to be everything that the DUP could ask for and more. But it is precisely because it is so far-reaching and so reliant on placing powers into the hands of ministers with limited parliamentary oversight that provokes questions over whether it is likely to make it to the statute book promptly and without extensive amendment.

At present, the EU law obligations which remain applicable to Northern Ireland under the Protocol flow directly into domestic law by the 'conduit pipe', to use the language of the UK Supreme Court

76 Legal Position (n 73 above).
77 Gudgin (n 58 above) 71.
78 Withdrawal Agreement (n 1 above) PINI, annex 7.
79 B Melo Araujo, 'A contextual analysis of article 16 of the Ireland–Northern Ireland Protocol' (2022) 71 International and Comparative Law Quarterly 531, 556–557.
80 Legal Position (n 73 above).
81 B Melo Araujo in this volume: NILQ 73(S1) 89–119.
82 'NI Protocol: Government urges DUP to return to Stormont "as soon as possible"' (*BBC News* 14 June 2022).

in *Miller*,[83] of section 7A of the European Union (Withdrawal) Act 2018. Clause 2 of the new Bill excludes a swathe of Protocol provisions from the scope of section 7A, in effect cutting the pipe. It is supported by clause 3, which excludes any interpretation of law in light of the Withdrawal Agreement, restricting the effect of section 7C of the 2018 Act. These changes do not, of themselves, absolve the UK of its international obligations.[84] The EU can continue to take action against the UK for this breach of the Withdrawal Agreement.[85] But it severs the connection between these Protocol obligations and domestic law. The Protocol provisions directly excluded from the operation of section 7A include all of its provisions relating to the movement of goods (including customs),[86] the regulation of goods,[87] state aid rules,[88] and the CJEU's enforcement role.[89] In each of these regards, ministers are given far-reaching powers to make new domestic law, enabling the UK Government to substitute its own scheme in place of the Protocol's rules. Clause 22 confirms that ministers can make regulations under this Act to make any provision which could be made by an Act of Parliament. The supposed limitation to this power, repeated throughout the Bill, is that the regulations are such that the minister 'considers appropriate' in connection with the Protocol, the broader Withdrawal Agreement or this legislation. This amounts to little by way of a constraint, with one Committee concluding with regard to these delegate powers that 'it seems wholly inappropriate for this to be done by means of subordinate legislation, particularly where that legislation is capable in certain circumstances of only requiring the negative procedure'.[90] It is, for example, very different from section 8C of the 2018 Act, which also gives ministers power to make such regulations as they 'consider … appropriate', but where the purpose must be connected to the implementation of the Protocol. Powers expressed in the same terms faced the most strenuous opposition on grounds of side-lining Parliament in the context of undermining the UK's international law commitments when they were included in the Internal Market Bill as proposed, and there is no reason to think that the House of Lords will be any more receptive to them in the current context.

83 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [65].

84 Vienna Convention on the Law of Treaties 1969 (1980) 1155 UNTS 331, art 27.

85 For an exploration of the limits of such rebalancing measures, see Melo Araujo (n 79 above) 558–562.

86 Northern Ireland Protocol Bill 2022, cl 4.

87 Ibid cl 8.

88 Ibid cl 12.

89 Ibid cl 13.

90 Delegated Powers and Regulatory Reform Committee, 'Northern Ireland Protocol Bill' (2022) HL 40, para 60.

Clause 15 of the Bill purports to protect the operation of the Protocol's provisions on human rights and equality, the Common Travel Area and north–south co-operation.[91] Ministers do not gain the power to add these provisions to the Bill's stated exclusions from the operation of section 7A. The Protocol's human rights and equality commitments, moreover, rely upon the operation of CJEU jurisprudence which explains how the relevant EU law functions.[92] Thus, when clause 14 of the Bill sets out broad exclusions to domestic courts drawing, within the terms of article 13(2) of the Protocol, on CJEU jurisprudence or general principles of EU law, it does so only with regard to excluded provisions. This seeks to insulate the UK Government from accusations that it is undermining these significant, but hitherto uncontroversial, arrangements. But these safeguards are far from watertight and appear to be undercut by general provisions. Clause 22, for example, defines the power to make regulations provided in multiple parts of the Bill and affirms that they can be used to modify the operation of section 7A of the 2018 Act. Although article 2 cannot be excluded by ministers in its entirety, aspects of its operation could therefore be side-lined through, for example, the promulgation of regulations related to goods standards, under clause 9.[93] Clause 14, moreover, cannot be reconciled with clause 20 which asserts, without any protection for the operation of article 2, that courts and tribunals are not bound by 'any principles laid down, or any decisions made, on or after the day on which this section comes into force by the European Court'. The overriding effect of this general exclusion is to remove the obligation upon Northern Ireland's courts to interpret the provisions of the Protocol 'in conformity' with relevant CJEU case law. The Bill thus claims to protect the Protocol's human rights and equality provisions in one clause but undermines their substantive operation in others.

The Bill's explanatory notes contain a commitment, as required by the Sewell Convention, that 'the UK Government will write to the devolved administrations to seek consent to legislate in the normal

91 Withdrawal Agreement (n 1 above) PINI, arts 2, 3 and 11.

92 *In re SPUC Pro-Life Limited (Abortion)* [2022] NIQB 9, [93] (Colton J). See C Murray and C Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72 Northern Ireland Legal Quarterly 1, 21–23.

93 This issue could have been even more significant, given that the introduction of the European Accessibility Act, Directive 2019/882/EU, came too late to be covered by art 2 of the Protocol, but product accessibility standards are a significant aspect of numerous EU regulations; L Waddington, 'A disabled market: free movement of goods and services in the EU and disability accessibility' (2009) 15 European Law Journal 575. Reductions of these protections would be prevented by the art 2 'non-diminution' guarantee if its operation is not curtailed.

manner'.[94] This, of course, is a hollow commitment in the context of legislation which primarily affects Northern Ireland when Stormont is not functioning. And even if Stormont was operative, the track record of Brexit legislation establishes that the UK Government has been willing to ignore the position of the clear majority within the Northern Ireland Assembly which has expressed opposition to these moves.[95] Clause 15, moreover, does not protect the operation of the article 18 'Stormont lock' from being excluded from domestic law by ministers if there is the prospect that majority support for the Protocol's trade terms in the continuation vote due in 2024 would embarrass the Government. This might not be one of the permitted purposes for ministerial action under the Bill, but these are so broadly drawn as to effectively allow for ministers to pursue that end under a broad range of pretexts. The Protocol Bill thus stops large parts of the Protocol from functioning in Northern Ireland law. Beyond that, the Bill is skeletal. It gives ministers the power to replace these arrangements with a dual regulatory system for product standards and red/green lanes for customs, as outlined in the 2021 Command Paper and repeated in a brief policy paper which accompanied the Bill,[96] but ministers can present this or any other plan to Parliament through regulations on an 'its-this-or-chaos' basis once the Bill becomes law. The Bill, with all its red meat for Brexit's most ardent backers, did not save Boris Johnson's premiership. The need to shore up these supporters in the race to become his successor, however, meant that all Conservative Party leadership candidates accepted the Bill as a given, and provided a boon to Liz Truss, as the minister responsible for the legislation, in her successful campaign.

Reconstruction?

Even as the Bill sets up the destruction of the Protocol, however, it continues to be presented by the UK Government as being a route to negotiations, by demonstrating the seriousness of its intent.[97] This account of the Bill puts considerable weight on its negotiated settlement provision, clause 19, which acknowledges that the UK and EU could reach a new deal which modifies, supplements or replaces the Northern Ireland Protocol, in whole or part. In those circumstances ministers are enabled to make regulations to give effect to that Agreement. Furthermore, under clause 15, this can include restoring the conduit pipe between the Protocol and domestic law. The provision holds out the possibility that the whole spiralling crisis can

94 Northern Ireland Protocol Bill Explanatory Notes (2022) para 24.
95 Murray and Rice (n 92 above) 10.
96 Foreign, Commonwealth and Development Office, Policy Paper: Northern Ireland Protocol: The UK's Solution (13 June 2022).
97 Chris Heaton-Harris MP, HC Deb 7 September 2022, vol 719, col 223.

be forgotten as swiftly as a bad dream in *Dallas*. In UK constitutional terms, however, this possibility is stage-managed by ministers. Just as the UK Government has belatedly accepted more extensive trade treaty scrutiny arrangements in Parliament, including public consultations,[98] this clause pointedly excepts any reworking of the Protocol from them. If, as with previous accommodations with the EU over the Protocol, any deal takes the form of an interpretive understanding, this would also sidestep the treaty scrutiny processes under the Constitutional Reform and Governance Act 2010. Under this Bill, Parliament will be giving ministers the power to make regulations to give effect to any deal reached with the EU, with MPs being presented with a one-off vote on arrangements that they can do little to influence.

If this is all a negotiation tactic, it is undoubtedly a high-stakes approach. The publication of the Bill is, of itself, incompatible with the UK's obligations to act in good faith to give effect to the Withdrawal Agreement[99] and has thus prompted the EU to reinitiate suspended enforcement proceedings, alongside fresh proceedings on a raft of protocol breaches, and to take retaliatory steps to exclude the UK from Horizon 2020. These proposals go to the core of the Protocol, and the UK cannot expect to escape such commitments without consequence. Claims the Protocol is 'clearly undermining' Good Friday Agreement obligations,[100] without ever articulating specific conflicts between the Protocol and the 1998 Agreement, do not help its cause in negotiations.

In reality, the similarity between the goods-movement elements of the EU's October 2021 proposals and the UK Government's plans disguises the fundamental difference in the two positions. The EU is able to countenance different channels for goods moving to Northern Ireland and those moving through Northern Ireland into the Single Market because such measures can be managed by agreement in the Joint Committee on the application of article 5 of the Protocol. Beyond that proposal, the UK Government's plan is not to reform the Protocol's application, but to scrap it and replace it with very different rules. Clause 19 is thus not an invitation to negotiation, it is an ultimatum, and its timing is conditioned by how the UK Government has approached the UK's divergence from the EU since Brexit. At present, the Protocol

98 Lord Grimstone of Boscobel to Baroness Hayter (19 May 2022).

99 Withdrawal Agreement (n 1 above) art 5.

100 M Ellis, Address to the Inaugural UK–EU Parliamentary Partnership Assembly (12 May 2022). The closest one minister could come to articulating these concerns is that 'the philosophy that underpins the Good Friday Agreement is the consent of both communities'; European Affairs Committee Protocol on Ireland/Northern Ireland Sub Committee, 'Oral evidence: follow-up inquiry on the impact of the protocol on Ireland/Northern Ireland' (26 May 2022), James Cleverley MP, Q67.

(as agreed) has been manageable because of the extension of grace periods which cover food safety and because there has been little active divergence in the product rules applicable in Great Britain and under EU law; its full potential in terms of checks on goods movements has not been realised. Significant developments in UK Government policy are, however, set to have an impact notwithstanding the ongoing 'standstill position' on the Protocol's implementation.[101] The Retained EU Law (Revocation and Reform) Bill, however, sets out the UK Government's plans to diverge from a swathe of retained EU law, and the model of growth pursued by Truss's administration would have been bound to rely on pronounced divergences in product standards.[102] From this perspective, therefore, the Protocol's goods arrangements must be transformed or the UK Government will either have to curtail its own plans for divergences in product standards in Great Britain or have to face responsibility for the introduction of such divergences bringing with them new trade barriers for companies moving goods from Great Britain to Northern Ireland. UK Government ministers have attempted to downplay the issue of future standards divergence, maintaining that 'in many areas, to all intents and purposes there will be no difference', but dual regulation prevents Northern Ireland concerns from restricting the UK Government's freedom of action.[103] A dual regulatory regime is, furthermore, inherently attractive to the UK Government because, in ending the position of Northern Ireland alignment with the Single Market for goods, it addresses the divide in the UK's own internal market and removes the need for the enforcement mechanisms which accompany that status, including the CJEU's role. Such a system, however, would make it difficult for businesses and consumers in Northern Ireland to understand how product standards apply in complex supply chains. Without a 'mountain of bureaucracy',[104] the risk of leakage of goods which do not meet required standards into the EU Single Market would become all but unmanageable, thereby shifting the pressures for new barriers to trade onto the land border. In light of these realities, the question for negotiations remains how committed the UK Government is to this plan in the aftermath of Truss's disastrous premiership, and whether her successor is more willing to compromise should the most pressing issue of checks on goods movements from Great Britain be addressed.

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101 Oral evidence (n 100 above) James Cleverley MP, Q58.

102 Post-Brexit, new EU product standards are also developing, which the UK is not following; see H Benn, How to Fix the Northern Ireland Protocol (Centre for European Reform 2022) 4.

103 Oral evidence (n 100 above) James Cleverley MP, Q65.

104 Maroš Šefčovič, 'Speech on EU–UK Relations' (London 29 June 2022).

The EU's approach, by contrast, has been to attempt to mitigate specific problems with the Protocol as they arise, making considerable play of engaging with stakeholders in Northern Ireland, 'from political leaders to businesses and a cross-section of civic society', in the release of its 2021 proposals.[105] Its introduction of measures to address the supply of medicines showcases this strategy of incremental streamlining of the Protocol's operation. The form of these easements, providing a specific exception for Northern Ireland from the operation of relevant EU law, illustrates the degree of change which can be achieved without having to renegotiate the terms of the Protocol. This approach, however, has hitherto won the EU few plaudits; the medicines issue went from being a flashpoint to being forgotten with little acknowledgment of the EU's moves by the UK Government or the Protocol's detractors. Implementation of the EU's October 2021 proposals, moreover, would result in an increase in checks over the current 'standstill' position on Protocol implementation; a promised '80-percent reduction'[106] on the SPS checks required by EU law under the Protocol is not necessarily an attractive prospect when the open-ended grace periods currently apply to many of these requirements. The problem with an evidence-based approach to ameliorations of EU law's application in the Northern Ireland context becomes one of sequencing; the EU has indicated that it is receptive to improving upon the October 2021 offering on checks, but it requires more information on practical problems before it moves to address them.

This incremental approach does little to address complaints about Northern Ireland's lack of say in post-Brexit EU law-making. The negotiations around the Johnson Protocol produced article 18, which provides an overarching mechanism which can end the application of the Protocol's trade rules if a majority in the Northern Ireland Assembly believe that they are no longer in Northern Ireland's interest. This provision for regular confirmatory votes is significant; it does not exist in other contexts where the EU Single Market applies to 'rule-taker' countries outside the EU, such as the EEA countries and under the Swiss–EU bilateral agreements.[107] Critics have nonetheless maintained that the EU's approach of 'partial ameliorative measures' is unlikely to ever be acceptable to Unionists because of the 'undemocratic nature of the

105 Maroš Šefčovič, 'Speech on the Commission's proposal on bespoke arrangements to respond to the difficulties that people in Northern Ireland have been experiencing because of Brexit' (Brussels 13 October 2021).

106 Ibid.

107 See H H Fredriksen and S Ø Johansen, 'The EEA Agreement as a Jack-in-the-box in the relationship between the CJEU and the European Court of Human Rights?' (2020) 5 European Papers 707.

Protocol'.[108] What remains missing, in the EU's approach, is a more extensive account of how to involve Northern Ireland's democratic institutions and stakeholders in the EU's processes of law-making. The October 2021 proposals on Northern Ireland engagement were the most underdeveloped element of its package and fell some way short of the processes proposed under the latest Swiss–EU negotiations.[109] But if the EU's approach of incremental fixes to problems with the Protocol as they emerge is to gain acceptance in Northern Ireland, the Commission must be responsive to such issues. The delays over finding a solution to the problematic application of EU steel tariffs to Northern Ireland illustrate the problems for a supranational body in attempting to manage the complex needs of a polity which is tiny in the context of the Single Market. Once attention was focused on the issue, the delays to addressing it persisted because of EU–UK cooperation over the management of the Protocol misfiring; the Commission sought to grant exemptions to cover normal volumes of steel being supplied from Great Britain to Northern Ireland but would only act once it received the relevant data from the UK Government.[110] The absence of an EU Office in Northern Ireland, to provide a direct means of responding to Protocol implementation issues affecting individuals and companies, compounds this difficulty. Only through a highly developed system of engagement with Northern Ireland stakeholders can there be effective 'troubleshooting' of such issues.

Even after Liz Truss's brief period in Downing Street, the UK Government and EU Commission thus remained far apart in terms of their respective conceptions of workable post-Brexit trade rules for Northern Ireland. The possibility of the Lords delaying the passage of the Protocol Bill, because of its disregard for the UK's international obligations and the extraordinary powers it places in the hands of ministers, provides a window of opportunity for both sides to bridge this gap, at a time when other significant geopolitical issues demand their attention. This room for manoeuvre, however, can be overstated. The issues which dog the Protocol Bill might be strikingly similar to those which had many peers prepared to use the Parliament Act to delay the passage of the Internal Market Bill for a parliamentary session, until a deal with the EU intervened, but the chamber itself is very different. Boris Johnson's appointments, not least in his resignation honours list, have expanded the bloc of Conservative peers to the point at which it might ultimately be possible to force through the legislation. The EU,

108 Gudgin (n 58 above) 72.

109 Swiss–EU Institutional Framework Agreement (2018) arts 15 and 16.

110 A Bounds, S Fleming and P Jenkins, 'Brussels offers to reduce Northern Ireland border checks' *Financial Times* (London 12 September 2022).

moreover, neither trusts the UK Government as a negotiating partner nor its willingness to implement arrangements that are agreed. It also considers that the costs of a trade conflict started over the Protocol will fall largely upon the UK, at a time that the UK economy can ill afford it and is hardly pressed to make concessions given the parlous state of the Conservative Government post-Truss. For the UK Government's part, having botched a post-Brexit growth plan centred around a fiscal stimulus, the Conservative Party could find itself boxed into prioritising regulatory divergence from the EU. Rishi Sunak has to keep prominent Eurosceptic elements of his fractious parliamentary party on board to maintain his majority; with opinion polls against him, his control over a party is much more tenuous than that of Boris Johnson in the early months of his premiership. Moreover, having raised DUP expectations with the Protocol Bill, it will be difficult to present any compromise centred on reductions of goods checks as sufficient for them to restore power-sharing. In combination, this makes the continuation of confrontation over the Protocol, with all its negative consequences for Northern Ireland's stability, more likely than a turn towards cooperation ahead of the next UK general election.[111]

CONCLUSION

The suggestion that 95 per cent of Johnson's deal overlapped with May's misses the point; the 5 per cent which does diverge has effected the very shift, the imposition of substantial trade barriers between different parts of the UK, that May had claimed no Prime Minister could contemplate. It might be said that May was seeking to defy the gravitational pull of Northern Ireland's distinct constitutional settlement in attempting to construct an approach which was applicable, at least in part, to the whole of the UK. But she considered herself obliged to make such an effort, not only because of her reliance on DUP MPs after the 2017 election, but seemingly also because it accorded with her own account of the Union. Her efforts to downplay what Brexit would involve for Northern Ireland generated a debt to Unionist expectations that UK Government policy could not fulfil; 'special status' for Northern Ireland in relation to trade in goods might have been a feature of May's deal but it became the defining feature of Johnson's Protocol.

Johnson's deal replaced the backstop arrangements with a spaghetti of complex trade provisions and subjected the whole fragile system of power-sharing in Northern Ireland to the strain of a confirmatory vote every four years (with all of the uncertainty that brings for

111 See C Murray, 'A new period of "indirect" direct rule – the Northern Ireland (Executive Formation etc) Bill' (*UKCLA Blog* 29 November 2022).

business). What the Protocol would involve became a moving target; the more comprehensive any trade deal within the subsequent Future Relationship Agreement, the fewer checks that would be required on goods moving from Great Britain to Northern Ireland. But under the Protocol, the UK became responsible for administering these controls, come what may, at the end of the transition period. When the TCA did not provide for comprehensive alignment between the UK and the EU, then the prospect of divergences in goods standards applicable in their markets was inevitably accompanied by fetters in goods movements between Great Britain and Northern Ireland. The problem is not, therefore, that special market rules for Northern Ireland are inherently unworkable or a threat to the UK's constitutional order. Rather, successive UK Governments have never fully accepted the extent of the October 2019 commitments and have actively sought to undermine those arrangements, placing dubious reliance on some of the language in the Protocol which was supposed to make the whole package more saleable to the UK Parliament. The opportunity for reconstruction remains, but the Northern Ireland Protocol Bill takes the UK Government down the path of gutting the Protocol and attempting to put something that suits its interests in its place, in the apparent expectation that the EU and Northern Ireland's non-Unionist parties will acquiesce.