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An analysis of the UK Government's defence of the Northern Ireland Protocol Bill under international law

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ABSTRACT

In the early summer of 2022, the United Kingdom (UK) Government introduced the Northern Ireland Protocol Bill in the House of Commons. This Bill establishes a regulatory framework that is intended to enable the UK Government to breach its obligations under the Withdrawal Agreement and, more specifically, the Ireland/Northern Ireland Protocol (the Protocol). The UK Government contends that the Bill can, however, be justified under international law by reference to both article 16 of the Protocol and the plea of necessity under customary international law. This article examines the extent to which the UK Government's position is valid.

Keywords: Ireland/Northern Ireland Protocol; Protocol Bill; Brexit; customary international law; necessity defence; safeguards.

INTRODUCTION

On 13 June 2022, the United Kingdom (UK) Government published the Northern Ireland Protocol Bill (the Bill).[1] If enacted, this piece of legislation would enable government ministers to override core components of the Ireland/Northern Ireland Protocol (the Protocol) annexed to the European Union (EU)–UK Withdrawal Agreement (Protocol).[2] As explained by Barnard, the Bill 'drives a coach and horses

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1 Northern Ireland Protocol Bill, 13 June 2022.

2 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the Economic Atomic Energy Community, OJ L 29, 31.1.20207-187/7.

through the Northern Ireland Protocol'[3] and, in doing so, paves the way for the UK to circumvent legally binding international obligations.

The UK Government has not sought to contest the notion that the Bill is incompatible with its obligations under the Protocol. Instead, in a legal position published alongside the Bill (UK Legal Position),[4] it contends that non-compliance with the Protocol can be justified under international law. Two legal bases for the justification of the Bill are identified by the UK Government. Firstly, it suggests that the Bill can be justified under article 16 of the Protocol which allows the parties to adopt safeguard measures where the application of the Protocol 'leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade'. Secondly, it is argued that the type of non-compliance with the Protocol envisaged under the Bill can be excused via the plea of necessity under customary international law.

The aim of this article is to examine the extent to which either article 16 of the Protocol or the doctrine of necessity offer a valid legal basis for the justification of the UK's actions as envisaged in the Bill. The next section explains the purpose and operation of the Protocol, the manner in which it has been contested since its entry into force and how the Bill seeks to upend many of its central features. The third and fourth sections respectively provide an overview of the rules governing the use of article 16 of the Protocol and the doctrine of necessity justifications and examines the UK Government's arguments in relation to both justifications. The final section explores the relationship between article 16 of the Protocol and the doctrine of defence and determines the extent to which the availability of the former either precludes or affects the use of the latter.

NORTHERN IRELAND PROTOCOL BILL

One of the central aims of the Protocol is the establishment of a regulatory framework to enable the avoidance of a hard border within the island of Ireland and, in particular, the application of border checks on goods traded between Northern Ireland (NI) and the Republic of Ireland (ROI).[5] This became a negotiating priority for the EU during the withdrawal negotiations when it became clear that the brand of Brexit being pursued by the UK Government – one which entailed the departure from both the EU customs union and internal market – would lead to checks on goods traded between the UK and the EU. The

3 Catherine Barnard, quoted in E Milligan, 'UK sparks EU ire with Bill to override parts of Brexit deal' (*Bloomberg UK* 13 June 2022).

4 Northern Ireland Protocol Bill: UK Government Legal Position (13 June 2022).

5 J Curtis, 'Insight: Brexit and the Northern Ireland border' (House of Commons Library 14 January 2020).

position taken by the ROI (and the EU) was that any checks carried out would be incompatible with commitments made under the 1998 Belfast/Good Friday Agreement.[6] This position was accepted by the UK and reflected in the final outcome of the negotiations.[7]

The Protocol achieves the goal of avoiding border checks within the island of Ireland by requiring the UK, in respect of NI, to comply with EU customs and internal market law relating to trade in goods.[8] It also means that the UK must give such rules the same legal effects as those they produce within the EU.[9] EU customs and internal market rules are thus covered by the doctrine of supremacy of EU law (EU law prevails over domestic law) and produce direct effect (individuals can invoke their rights derived from EU law directly before domestic courts under certain conditions). Furthermore, the Court of Justice of the European Union (CJEU) maintains its jurisdiction on matters relating to the application and interpretation of EU law under the Protocol.[10]

Removing and replacing this regulatory regime is very much the key aim of the Bill. It identifies a number of Protocol provisions, which it classifies as 'excluded provisions'. Excluded provisions include those Protocol provisions which require the UK, with respect to NI, to comply with EU rules on the movement of goods and customs,[11] the regulation of goods,[12] state aid[13] and be subject to the jurisdiction of the CJEU. Together, these provisions comprise significant components of the regulatory framework established by the Protocol with the aim of ensuring that NI can trade with the EU as if it was still part of the EU internal market. The Bill also allows UK ministers to exclude other provisions of the Protocol where this is justified in order to safeguard 'social or economic stability in Northern Ireland'[14] and 'the territorial or constitutional integrity of the United Kingdom'.[15]

More importantly, the Bill provides that the EU law covered in excluded provisions will not produce the same legal effect as that of EU law within the EU legal order. In other words, EU law to which NI is subject under articles 5–10 of the Protocol would no longer be covered by the principle of supremacy or produce direct effect in the UK. This then allows the Bill to achieve its main aim, which is to allow

6 R Montgomery, 'The Professional' (*Dublin Review of Books* November 2021).
7 Art 1.3 Protocol.
8 Arts 5, 7–10 Protocol.
9 Art 12(5) Protocol.
10 Art 12(4) Protocol.
11 S4 NI Protocol Bill.
12 Ibid s 5.
13 Ibid s 12.
14 Ibid s 15.
15 Ibid.

the UK Government to disapply and replace the regime covered by the excluded provisions.

Not only does the Bill include provisions that are in direct conflict with obligations under the EU–UK Withdrawal Agreement (eg the obligation to accord EU law the same legal affect as that accorded to EU law within the EU), it establishes a legal framework whose entire reason for being is to empower UK ministers to further deviate from legally binding commitments made under said agreement. The Bill also establishes an alternative trade regime which would replace that currently provided for under the Protocol. It provides, firstly, for the establishment of a green lane/red lane system where goods originating from Great Britain (GB) would be subject to EU customs checks or not depending on their final destination[16] and, secondly, a dual regulatory regime where NI economic operators can choose whether to place their goods in the NI market under either EU or UK rules.[17]

It is therefore indisputable that the Bill, as it currently stands, is incompatible with the UK's international obligations. In light of this, rather than adopting the indefensible stance that the Bill is compatible with the Withdrawal Agreement, the UK Legal Position argues that such non-compliance can, exceptionally, be justified under customary international law. It contends that there are circumstances that preclude the wrongfulness of its conduct[18] and, more specifically, it invokes the doctrine of necessity, arguing that the non-performance of some of its obligations is needed to 'alleviate the socio-political conditions, while continuing to support the Protocol's objective'.[19] The UK Legal Position also briefly refers to article 16 of the Protocol, but it is not entirely clear whether the UK intends to rely on this legal basis to justify the Bill. The UK Government explains that its 'assessment that the situation in Northern Ireland constitutes a state of necessity is without prejudice to the UK's right to take measures under Article 16 of the Protocol',[20] which suggests that, whilst the UK is currently seeking to justify the Bill by reference to the necessity defence alone, it has not discounted the possibility of making use of the Protocol's safeguards regime at some point in the future.

ARTICLE 16 OF THE PROTOCOL

Article 16 of the Protocol – often referred as the Protocol's safeguard clause – has become the most (in)famous provision in the Protocol. It

16 Ibid s 6.
17 Ibid s 7.
18 UK Legal Position (n 4 above).
19 Ibid.
20 Ibid.

first made its way into public consciousness a few weeks after the entry into force of the Protocol, after the leak of a draft proposal for a European Commission Proposal on Covid-19 vaccines, which stated that export restrictions on vaccines traded between the EU and the UK (including NI) could be justified under article 16 of the Protocol.[21] Although the European Commission quickly moved to dismiss the proposal and article 16 of the Protocol was never formally invoked, this incident had the effect of galvanising opposition to the continued application of the Protocol within the UK.[22] Since then, the UK has expressed its openness to invoking article 16 to justify the disapplication of certain elements of the Protocol when it published the NI Protocol Command Paper, which challenged the viability of the Protocol and threatened to disregard the UK's obligations unless such flaws were addressed.[23] More recently, there have been reports that the former UK Prime Minister, Liz Truss, considered invoking article 16 of the Protocol to justify the unilateral extension of the so-called 'grace periods' on certain imports (where the UK does not, contrary to Protocol requirements, apply border checks on certain goods imported from GB into NI).[24] The invocation of article 16 of the Protocol has become a regular feature of discussions surrounding the Protocol and its reference in relation to the Bill is yet another instalment in this long-running saga.

Article 16 of the Protocol can be subdivided into three components. Firstly, the substantive component in paragraph 1 outlines a number of requirements that must be met in order for a party to validly apply safeguard measures. This includes conditions relating to the external circumstances that must be present in order to invoke article 16 of the Protocol, as well as requirements relating to the application and scope of the safeguard measures. Secondly, the procedural component governed by paragraph 3 and annex 7 of the Protocol requires that any party wishing to apply safeguards must first notify its intention to do so to the other party and engage in consultations prior to the application of said safeguards. Thirdly, paragraph 2 governs the application of rebalancing measures. Even where safeguard measures are lawfully applied by one party, the other party has the right to adopt rebalancing measures as long as these are proportionate and limited to what is strictly necessary to address the imbalance caused by the safeguard measures.

21 European Commission Implementing Regulation on making the exportation of certain products subject to the production of an export authorization, 29 January 2020, SEC(2021) 71 final.

22 A McCormick, 'The Northern Ireland Protocol Bill' (IIEA July 2022) 10.

23 HM Government, 'Northern Ireland Protocol: The Way Forward' (Policy Paper July 2021).

24 P Foster, 'Biden warns Truss not to rip up Northern Ireland protocol' *Financial Times* (London 6 September 2022).

As things stand, the UK has not formally invoked article 16 of the Protocol to justify the Bill. Nor, as discussed above, has it signalled any clear intent to do so in the near future.[25] And, whilst the UK's Legal Position identifies article 16 of the Protocol as a legal basis for non-compliance with the Protocol obligations envisaged by the Bill, it makes no attempt to explain how such non-compliance can be justified under this provision. Instead, the focus is placed almost exclusively on justifying the Bill in light of the doctrine of necessity. The following discussion therefore focuses solely on the substantive requirements of article 16 of the Protocol and examines whether the Bill can be justified under this legal basis. To do so, the article will rely on the UK Legal Position's description of the rationale for the Bill, as well as past arguments made by the UK Government, notably in the NI Protocol Command Paper, to justify the use of article 16 of the Protocol.

Conditions for the invocation of safeguard measures

As outlined above, Protocol safeguards can be applied if the application of the Protocol 'leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade'.[26] According to the UK Legal Position, those conditions were already met in 2021, 'as a result of both diversion of trade and serious societal and economic difficulties occasioned by the Protocol'.[27] It adds that the UK Government has now been forced to act given 'the strain the arrangements under the Protocol are placing on institutions in Northern Ireland, and more generally on socio-political conditions'[28] and explains that the Bill 'will alleviate the imbalance and socio-political tensions without causing further issues elsewhere in the Northern Ireland community, including by ensuring that East–West connections are restored, without diminishing existing North–South connections'.[29] The UK's position is that the non-compliance envisaged under the Bill is intended to address serious economic and societal difficulties as well as trade diversion which result from the application of the Protocol. However, none of these terms are defined in the Protocol.

The application of safeguards in case of economic difficulties is reminiscent of the World Trade Organization (WTO) safeguards regime whereby WTO members are allowed to reimpose barriers to trade – mostly tariffs – on a temporary basis where trade liberalisation commitments have caused harm to specifically identified domestic

25 UK Legal Position (n 4 above).
26 Art 16.1 Protocol.
27 UK Legal Position (n 4 above).
28 Ibid.
29 Ibid.

industries.[30] However, article 16 of the Protocol does not limit its scope to sectoral or even regional difficulties – it casts the net wider by seemingly encompassing any type of economic difficulty. This is certainly how the UK Government sees it. In the Command Paper, for example, it listed high consumer prices, increased operating costs faced by businesses and disruptions to food and parcel supplies as evidence of difficulties of an economic nature resulting from the application of the Protocol. The difficulties of a societal nature are potentially also very wide in their scope. In theory, it could cover any safeguard intended to address a non-economic public interest objective (eg public order, protection of human rights, the fight against crime and protection of cultural heritage). When referring to societal difficulties associated with the Protocol, the UK has mentioned instances of disorder, protests and surveys which it argues indicate the unease of the NI public with the Protocol and the general lack of support for the Protocol in the Unionist community.[31]

All of these difficulties must be 'serious' and 'likely to persist'. Of note is that article 16 of the Protocol does not envisage application of circumstances in cases where difficulties have not yet occurred – in order for a party to invoke the provision, it must be able to demonstrate that the difficulties resulting from the application of the Protocol have materialised. The requirement that these difficulties be 'serious' underlines the exceptional and grave nature of the circumstances that must be present in order to apply safeguard measures. A mere inconvenience would not suffice – the degree and extent of the difficulty should be such that the party is compelled to adopt safeguard measures. The requirement that difficulties are 'liable to persist' reinforces the notion that article 16 of the Protocol should only be invoked in truly exceptional circumstances. A temporary difficulty which is part and parcel of the adjustment process to a new regulatory regime cannot fall under the scope of the Protocol safeguards regime.[32] By contrast, a serious difficulty that will persist in the long term unless action is taken could justify the application of safeguards.

Finally, it must be shown that the application of the Protocol has *led* to these serious difficulties. In other words, any party wishing to apply safeguards must establish a causal link between the requirement to comply with Protocol obligations and the occurrence of the serious difficulties. Whilst the text of the Protocol does not exclude the

30 Article XIX of the General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat A-11, 55 UNTS 194; A Sykes, *The WTO Agreement on Safeguards: A Commentary* (Oxford University Press 2001).

31 NI Protocol Command Paper, 14.

32 R Howse, 'Safeguards' in F Fabbrini (ed), *The Law and Politics of Brexit* vol IV (Oxford University Press 2021) 266.

possibility that other factors may have contributed to these serious difficulties, the use of the term 'leads to' suggests that the application of the Protocol must be, if not the primary cause, at the very least a substantial factor behind the emergence of these difficulties. Such an interpretation would be in line with the overarching rationale of the Protocol safeguard regime, which is to permit the parties to adopt restrictive measures only under exceptional and grave circumstances. A scenario where a party is able to adopt safeguards to address a difficulty that might only be marginally and incidentally related to the application to the Protocol would go against the purpose of the regime.

The ability of the factors identified by the UK to justify the Bill and to meet the abovementioned requirements can be reasonably questioned. The alleged serious economic difficulties concern trade disruptions that followed the Withdrawal Agreement's entry into force and the UK's exit from the EU internal market, and their consequences on certain economic sectors and consumer prices. These consequences were entirely predictable and, in fact, were indeed predicted outcomes of the Protocol and the decision to leave the EU internal market. On 14 December 2020, the NI Department for the Economy released a paper confirming that, even if the UK were to sign a trade agreement with the EU, the combination of the Protocol and the UK's exit from the EU internal market would lead to 'increased trade frictions'.[33] The economic modelling employed in the paper predicted a '5.6% reduction in imports from GB'[34] and 'a 5.3% reduction in exports to the rest of the world (including ROI & EU)'.[35] That the EU and the UK accepted the inevitability of these adverse consequences is evidenced by the fact that, prior to the entry into effect of the Protocol, the UK and the EU both agreed on a number of grace periods that would allow the UK not to apply full checks on certain GB goods imported into NI, as required under the Protocol. There was, then, an acceptance that trade disruptions would occur once the Protocol became operational, and that some level of economic adjustment would be required.[36] The requirements of seriousness and permanence would arguably preclude difficulties that were anticipated by the parties from the outset.[37]

33 NI Department for the Economy, Direct Economic Impact of the Northern Ireland Protocol on the NI Economy (NI Department for the Economy 14 December 2020) 4.

34 Ibid.

35 Ibid

36 See, for example, the multiple Unilateral Declarations of the UK and the EU concerning the application of grace periods where the UK states that the relevant such periods are intended to give NI economic operators time to adjust to new trading patterns: Post-Brexit Governance NI, 'Joint Committee: decisions and declarations'.

37 Howse (n 32 above) 265.

Equally, whilst an economic impact assessment of the Protocol is beyond the scope of this article (and the expertise of the author), it is worth noting that the economic effects of the Protocol should be interpreted in the wider context of the UK's decision to leave the EU. Recent studies indicate that, since the entry into effect of the Protocol, NI's economic performance has outperformed that of the rest of the UK. Reports published by both the National Institute for Economic and Social Research (NIESR) and the London School of Economics and the Resolution Foundation have shown that, in the absence of the Protocol, NI would have achieved much lower growth.[38] In other words, although it is clear that NI has experienced economic difficulties since the Protocol became operational, those difficulties are not as pronounced as those experienced by those parts of the UK that are not covered by the Protocol. Indeed, the economic modelling published by the NI Department for the Economy shows that NI is worse off now, but only relative to a counterfactual in which the UK had not left the EU internal market.[39] Viewed from this perspective, the economic difficulties experienced by NI seem as much a consequence of the UK's exit from the EU customs union and internal market as they are related to the Protocol itself.

With respect to the societal difficulties – focusing largely on the political and community tensions that have followed the Protocol – the discontent felt by some within the Unionist community in relation to the Protocol, and, in particular, border checks applied on GB goods entering NI, is real and should not be dismissed. It reflects fears about the long-term viability of NI's place in the UK and has affected the operation of the political institutions that underpin the Belfast/Good Friday Agreement, not least the decision of the leading Unionist party in NI to paralyse the region's executive and legislative institutions.[40] Nonetheless, it is by no means a given that these grievances are sufficient to invoke the application of Protocol safeguards. In the first instance, Unionist opposition to the Protocol was an anticipated consequence of the Protocol. As explained by Andrew McCormick, ex-Director General of International Relations for the Northern Ireland Executive Office, 'the implications [of the Protocol] were clear to unionist leaders, who opposed the Withdrawal Agreement in December 2019 and January 2020'.[41] The UK signed up to the Protocol knowing that it was opposed

38 NIESR, 'Economic outlook: powering down, not levelling up' series A no 1 (Winter 2022); S Dhingra, E Fry, S Hale and N Jia, 'The big Brexit: an assessment of the scale of change to come from Brexit' (The Resolution Foundation June 2022).

39 Howse (n 32 above) 268.

40 'Stormont deadlock: DUP "in denial about financial situation"' (*BBC News* 20 June 2022).

41 McCormick (n 22 above) 7.

by significant elements of Unionism in NI. Secondly, the view that Unionist opposition to the Protocol represents a societal difficulty justifying the non-application of Protocol obligations is problematic in that it ignores the views of other stakeholders in NI. Recent polling, for example, shows that the majority of NI voters support the Protocol, and that such support is steadily increasing with time.[42] Finally, it is also debatable whether the societal difficulties mentioned by the UK can be attributed to the Protocol. The Belfast/Good Friday Agreement was negotiated in a specific context, where the UK was an EU member state and checks on goods traded between the UK and the ROI were not required. The UK's decision to extricate itself from the EU customs territory and internal market disturbed the balance achieved in the Belfast/Good Friday Agreement by creating a situation where such checks would have to be reinstated. The Protocol is an attempt to mitigate some of the adverse effects of Brexit on the Good Friday/Belfast Agreement by ensuring that no checks are applied on goods traded within the island of Ireland. It is an imperfect response in that it does not solve the problem of checks on East–West trade, but the Protocol remains a symptom of difficulties which were caused by the UK's original decision to leave the EU's regulatory framework.

The UK Government has also argued that safeguard measures can be justified because the Protocol has led to 'trade diversion'. Trade diversion is defined as an 'increase in trade volume through the replacement of imports from third countries with low-priced imports from trading partners in the free-trade area'.[43] The decision to include trade diversion as a condition for the invocation of article 16 of the Protocol was odd, given that this is a phenomenon which can be expected to occur when countries sign trade agreements which are, by their very nature, intended to reduce trade barriers between the parties. Whilst the Protocol is not a 'standard' trade agreement in the sense that it is not primarily intended to promote trade liberalisation, it does present the central feature traditionally associated with trade agreements – that is, it requires the removal of barriers to trade between two customs territories: the UK (with respect to NI) and the EU. Establishing trade diversion as a ground for the application of safeguards creates a fairly unique situation in international treaty practice, where parties are allowed to adopt safeguard measures to address circumstances that are wholly unexceptional but also entirely predictable.

42 D Phinnemore, K Hayward and L Whitten, 'Testing the temperature 5: what do voters in Northern Ireland think about the Protocol on Ireland/Northern Ireland?' (Post-Brexit Governance NI June 2022).

43 W Koo, P Kennedy and A Skripnitchenko, 'Regional preferential trade agreements: trade creation and diversion effects' (2006) 28 Applied Economic Perspectives and Policy 410.

It is also worth noting that, whilst trade diversion is typically understood in reference to the effect of a trade agreement on trade with countries that are not part of the trade agreement, in the case of article 16 of the Protocol, it seems that the focus is on internal trade diversion. The requirement seems to have been included in the Protocol to allow the parties to react to situations where application of the Protocol has led to the diversion within the UK or the EU. This is certainly a view shared by the UK which has argued that the Protocol has led to GB trade with NI being diverted towards the EU.

However, demonstrating that trade diversion has occurred and that such diversion has been caused by the Protocol may not be straightforward. In the first instance, this is because determining the existence of trade diversion is an empirical question entailing the identification and assessment of a counterfactual, and the results will vary significantly depending on a variety of factors, such as the initial structure of the economic relationship, the sectors involved and the nature of the new economic relationship.[44] The magnitude of the diversionary effects will also vary depending on the choice of the statistical model employed by economists, meaning that different design choices can lead to radically different findings.[45] Assessing trade diversionary effects is therefore a highly complex process that requires much more than merely pointing to the correlation between the Protocol and an increase in trade between NI and the EU.

Establishing a causal link between the Protocol and subsequent changes in trade flow patterns also presents challenges. The UK's position is based on the claim that the Protocol has caused trade diversion by erecting barriers to trade between GB and NI. The counter-argument to this point is that the main purpose of the Protocol is to ensure that there are no barriers to trade within the island of Ireland and that barriers to trade between NI and GB were caused by the decision of the UK to leave the EU customs territory and diverge from EU internal market rules. It would be odd if the UK were to be allowed to adopt safeguard measures to address circumstances that are a direct consequence of its decision to place NI in a regulatory regime that is separate and distinct from the rest of the UK.

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44 L Sun and M Reed, 'Impacts of free trade agreements on agricultural trade creation and trade diversion' (2010) 92 American Journal of Agricultural Economics 1351, 1352–1353.

45 T Eicher, C Henn and C Papageorgiou, 'Trade creation and diversion revisited: accounting for model uncertainty and natural trading partner effects' (2012) 27(2) Journal of Applied Econometrics 296–321.

The Bill as a safeguard measure

If the conditions for the invocation of article 16.1 of the Protocol are met, a party 'may unilaterally take the appropriate safeguard measures'. However, as far as the NI Protocol Bill is concerned, the determination that conditions for the invocation of article 16 of the Protocol have been met is only one part of the equation. It must also be determined whether the measures envisaged under the Bill constitute safeguard measures under article 16 of the Protocol. The provision, however, does not define what constitutes a safeguard measure.

The first sentence of article 16.1 of the Protocol states that safeguard measures can be applied if 'the application of the Protocol leads' to materialisation of certain situations. One might assume that if a particular difficulty is being caused by compliance with a Protocol obligation, the remedy for that difficulty would entail the suspension of that obligation. This view of article 16 of the Protocol as an 'escape clause'[46] that allows the parties to derogate from Protocol obligations under certain conditions is endorsed by both parties. The leaked European Commission Proposal on export restrictions claimed that '[w]hilst quantitative restrictions on exports are prohibited between the Union and Northern Ireland, in accordance with Article 5(5) of the Protocol on Ireland/Northern Ireland, this is justified as a safeguard measure pursuant to Article 16 of that Protocol'.[47]

Similarly, the UK's legal position on the Bill makes it clear that article 16 of the Protocol is viewed as a legal basis that can justify the adoption of measures that would otherwise be deemed incompatible with the Protocol. It is also worth noting in this regard that, when the UK threatened to suspend its obligations under the Protocol by invoking article 16 of the Protocol, the EU sought to challenge this by claiming that the conditions for the invocation have not been met rather than arguing that the provision does not allow for the suspension of Protocol obligations.[48] This interpretation of article 16 of the Protocol is also corroborated by those who were involved in the negotiations of the agreement. For example, Anton Spisak, previously a UK civil servant involved in the negotiations of the Protocol, has explained how the safeguard clause allows either side to 'act unilaterally … by suspending certain obligations'[49] if certain circumstances arise. Similarly, Thomas Lieflander, a member of the European Commission team that negotiated

46 K Pelc, 'Seeking escape: the use of escape clauses in international trade agreements' (2009) 53(2) International Studies Quarterly 349–368.

47 European Commission (n 21 above) 3.

48 A Beesley, '"Serious consequences" for EU–UK relations if article 16 triggered – Šefcovic' *Irish Times* (Dublin 15 May 2021).

49 A Spisak, Twitter, 4 February 2021.

the Withdrawal Agreement, describes the safeguards clause as catering to situations that 'justify temporary and limited non-compliance'.[50]

This reading of article 16 of the Protocol as an escape clause is reinforced by an examination of its origin. Article 16 of the Protocol is largely inspired from the text of article 112 of the European Economic Area (EEA) Agreement.[51] The EEA encompasses the EU and three non-EU countries (Iceland, Liechtenstein and Norway) who are entitled to benefit from and participate in the EU internal market subject to their continued compliance with the EU internal market rules. The main purpose of article 112 EEA is to allow these countries to derogate from such rules under exceptional and limited circumstances.[52] The transposition of a legal mechanism akin to that of article 112 EEA in the Protocol makes sense given that, like the EEA, the Protocol requires the UK (a third country) to comply with a considerable portion of EU internal market rules. Viewed in this light, the Protocol safeguards regime provides a safety net for the parties, allowing them to exceptionally and temporarily suspend certain obligations where such obligations produce adverse effects.

This reading of the concept of safeguards is disputed. Howse has argued that there is no textual basis for an interpretation of article 16 of the Protocol which allows for the derogation of the Protocol obligations.[53] Instead, he claims that the Protocol safeguards regime is similar to the non-violation clause in the General Agreement on Tariffs and Trade (GATT), where GATT members may challenge measures adopted by other members which, whilst not constituting breaches of their obligations, have the effect of undermining reasonable expectations on trade liberalisation commitments.[54] Under this reading, the Protocol safeguards regime would not allow parties to suspend their obligations. It would only serve to justify Protocol-compatible measures that destabilise the operation of the Protocol. The underpinning rationale for this position is that one of the Protocol's central objectives is to protect the Belfast/Good Friday Agreement 'in all its dimensions'.[55] The safeguards regime, as read by Howse, acknowledges this wider context by providing that measures that disrupt the Belfast/Good Friday Agreement can only be justified

50 T Liefländer, 'Article 16' in T Lieflander, M Kellerbauer and E Dimitriu-Segnana (eds), *The UK–EU Withdrawal Agreement: A Commentary* (Oxford University Press 2021) 482.

51 Agreement on the European Economic Area, OJ No L 1, 3 January 1994, 3.

52 H H Frederiksen, 'Part VII: institutional provisions' in F Arnesen, H Haukeland Fredriksen, H P Gravaer, O Metsad and C Veder (eds), *Agreement on the European Economic Area: A Commentary* (Hart/Nomos 2018) 883.

53 Howse (n 32 above) 263–265.

54 Ibid 263.

55 Art 1.2 Protocol.

exceptionally and on a limited and temporary basis. While this interpretation of the concept of 'safeguard measures' under article 16 of the Protocol is compelling, there is no escaping the fact that it remains a minority position and certainly not one that, as discussed above, has been endorsed by the subsequent practice of the parties to the Withdrawal Agreement.

Although there may be some questions surrounding the nature of Protocol safeguards, article 16 of the Protocol imposes strict limits in terms of the scope and the duration of such measures. Where applied, safeguard measures must be 'restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation' and 'priority should be given to measures that least disturb the functioning of the Protocol'.[56] This language replicates verbatim that of article 112 EEA and, in doing so, establishes a proportionality requirement to ensure that safeguard measures do not unnecessarily inhibit the functioning of the Protocol. Moreover, the express stipulation that the safeguard measures be *strictly* necessary to remedy the situation, combined with the clarification that the measures should least disturb the operation of the Protocol, indicates that a least-restrictive means test should be applied when assessing the lawfulness of safeguards.[57] Such an interpretation of the strict necessity test has also been endorsed in relation to article 112 EEA[58] and would mean that, in order to meet the requirements of article 16 of the Protocol, a party would have to show that (i) the safeguard does contribute to remedying the situation it is purportedly seeking to address and (ii) it has applied the safeguard measure that least disturbs the operation of the Protocol. Instinctively, it is difficult to see how the Bill, in its current form, would pass any proportionality analysis, even less so one that comprises a strict necessity test. The Bill does not propose the adoption of isolated measures designed to remedy specific difficulties – rather, it seeks to permanently replace provisions that are central to the achievement of the Protocol's stated aims. Even if it is accepted that article 16 of the Protocol allows the parties to suspend their obligations, the regime is not intended to justify the wholesale substitution of the negotiated outcome with a completely new regulatory framework.

In some cases, the changes proposed by the Bill do not seem to be linked to any of the grounds identified in article 16 of the Protocol. For example, the Bill proposes the removal of the application of EU state aid rules and the CJEU's jurisdiction on EU law matters covered by the Protocol, when there is little to show that these requirements are intended to address, or would contribute to remedying, any economic

56 Art 16(1) Protocol.
57 Howse (n 32 above) 268.
58 Frederiksen (n 52 above) 887.

or societal difficulties. Although some politicians in Westminster have called for the removal of these Protocol obligations, they have not been criticised by industry and consumer groups in NI, nor have they featured prominently in the list of complaints voiced by Unionist opposition to the Protocol.[59]

It is also doubtful whether any adjudicatory body would come to the conclusion that the regulatory frameworks envisaged by the Bill constitute the least restrictive means to remedy the economic and societal difficulties which result from the checks on East–West trade in goods. On the contrary, there are other options that could be pursued by the UK, which are not only less restrictive but also address these concerns more efficiently. For example, whilst the green/red channel regime might potentially reduce some of the checks carried out on GB goods entering NI, it will not remove them altogether. By definition, the GB goods entering NI via the red channel will be subject to the full panoply of EU customs and regulatory compliance checks. An alternative solution, which has been mooted specifically in relation to sanitary and phytosanitary standards, would be to negotiate agreements on mutual recognition of rules with the EU.[60] This is an option that would obviate regulatory compliance checks in this area without the need to derogate from Protocol obligations. It is also an option that has been met with support from the NI electorate,[61] businesses[62] and the Unionist community.[63] However, the UK Government has continuously rejected this option because it would require the UK to maintain regulatory alignment with the EU. Far from being a proportionate and least restrictive response to a situation of necessity, the Bill seems to be the result of a political choice. By ignoring a solution to the difficulties presented by East–West trade barriers that is not only favoured by most stakeholders in NI but is also less restrictive and more efficient than what has been proposed in the Bill, the UK Government prioritised its political desire to maintain its ability to diverge from EU rules over the need to address the alleged serious economic and social difficulties resulting from the application of checks on East–West trade.

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59 McCormick (n 22 above) 19.

60 J Curtis and N Walker, 'Securing a Veterinary Agreement in the Northern Ireland Protocol' (House of Commons Library Briefings 13 December 2021).

61 K Hayward, D Phinnemore and L Whitten, 'Testing the temperature 3: what do voters in Northern Ireland think about the Protocol on Ireland/Northern Ireland?' (Post-Brexit Governance NI October 2021).

62 Northern Ireland Business Brexit Working Group – Written Evidence (FUI0025), 7 June 2022.

63 D Young, 'Swiss-style deal would only solve part of NI protocol problem – Arlene Foster' *Belfast Telegraph* (17 February 2021); P Foster and A Beesley, 'DUP's shifting stance on "Swiss-style" EU trade alignment revealed' *Financial Times* (London 22 February 2021).

DOCTRINE OF NECESSITY

The necessity defence as a circumstance precluding wrongfulness under customary international law

Under international law, state responsibility can be engaged for conduct that is wrongful where a breach of a binding international obligation has been committed. An internationally wrongful act consists of either a violation of an obligation derived from customary international law, or a general principle applicable within the international legal order or a treaty.[64] In either scenario, state responsibility is triggered if the wrongful act (or omission) is: (i) attributable to a state under international law; and (ii) inconsistent with an international obligation.[65]

However, the state can rely on defences or excuses to preclude the wrongfulness of the international act. Such circumstances precluding wrongfulness are derived from customary international law and codified in articles 20 to 25 of the International Law Commission's (ILC) Articles on State Responsibility (ASR).[66] They include, for example, the doctrines of self-defence, distress, *force majeure* and necessity. The latter is the main legal basis invoked by the UK Government to justify the Bill. The claim, articulated in the UK Legal Position, is that the Bill is 'lawful under international law' as the non-performance of the Protocol can be justified under the doctrine of necessity. Before undertaking a more detailed analysis of the defence of necessity, it is worth noting that the claim that the Bill would be lawful under international law, via the defence of necessity, is based on a misunderstanding of the nature of the effects of circumstances precluding wrongfulness.

A central conceptual feature governing the application of circumstances precluding wrongfulness is the distinction between primary and secondary rules. Primary rules concern substantive requirements under international law which regulate the conduct of states, whereas secondary rules relate to the conditions under which state responsibility can be engaged – that is the conditions under which a state can be 'considered responsible for wrongful actions or

64 International Law Commission, 'Draft articles on the responsibility of states for internationally wrongful acts with commentaries' UN GAOR 56th Session Supp 10, ch 4, UN Doc A/56/10 (2001), 55.

65 J Klabbers, *International Law* 2nd edn (Cambridge University Press 2017) 139–141.

66 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art 7, Report of the International Law Commission on the work of its fifty-third session, 19 UN GAOR Supp no 10, at 43, UN Doc A/56/10 (2001).

omissions and the legal consequences that flow therefrom'.[67] The distinction is key in understanding the effect of the invocation of circumstances precluding wrongfulness. They do not serve to render the non-performance of an obligation under international law lawful. They merely serve to exonerate the state invoking them from the liability that results from the non-performance of primary rules.[68] Consequently, even if it is determined that the defence of necessity can justify the Bill, it does not follow that the Bill is lawful under international law. The effect of a successful invocation of the defence of necessity is merely to excuse the non-performance of an international obligation so long as the conditions of necessity remain in place.[69]

Conditions for the invocation of the necessity defence

The existence of a ground of defence under international law has been contested in the past, but today it is generally recognised as customary international law by scholars[70] and the case law.[71] As explained in the ILC Commentaries, the necessity defence only applies to truly exceptional circumstances, namely in situations where there is 'a grave danger either to the essential interests of the State or of the international community as a whole'.[72] As such, the necessity defence can only be invoked under strict conditions.[73]

According to article 25 of the ASR, there are four substantive standards that must be met in order for the non-performance of an international obligation to be covered by the necessity defence. It must be shown that: (i) the non-performance is the only way to safeguard an essential interest;[74] (ii) the non-performance cannot seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole;[75] (iii) the international obligation does not preclude the use of the necessity defence;[76] and (iv) the state invoking necessity cannot have contributed

67 Ibid 59.

68 J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) (ILC Commentaries) 160.

69 *Case Concerning the Gabčikovo-Nagymaros Project* (Hungary/Slovakia) Judgment of the International Court of Justice, 25 September 1997, ICJ reports, 1997, 67, para 101. See M Agius, 'The invocation of necessity under international law' (2009) 56(2) Netherlands International Law Review 95–135, 113–119.

70 F V Garcia Amor, L Sohn and R R Baxter, *Recent Codification of the Law of State Responsibility for Injury to Aliens* (Oceana Publications 1974) 34–35.

71 See *Gabčíkovo-Nagymaros* (n 69 above) para 51.

72 ILC Commentaries (n 68 above) 80.

73 Ibid 83.

74 Art 21(1)(a) ASR.

75 Art 21(1)(b) ASR.

76 Art 21(2)(a) ASR.

to the situation of necessity.[77] While the Withdrawal Agreement does not expressly preclude the possibility of invoking the necessity defence, as set under point (iii), it may be that the very existence of a treaty-based exception such as article 16 of the Protocol affects the UK's ability to invoke the necessity defence. This issue will be addressed in the final section of this article. The proceeding discussion thus focuses on the conditions for invocation of the necessity defence set out under points (i), (ii) and (iv).

The plea of necessity may only be exercised to justify the non-performance of international obligations where such non-performance is needed to safeguard an essential interest. The ILC Commentaries on the ASR provide only minimal guidance as to what constitutes an essential interest beyond stating that such interests extend to 'interest of the State and its people as well as the international community and that the essential nature'[78] of an interest 'depends on all circumstances, and cannot be prejudged'.[79]

Avoiding a straitjacket definition of essential interests makes sense since such interests may vary significantly from one state to the next depending on historical, cultural and socio-economic circumstances. In practice, international tribunals have accepted that essential interests are not limited to cases where the existence of the state is threatened and have, instead, accepted that the necessity defence can be invoked to address a wide spectrum of interests, from national security to the functioning of public services, environmental concerns and economic interests.[80]

The vagueness and the largely subjective nature of the concept of essential interest[81] means that a great emphasis is typically placed on demonstrating the gravity and imminence of the peril threatening the interests.[82] The requirement of gravity, which is often equated to any peril that negatively affects the essential interest,[83] is used to ensure that minor harms caused to an essential interest are not covered by the necessity defence.[84] The requirement that the peril be imminent

77 Art 21(2)(b) ASR.

78 Ibid.

79 ILC Commentaries (n 68 above) 183.

80 R Ago, 'Addendum to the Eighth Report on State Responsibility – Document A/CN.4/318/ADD.5–7' (1980) II(1) Yearbook of the International Law Commission 14, para 2.

81 H Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933) 196.

82 E Paddeu and M Waibel, 'Necessity 20 years on: the limits of article 25' (2022) International Centre for Settlement of Investment Disputes (ICSID) Review 12.

83 Agius (n 69 above) 103.

84 *Russian Indemnity (Russia v Turkey)* (1912) XI UNRIAA 421, translated in (1913) 7 AJIL 178, 196

is understood to mean that the peril must be more than a mere theoretical possibility. In *Gabčíkovo-Nagymaros*, the International Court of Justice (ICJ) clarified that, while the threat must be imminent in the sense of proximate,[85] a peril in the long term can also be deemed to be imminent if 'it is established, at the relevant point in time, that that realization of that peril, however far off it might be, is not thereby any less certain and inevitable'.[86] However, this does not mean that the invoking state must show that the peril will happen, rather that its occurrence is not merely plausible.[87]

The essential interests outlined in the UK Legal Position are the same as those referred to in the context of article 16 of the Protocol. The UK points to 'both diversion of trade and serious societal and economic difficulties occasioned by the Protocol'[88] and adds that 'the strain that the arrangements under the Protocol are placing on institutions in NI, and more generally on socio-political conditions, has reached the point where the Government has no other way of safeguarding the essential interests at stake than through the adoption of the legislative solution that is being proposed'.[89] Given the considerable breadth of the concept of essential interests, it seems likely that difficulties of a societal or economic nature would fall under the scope of necessity defence. Similarly, the requirement of 'imminence' should not pose any particular problems, as the difficulties that the UK Government has identified are plausible and, in some cases, have materialised in practice. Satisfying the requirement of 'gravity' might, however, prove more challenging in certain cases. The claims of serious societal difficulties relating to rising political and community tensions in NI can be qualified as grave. And as they touch on issues of security and identity, which are deeply connected to the notion of national sovereignty, adjudicators will likely extend a significant margin of discretion to the UK. With respect to the claims of serious economic difficulties, as examined above, it is doubtful whether they can be qualified as grave. Many of these difficulties were predicted at the time of the conclusion of the Withdrawal Agreement and accommodations were made for the most serious ones through the establishment of grace periods which, at the time of writing, are still in place. The economic difficulties that are currently being experienced, to the extent that they exist and can be linked to the Protocol, were predicted negative externalities associated with the Protocol. Moreover, to the extent that NI's economic performance, post-Protocol, is actually better than that

85 ILC Commentaries (n 68 above) para 15.
86 *Gabčíkovo-Nagymaros Project* (n 69 above) para 54.
87 Agius (n 69 above) 104.
88 UK Legal Position (n 4).
89 Ibid.

of the rest of the UK, it is difficult to argue that the difficulties are of a nature to truly imperil the UK's essential interests.

The unlawful act or omission must be the only way to ensure the goal of safeguarding the essential interest. This is one element where the ILC Commentaries provide ample guidance. The ILC clarifies that the necessity defence will not cover instances where there are 'other [lawful] means, even if they may be more costly or less convenient'.[90] The alternative means available could consist of unilateral actions, concerted action with other states or within the context of international organisations. A state must always opt for a lawful means to safeguard its interests if one is available. Moreover, the 'only way' must be understood as a requirement of necessity in the sense that unlawful conduct must be limited to what is strictly necessary to safeguard the essential interest. Any conduct that goes beyond what is necessary to achieve that goal cannot be justified under the necessity defence. The ILC Commentaries therefore endorse the application of a strict necessity test which, like the one found in article 16 of the Protocol, severely restricts the discretionary power of states.

This strict reading by the Commentaries of the 'only way' condition is reflected in state practice and case law.[91] Indeed, this is the requirement where the necessity defence often falls down, as it is extremely unlikely in any given circumstance that there would be only one course of action available to states to achieve a particular goal.[92] However, the stance that the necessity defence only applies in instances where absolutely no other lawful alternatives apply is one that is contested by scholars and in some recent international investment law case law. In most cases, states will have a variety of policy tools available to them and will, based on information available at the time, make an assessment as to which tool or package of tools they consider the most appropriate to realistically achieve their aims. With that in mind, some have suggested that states be given more leeway in their assessment of whether a course of action is the 'only way' to safeguard essential interests.[93] One suggestion, which has gained some traction in academic literature, is that courts should examine the extent to which the measure adopted by the state was the only feasible and effective means to safeguard the essential interest.[94] The test of

90 ILC Commentaries (n 68 above) 81.

91 Agius (n 69 above) 105; ILC Commentaries (n 68 above) 83.

92 Paddeu and Waibel (n 82 above) 15.

93 See R Manton, Necessity in International Law, Thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in Law (University of Oxford 2016 164–177).

94 A Reinisch, 'Necessity in international investment arbitration – an unnecessary split of opinions in Recent ICSID Cases' (2007) 8 Journal of World Investment and Trade 191, 20; Paddeu and Waibel (n 82 above) 15; Manton (n 92 above) 177.

feasibility would look at whether suggested alternative measures were options that could be realistically implemented at the time – rather than simply theoretical options that were not practically feasible. The test of effectiveness would then assess whether the lawful and feasible alternatives could achieve the objective of safeguarding the essential interest. Although this reading of the 'only way' test is less strict than that endorsed by the ILC Commentaries and the case law, it is one that the Bill will also struggle to pass. As discussed in the previous section above, many of the measures included in the Bill that would lead to non-compliance with the Protocol do not seem to be genuinely linked to the essential interests that are supposedly being safeguarded. Furthermore, where a link can be established between the non-compliant measures and the essential interests, there are alternative measures that are not only feasible but are also more effective means of safeguarding those interests. On this point it is relevant that the 'only way' requirement covers not just unilateral measures but also cooperative action with other states.[95] The UK's refusal to consider the conclusion of mutual recognition of rules arrangements on areas such as sanitary and phytosanitary standards – despite the overwhelming support for such an agreement in NI – the EU's willingness to do so and the potential for such arrangements to colossally reduce border checks, all indicate that the UK has ignored other means to safeguard its essential interests that were lawful, feasible and effective. Finally, article 16 of the Protocol could potentially provide the UK with a lawful means to derogate from its obligations under the Protocol. If the UK were to refuse to even test the applicability of article 16 of the Protocol in relation to the Bill it could not reasonably argue that it had explored all alternative lawful means.

A state invoking the necessity defence must show that the unlawful conduct does not seriously impair an essential interest of the other state or states concerned or of the international community as a whole. Both the ILC Commentaries and the majority of case law have read this requirement as entailing the balancing of the interests of the state invoking the defence against those of other states and the international community.[96] Under this interpretation, the invoking state must show that the essential interest justifying the unlawful conduct outweighs 'all other considerations, not merely from the point of view of the acting State, but on a reasonable assessment of competing interests'.[97] In other words, there is a balancing exercise to be carried out by the invoking state where it must weigh its essential interests, the urgency

95 ILC Commentaries (n 68 above) 83.

96 See R Sloane, 'On the use and abuse of necessity in the law of state responsibility' (2017) 106(3) American Journal of International Law 457–508, 459.

97 ILC Commentaries (n 68 above) 84.

of the situation and in the absence of action the harm that would be caused to those essential interests that would be damaged by the unlawful conduct.[98]

Despite its ubiquity in case law, the balancing inquiry has been subject to criticism. States invoking the necessity defence will, naturally, tend to value their interests above those of others.[99] Further, this reading places international judges in a very difficult position. In the absence of a hierarchy of values in international law, judges are being asked to make subjective assessments as to which values and interests should prevail over others.[100] In practice, international courts have tended not to struggle with the balancing inquiry, often siding with the invoking state. This is a natural consequence of the inherently exceptional circumstances under which a plea of necessity tends to be invoked.[101] It is, generally speaking, 'unlikely that a State against which necessity is invoked will also happen to face a comparably, let alone more, exceptional situation'.[102] Some have suggested that the necessity defence cannot be successfully invoked in cases where the competing essential interests are more or less equivalent in weight.[103] Under this reading, unlawful conduct may only be justified via the necessity defence if the weight and urgency of the essential interest of the invoking state is clearly more important than those of other states and the international community.[104]

The UK Legal Position goes no further than simply asserting that it has been 'assessed that the legislation will not seriously impair an essential interest of the state or states towards which the obligations exist or of the international community as a whole'. But a closer examination of the potential impact of the Bill suggests that the competing interests of the EU and the UK are fairly equivalent. For the UK, the Bill is intended to minimise border checks on the Irish Sea border and quell the socio-political tensions that have led to the collapse of NI's devolved institutions as a result of the withdrawal of support from the main Unionist party. But, if enacted, the Bill would create very similar problems for the EU (and the ROI), as it would force them to consider the establishment of border checks within the island of Ireland and potentially cause unrest within the Irish

98 R Boed, 'State of necessity as a justification for internationally wrongful conduct' (2000) 3(1) Yale Human Rights and Law Development Journal 18–19.

99 Manton (n 92 above) 78, 181.

100 Sloane (n 96 above) 458.

101 Manton (n 92 above) 184.

102 Ibid.

103 R Ago, 'Addendum – Eighth Report on State Responsibility' (29 February, 10 and 19 June 1980) UN Doc A/CN.4/318/Add.5-7 (1980) II(1) Yearbook of the International Law Commission 19.

104 Ibid. See also Paddeu and Waibel (n 82 above) 171–172.

nationalist community within the UK. It is not clear, then, that the essential interests being invoked by the UK clearly outweigh those of its partners. Rather, this seems to be a case of a party prioritising its interests over those of its counterparts.

Article 2(b) of the ASR articulates the non-contribution requirement, according to which necessity cannot be invoked where the state has contributed to the state of necessity. The ILC Commentaries add that the preclusion of the necessity defence concerns situations where the state's contribution to the situation of necessity is 'sufficiently substantial and not merely incidental or peripheral'.[105] Many of the points raised in relation to the causation requirement under article 16 of the Protocol can be applied to the non-contribution assessment. The UK contributed to the situation by leaving the EU customs territory and internal market and concluding the Protocol in full knowledge of both the disruptions it would cause to East–West trade and the political tensions it would create within NI. Its contribution to the materialisation of the circumstances that it argues have given rise to a state of necessity is a pivotal one rather than an incidental or peripheral one.

This element of the necessity analysis is, however, problematic. Firstly, this is because its basis as customary international law is contested. It was, until relatively recently, rarely mentioned in international rulings,[106] and its inclusion in the ASR was not unanimously approved by states.[107] Secondly, international courts have tended to address the question of a state's contribution in a superficial and inconsistent manner.[108] There is, as a result, a lack of clarity regarding the standards that should be employed to determine the degree of a state's contribution to the state of necessity that would preclude the plea of defence. For example, the concept of 'substantial contribution' is barely addressed in the case law. In *Gabčíkovo-Nagymaros*, the ICJ found that the invoking state had 'helped, by act or omission to bring about' the state of necessity, but failed to provide any detailed guidance as to what the term 'help' means in practice. In recent investment arbitration cases, tribunals have tended to simply note that the invoking state had contributed to the situation of necessity and assumed that such contribution was sufficiently substantial without further examination.[109] There is also uncertainty as to whether the requirement of non-contribution should be read as a purely causal requirement (where the mere existence of a contribution precludes

105 ILC Commentaries (n 68 above) 83.
106 Manton (n 92 above) 190.
107 Ibid; Paddeu and Waibel (n 82 above) 19.
108 Manton (n 92 above) 191–192.
109 Paddeu and Waibel (n 82 above) 20.

the defence) or one that requires some degree of fault on the part of the invoking state. Some commentators argue that a purely causal requirement would make it impossible, in most cases, to successfully make the plea of necessity as it is always possible to identify actions or omissions of the invoking state that have contributed to the state of necessity.[110] Such an outcome would lead to scenarios where states are precluded from adopting measures to safeguard essential interests purely because they may have at some point in the past taken a decision that contributed to their current predicament. A fault-based approach – where the invoking state must show that it did not contribute to the state of necessity either deliberately or through negligence – is seen as a preferable option, in that it protects the ability of states to address harmful situations whilst at the same time ensuring that states are not able to abuse the necessity defence by invoking it in relation to events which they caused either deliberately or by acting recklessly.[111] However, the case law on this remains mixed, with some rulings adopting the purely causal approach suggested by the text of the ASR and others adopting a fault-based conception.[112]

Irrespective of whether a causation or fault-based approach is applied, the UK would surely struggle to pass the non-contribution test because the difficulties that the Bill is seeking to address were identified and, with respect to economic difficulties, quantified before the Protocol was concluded. It cannot be overlooked that the UK knowingly contributed to the state of necessity which the UK claims currently exists by opting to leave the EU customs territory and internal market and signing the Protocol. The state of necessity to which the Bill is responding is one of the UK's own making. In addition to this, since the entry into force of the Protocol, the UK has actively pursued policies that have further exacerbated those difficulties. A clear example of this can be found in relation to the UK's external tariffs policy. Under article 5(1) of the Protocol, goods imported into NI from third countries – that is, non-EU countries – are subject to EU tariffs unless they are shown to be goods at risk of being subsequently moved on to the EU. Imported goods are deemed not at risk of being subsequently moved on to the EU where the UK tariffs applicable for those goods are equal or higher than the applicable EU tariffs or, where the NI importer is registered with the UK Trusted Trader Scheme, if the applicable UK tariff is not lower than the EU tariff by more than

110 Sloane (n 96 above) 475; Paddeu and Waibel (n 82 above) 179.
111 Manton (n 92 above) 195; Paddeu and Waibel (n 82 above) 180.
112 Paddeu and Waibel (n 82 above) 180.

3 per cent.[113] In short, the more UK tariffs are lowered relative to EU tariffs, the more it is likely that goods entering NI will be deemed at risk and subject to higher EU tariffs. This applies whether the third-country imports access NI directly from those third countries or via GB. Yet, since formally withdrawing from the EU, the UK has lowered its external tariffs applied on imported goods relative to those applied by the EU.[114] The increase in the disparity between UK and EU tariff rates inevitably leads to an increase in the number of goods imported into NI from GB that are considered to be at risk of being moved on to the EU. This, in turn, leads to increased barriers to trade on goods moving from GB into NI.[115] The same applies to the UK's plans to diverge from EU regulatory standards in areas such as food safety and environmental protection, which apply in the UK in respect of NI under the Protocol.[116] The further the UK moves away from EU law, the more onerous the border checks on GB goods entering NI become.[117] The UK has thus not only contributed to the GB–NI barriers to trade it argues have led to a situation of the state of necessity, but it has also knowingly pursued policies which have increased such barriers since the entry into force of the Protocol.

RELATIONSHIP BETWEEN THE DOCTRINE OF NECESSITY AND THE PROTOCOL SAFEGUARDS CLAUSE

In addition to the question of the validity of the invocation of both the Protocol safeguards clause and the necessity defence, one must also assess the relationship between these two legal mechanisms. In particular, it is necessary to determine the extent to which the availability of a treaty-based exception, such as article 16 of the Protocol, affects or even precludes the ability of the UK to invoke the necessity defence.

113 Decision No 4/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 on the determination of goods not at risk [2020/2248] OJ L443/6.

114 L A Winters, M Gasiorek and J Magntorn Garrett, 'New tariff on the block: what is in the UK's global tariff?' (*UKTPO Blogs* 20 May 2020).

115 M Gasiorek and J Magntorn Garrett, 'Reflections on the UK global tariff: good in principle, but perhaps not for relations with the EU' (*UKTPO Blogs* 21 May 2022).

116 UK in A Changing Europe, 'UK–EU regulatory divergence tracker: fourth edition' (12 July 2022).

117 D Phinnemore, K Hayward, B Melo Araujo and L Whitten (Queen's University Belfast) – Written evidence to the House of Lords Sub-Committee on the Protocol on Ireland/Northern Ireland (IIO0023), June 2021.

The first port of call in answering this question is article 55 of ASR which identifies the maxim of *lex specialis derogate legi generali* as the principle governing conflicts between ASR and treaty provisions.[118] It provides that the ASR does not apply 'where and to the extent that the conditions of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law'. The question then arises as to whether article 16 of the Protocol can act as *lex specialis* to the necessity defence. On this matter, Howse observed that the references to necessity and proportionality under article 16 of the Protocol 'might be interpreted as indicating that [the provision] is intended as *lex specialis* of the customary international law of state responsibility'.[119] Howse points to other striking overlaps between the two rules:

> The language of 'serious economic, societal or environmental difficulties' in Article 16 could be understood as a modification of the notion of 'essential interests' that are 'in grave or imminent peril'. The obligation to prioritize measures that 'will least disturb the function of this Protocol' might similarly be seen as reflecting (while modifying) the idea that necessity may not be invoked to 'seriously impair an essential' interest of the state to which the obligation is owed.[120]

For Howse, the operation of *lex specialis* would result in either article 16 of the Protocol 'modifying or completely displacing custom'[121] or the cumulative application of article 16 of the Protocol and the custom. In the latter case, any requirements imposed under the defence of necessity over and above those imposed under article 16 of the Protocol (eg non-contribution requirement) would also apply.[122]

The *lex specialis* rule, however, cannot govern the relationship between article 16 of the Protocol and the defence of necessity. When it comes to the issue of state responsibility, the distinction between primary rules and secondary rules is key to assessing the extent to which customary defences apply. This is because, despite the substantive overlap between the two mechanisms, the Protocol safeguards regime and the defence of necessity fulfil very different normative functions. Circumstances precluding wrongfulness under customary international law only apply, by definition, in cases where states have committed breaches of international law that are considered unlawful. But, as explained by Paddeu, an unlawful breach of international law requires

118 S Forlati, 'Reactions to non-performance of treaties in international law' (2012) Leiden Journal of International Law 25, 768.

119 Howse (n 32 above) 260.

120 Ibid 261.

121 Ibid.

122 Ibid 262.

more than just the determination that an act or omission attributed to a state is incompatible with an international obligation.[123] It must also be shown that 'no justifications are present before it can be concluded that a breach has occurred'.[124] The analytical structure which follows is that 'the treaty defence comprises a set of primary legal rules that must be adjudicated upon before possibly attracting the secondary, customary defence'.[125]

Viewed under this light, the necessity defence is very much a 'defence of last resort'.[126] The upshot is that, where treaty provisions include mechanisms that allow parties to deviate from their obligations in situations where the necessity to do so arises, such mechanisms must be applied 'prior to and independently'[127] of the doctrine of defence. In other words, where the necessity defence is available, it can only come into play after it is shown that non-performance cannot be justified by reference to a treaty-based exception.

This position has been articulated in a number of international investment law rulings.[128] In *Sempra v Argentina*, for example, an investment-arbitration ruling was annulled because it had chosen to apply the customary defence of necessity without ever examining the necessity exception that was available under the relevant bilateral investment treaty. The *ad hoc* committee annulling the decision reasoned as follows:

> Article 25 is concerned with the invocation by a State Party of necessity 'as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State.' Article 25 presupposes that an act has been committed that is incompatible with the State's international obligations and is therefore 'wrongful.' Article XI, on the other hand, provides that 'This Treaty shall not preclude' certain measures so that, where Article XI applies, the taking of such measures is not incompatible with the State's international obligations and is not therefore 'wrongful.' Article 25 and Article XI therefore deal with quite different situations. Article 25 cannot therefore be assumed

123 F Paddeu, 'Circumstances precluding wrongfulness in international law' in F Paddeu and L Bartels, *Exceptions in International Law* (Cambridge University Press 2020) 209.

124 Ibid.

125 J Kurtz, 'Adjudicating the exceptional at international investment law: security, public order and financial crisis' (2010) International and Comparative Law Quarterly 59, 344.

126 Paddeu and Waibel (n 82 above) 2.

127 Manton (n 92 above) 104.

128 For an excellent analysis of relevant case law, see A Gourgourinis, '*Lex specialis* in WTO and investment protection law' (2010) 53 German Yearbook of International Law 610–618.

> to 'define necessity and the conditions for its operation' for the purpose of interpreting Article XI, still less to do so as a mandatory norm of international law.[129]

The *ad hoc* committee finds then that the treaty exception and the customary defence, despite the substantive similarities, relate to 'quite different situations'. It is only where there is a determination that the conduct is not compatible with the treaty provision (primary obligation) that the tribunal can examine whether the responsibility of a state can be covered by a customary defence. Transposed to the context of the NI Protocol Bill, this would mean that the UK can only invoke the defence of necessity if the Bill cannot be justified under article 16 of the Protocol.

The above discussion highlights a problematic aspect of the UK's legal position on the Bill. The UK Government contends that Bill can be justified by reference to either (or both) article 16 of the Protocol and the defence of necessity. But it focuses its arguments almost exclusively on the latter. As the legal position states, the arguments based on the necessity defence are made without prejudice to the UK's right to take measures under article 16 of the Protocol.[130] In short, the UK Government does not exclude the possibility of invoking article 16 of the Protocol but is presently justifying the Bill by reference to the defence of necessity.

The extent to which it can validly invoke the defence of necessity nonetheless depends on the rules governing the defence's relationship with article 16 of the Protocol. If article 16 of the Protocol is deemed to act as *lex specialis* to the defence of necessity, the effect would be to either preclude the application of the latter or to only apply those aspects of the defence that go above and beyond the requirements of article 16 of the Protocol. In any event, the UK would be required to justify the Bill in light of the more stringent requirements of article 16 of the Protocol. If, as this article argues, the primary/secondary rules distinction applies, then the UK could rely on the defence of necessity if the Bill is shown to be an unlawful act under international law – that is, if the Bill violates the UK's obligations under the Withdrawal Agreement and cannot be justified under article 16 of the Protocol. Only in this scenario can the UK invoke the defence of necessity to preclude the wrongfulness of its conduct. The only way to get to the necessity defence is to accept the illegality of the conduct – something which the UK has so far rejected. Therefore article 16 of the Protocol cannot be sidestepped. Under the *lex specialis* rule, article 16 of the Protocol will be the main (possibly only) focus of any analysis, whereas

129 ICSID, *Sempra Energy International v Argentina*, Decision on Application for Annulment of 29 June 2010, ICSID Case No ARB/02/16, para 200.

130 UK Legal Position (n 4 above).

under primary/secondary rule analysis, the defence of necessity only comes into play after the justification of the Bill under article 16 of the Protocol has been dismissed.

CONCLUSION

Even if it is accepted that article 16 of the Protocol does allow for derogations to Protocol obligations, it seems inconceivable that the conditions for the invocation of the provision would be met. The Bill's aim is not to tweak and adjust problematic aspects of the Protocol. Its purpose is to entirely remove central components of the Protocol and replace them, unilaterally, with a completely different regulatory framework. Leaving aside the contentious questions of whether the external circumstances justifying the adoption of safeguards are present and whether these circumstances have been caused by the Protocol, it is difficult to imagine a world in which an adjudicator would come to the conclusion that the adoption of a measure which torpedoes the Protocol in almost its entirety is limited to what is strictly necessary. It is possible that the non-committal approach of the UK Legal Position towards article 16 of the Protocol reflects a recognition by the former's drafters of the inadequacy of the latter as a legal basis for the justification of the Bill.

Another issue that may have been weighing on the minds of the drafters of the UK Legal Position is whether existence of article 16 of the Protocol precluded the availability of the defence of necessity. Should the rule of *lex specialis* govern the relationship between article 16 of the Protocol and customary defence, the necessity defence – or most of it at least – would no longer be available to the UK. However, the *lex specialis* rule should not apply in relation to article 16 of the Protocol and the defence of necessity, as these two legal mechanisms have two very different normative functions. The Protocol safeguards regime allows parties to lawfully derogate from their obligations, whereas the defence of necessity has the effect of precluding the wrongfulness of unlawful conduct. The upshot is that the defence of necessity comes into play once it is shown that the Bill cannot be justified under article 16 of the Protocol.

It is, in any case, doubtful that the UK will fare significantly better by relying on the necessity defence. Whilst the *rationae materiae* scope of the defence is wider than that of the Protocol safeguards, some of the substantive standards that must be met for the former to be validly invoked are as restrictive as the latter – sometimes more so. That the Bill should fail to meet these conditions should not come as a surprise. The necessity defence can only excuse non-performance under exceptional circumstances and on a temporary basis. But many

of the circumstances identified by the UK to justify a state of necessity were predicted outcomes of the Protocol combined with the decision to leave the EU customs union and internal market. More than that, not only are these difficulties at least partly of the UK's own making; in some cases they have been exacerbated by the UK's actions since the entry into force of the Withdrawal Agreement. There is also nothing particularly limited or temporary about the Bill. It is sweeping in its scope. Many of the features of the Bill which would lead to a breach of the Protocol are only loosely, if at all, related to the circumstances identified in the UK Legal Position to justify non-performance. Where a link can be established, the Bill goes significantly beyond what is necessary to remedy the difficulties, often ignoring alternative measures that are not just less disruptive in terms of the operation of the Protocol but also, arguably, more effective means of achieving their supposed aims. Rather than limiting itself to the non-performance of obligations for a time-limited period, the Bill hollows out much of the Protocol and replaces it with an entirely different regulatory framework. Viewed in this light, the Bill seems like an attempt by the UK to unilaterally rewrite its international obligations under the pretext of necessity.