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Peter Thiel's oxymoron? The Windsor Framework and exceptional economic governance spaces

Aoife O'Donoghue
Queen's University Belfast
Correspondence email: aoife.odonoghue@qub.ac.uk.

ABSTRACT

Much of the pro-Brexit campaigning focused on the possibility of freeports and/or Singapore on Thames. Yet, it is Northern Ireland that turns out to have the innovative trading space. Globally, there are networks of freeports, complex sovereign spaces such as Hong Kong and a variety of tax havens and charter cities taking a multitude of forms. Some of these have emerged from colonial spaces and others have not. There is also an accelerating trend towards the privatisation of space exploitation. But across many of such spaces there is a dearth of employment protection, of access to human rights, massive gaps in transparency and a lack of substantive democracy, or in some cases no democracy at all. Yet, for some, such as Peter Thiel, this makes them – apparently – the perfect economic space. The Windsor Framework, a response to the specific issues Brexit caused for Northern Ireland, stands in contrast. It includes human rights provisions in its texts and it acknowledges where it sits within a broader transitional framework which aims to embed democracy as core to how the space is run, which is the impetus for it being a unique economic space. This article explores the nature of the current pro and anti-democratic trends in creating exceptional economic governance spaces.

Keywords: Windsor Framework; democracy; international economic law; international trade law; space law; rights; charter cities.

INTRODUCTION

> Since 1920, the vast increase in welfare beneficiaries and the extension of the franchise to women – two constituencies that are notoriously tough for libertarians – have rendered the notion of 'capitalist democracy' into an oxymoron. (Peter Thiel)[1]

The conceit behind Thiel's oxymoron is that capitalism's failings are down to its incompatibility with democracy. While Marxist scholars are likely to agree, Thiel's solution would be at odds with their remedies. For Thiel, curtailing democratic governance and regulation is essential for commerce to thrive and the remedy lies in less public law and more technology, whether in space, on the internet or in sea-steads.[2] In each of these spaces, he sees a new form of exceptional economic space. Yet these economic spaces are not so new. Exceptional territorial spaces, where the laws differ from those of the surrounding areas often within the same country, primarily to facilitate commerce, are not uncommon and are becoming increasingly widespread. Their contemporary forms start with Shannon Airport in 1959 and these exceptional spaces are now so commonplace as to be almost unremarkable. Their acceptance as natural is evident across much of the pro-Brexit campaign, particularly in the possibility of freeports or Singapore on Thames. But it is Northern Ireland that is proclaimed 'the world's most exciting economic zone'.[3] Whether the Windsor Framework, the legal structure regulating trade in Northern Ireland post-Brexit, pushes against Thiel's oxymoron or supports it lies at the core of this piece.

This article uses Northern Ireland and the Windsor Framework to consider two trends observable in these exceptional spaces. First, there is an increase in democratic interventions by national and subnational governments in the creation and management of these spaces. Conversely, there is also an anti-democratic trend that prioritises commerce over democratic norms. In doing so, the article considers whether the Windsor Framework is a model for future exceptional economic spaces. This is a question of particular importance given the acceleration of private companies extending such exceptionalism into space. Not that capitalism and democracy are inevitably tied, always are in congruence or are co-constitutive, but rather that

1 Peter Thiel, 'The education of a libertarian' (2009) *Cato UnBound: A Journal of Debate*. Peter Thiel is the billionaire co-founder of PayPal and Palantir. He is deeply engaged with US politics having served on Donald Trump's transition team and financially supported other libertarian causes. Max Chafkin, *The Contrarian: Peter Thiel and Silicon Valley's Pursuit of Power* (Bloomsbury 2021).

2 Thiel (n 1 above).

3 'Rishi Sunak threatens to push through Brexit deal on Northern Ireland without DUP' *Financial Times* (London 28 February 2023).

the Windsor Framework suggests that there are possibilities in considering how commerce may be facilitated that does not depend on restricting democracy or rights. The question of the relationship between democracy and capitalism forms part of a larger conceptual and political debate that this article does not seek to resolve. Rather, the article queries the ways in which democracy is characterised within international economic law.

There is a tremendous variety amongst the network of freeports, tax havens, private cities and other complex sovereign spaces that exist today. This diversity reflects the intentions of those creating them, whether that is the private city of Próspera in Honduras, the multitude of zones within small geographical spaces in the Emirates, or now Northern Ireland. The objectives behind their creation vary from creating a liberation space free of (some) law, attracting foreign direct investment, or facilitating complex peace settlements. What each share is a specific relationship between commerce and governance, where the barometer of democratic engagement and oversight shifts, and it is this relationship that is the focus here rather than the specific demarcations between these territories.

An inter-relationship between commerce, government and, at times, imperialism is a significant, if an understudied, aspect of legal economic discourse. The Dutch East India Company and the City of London are just two examples of historic exceptional spaces.[4] The colonisation of space, a current focus of several tech billionaires, points to their potential future. This article begins by considering the role of law, both international and domestic, in creating these exceptional spaces alongside a brief discussion of their history. The article then looks at the two current trends before looking at the Windsor Framework. Before concluding, the article considers the current frontiers, particularly as regards to the privatisation of space, and the future of exceptional economic spaces, be they less, or perhaps more, democratic.

EXCEPTIONAL ECONOMIC GOVERNANCE SPACES

Special economic zones (SEZs), export processing zones (EPZs) and charter cities are just three forms of exceptional economic governance spaces (EEGS) that are part of a broader array of aberrant zones of sovereignty.[5] Their function and operation rests in economic interests and now stretches into non-territorial spaces and extending beyond

4 Andrew Phillips and J C Harman, *Outsourcing Empire: How Company-States Made the Modern World* (Princeton University Press 2020) 22.

5 Thomas Farole and Gokhan Akinci, 'Introduction' in Thomas Farole and Gokhan Akinci (eds), *Special Economic Zones: Progress, Emerging Challenges, and Future Directions* (World Bank 2011) 1–21.

the atmosphere into space.[6] In a 2021 special issue of the *Journal of Economic Law* Douglas Zeng outlines both the variations amongst EEGS and the ostensible benefits that accrue including more jobs, innovation in the economy and inward investment.[7] But, as is discussed later, other research is less certain that these benefits truly follow or outweigh their costs. These EEGS rest on several law-based premises, including three outlined by James Nedumpara, Manya Gupta and Leïla Choukroune:

(i) fiscal incentives in the nature of tax incentives and exemption of duties,

(ii) non-fiscal incentives in the form of infrastructural and developmental facilities, and

(iii) regulatory incentives covering lenient and flexible compliance requirements.[8]

With a fourth, outlined by Shreya Bhattacharya and Kyle Allen:

(iv) quasi-sovereign units or Charter Cities that are entirely privately governed not merely construct a separate economic framework for the designated territory, but also establish a legal and political system autonomous from the host state.[9]

These spaces include, both implicitly and explicitly, an inducement rooted in light-touch democratic and/or judicial oversight, or in some scenarios democracy's absence.[10] EEGS run the gamut from entirely private sovereignty (itself an oxymoron), designed to be neither democratic nor representative, to areas where the demarcation is less stark but nonetheless impactful, like freeports, to specific regions like Hong Kong whose sovereignty and economic life are inexorably tied. They include spaces created by functioning democracies that demarcate

6 The World Customs Organization's Kyoto Convention defines SEZs as 'a part of the territory of a Contracting Party where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory'. World Customs Organization, The International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto 17 April 2008) ch 2, specific annex D.

7 Douglas Z Zeng, 'The past, present, and future of special economic zones and their impact' (2021) 24 Journal of International Economic Law 259–275.

8 James J Nedumpara, Manya Gupta and Leïla Choukroune, 'WTO litigation and SEZs: determining the scope of exceptional trade unilateralism' (2021) 24 Journal of International Economic Law 403–422, 403.

9 Shreya Bhattacharya and Kyle Allen, 'Is the charter cities moment here?' (*OXPOL* 30 October 2020); Margaret Kohn, 'The danger zone: charter cities, citizenship, and social justice' (*VerfBlog* 26 January 2020).

10 Free Trade Areas and Customs Unions also raise issues around democracy; however, they are not a key concern for this article.

a territory that is outwith the law that businesses and individuals habitually must comply with. They are also created in low- or mid-income economies which, while democracies, have histories linked to imperialism and whose economic sovereignty is always buffeted by both international law and more powerful economic actors, be they the states of the Global North, global corporations or international economic organisations.[11] Those created in non-democratic states also account for a variation in this trend, while the future lies in less traditionally territorialised spaces such as space. It is the removal of democracy, on a sliding scale from moving decision making upwards to 'private' sovereignty or international governance, that lies at the core of these queries, but also here lie the possibilities of an upscaling of democratic innovation and its deepening.

The legal infrastructures that support these EEGS are various. Underpinning much of international law, most of which is international economic law, is the Lotus Principle, that 'whatever is not explicitly prohibited by international law is permitted'.[12] This lays the foundations for why the World Trade Organization (WTO) does not not regulate these spaces, which, considering its overtly hostile view of inducements of commerce such as subsidies, tax incentives or non-tariff barriers, at first sight seems curious. Neither SEZs nor charter cities, which some describe as next generation SEZs, are mentioned in the WTO Agreements, nor are they present in most regional trade agreements. There are also few complaints made to the WTO Dispute Settlement Body (DSB) about the unilateral incentives within these spaces.[13] One recent case, between the United States (US) and India, suggests some willingness by the WTO DSB to engage with EEGS.[14] But the ramifications of this DSB finding is limited for two reasons:

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11 Lorenzo Cotula and Liliane Mouan, 'Labour rights in special economic zones: between unilateralism and transnational law diffusion' (2021) 24 Journal of International Economic Law 341–360.

12 *The Case of the SS Lotus* 1927 PCIJ Series A, No 10.

13 WTO Request for consultations, *China—Measures Relating to the Production and Exportation of Apparel and Textile Products (China—Textiles)*, WT/DS451/1, G/L/1004, G/SCM/D94/1, G/AG/GEN/103; WTO Request for consultations, *China—Measures Related to Demonstration Bases and Common Service Platforms Programmes (China—Demonstration Bases)*, WT/DS489/1, G/L/1105, G/SCM/D105/1; WTO Panel Report, *Brazil—Certain Measures Concerning Taxation and Charges (Brazil—Taxation)*, WT/DS472/R, adopted 11 January 2019; WTO, Panel Report, *Colombia—Measures Relating to the Importation of Textiles, Apparel and Footwear (Colombia—Textiles)*, WT/DS461/R, adopted 22 June 2016; WTO Appellate Body Report, *Colombia—Measures Relating to the Importation of Textiles Apparel and Footwear(Colombia—Textiles)*, WT/DS461/AB/R, adopted 22 June 2016.

14 WTO Panel Report, *India—Export Related Measures (India—Export Related Measures)*, WT/DS541/R, circulated on 31 October 2019.

first, the US's current negative view of the WTO DSB, which lessens the possibility of it, or others, pursuing further cases, and, second, the restricted nature of the specific findings in the case.

Both the absence of disputes and of legal architecture suggest acquiescence by the WTO and its members to these specific forms of unilateralism, even while the EEGS create economic inducements that advantage some WTO members over others.[15] In contrast, measures designed to protect the environment, public health or development consistently run into difficulties at the WTO, which always places them as second priorities behind preventing economic unilateralism.[16] From an international trade law perspective a rationalisation of the difference in approach could be that the distinction between EEGS and traditional economic sovereign spaces is that, in the former, it is deregulation as opposed to, in the latter, where it is increased or altered regulation, at question. Nonetheless, if the aim is freer trade that does not create nation-based inducements, then the WTO should at least look more closely at EEGS and the possibilities of trade distortion. But such a stance chimes with much of the literature of the 1980s and 1990s that pushed toward the then proposed WTO as a mechanism where free trade could be operationalised at a remove from democratic oversight, perhaps recalling Thiel's oxymoron – the franchise interferes with commercial progress.[17] Recent trade law scholarship has returned to this point, with leading figures like Ulrich Petersmann calling for a return to the 1990s, and further back, to pre-First World War lessons where he describes trade as freer.[18] Albeit that the pre-First World War era is an imperial trade era and in many incidences contained thin or fully anti-democratic and imperial trade regimes rarely is highlighted.

Over 80 per cent of EEGS are in low- and middle-income states, with the form they take often reflecting their geographical location and history.[19] For low-income and middle-income countries, creating EEGS

15 Julien Chaisse and Georgios Dimitropoulos, 'Special economic zones in international economic law: towards unilateral economic law?' (2021) 24 Journal of International Economic Law 229–257.

16 For example, DS58: United States—Import Prohibition of Certain Shrimp and Shrimp Products (2001), DS381: United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (2017).

17 Adam Tooze, 'Neoliberalism's world order' (2018) 65 Dissent 132, 134.

18 Ernst-Ulrich Petersmann, *Transforming World Trade and Investment Law for Sustainable Development* (Oxford University Press 2022); Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019) 28.

19 François Bost, 'Special economic zones: methodological issues and definition' (2019) 26 Transnational Corporations Journal 141–153, 150; United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2019: Special Economic Zones* (UNCTAD 2019) 137.

is regularly connected to World Bank or International Monetary Fund loans and their associated conditionality, which since the 1980s are tied to the Washington Consensus.[20] The Washington Consensus (and its 'new' variation) ties loans to market reforms, including the opening-up of economies to foreign investment, the divestment of national resources, the lowering of taxes and deregulation.[21] Using sovereign debt as a governance tool has a long history, with Haiti providing an example of where debt is exploited by multiple states, there France and the US, to control both the economy and the governance of a state.[22] The enormous cost to Haiti continues to have negative ramifications, long after it was initially required to compensate French slavers for their financial loss following Haiti's revolution and declaration of independence.[23] International investment law also plays a significant role, particularly if there is a dispute, especially one that arises from a change of government that leads to the regulation or ending of an EEGS. Ram and Guo describe the forms of obligations that investors have in these zones and the varieties in which they come.[24] These may include levels of investment, specific job target numbers alongside developmental objectives such as technology transfers, but also, potentially, labour welfare and environment standards. Sometimes these investors are states, for example China in Sri Lanka.[25]

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20 T Krever, 'The legal turn in late development theory: the rule of law and World Bank's Development Model' (2011) 52 Harvard International Law Journal 288–319; F J Garcia, 'Global justice and the Bretton Woods institutions' (2007) 10 Journal of International Economic Law 461–481.

21 Jennifer Bair, 'Taking aim at the new international economic order' in Philip Mirowski and Dieter Plehweeds, *The Road from Montpelerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009) 147; Dani Rodrik, 'Goodbye Washington consensus, hello Washington confusion? A review of the World Bank's economic growth in the 1990s: learning from a decade of reform' (2006) 44 Journal of Economic Literature 973–987; Katharyne Mitchell and Matthew Sparke, 'The new Washington consensus: millennial philanthropy and the making of global market subjects' (2016) 48 Antipode 724–749.

22 Hans Schmidt, *The United States Occupation of Haiti, 1915–1934* (Rutgers University Press 1995).

23 Robert Knox, 'Haiti at the league of nations: racialisation, accumulation and representation' (2020) 21 Melbourne Journal of International Law 245–274.

24 Joanna Lam and Rui Guo, 'Investor obligations in special economic zones: legal status, typology, and functional analysis' (2021) 24 Journal of International Economic Law 321–340.

25 Dilini Pathirana and Dinesha Samararatne 'The Colombo Port Project' in Matthew Erie (ed), *A Casebook on Chinese Outbound Investment: Law, Policy, and Business* (Cambridge University Press forthcoming).

The International Labour Organization (ILO) undertakes extensive work on the impact of EEGS on labour rights.[26] Informalisation of work regulations is common and, while at times these spaces drive employment up, the quality of those jobs, the conditions (including working hours) and the impact on other sectors of the economy outside the EEGS can be entirely detrimental to employment and regulatory standards.[27] The ILO, with the United Nations Conference on Trade and Development (UNCTAD), issued a report on working conditions across EEGS, linking them to the sustainable development goals.[28] The report states that:

> the history of violations of fundamental rights at work in such zones serves as a reminder of the need for clear and enforceable labour policy. If countries do not protect the rights of workers on whom the EPZs depend, the goal of economic development is ultimately unsustainable.[29]

They do suggest that these spaces could theoretically lead to higher labour standards and rights, and that this form of innovation could expand outwards beyond their territorialisation, rather than creating a lower standard, that in turn lowers the standards beyond. But the report acknowledges that very few were taking such a positive course. There were some examples in Brazil and South Africa. Their presence lends some credit to the possibilities of alternative practices that increase standards, even beyond labour rights to the environment and social policy, though both UNCTAD and the ILO, in their survey of 100 zones, found that the vast majority were not promoting themselves as regulatory innovators to support or develop rights, rather the opposite.

Domestic law plays a significant role, and specific examples are discussed below. From the international law perspective, domestic law is the root of EEGS' unilateralism, but this form of unilateral action is acceptable within international economic law to the extent that it favours rather than discriminates against foreign capital.[30] Unilateralism is problematic in one direction only. But domestic

26 Ramapriya Gopalakrishnan, 'Freedom of association and collective bargaining in export processing zones: role of the ILO supervisory mechanisms' Working Paper No 1 (International Labour Organization 2007); Conclusions adopted by the Tripartite Meeting of Experts to promote Decent Work and Protection of Fundamental Principles and Rights at Work for Workers in Export Processing Zones (EPZs) (Geneva 21–23 November 2017).

27 Deirdre McCann, 'Informalisation in international labour regulation policy: profiles of an unravelling' in Diamond Ashiagbor, *Re-imagining Labour Law for Development* (Hart 2019) 77.

28 ILO-UNCTAD, 'Enhancing the Contribution of Export Processing Zones to SDG 8 on Decent Work and Inclusive Economic Growth: A Review of 100 Zones' 24 March 2020.

29 Ibid iv.

30 Chaisse and Dimitropoulos (n 15 above) 326.

constitutional law, and its requirements, including those connected to the judiciary or to democracy, are rarely considered as relevant curtailing factors. Yet, as will be discussed below, often they are important protectors of specific rights, the right to equality throughout the territory, for instance, as well as with regards to concepts of sovereignty over resources and territory.

A BRIEF HISTORY OF EEGS

The modern era of EEGS begins in the west of Ireland at Shannon Airport in 1959.[31] But, there is little to be gained from thinking of these trends as linear trajectories, or waves where one form overtakes the next or where there is a single form of economic space which morphs into another.[32] Rather there are a multiplicity of these spaces operating, contracting and expanding with differing aims and legal structures that overlap and evolve. This also points to the possibility of not one linear future, rather that the trends apparent at this present moment will themselves wax and wane. There are echoes in the past but cognisance of the imperialism of the past, and the non-territorialised aspects of the future, requires caution in drawing lessons or direct comparisons. Looking at what comes before illustrates that what is claimed to be new and innovative often echoes past attempts to create spaces apart where commerce overshadows other priorities.

The history of EEGS runs through, though not in a fixed pattern, from the 1600s to the Dutch East India Company, through the First World War, to 'banana republics' and into the present. The still operational Hudson's Bay Company, founded in 1670 – albeit that it surrendered its sovereign powers in 1869 – is an example of the evolving character of these spaces.[33] As Sharman and Phillips describe in their book *Outsourcing Empire*, charter company states illustrate the complicated history of the handing over of sovereign spaces to commercial interests that is consistent in occurrence if not form.[34] For instance, the nature

31 Sherzod Shadikhodjaev, 'SEZs under the WTO scrutiny: defining the scope of trade issues' in Julien Chaisse and Jiaxiang Hu (eds), *International Economic Law and the Challenges of the Free Zones* (Kluwer Law International 2019) 213–231.

32 Kimberly Hutchings, *Time and World Politics: Thinking the Present* (Manchester University Press 2013) 16; Emily Grabham, *Brewing Legal Times: Things, Form and the Enactment of Law* (University of Toronto Press 2016) 145.

33 Rupert's Land and North-Western Territory – Enactment No 3: Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June 1870; A Phillips and J C Sharman, *Outsourcing Empire: How Company-States Made the Modern World* (Princeton University Press 2020) 130.

34 Phillips and Sharman (n 33 above) 153.

of the territorialisation of economic spaces has repeatedly evolved. Colonialism plays an important role in these contexts, in the histories of the interlink between imperialism and corporations such as the East India Company, across the canons of international law such as Hugo Grotius' focus on trade routes, or the protection of citizens abroad which extended to their commercial interests, to the charters granted by various sovereigns to adventurers for areas of land in the Americas and Pacific.[35]

The continuities extend beyond the Hudson's Bay Company, for instance, in the tax havens of many British overseas territories.[36] Further, both Singapore and Hong Kong are very specific economic spaces and reminders of how colonial history, including economic innovations alongside geographic location, provide for examples that many suggest should be emulated, albeit that neither their histories nor their current policy/legal structures can be recreated. During the Brexit campaign, both Singapore and Hong Kong were identified as spaces to mimic, as Singapore on Thames, albeit absent the forms of social housing, healthcare or educational provision that each provide.[37] These continuities do not just occur in Other places, in the colonial domain. The City of London and its corporation, with its history dating to the early Norman period, is yet another example, especially its enfranchisement of business interests.

The so-called banana republics of Central America also provide iterative connections with the present, particularly with regards to recent neo-imperialist reforms of investor governance spaces. The loss of sovereignty in these spaces holds particular resonance for Honduras. A banana republic is where a capitalist government, operated as a private commercial enterprise for the exclusive profit of the ruling and foreign class, exists. They are, by their nature, undemocratic. Marcelo Bucheli describes banana republics as the 'quintessential representation of American imperialism in Latin America', structured by American fruit companies that profited by 'holding the local governments in

35 For example the First Virginia Charter April 10, 1606; Yale University Project, '1996–2007 The Avalon Project'; Martine Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595–1615* (Brill 2006).

36 Eric A San Juan, 'Fiscal sovereignty: tax havens and the demarcation of the Third World' (2022) 54 George Washington International Law Review 43–101; Ronen Palan, 'Tax havens and the commercialization of state sovereignty' (2002) 56 International Organization 151–176.

37 Quinn Slobodian, *Crack-Up Capitalism: Market Radicals and the Dream of a World without Democracy* (Penguin 2023) 13, 61. Other aspects of their governance, such as draconian policing have also been emulated within the United Kingdom, see Illan Wall, *Law and Disorder: Sovereignty, Protest, Atmosphere* (Taylor & Francis 2020) 31.

[their] pockets, controlling the local economy of the host countries, and harshly exploiting the plantation workers'.[38] In Honduras by the late 1800s, the United Fruit Company, the Standard Fruit Company, and the Cuyamel Fruit Company controlled the cultivation, harvesting and exportation of bananas and completely managed the road, rail and port infrastructure, while the Government of Honduras had ceded title to vast swathes of the north of the country.[39] Eventually, the US dollar became legal tender in Honduras. Throughout this period, local activists in Honduras maintained their opposition to privatisation of their governance, a battle that continues, as discussed below.

CISKEI

Ciskei, a creation of apartheid South Africa, is a historic example, but a critical one. Ciskei was one of 10 'independent states' or Bantustans. Bantustans were specific territorial spaces set apart as Black tribal homelands, where individuals were forcibly transferred to from South Africa and then stripped of their South African citizenship.[40] Bantustans contained legislative assemblies with a degree of self-rule and nominal independence, albeit no state recognised them and they were condemned on multiple occasions by the UN General Assembly.[41] The rationale for considering Ciskei is its place as an exemplar of EEGS, favoured by Milton Friedman in his advice to South Africa in the 1970s.[42] This form of 'enclave' he described as being like Hong Kong, and as giving freedom without the ballot box, freedom without democracy, where a pure form of libertarian economic governance could prevail.[43] This did not have popular support, with many Black

38 Marcelo Bucheli, 'Enforcing business contracts in South America: the United Fruit Company and Colombian Banana Planters in the Twentieth Century' (2004) 78 Business History Review 181–212.

39 Malcolm D MacLean, 'O Henry in Honduras' (1968) 3 American Literary Realism 1870–1910 36–46.

40 Henry J Richardson II, 'Self-determination, international law and the South African Bantustan policy' (1978) 17 Columbia Journal of Transnational Law 185–220, 186; it has an older history as a former Bantu, the Bantu Authorities Act 1951.

41 James Crawford, *The Creation of States in International Law* (Clarendon Press 2006) 338–349; GA Res 2775, 26 UN GAOR, Supp (No 29) 39, UN Doc A/8429 (1971); GA Res 3411, 30 UN GAOR, Supp (No 34) 35, UN Doc A/10034 (1975); GA Res 31/6, 31 UN GAOR, Supp (No 39) 10, UN Doc A/31/39 (1976).

42 'With Rose Friedman, "Record of a trip to southern Africa, March 20–April 9, 1976" unpublished typescript transcribed from a tape, dictated 7–9 April 1976. Excerpts published in Milton Friedman and Rose Friedman, *Two Lucky People: Memoirs* (University of Chicago 1998) 435–440.

43 Slobodian (n 37 above) 84; Friedman and Friedman (n 42 above).

South African groups organising against them, often followed by brutal suppression.[44]

Ciskei was declared independent in 1981 and aimed to concentrate the Xhosa-speaking peoples into one area, but, more than this, it was created as a form of legal/economic system to attract foreign investment.[45] It contained little by the way of labour, employment or other protections while also having lower taxes, including no corporate taxes, than the rest of South Africa.[46] The Ciskei 'government' heavily subsidised industry to attract foreign investment while also ensuring easy access to capital. It contained a large unorganised workforce. The Bantustans were densely populated, while the state often paid half of factory wages, and wages were pegged at 25 per cent lower than the rest of South Africa. Most international firms operated with little regulation in Ciskei.[47] In stark contrast, the Black South African populations were generally only allowed to run one business, and it had to be one selling necessities.[48]

There was no democracy, but what existed was a society built to attract private capital. Ciskei was described as a 'laboratory experiment', an example trumpeted at the time, and continues to be pointed toward as an exemplar where the extreme form of racialised totalitarianism is brushed over in favour of a whole regime dedicated to commerce.[49] The aim was to create a Hong Kong of Africa.[50] Yet, there was no boon for the population: for example, Ciskei had an abnormally high death rate – infant mortality was 50 per cent.[51] As with broader South African history, protest and strike eventually led to the end of Ciskei, but it has

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44 'Say no to Ciskei independence' (*South African History Online* 22 February 2016).

45 Status of Ciskei Act 110 of 1981; Republic of Ciskei Constitution Act 20 of 1981; Ciskei Government Gazette, vol 9, no 96 (4 December 1981); John Dugard, 'South Africa's independent homelands: an exercise in denationalization' (1980) 10 Denver Journal of International Law and Policy 11–36, 18.

46 Alan Hirsch, 'Investment incentives and distorted development: industrial decentralization in the Ciskei' (1986) 17 Geoforum 187–200, even as the proponents maintained its success; Leon Louw, 'Ciskei's economic reforms: correcting the critics' (1986) 3 Indicator South Africa 18–21.

47 Laura Evans, *Survival in the 'Dumping Grounds': A Social History of Apartheid Relocation* (Brill 2019) 75.

48 Henry J Richardson II, 'Self-determination, international law and the South African Bantustan policy' (1978) 17 Columbia Journal of Transnational Law 185–220, 188.

49 Slobodian (n 37 above) 97; see also on Chile under Pinochet, Whyte (n 18 above) 156.

50 Whyte (n 18 above) 84.

51 Alan Hirsch, 'Industrialising the Ciskei: a costly experiment' (1986) 3(4) Indicator South Africa 15–18; Meredeth Turshen, 'Health and human rights in a South African Bantustan' (1986) 22 Social Science and Medicine 887.

maintained its place as an exemplar of what is possible amongst those who agree with Thiel's oxymoron.[52] Freedom without the ballot box remains a potent claim.

PRÓSPERA: A CONTEMPORARY CISKEI?

Próspera is a private city located on the island of Roatán in Honduras with its own fiscal, regulatory and legal systems, founded in 2011 by Honduras Próspera Inc, a US company registered in Delaware.[53] Próspera is a charter city that, much like the charter companies of the imperial era, possesses its own judicial, administrative and business practices, its own sovereign authority.[54] Cao describes charter cities as hyperkinetic variants of SEZs.[55] Próspera's owners – and owners is the correct term – describe it as for 'builders, pioneers, and risk-takers who believe in the boundless potential of human achievement and choose to build the future we want'.[56] It is not alone, there is a stalled charter city proposal for Madagascar and a plan, which did not get far, 'in 2020 following discussions between property developer Ivan Ko and the Irish Government, with the former proposing the construction of a safe haven in the form of a semi-autonomous city in Ireland', to be called Nextpolis.[57] Charter cities are becoming a popular proposition: for instance, the idea was floated during Liz Truss's brief sojourn as Prime Minister and by Rishi Sunak.[58]

Próspera was established following a coup in Honduras. The new Government created zones for employment and economic development (ZEDEs). ZEDEs were intended to be part of the newest generation of EEGS, a sovereign space apart from the rest of Honduras. Próspera's design means 'private government decides and adjudicates on all law'. It is not the absence of law, but rather that commercial interests design the law. In 2012, the Honduran Supreme Court found ZEDEs to be unconstitutional.[59] The Supreme Court found ZEDEs to be a threat to Honduras' territorial integrity as they possessed state-like competences (administrative, judicial and financial) thus also undermining Honduran territorial sovereignty. The Court also found

52 Slobodian (n 37 above) 84.
53 Próspera Law Code.
54 Lan Cao, 'Charter cities' (2019) 27 William and Mary Bill of Rights Journal 717–764, 720.
55 Ibid 721.
56 Próspera website homepage.
57 Bhattacharya and Allen (n 9 above).
58 George Monbiot, 'Welcome to the freeport' *The Guardian* (London 17 August 2022).
59 RI-769-11 Casación Constitutional 17 October 2012.

they violated Honduran citizens' freedom of movement as they could not move to Próspera without paying an annual fee and signing the city's social contract.[60]

The findings of the Honduran Supreme Court on its Constitution suggest that endeavours like it are in vain, however, the judges were subsequently replaced (one of the lawyers leading the campaign against the law was also murdered), and the Constitution amended to permit ZEDEs.[61] Huge protest movements and the deaths of activists and journalists across Honduras followed. Honduras' history as a banana republic is important in that context, as is Próspera's own branding. Its website describes how 'legacy systems, poor governance and its cumulative effects trap human potential, leading to economic stagnation', comparing G20 to non-G20 states, arguing that, just as in Hong Kong and Singapore, it can help Honduras prosper through its good governance, which assumes that Hondurans are not capable of this themselves. The imperialism of the context is sometimes quite blatant. When Stanford economist and former World Bank chief economist Paul Romer contemplates the idea of returning to colonialism as a good thing and doing it explicitly via trade, this is one form he is alluding to, and indeed he was involved with Próspera.[62]

A newly elected Government suspended the ZEDE in 2021. Próspera currently stands in legal limbo while its owners, via the International Centre for Settlement of Investment Disputes (ICSID), are seeking nearly $11 billion in compensation, two-thirds of the 2022 Honduran budget, under the Central America Free Trade Agreement and the US–Honduras Bilateral Investment Treaty.[63] Some US members of Congress have called for the US to withdraw from this form of investor dispute specifically because of Próspera.[64] This is a very current example of attempts to create spaces outside of democracy, rights or law and it is a space that appears not to have any difficulties within international economic law. Critically, these spaces are not not compatible with the General Agreement on Tariffs and Trade, General

60 Ibid.

61 George Rodríguez, 'Honduran Supreme Court deems private cities unconstitutional; President warns they will be built eventually' (2012) Latin America Data Base 1–3; Beth Geglia. 'Honduras: reinventing the enclave' (2016) 48 NACLA Report on the Americas 353–360.

62 Paul Romer, 'Why the world needs charter cities' (*TEDTalk* 2010).

63 Próspera is registered as a corporation in Delaware: *Próspera, Honduras Próspera Inc, St John's Bay Development Company LLC and Próspera Arbitration Center LLC v Republic of Honduras* ICSID Case No ARB/23/2.

64 David Lawder, '33 Democrats urge ban on investor-state dispute provisions in all US trade deals' (*Reuters* 3 May 2023).

Agreement on Trade in Services etc, while also paradoxically defended under the terms of international investment law.[65]

THE ANTI-DEMOCRATIC TREND

Economist Garett Jones' 2020 book, *10% Less Democracy: Why You Should Trust Elites a Little More and the Masses a Little Less*, sums up a particular approach to governance where democracy is considered to have failed (to a greater or lesser extent) and something else, often something either elite or commercially driven, should replace it.[66] This is not new, such debates have been a constant since franchises were extended. Quinn Slobodian's book, *Crack-up Capitalism*, describes this trend of legal economic space creation, as does his earlier work, *The Globalists*, across the twentieth and twenty-first centuries.[67] Equally, Jessica Whyte outlines the processes by which human rights discourse and neoliberalism were reconciled, while maintaining an aversion to democratic oversight and, in more extreme cases, supporting 'transitional authoritarianism' to ensure the creation of a neoliberal economy.[68] This is not to suggest a uniformity of approach, much as EEGS vary in form, the anarcho-capitalist, ultra libertarian or neoliberal aims of these theories/political interventions is to create a space where democracy and a rights-based space is secondary to the economic interests of commerce also vary.

Newer iterations, whether that is the discourse on space, which will be returned to, William Rees Mogg and James Dale Davidson's sovereign individual,[69] Mark Zuckerberg's claim that Facebook was more like a government than a traditional state,[70] or Balaji Srinivasan's online secession where he claims a new de-territorial state could emerge, the parameters of where EEGS may move next are both familiar and new.[71] Srinivasan's online state would not have citizens but rather shareholders, nor would they apparently require healthcare or education or even retirement, and, while he describes it as consensual,

65 Nedumpara et al (n 8 above).

66 Garett Jones, *10% Less Democracy: Why You Should Trust Elites a Little More and the Masses a Little Less* (Stanford University Press 2020).

67 Slobodian (n 37 above).

68 Whyte (n 18 above) 178.

69 James Dale Davidson and William Rees Mogg, *The Sovereign Individual: Mastering the Transition to the Information Age* (Touchstone 1999).

70 Maryanne Kelton, Michael Sullivan, Zac Rogers, Emily Bienvenue and Sian Troath, 'Virtual sovereignty? Private internet capital, digital platforms and infrastructural power in the United States' (2022) 6 International Affairs 1977–1999, 1977.

71 Balaji Srinivasan, *The Network State: How to Found a New State* (Kindle 2022).

it is not democratic.[72] Digital iteration form 'Economic Zone 5.0' is described as a 'new unilateral compromise between the state and market'.[73] There are specific digital zones that exist not as separate physical spaces but digital EEGS that have already been created in Korea, Malaysia and China.[74] Charter cities could be categorised both as 1.0 and 6.0, while we have the City of London, and the US state of California that, since the 1870s, allow for the establishment of charter cities and have the 'freedom to set their own rules about elections, salaries and contracts',[75] the newer forms of charter city like Próspera also exist. This in many ways demonstrates the non-linear ways in which the history of the EEGS evolves.

These exceptions are trending toward the routine. Exceptions from generally applicable domestic regulations, legal requirements or democratic norms is the framework on which EEGS are based. Although there is no complete withdrawal of laws, rather they are remarkable in the general adherence to the lessening of democratic ties.[76] As already discussed, they are on a spectrum, with some retaining democratic oversight but with the potential for internationalised investor disputes and large exemptions from tax, employment, environmental and other laws, but others are not and extend to private sovereignty. There are almost too many of them with such variety – even within Dubai there are multiple sub-categories – that capturing an overall trend is difficult, but within each of these EEGS law plays a fundamental role. The EEGS poke holes within sovereign states and create zones outside democracy, employment, environmental and human rights law where commerce holds sway, but this is achieved through law. This is often accompanied by neoliberal economics, or in some places libertarianism and in others neo-imperialism. But they require a lot of law to exist and maintain their operation.

What is important about each of these examples is that each has happened, and each was based on a premise where democracy and traditional sovereignty were and are replaced. The human cost is sometimes recognised; they rarely make claims to create a great place for everyone, albeit there is often a claim to a better future. But the 'cost of freedom' is human misery for the majority achieved through steep deregulation of some laws with the introduction of often draconian

72 Ibid. See also, on Bitcoin, David Golumbia, *The Politics of Bitcoin: Software as Right-Wing Extremism* (University of Minnesota Press 2016).

73 Zeng (n 7 above).

74 Ibid.

75 Cao (n 54 above) 727.

76 Nedumpara et al (n 8 above). Lorenzo Cotula, 'The state of exception and the law of the global economy: a conceptual and empirico-legal inquiry' (2017) 8(4) Transnational Legal Theory 424–454, 441.

policing and the safekeeping of private property above all else, while the evidence that these zones create wealth for a state remains scant, despite decades of examples.

POTENTIAL PRO-DEMOCRATIC TRENDS

There is another trend. The assumption when creating economic spaces is the importance of keeping the negotiations far away from populations lest they ruin them – from the point of view of commerce – but that this is not necessarily correct. Differing forms of democratic engagement, from the subnational to referendums, the involvement of other parts of government, including courts, alongside civil society activism, can be essential to creating EEGS that may be positive in driving regulation in favour of the environment, labour standards and human rights.

Ohio Omiunu documents recent trends that see subnational regions engaging directly in trade negotiations. His primary examples are Canada, Nigeria and Belgium and, by necessary extension, the European Union (EU).[77] Across his work, he outlines ways in which subnational areas input into economic law negotiations and/or influence them. Though the reaction of some to the rejection of a trade agreement by Wallonia, a sub-region of Belgium, was that Wallonia needed to be got around, though, as a mixed agreement, the EU, as a legal and political project, required the region's inclusion.[78] The tendency toward attempting to sideline the troublesome region or to alter the law to remove the necessity of consultation hints towards the anti-democratic trend, but there are hints the opposite trend may be emergent.

Canadian federal states, at the request of the EU, were directly involved in negotiating the Comprehensive Economic and Trade Agreement (CETA),[79] In contrast, Wallonia's rejection of CETA from within the EU is evidence of what potentially happens when there is no consultation. But further, the possibility of improved settlements if more time is taken to undertake democratic engagement is evidenced,

77 Ohio Omiunu, 'The evolving role of sub-national actors in international trade interactions: a comparative analysis of Belgium and Canada' (2017) 6 Global Journal of Comparative Law 105–137; Ohiocheoya Omiunu and Ifeanyichukwu Azuka Aniyie, 'Evolution of subnational foreign economic relations in Nigeria' (2018) 25 South African Journal of International Affairs 365–392.

78 European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01; Franz C Mayer, 'European vetocracy? How to overcome the Wallonian CETA problem' (*VerfBlog* 24 October 2016).

79 Stéphane Paquin, 'Federalism and the governance of international trade negotiations in Canada: comparing CUSFTA with CETA' (2013) 68 International Journal 545–552.

especially as regards Quebec. Quebec's participation resulted in issues such as regulatory cooperation, certification, labour mobility and cultural diversity being brought into the negotiations.[80] In contrast, subregions of the EU were excluded from negotiations and, while requiring Wallonia's assent could be regarded as *sui generis*, as will be discussed below, it is not the only part of the EU that requires a more localised international economic law response.[81] The involvement of Canadian federal states resulted in their direct influence on the outcome and, as Stéphane Paquin argues, contributed to its legitimacy.[82] Wallonia's rejection of CETA chimed with much discontent with its content throughout the EU, in some ways representing broader concerns with its substance.

CETA also arises in the Irish context, though, as a non-federal state, the difficulties were less to do with the subnational and more as regards the requirements of the Irish Constitution. In *Costello v Government of Ireland*, the Irish Supreme Court decided that the Irish Arbitration Act 2010 could not be set aside via Treaty negotiations and that pause and consideration of the impact on domestic law was necessary.[83] Specifically, a majority of the Supreme Court held that the quasi-automatic effect of the investor tribunals created by CETA rulings would undermine state sovereignty especially in its legislative and judicial capacity, as well as putting at risk the state's 'general constitutional identity and fundamental constitutional values'.[84] The Irish Supreme Court ruled CETA could be brought within the terms of the Constitution but decided that a Constitution grounded in popular sovereignty and democracy alongside the structures by which domestic law is created meant that it required the involvement of the institutions of state. The Supreme Court decided not that CETA could never be in accordance with the Irish Constitution but rather that the necessities of democratic constitutionalism required more. Ireland offers a complicated example of interactions with international economic law. Since 1987 and *Crotty v An Taoiseach*, there is an embedded legal narrative where the potential alienation of power away from the domestic legal order and the Irish Constitution requires the consent,

80 Stéphane, Paquin 'Trade paradiplomacy and the politics of international economic law: the inclusion of Quebec and the exclusion of Wallonia in the CETA negotiations' (2022) 27 New Political Economy 597–609, 605.

81 Michel Huysseune and Stéphane Paquin, 'Paradiplomacy and the European Union's trade treaty negotiations: the role of Wallonia and Brussels' (2023) Territory, Politics, Governance 1–20.

82 Paquin (n 80 above) 605.

83 *Costello v Government of Ireland* [2022] IESC 44, [230] per Hogan J Eoin Daly; 'From sovereignty to social liberalism: two new dimensions of constitutional identity in Ireland' (10 June 2023).

84 *Costello* (n 83 above) [230] per Hogan J.

often by referendum but also via the institutions of state, to do so.[85] In *Crotty*, the Supreme Court defined sovereignty as a set of competencies that the executive cannot alienate without a referendum.[86]

If we return to Honduras and the original 2012 finding of unconstitutionality by its Supreme Court, there you get a similar argument as regards to sovereignty as being beyond the power of the executive to alienate. For Honduras, this includes freedom of movement, and the executive's lack of authority to pass that to a private entity to regulate and commercialise. In Ireland, the altering of dispute settlement processes and the involvement of investment dispute bodies could also not be created via executive, or EU, competence. If we go back to the idea of the charter city for Ireland, Nextpolis, and compare it with Próspera there is a distinct thread of constitutional hesitancy in both states that suggests that Ireland's Supreme Court would likely come to the same conclusion that its Honduran counterpart did. The Irish executive could not create a charter city without a referendum. Charter cities go far beyond Shannon Airport as the originator of modern EEGS. Any referendum would not only be a democratic exercise but also a use of constituent power to alienate a territory running closer to an exercise of self-determination. Ireland has altered its territorial claims via referendum; thus, it is not out of the question, but that was in relation to peace in Northern Ireland, the necessity of consent for unification and not in the service of commerce.[87] Próspera proceeded through the altering of the Constitution, the removal of members of the judiciary, and other forms of intimidation. Alienating executive/legislative/judicial competencies without the exercise of constituent power or at least democratic engagement should provide a moment of pause for any proposition to create an EEGS.

The reactions across Europe and Canada to CETA, in Honduras and historically in South Africa, are examples of how knowledge can be galvanised as resistance. The failure of both megaregional agreements, the Trans Pacific Partnership and the Transatlantic Trade and Investment Partnership (TTIP), were for multiple reasons, but the absence of transparency and the upending of democratic accountability formed part of the resistances across many countries to their

85 *Crotty v an Taoiseach* [1987] IR 713; see also *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

86 *Crotty* (n 85 above); Tom Hickey, 'Popular sovereignty in Irish constitutional law' (2017) 40 Dublin University Law Journal 147–170.

87 C R G Murray and Aoife O'Donoghue, 'Unity in diversity? Constitutional identities, deliberative processes and a "Border Poll" in Ireland' (2023) 34(2) King's Law Journal 340–368.

imposition.[88] Under TTIP, the imposition of child labour standards, common in EU economic agreements with the Global South, was an outside imposition of standards in an unaccountable and problematic way.[89] Bottom-up resistance played an important role in stalling their advance, forming another strand of the pro-democratic trend. Feminist responses, indigenous organising and urban utopianism each offer further examples of bottom-up resistance to undemocratic trends.[90] There are movements in Toronto, akin to sanctuary cities in the US, which are about localising politics and demonstrating that a distinct form of more democratic charter city is possible.

> If the city is to become a site of social citizenship and social justice, we must defend local normative orders that are inclusive and solidaristic. The city should be imagined as both a particular site of shared value and also a nodal point in broader, cosmopolitan networks of exchange and obligation. The right to the city should not be construed as something akin to shareholder value in corporate law. This means that city-zens should not use local institutions exclusively to promote the interests of current residents, and local decisions should be reviewed by constitutional courts or supranational human rights courts for consistency with principles of rights and equity.[91]

The diffusion of knowledge and creation of transnational alliances is not inevitably worth the price that some, especially in Honduras, pay. Contributing progressively to constructing EEGS or forcing their re-imagining may not just make them more legitimate, but also improve their substantive outcomes.[92] It potentially makes it more likely that EEGS could claim higher labour or environmental standards, which the ILO argues is possible, rather than anticipating a rush to the bottom, albeit, as always, with substantive democracy that requires deep political engagement.

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88 Aoife O'Donoghue and Ntina Tzouvala, 'TTIP: The rise of "mega-market" trade agreements and its potential implications for the Global South' (2016) 8(2) Journal of Trade, Law and Development 181–209.

89 Richard Gibb, 'Post-Lomé: the European Union and the south' (2000) 21 Third World Quarterly 457–481.

90 Casey R Lynch, 'Representations of utopian urbanism and the feminist geopolitics of "new city" development' (2019) 40 Urban Geography 1148–1167.

91 Kohn (n 9 above).

92 C Freudlsperger, *Trade Policy in Multilevel Government, Organizing Openness* (Oxford University Press 2020).

THE WINDSOR FRAMEWORK

Returning to Northern Ireland, the article now moves to the question of what the Windsor Framework tells us about these trends. As already discussed, Rishi Sunak describes the Framework as creating the most exciting economic space in the world, and further, removing barriers, like a border in the Irish Sea, that had become serious sources of tension.[93] But what does Sunak mean by that? Does he mean Singapore on Thames as his erstwhile immediate predecessor and her Chancellor wanted for London, a large form charter city, perhaps? Does he mean the subnational as a new form of democratic intervention within trade law development?

On the positive side of the equation, we have article 2 of the Framework.[94] In contrast to Thiel's oxymoron, article 2 embeds rights and anti-discrimination law as central to how the space is understood. Article 2 ensures that rights will not regress because of Brexit or establishing Northern Ireland as a form of EEGS.[95] Article 2 links human rights that come both from the 1998 Good Friday Agreement[96] and EU equality provisions, explicitly six EU Directives that Northern Ireland dynamically aligns with. Another positive feature is how the rights elements became incorporated. Specifically, the role that civil society, politicians from locale to Members of the European Parliament, alongside the Northern Ireland Human Rights and Northern Ireland Equality Commissions played in ensuring rights did not regress and, further, that these protections were included in the Agreement and the human rights bodies given substantive roles in oversight.[97] When seen in global terms, this is a substantive progression on how EEGS are conceived, albeit from the local level, there is a myriad of responses, as there are to Brexit more broadly. Article 2 has already been the subject of three cases, and thus far has disapplied two pieces of UK legislation

93 R Sunak, HC Deb 27 February 2023, vol 728, col 57, though not all concerns are resolved, see *In re Allister* [2023] UKSC 5.

94 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Official Journal of the European Union, Document 12020W/TXT (L 29/7) (31 January 2020).

95 Aoife O'Donoghue, 'Non-discrimination: article 2 in context' in Federico Fabbrini (ed), *The Law and Politics of Brexit Part IV* (Oxford University Press 2022) 89–106.

96 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) 1998 2114 UNTS 473.

97 C R G Murray and Claire Rice, 'Beyond trade: implementing the Ireland/Northern Ireland Protocol's human rights and equalities provisions' (2021) 72 Northern Ireland Legal Quarterly 1–28.

that diminished rights within Northern Ireland, albeit both cases are subject to appeal.[98]

Another feature, significant given what occurred in Wallonia, is Michel Barnier's, as the EU chief negotiator, direct engagement with EU members and not just the member states themselves but specific regions within them alongside various groups directly affected by Brexit.[99] This included multiple visits to Northern Ireland and meetings with various representative groups from civil society, as well as politicians and state agencies. While this was not intended to set a precedent for future EU negotiations, yet given what occurred in Wallonia, this form of engagement at the national and subnational level suggests a distinct form of EU negotiation engagement is possible and feasible.

On the negative side, regarding the creation of new laws under the Framework, there is a democratic deficit. Where dynamic alignment is necessary, some oversight through committee structures is in place, but direct engagement in how new law is made remains absent.[100] An easy alleviation, partially at least, would be for the Irish Government to extend the European parliamentary franchise to include those resident in Northern Ireland entitled to claim Irish citizenship. Under both EU and Irish law this would be straightforward, it would not require a referendum and there is precedent amongst EU states for citizens not resident in the country to vote in EU parliamentary elections.[101]

In updating from the Ireland/Northern Protocol and renaming it as the Windsor Framework (itself a response to public dissatisfaction), increased involvement by Northern Ireland's devolved institutions is in place. The Stormont Brake and the Windsor Framework Democratic Scrutiny Committee, two of the sites in which EU law

98 *SPUC* (2023) NICA 35; *Dillon* (2024) NIKB 11; *JR295* (2024) NIKB 35. See Colin Murray, 'We're all trying to find the guy who did this … the disapplication of the Illegal Migration Act in Northern Ireland' (*EU Law Analysis* 15 May 2024); Anurag Deb and Colin Murray, 'The Dillon Judgment, disapplication of statutes and article 2 of the Northern Ireland Protocol/Windsor Framework' (*EU Law Analysis* 8 March 2024).

99 M Barnier, *My Secret Brexit Diary: A Glorious Illusion* (Polity Press 2022) 85, 89, 118.

100 Murray and Rice (n 97 above).

101 Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, 'Continuing EU citizenship "rights, opportunities and benefits" in Northern Ireland after Brexit' (Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission March 2020) 54–55. See also *Spain v United Kingdom of Great Britain and Northern Ireland* Case C-145/04 2017.

changes that impact on Northern Ireland are scrutinised, are important innovations.[102] The Stormont Brake, which enables the Northern Ireland Assembly to object to, albeit not block, new EU laws is particularly noteworthy.[103] To be operationalised, first, the new EU measure must come within the scope of article 13 of the Windsor Framework, it must significantly differ from what it is amending or replacing, it must be significant and specific to the everyday life of communities in Northern Ireland and in a way that is liable to persist. A specific procedure within the Northern Ireland Assembly is necessary including discussions with the UK Government and traders and other interested parties as well as with the EU. Thirty members of the Assembly from two different political parties or one political party and an independent must support the Brake and this invocation is then forwarded to the Secretary of State for Northern Ireland who sits at the UK Government level. It is then for the Secretary of State to decide if the procedures, including quite tight deadlines, have been met. The UK Government decides at that point whether to, and in good faith, notify the EU and then a further procedure commences. Thus far, the Stormont Brake has not been pulled. And it remains to be seen how effective it will be. It does require, for instance, that the Stormont Assembly is operational, and it remains at the UK Government's discretion as to whether it will be pulled. But, set against the other democratic innovations, it does suggest that with some imagination a plethora of democratic oversight options are possible.

While these were not satisfactory to all parties, the Windsor Framework is quite a boutique arrangement, especially in the terms of an EEGS. Direct democratic engagement is far from the norm, and, while it remains to be seen how it will function, the possibilities now that it is introduced is that it could become a new workable norm in economic negotiations.

102 C R G Murray and N Robb, 'From the Protocol to the Windsor Framework' (2023) 74(2) Northern Ireland Legal Quarterly 395–415, 405; A Deb, 'Parliamentary sovereignty and the protocol pincer' (2023) 43 Legal Studies 47–65, 63–64; Windsor Framework (Democratic Scrutiny) Regulations 2023 (SI 2023/XX) para 2.

103 Article 13(3a) Decision No 1/2023 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 24 March 2023 laying down arrangements relating to the Windsor Framework [2023/819] PUB/2023/426 OJ L 102, 17 April 2023, 61–83.

SPACE AND THE FRONTIER OF EEGS

In 2022, the space industry was worth $469 billion and will reach $737 billion by the end of the decade.[104] When you consider that $11 billion represents two-thirds of Honduras' annual budget, the sheer size becomes apparent. Not only does the ever-increasing size of the industry make it important, but it is also where a tremendous amount of legal innovation is occurring and where zones of exceptionalism appear to have found their newest locale. This section is not intended to give a full account of the legal and economic questions that space exploration creates, but rather to point to where the debates on EEGS are currently moving toward.

Space is the new wild west, the new spice islands of the Dutch East India Company,[105] the new factories of Ciskei, or, to echo a long-held view, not from *Star Trek* but from proponents of the US space programme of the 1950s, the final frontier.[106] Mary Jane Rubenstein outlines in her work the language of frontiers, of exceptionalism, of rights of extraction, of destiny, of exploration and occupation that are rife in the discourse on space.[107] But she asks a fundamental question: just who is working in the kitchens in the restaurants on Elon Musk's luxury trip to Mars?[108]

A small but important example of the way we conceive of space is found in the Moon Treaty, which, among other things, prohibits sovereignty in any part of space.[109] Albeit other than India, no space-active state has ratified the Treaty. The Moon Treaty declares it to be the common heritage of mankind. But, as with the oceans, this has meant more about licensing for mining than it has about seeing space as a non-economic place to be shared.[110] The history of the moon protected by the Moon Treaty is the history since humanity started to physically interact with it: it does not have a historical existence beyond our interactions with it. It is entirely anthropocentric.[111]

How space is conceptualised in the West is very much as a frontier to be explored and colonised and as a resource to be exploited, and often

104 Space Economy Report 10th edn (*Euroconsult* nd).

105 Amitav Ghosh, *The Nutmeg's Curse: Parables for a Planet in Crisis* (John Murray 2022) 5.

106 Mary Jane Rubenstein, *Astrotopia* (University of Chicago Press 2022) 69.

107 Ibid 4–9, 105–108.

108 Ibid 15.

109 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies 1979 1363 UNTS 3.

110 Karin Mickelson, 'Common heritage of mankind as a limit to exploitation of the global commons' (2019) 30 European Journal of International Law 635–663.

111 Annette Froehlich, *Protection of Cultural Heritage Sites on the Moon* (Springer 2020).

all three at the same time, leading to its conceptualisation as a locale where we naturally and rightfully will expand.[112] If we think of this in terms of Elon Musk's and Jeff Bezos' plans for space or the billionaires 'space race', it is in the context of the privatisation of space exploration and the assumption of those places as ideal sites of capitalist extraction. Musk has published a manifesto about Mars and how he thinks it should be governed and it very much is in line with the articulations of Ciskei, Próspera and forms of digital sovereignty.[113] While space exploration has always included military considerations, as with the imperial histories discussed earlier, it is also about extraction and how we assume that the minerals and resources beyond Earth are ours to use because they are *terra nullius*, they are empty. Just as we assumed this before about *terra incognita Australias*, a creation of emptiness that was to the benefit of economic exploitation.[114] It is once again the creation of an exceptional economic space.

As discussed earlier, international law's Lotus Principle means everything is permitted unless it is prohibited, albeit states often act on the basis that they need a positive basis to proceed. If we accept that extending international law into space is a natural step, which, of course, is not a pregiven, then this principle applies equally there. Paliouras argues that non-appropriation is the '*grundnorm* of *juris spatialis*'.[115] He includes in this the Moon and other celestial bodies. Looking to the current state of the law under the Outer Space Treaty, the issue of attribution in the context of the privatisation of space becomes key. Currently, the Outer Space Treaty attributes the private exploration of space to the host nations of those enterprises.[116] When the behaviour of private actors becomes attributed or imputed to the

112 Cait Storr, '"Space is the only way to go": the evolution of the extractivist imaginary of international law' in Shane Chalmers and Sundhya Pahuja (eds), *Routledge Handbook of International Law and the Humanities* (Routledge 2021) 290.

113 Elon Musk, 'Making humans a multi-planetary species' (*New Space* 2017) .

114 Ruth Houghton and Aoife O'Donoghue, 'Utopias, colonialism and international law' (2024) 27 Law, Text and Culture 204–227; Vasuki Nesiah, 'Placing international law: white spaces on a map' (2003) 16(1) Leiden Journal of International Law 1–35, 3; Shane Chalmers, 'Terra nullius? Temporal legal pluralism in an Australian colony' (2020) 29(4) Social and Legal Studies 363–485, fn 1. See also, Merete Borch, 'Rethinking the origins of *terra nullius*' (2001) 32 Australian Historical Studies 222–239.

115 Zachos A Paliouras, 'The non-appropriation principle: the grundnorm of international space law' (2014) 27 Leiden Journal of International Law 37–54, 38.

116 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 610 UNTS 205 (1967); see also *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (New Application 1962), Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3.

state, that behaviour itself has law-forming implications. Attribution asserts that lawyers, judges and officials can look to private activity as relevant behavioural building blocks of an emerging rule of customary international law, or the 'subsequent practice' that helps to determine the meaning of Treaty terms. Via attribution, private actors can become initiators of state practice and ultimately become the creators of customary international law, of binding law in much the same way that private imperial companies did through from the 1600s–1800s. That is, private activity can count as relevant state practice, which in theory should rarely happen, but in practice is more complicated.[117] Thus, when a private actor standing in the shoes of a state asserts a legal rule in national and international fora or behaves as though their asserted rule were correct and openly acts accordingly, that it applies to custom formation, and this extends to space.[118]

Durkee suggests that 'it is possible to argue that private companies are themselves developing the international law of outer space' through a variety of means such as pushing for particular practices, or omissions (like lobbying states to not sign Treaties in this area) and their own actions/behaviours which in the absence of states acting differently becomes that state's interpretation of the Outer Space or Moon Treaty.[119] Attributed law-making, as Durkee argues, raises a lot of concerns, and especially here where we have private law-making that suits commerce and downgrades any other affects.

Much of the Treaty language across space law frames its contents as being in accordance with international law, which, as has been evident throughout this piece, is no guarantee of democratic engagement, human or labour rights or environmental standards. Emptiness or the inability to claim sovereign territorial control does not rule out resource exploitation, and, while there is a divide in the commentary, many make a direct analogy with the imperial evolution of the law of the sea.[120] But much of this also chimes with the anti-democratic character of anarcho-capitalist and neoliberal claims. Space is the perfect location to escape state sovereignty, claims to democracy or any labour standards: there is a clear idea that going to space will be to go with no regulatory interference, but that is a decision – it is not inevitable.[121] To return to Rubenstein's question about who will be working in Elon Musk's kitchens, there is an assumption in each of the billionaire assertions to space that there will be an underclass. But

117 Melissa J Durkee, 'Interstitial space law' (2019) 97 Washington University Law Review 423–481, 443.

118 Ibid.

119 Ibid 428.

120 Paliouras (n 115 above) 47.

121 Musk (n 113 above).

more than that, it is (a) space absent democracy, human rights, labour and employment law and that makes it attractive to the billionaires going there. That and the major state-contracts available through the privatisation of the National Aeronautics and Space Administration and other space agencies.[122] It is the future of EEGS, and that future is overlapping with the present enthusiasm for charter cities and online sovereignty, but it is also part of a much longer history of attempts to create spaces away from democracy and regulation. However, there is an opportunity with space to embrace the democratic choice.

CONCLUSION

> a relatively free economy is a necessary condition for a democratic society … I also believe there is evidence that a democratic society, once established, destroys a free economy.[123] (Milton Freedman)

The Windsor Framework may be *sui generis*. There are far more imitators of Shannon Airport and Dubai than there are (yet) of the Windsor Framework. The Framework also comes out of the Exit Agreement, an exit from one EEGS into another, albeit the Framework itself occupies two spaces at once, as it looks both backward to the UK's membership of the EU and Northern Ireland's peace process and forwards into Northern Ireland's and the EU's future. The question this article poses is whether the future of EEGS is closer to the democratic trend that can be observed in the Framework or one that aligns with Peter Thiel's oxymoron.

Zeng argues for the need to focus on 'a sound legal and regulatory framework and an embodiment of sustainability and resiliency towards various external shocks like today's COVID-19 pandemic'.[124] What is missing from these types of suggestions and where the Windsor Framework may be a corrective is that you must also have democratic resilience, and that includes rights, environmental futures and the possibility of creating increasingly better working and living conditions entrenched in democracy. Many EEGS top tables on doing business, but these matrices of 'freedom' do not include democracy and instead reward steep deregulation. Yet, in any table of human misery, many would also come out on top. The apartheid in South Africa, the modern slavery in Dubai, the murder of political, especially indigenous

122 Elena Cirkovic, 'The Earth system, the orbit, and international law' in Margot A Hurlbert, Timothy Cadman and Andrea C Simonelli, *Earth System Law: Standing on the Precipice of the Anthropocene* (Taylor & Francis 2022) 121.

123 Peter Brimelow, 'Why liberalism is now obsolete: an interview with Nobel Laureate Milton Friedman' (*Forbes* 12 December 1988).

124 Zeng (n 7 above).

activists, in Honduras, the past imperial policing in Hong Kong or the present crackdown from Beijing, the misery is as fundamental as is the economic freedom. There are some spaces within EEGS that improved women's labour rights, including non-discrimination and maternity rights. However, these are the exceptions. Often such EEGS focus on women's labour rights because they are the majority employed and there a high levels of risk associated with the work. But standards often also lack enforcement and are accompanied by laws against collective bargaining, making it ever more unlikely that this 'notoriously tough' constituency for Thiel will come on board.[125] Labour conditions ought not to be at the beneficence of commercial interests nor a form of rights-washing to improve a corporate image.

One of the re-occurring arguments against democracy, and this is partially what Thiel is saying about extending the franchise, is that otherwise there is chaos. He creates a binary between order – for Thiel this is the order of the corporation/shareholder and the chaos of democracy. This is very often the anti-democratic trend that pushes against thick democracy and favours authoritarian (including commercial) control. Devolution in the UK mediates towards complication. Northern Ireland and the Windsor Framework are messy. But the messiness that they create builds a form of resilience and engagement with democracy. This may not prioritise commerce, but there is little evidence that it harms it, while the absence of democracy has repeatedly been demonstrated to cause harm. Perhaps this is the real oxymoron, that unfettered commerce is incompatible with the freedom and rights of the masses, particularly their right to direct the laws that bind them.

125 Cotula and Mouan (n 11 above) 358.

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People – the forgotten chapter? From the EU's neighbourhood policy to post-Brexit Ireland (north and south) – and lasting damage to the integrative capacity of the EU Internal Market project†

Dagmar Schiek
University College Dublin*
Correspondence email: dagmar.schiek1@ucd.ie.

ABSTRACT

Following distorted perceptions of the role of people movement in the European Union (EU), the Trade and Cooperation Agreement between the EU and the United Kingdom does not enable people movement to the same extent as other Association Agreements between the EU and its other neighbouring states. Even the much discussed Ireland/Northern Ireland Protocol (also Windsor Framework) largely ignores people movement, whose protection on the island of Ireland remains weak as a result. This note argues that forgetting the people matters, not only on grounds of the principles, but also for practical relations on the island of Ireland.

Keywords: free movement; people; Internal Market; Brexit; EU neighbourhood.

INTRODUCTION

Movement of people has been presented as contributing to 'Brexit' throughout and beyond United Kingdom (UK) academia,[1] culminating in the suggestion that the founders of the European Economic Community (EEC) never truly supported free movement of workers as integral to the Common Market.[2] That scepticism against

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1 See, for example, Susanne K Schmidt, Micheal Blauberger and Dørte Sindbjerg Martinsen, 'Free movement and equal treatment in an unequal union' (2018) 25 Journal of European Public Policy 1391, and other articles in that special issue.

2 Catherine Barnard and Sarah Fraser Butlin, 'Free movement vs fair movement: Brexit and managed migration' (2021) 55 Common Market Law Review 203–226.

movement of people is also mirrored in UK-based textbooks, which teach the Internal Market and free movement of people separately.[3] Post-Brexit, socio-legal studies emphasise that European Union (EU) free movement rights for workers systematically destabilised poor neighbourhoods in Norfolk (England) and mainly led to the free movers being depreciated,[4] explicitly contradicting studies highlighting the opportunities of free movement,[5] and underlining the earlier suggestion for the EU to replace free movement by 'fair movement'.[6] The same ideal of an Internal Market without people also informed the draft for a continental partnership with the UK by a group of German and UK authors.[7] The Trade and Cooperation Agreement (TCA) with the UK as well as the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland (also Windsor Framework) mirror this vision, containing at best weak references to people movement on the island of Ireland as a result.

This note argues that forgetting the people matters, not only on grounds of the principles, but also for practical relations on the island of Ireland. The island of Ireland accordingly presents an astute case-study for the inherent problems of economic relationships between states which deprioritise person movements. It will start with summarising the principled relevance of free movement of persons, contextualise the state of affairs on the island of Ireland with the EU's general approach to trade agreements beyond and within its neighbourhood, highlight the complexity of the state of affairs and illustrate its shortcomings through two current examples.

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3 Most radically, Iyiola Solanke, in *EU Law* 2nd edn (Cambridge University Press 2022) pt III, presents 'Citizenship and migrant workers' under 'Rights of Movement and Residence in the EU', while the Internal Market in pt IV is taught without free movement of workers. Similarly, free movement of workers and EU citizenship are mixed into one chapter by Catherine Barnard, 'Free movement of natural persons and citizens' in Catherine Barnard and Steve Peers (eds), *European Union Law* 4th edn (Oxford University Press 2023) ch 13. At the other end of the spectrum, the Internal Market is taught as the TFEU presents it (goods, workers, establishment, services), and EU citizenship added as a separate chapter, in Paul Craig and Graínne de Búrca, *European Union Law: Text, Cases and Materials* 6th edn (Oxford University Press 2020).

4 Catherine Barnard and Fiona Costello, 'When (EU) migration came to Great Yarmouth' (2023) 18 Contemporary Social Science 150.

5 The article refers to older publications by Adrian Favell, who with collaborators maintains an optimistic perspective: Roxana Barbulescu and Adrian Favell, 'Commentary: a citizenship without social rights? EU freedom of movement and changing access to welfare rights' (2020) 58 International Migration 151; Ettore Recchi and Adrian Favell, *Everyday Europe: Social Transnationalism in an Unsettled Continent* (Polity Press 2019).

6 Barnard and Fraser Butlin (n 2 above).

7 Jean Pisani-Ferry, Andre Sapir, Guntram B Wolff, Norbert Roettgen and Paul Tucker, Europe after Brexit: A Proposal for a Continental Partnership (Bruegel 2016).

PEOPLE IN THE EEC COMMON MARKET AND THE EU INTERNAL MARKET – BETWEEN POSITIVE VISION AND LIMITING REALPOLITIK

There is a normative case for indivisibility of people and products in an internal market, which liberalises economic collaboration through free movement. Free movement in the EU entails the right to demand absence of barriers of movement, be these discriminatory or not. Free movement of goods and freedom of establishment and services enable producers to trade freely across the Internal Market, and thus to optimise allocation of production, which also results in reallocation. For example, agricultural production will follow adequate weather conditions, industrial production will follow concentration of capital, and production requiring highly qualified workers will follow concentration of those.[8] If economic freedoms are not matched by free movement of people, those depending on employment or sole self-employed work are then denied the right to follow the economic moves and demand equal treatment with locals at their destination. Such regimes can be criticised as 'favouring capital over labour',[9] because they reinforce imbalances between those producing based on owning capital and those labouring individually for remuneration.

In a progressive interpretation, the EU Internal Market can be read as a counter-model to such one-sided liberalisation. The Treaty on the Functioning of the European Union (TFEU) lists persons, services, goods and capital as equally relevant elements of the Internal Market (article 26 TFEU), thus guaranteeing free movement of products (goods and services) and production factors (labour and capital, factor mobility). The four economic freedoms include individual rights to move across borders and be treated equally with the resident population if participating in economic activities. This supports the normative vision that creating the Internal or Common Market should serve labour as well as capital, which also explains slightly less generous provisions for those moving outside market activities.[10] There is also the hope that

8 In summary, Dagmar Schiek, Liz Oliver, Christopher Forde and Gabriella Alberti, *EU Social and Labour Rights and EU Internal Market Law* (European Parliament 2015) 20–24; and full textbook coverage by Richard Baldwin and Charles Wyplosz, *The Economics of European Integration* 7th edn (McGrawHill 2022) 234–255.

9 Jukka Snell, 'The Internal Market and the philosophies of market integration' in Catherine Barnard and Steve Peers (eds), *European Union Law* 6th edn (Oxford University Press 2023) 336–365, referring to the 'home country control model' of the Internal Market.

10 Niamh Nic Shuibhne, 'Reconnecting free movement of workers and equal treatment in an unequal Europe' (2018) 43 European Law Review 477; Dagmar Schiek, 'Towards more resilience for a social EU – the constitutionally conditioned Internal Market' (2019) 13 European Constitutional Law Review 611.

movement of people potentially integrates societies, especially if the regime facilitates reverse and multiple movement as opposed to mere one-off migration. While empirical research on integrating people movement signals nuanced optimism,[11] EU free movement is flawed both by excluding non-EU denizens[12] and neglecting adjustment of social structures in order to avoid disadvantage for those who stay in place.[13] Nevertheless, the positive vision retains its appeal. Accordingly, the idea that 'the four freedoms of the Single Market are indivisible'[14] also became a core pillar of the initial Brexit negotiations.

Yet, the EEC's and EU's position on people movement has not been universally supportive of the ideal. The Spaak Report, of 21 April 1956[15] envisaged a Common Market for goods and services, with the perspective of including capital. It remained reluctant to integrate labour markets, only recommending incremental increase of movement of workers under the control of member states. The Conference of Messina went beyond the Spaak Report, reflecting the conditionality of openness to international trade by social-democratic parties in post-war Western Europe.[16] That openness did not embrace a common market for capitalists only.[17] This political orientation was also reflected in the dialogue of management and labour at Val

11 Recently from macro-economic perspectives, see Beata Farkas, Andor Mate and Tamas Racz, 'A contested foundation of European integration: the free movement of labour' (2022) 44 Society and Economy 310; from sociological perspectives: optimistic Barbulescu and Favell (n 5 above) and Recchi and Favell (n 5 above); more sceptical Franziska Buttler, 'Does the Europeanization of daily life increase the life-satisfaction of Europeans?' in Martin Heidenreich (ed), *Exploring Inequalities in Europe* (Edward Elgar 2016) 195; Martin Heidenreich, 'Social cohesion in Europe. between Europe-wide convergence and social and territorial inequalities' in Martin Heidenreich (ed), *Territorial and Social Inequality in Europe* (Springer 2022) 313.

12 Cristina Juverdeanu, 'The different gears of EU citizenship', (2021) 47 Journal of Ethnic and Migration Studies 1596.

13 This can be viewed as the legitimate element in the critique by Barnard and Costello of free movement of workers (n 4 above).

14 European Council (Article 50) Guidelines on Brexit Negotiations of 29 April 2017, EUCO XT 20004/17.

15 The full text of 169 pages is only available in French. A 20-page summary of the most important points in English is also available.

16 Brian Shaev, 'Liberalising regional trade: socialists and European economic integration' (2018) 27 Contemporary European History 258.

17 A contemporary caricature captures the rejection of only capitalists profiting from the Internal Market while keeping their workers firmly behind national borders. Cartoon by Nitro on 'Employers and the European Common Market' (24 January 1957).

Duchesse, which accompanied the conference of Messina.[18] As a consequence, the Common Market as agreed at Messina encompassed factor mobility, with free movement of workers to be realised by the end of the transition period (1965), while free movement of capital was further postponed. Today's EU Treaties are more expansive on free movement of goods than on any other freedom. After Denmark, Ireland and the UK acceded to the EEC (1973), all further enlargements were accompanied by restrictions of free movement of workers.[19] This indicates that the unease over this particular freedom at times infects the integration process. Accordingly, the Brexit process was accompanied by political demands for reducing free movement of people within the EU, and early versions of the draft Ireland/Northern Ireland Protocol already offered to Northern Ireland access to markets in goods only, this being portrayed as the main aspect necessary to overcome physical border controls.[20] The EU has rightly been criticised for betraying the principle of indivisibility of the Internal Market in relation to Northern Ireland.[21]

PEOPLE IN THE EU'S EXTERNAL RELATIONS

In the EU's external relations, a preference for trade over people becomes a normative principle, mirroring the state of affairs in international trade law. Under the law of the World Trade Organization (WTO), rules on trade in goods and tariffs related thereto are elaborated with a long tradition in the GATT (General Agreement on Trade and Tariffs, subsequently supplemented by agreements on Sanitary and Phytosanitary matters and Technical Barriers to Trade), while people movement is merely comprised as far as necessary under the

18 See the historical documents available from the Luxembourg Centre for Contemporary and Digital History under 'Historical events in the European integration process (1945–2009)'.

19 The accession Treaty with Greece (OJ L 291 of 19 November 1979) was the first to 'phase in' free movement of workers, by withholding the right to free movement from Greek workers for a period of six years (art 45). The motivation of this was the fear of high numbers of workers from Spain and Portugal, whose accession was negotiated in parallel, into the EEC. (Arts 55 and 216 Accession Treaties with Spain and Portugal – OJ L302 of 15 November 1985 – contained the same limitation.) The mechanism to post workers relying on the employers' freedom to provide services, while denying them equal treatment, was created in the 1980s after Spanish and Portuguese construction companies became active in the EEC.

20 Sylvia de Mars and Colin Murray, 'With or without EU? The Common Travel Area after Brexit' (2020) 21 German Law Journal 815, 837.

21 Anand Menon, 'The EU and Britain are playing a high-stakes game of chicken' *The Guardian* (London 28 February 2018).

GATS (General Agreement on Trade in Services).[22] In short, article 1 GATS recognises the 'presence of persons … e.g. non-nationals on consultancy or construction tasks' as one mode (mode 4) of service provision, alongside the presence of managers and specialists as part of a commercial presence (mode 3). An annex specifies that members have maximum liberty as to which persons they recognise, as long as no integration into the labour market in the host country is aspired. From this it follows that – in contrast to free movement under EU law – persons moving under WTO GATS mode 4 or 3 have no claim to equal treatment or access to social infrastructure in the host state. They also lack any individual right to move, as people are moved as an accessory to service provision (including goods delivery). Person movement rarely enjoys more comprehensive coverage[23] beyond regional trade agreements, such as that comprised by the EU Treaties.[24]

The EU's association agreements with its neighbouring states are a little more generous, thus classed as deep trade agreements in a recent WTO publication.[25] They all contain WTO-type clauses allowing entrepreneurs and their workers to move into the EU in the context of service provision. In addition, they typically also contain subsections on visa agreements and people movement. These are particularly pronounced in those association agreements with countries which are to become candidates for EU membership. But even in those which were conceived as mere neighbourhood agreements, equal treatment of movers is ensured. For example, the Ukraine/EU association agreement[26] provides for equal treatment of Ukrainian workers in the

22 Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization. Text, Cases and Materials* 5th edn (Cambridge University Press 2022) ch 7, 4.4.1; on the political demand for a 'general agreement on movements of people' at the time when the WTO was negotiated, see Thomas Straubhaar, 'Why do we need a General Agreement on Movements of People (GAMP)?' in Bimal Gosh (ed), *Managing Migration: Time for a New International System?* (Oxford University Press 2000) 105.

23 On some examples of person movement in bilateral trade agreements, see Asa Odin Ekman and Samuel Engblom, 'Expanding the movement of natural persons through free trade agreements: a review of CETA, TTP and ChAFTA' (2019) 35 International Journal of Comparative Labour Law and Industrial Relations 163.

24 On difficulties agreeing on free movement of people, see Clayton Hazvinei Vhumbuni and Joseph Rujema Rudigi, 'Facilitating regional integration through free movement of people in Africa: progress, challenges and prospects' (2020) 9 Journal of African Union Studies 43.

25 Aaaditya Mattoo, Nadia Rocha and Michele Ruta, *Handbook of Deep Trade Agreements* (International Bank for Reconstruction and Development 2020).

26 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part; OJ L 161, 29.5.2014, p 3-2137, lastly amended by decision No 1/2023 of the EU–Ukraine Association Committee in Trade Configuration of 24 April 2023, OJ L 123 of 8 May 2023, consolidated version.

EU and EU citizens in Ukraine (article 17), while the volume of person movement remains strictly under national control (articles 18–19).

The TCA with the UK is exceptional[27] in that it does not contain any specific chapter on person movement beyond the protection of some rights for those who had actively used their movement rights prior to Brexit. Beyond that, provisions on person movement are mainly limited to the WTO GATS mode 4 model,[28] though movement of beneficiaries of EU programmes to which the UK may accede in the future are also provided. Even in relation to Northern Ireland the EU has, in contrast to early declarations, agreed to divide its Internal Market into goods on the one hand – now covered by articles 5–11 of the Ireland/Northern Ireland Protocol (from March 2023 referred to as the Windsor Framework)[29] – and all other freedoms on the other hand.

PEOPLE ON THE ISLAND OF IRELAND POST BREXIT – THE EU REGIMES

The situation of the island of Ireland after Brexit constitutes an interesting case study on asymmetric participation in the people-dimension of the EU integration project.

The case study is intriguingly complex, even if only focusing on EU law and EU agreements, while disregarding the Common Travel Area due to its hybrid character between law and politics.[30] Movement of people onto and off the island of Ireland as well as between its parts is governed by at least three overlapping legal

27 Tobias Lock, 'Citizenship beyond Irish and British' in Christopher McCrudden (ed), *The Law and Practice of the Ireland – Northern Ireland Protocol* (Cambridge University Press 2022) 247, mentioning the EU's more far-reaching proposals at 248 with fn 7.

28 On this Catherine Barnard and Emilija Leinarte, 'Mobility of persons' in Federico Fabbrini (ed), *The Law and Politics of Brexit – Volume 3: The Framework of the New EU–UK Relationship* (Oxford University Press 2021) 134.

29 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 (OJ L 29, 31.1.2020, p 7-187) allows adaptation of the Protocol Ireland/Northern Ireland by decision of the Joint Committee (art 5(2)), which was the basis of adding specifications to arts 6 and 13 and also stating that the Protocol will be referred to as 'Windsor Framework' (Decision No 1/2023 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 24 March 2023,OJL 102/61 of 17.4. 2023). An updated consolidated version of the Withdrawal Agreement is available on EURLEX.

30 See on this Imelda Maher in the forthcoming special issue.

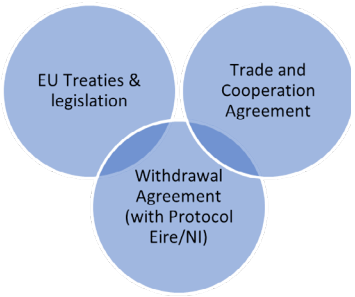

Figure 1: Overlapping regimes on person movements

regimes (Figure 1): first, the EU Treaties remain relevant as far as Ireland is concerned. This also means that Ireland should have to extend advantages offered to non-EU nationals, for example British nationals, to EU nationals as well, in so far as these privileges relate to EU-derived rights, in particular free movement.[31] Second, for Northern Ireland as part of the UK, two agreements between the EU and the UK are decisive: the Withdrawal Agreement[32] with its Ireland/Northern Ireland Protocol (also Windsor Framework) and the TCA between the EU and the UK.[33] The Withdrawal Agreement refers to the EU Treaties, requiring some of its provisions to be interpreted in line with them, or given comparable effects. The TCA is, according to article 50 of the Treaty on European Union, the ultimate successor of the Withdrawal Agreement, whose effects should ultimately dissipate. However, the Protocol (also Windsor Framework) is conceived for unlimited duration, but for the UK's privilege to unilaterally rescind it following a specified process in Northern Ireland (article 18). The TCA dissolves any relationship with the EU Treaties, though from EU perspectives it still qualifies

31 The authority here is the 2002 ruling of the European Court of Justice in Gottardo (15 January 2002, C-55/00, ECLI:EU:C:2002:16), where Italy was considered as violating EU Treaty rights for EU citizens by granting non-EU citizens more favourable social security rights. It retains practical relevance (eg Grega Strban, "Member states' approaches to bilateral social security agreements' (2018) 20 European Journal of Social Security 129). Ireland's EU membership means that it must not provide more support for free movement of UK citizens than for that of EU citizens by treating UK citizens more generously than the latter – while UK citizens may of course be granted the same privileges as EU citizens in Ireland, and even more privileges in areas not governed by EU law, such as voting in national elections or immigration control beyond securing free movement rights. Since the Common Travel Area affects social security, access to education and healthcare, its application by Ireland will have to be constantly monitored for EU rights compliance.

32 See n 29 above.

33 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part OJ EU L 144 of 31 December 2020, p 14-2488.

as EU law. This leaves a confusing picture of partially overlapping spheres (see Figure 1).

Yet, those legal instruments collectively do not encompass people movements to the same degree as elsewhere in the EU neighbourhood. In all its complexity, the overall legal framework only provides very limited dents into the fixation of trade on goods, even though the limited size of both Ireland as a state and Northern Ireland as a very small, devolved region of the UK would have suggested more openness towards people movement. This lack of openness for people movement will continue to create a host of practical problems, which international law instruments or gentlefolk agreements, such as the Common Travel Area, are ill-suited to overcome.

Under the main part of the Withdrawal Agreement, people movements are only protected for those who moved as self-employed or employed persons before Brexit. They retain rights to remain in the place where they have moved but lose the right to move to other EU member states if they only have UK citizenship. Those who have moved to provide services are not so protected (Withdrawal Agreement, part 2, in particular titles II and III). The TCA generally allows some service provision (title II), and also person movement in the understanding provided by mode 4 of the WTO GATS (articles 140–145 TCA).[34] In addition, any UK participation in EU programmes requiring person movement (for example in research) is conditional to people movement enabled reciprocally for these purposes (article 712 TCA).

The Protocol (also Windsor Framework) only mentions people movement indirectly by allowing the UK and Ireland to maintain the Common Travel Area in so far as it does not conflict with EU law (article 3). That provision does not create any obligations to maintain the Common Travel Area, nor rights for citizens. There may be the faint hope to interpret article 2 as including free movement because this provision refers to rights guaranteed by the Belfast/Good Friday Agreement, which again refers to the right to freely choose one's residence. However, choosing one's residence is only a very limited expression of free movement, and in that Agreement probably relates to sectarian divisions within Northern Ireland more than to choosing residence in Ireland.[35] The Protocol (also Windsor Framework)

34 See above text accompanying n 27 and n 28 above.

35 Accordingly, even the Northern Ireland Human Rights Commission and the Equality Commission Northern Ireland, who generally promote the widest possible interpretation of art 2, refer to free movement rights as additional to the protections afforded by the Good Friday/Belfast Agreement, which the UK has committed to protect in art 2, Protocol (Windsor Framework); Equality Commission Northern Ireland, Northern Ireland Human Rights Commission, *Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol* (2022) 7.

enables neither movement of workers or self-employed persons nor movement of service providers or the posting of workers by those who provide services into Ireland or the UK. EU Treaties allow Irish citizens resident in the UK, including Northern Ireland, to move back to the EU at large, with the proviso of equal treatment, including equal treatment with UK citizens in Ireland.[36]

INSTEAD OF A CONCLUSION: PRACTICAL PROBLEMS ILLUSTRATING SHORTCOMINGS

The substantial neglect of person movements across the overall legal frameworks can clearly have negative impacts on continuing socio-economic interactions on the island of Ireland. It will also stymy efforts of continuing all-island integration in cultural and civic arenas. Two recent examples come to mind.

First, the Irish Government, in Summer 2023, announced their intent to fund studies for nursing in Northern Ireland. That offer has since been extended to studying medicine, though it is still being finalised.[37] Under EU law, funds to study nursing would have to be extended to EU citizens having moved to Ireland as workers, self-employed or service providers and their families, including children, wishing to study nursing. Thus, under EU law one might question whether Ireland may limit those places to Irish citizens, who have no problem moving to Belfast and taking up work there during their studies or thereafter without violating their Treaty obligations towards other EU citizens.[38] On the other hand, Ireland might argue that as long as EU free movers and their children are given equal opportunity to access funded places for studying nursing or medicine, the equal treatment principle is observed. Ireland would thus give the 'Belfast places' only to Irish citizens or those who can derive rights to work in the UK from pre-Brexit free movement. While this approach may pass muster under EU law, it is undoubtedly very complex, and distorts the envisaged all-island approach by excluding a large proportion of Irish residents who are otherwise integrated into Irish society as EU citizens.

Recent UK legislation offers a second example: section 75 of the UK Nationality and Borders Act 2022 empowers the Government to issue immigration rules requiring an Electronic Travel Authorisation (ETA)

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36 See n 31 above.

37 As recent as 18 January 2024, a debate in the Dáil exposed that the Government hopes for the scheme in medicine to be finalised for September. The answers of Simon Harris seem to indicate that practical parts of the education would be completed in Ireland, limiting the concerns expressed above: Dáil Debates, Thursday, 18 January 2024.

38 See text accompanying n 31 above.

for anyone entering the UK who is neither a UK citizen nor has a right to abode for other reasons. Entering the UK by crossing the border into Northern Ireland is included in the legislation.[39] Presently, 'only' some non-EU nationals are required to produce the ETA, and permanent exceptions apply by statute for those covered by the Common Travel Area, and enjoying status rights (settled status in UK terminology) resulting from their movement to the UK before Brexit as EU citizens. More exceptions have been promised but not legislated for in favour of those legally resident in Ireland, as well as for travels of less than 24 hours. ETAs will be required of EU citizens who do not fall under the exceptions as announced in the near future. Requiring ETAs for persons requiring a visa to enter the UK will mainly impact on tourism on the island of Ireland, and most specifically on businesses operating out of Ireland. It will become impractical for them to include tours to Northern Ireland outlasting the 24-hour timeframe. Those Northern Irish accommodations booked by Irish providers will suffer alongside their business partners, in the wake disturbing one of the sectors that enjoyed support by all-island initiatives in the past.

These two examples demonstrate that, beyond the principled value of free movement, neglecting persons in the post-Brexit relationships has severe consequences. These will be felt particularly acutely on the island of Ireland. Accordingly, free movement of goods, however relevant, is far from the only area to be safeguarded. Enabling free movement of goods may suffice to avoid physical border infrastructure being required under WTO law.[40] Yet, in order to enable effective socio-economic cooperation and ensuing societal relations, free movement of people in their own right, beyond an attachment to economic services, and with direct legal effect, remains indispensable.

39 Nationality and Borders Act 2022, s 75, amends the Immigration Act 1971 by introducing a pt 1A entitled 'Electronic travel authorisation'. This part enables the Government to issue immigration rules requiring an ETA, though never for British or Irish citizens.

40 De Mars and Murray (n 20 above).