The Northern Ireland Protocol Bill

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Executive summary

At the heart of the issue of the Northern Ireland Protocol (NIP) Bill is the interpretation of the 1998 Belfast/Good Friday Agreement by the UK Government. While "constructive ambiguity" is the most essential feature of that 1998 Agreement, this approach is much harder to apply to the issues arising from Brexit, which, taking the UK Government's determination to break away from the EU Single Market and Customs Union as a given, requires a choice as to where checks and controls on the movement of goods should apply.

There is no perfect way to achieve complete protection over all aspects of the Belfast/Good Friday Agreement and of the EU Single Market and Customs Union simultaneously. The Protocol on Ireland/Northern Ireland (more commonly referred to as the Northern Ireland Protocol), annexed to 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" (more commonly referred to as the Brexit Withdrawal Agreement) signed on 24 January 2020 by the EU and the UK Government, was a compromise that followed lengthy and detailed negotiations which had not produced any better option. Finding a realistic and practical way ahead now depends on being able to identify the real problems that need to be addressed, taking account of the constitutional position of Northern Ireland, and an understanding of how the present real difficulties relating to this developed.

The NIP Bill is said to be essential because unionist opposition to the Protocol is preventing the operation of the institutions created under the Belfast/Good Friday Agreement. However, the issue of checks and controls on goods moving from Great Britain to Northern Ireland was known and understood when the Protocol was adopted between October 2019 and January 2021. The UK Government has given contradictory signals about that issue. Unionists claim they were promised unfettered access for goods moving from Great Britain to Northern Ireland, but there was no way any such promise could be reconciled either with the Protocol itself, or with the agreements reached in December 2020 on how the Protocol would be applied. Hence, the UK Government itself has clearly contributed to the sense of grievance strongly felt by many unionists over the Protocol.

In claiming to address the issue of unionist disengagement through the NIP Bill, the UK Government has adopted a one-sided analysis of the Belfast/Good Friday Agreement. While arguing that the NIP Bill is needed to uphold that Agreement, the "solution" it seeks to impose does not take account of the views of the majority of people in Northern Ireland who are not opposed to the Protocol, nor would it have the agreement of the EU or the Irish Government. The NIP Bill invokes the Acts of Union of 1800 which had and have no basis in democratic legitimacy and are overtaken by (and are arguably incompatible with) the 1998 Agreement. The democratic legitimacy of the union (and its corollary, the partition of Ireland) was only secured through the Belfast/Good Friday Agreement. It would set a dangerous precedent to respond to the refusal of one side to participate in the institutions by providing a concession in their favour, especially one which would run contrary to the views and interests of the majority.

The fundamental reality is that Brexit has created a dilemma that was not foreseen in 1998 and which can only be resolved by a process of real engagement founded on the inclusive principles expressed in the 1998 Belfast/Good Friday Agreement. There is a critical need to put the interests of Northern Ireland first, in a way that reflects the fact that any application of Brexit disturbs the delicate balance established under the 1998 Agreement. This means respecting all points of view in Northern Ireland as well as the principles that govern the UK and EU. However, there is potential for a practical and reasonable way forward. For example, it should be possible to make the most of the concepts of green and red (or express) lanes to facilitate the movement of goods from Great Britain to Northern Ireland to address the practical problems of the Protocol, not as a unilateral intervention, but as a possible landing zone for agreement. Clearly though, it may be more difficult to apply the notion of constructive ambiguity to trade than to constitutional issues. Any solution will involve some dislocation compared to the pre-Brexit *status quo ante*, and it is vital that any further discussions or negotiations between the EU and UK Government regarding the UK's relationship with the EU acknowledge this reality and seek out the best available compromise.

The key, as happened in the run up to the 1998 Agreement, is for courageous leaders to stand up and look beyond short-term and sectional interests to an agreement that can endure in the best interest of all the peoples on these islands.

Introduction

Much of the commentary so far on the Northern Ireland Protocol Bill (NIP Bill) introduced on 13 June 2022[1] has focused on the issue of its incompatibility with international law. But at the heart of the issue is the interpretation of the 1998 Belfast/Good Friday Agreement.

The UK Government claims that the Bill is necessary to uphold the Belfast/Good Friday Agreement. Its opponents assert that it is the Protocol on Ireland/Northern Ireland (the Protocol)[2] itself that upholds the Agreement – which was the position that was agreed formally by the UK and the EU in October 2019 and ratified in January 2020. This paper considers the NIP Bill in light of the 1998 Agreement and joins with the many voices urging the need for pragmatic and realistic negotiations to secure a way ahead which, like the 1998 Agreement itself, takes proper account of the different interests and perspectives that exist in Northern Ireland.

In detail, for effective negotiations to take place, it is essential to:

- identify the real problems that need to be addressed;
- consider the legitimate foundations of the constitutional position of Northern Ireland and how that is affected by Brexit;
- review how the present real difficulties developed; and
- use such an analysis to identify a realistic and practical way forward.

Ambiguity is at the heart of the Belfast/Good Friday Agreement. No one should be surprised that there are very different interpretations of what the Belfast/Good Friday Agreement means – "constructive ambiguity" is its most essential feature. However, as one of my co-workers on the implementation of the Agreement 24 years ago highlighted to me, Brexit created a tension between two referenda – the 1998 Agreement in Northern Ireland and the 2016 Brexit vote. Both had "self-determination" at their core, but different "units of determination" were central to each debate – i.e., Northern Ireland in 1998 and the entirety of the UK in 2016. The problem is that the concept of self-determination cannot be fudged.

More prosaically, Brexit also introduced something binary (i.e., control on the movement of goods) which is much harder to treat ambiguously if it is addressed as a constitutional issue. However, it is possible to apply different treatments to different flows of goods. The issue has been expressed most clearly in the "Brexit Trilemma", as formulated by Daniel Kelemen[3] and others, and is unavoidable. It is possible to fulfil any two, but not all three of the following simultaneously:

- To leave the EU Single Market and Customs Union
- To avoid checks and controls on goods moving between Ireland and Northern Ireland
- To avoid checks and controls on goods moving between Great Britain and Northern Ireland.

Focusing on the real problems

It is vital to clarify the problems that need to be solved. The UK Government has conflated a number of distinct issues when developing a rationale for the NIP Bill. There is widespread consensus that the Protocol is leading to genuine issues for businesses and consumers and that these problems would be much greater were it not for the grace periods that are in operation at present. There are some important practical problems because significant health-related obligations

1 House of Commons (2022) Explanatory Notes relating to The Northern Ireland Protocol Bill as introduced in the House of Commons on 13 June 2022 (Bill 12), available at: https://publications.parliament.uk/pa/bills/cbill/58-03/0012/en/220012en.pdf

2 The Protocol on Ireland/Northern Ireland, commonly referred to as the Northern Ireland Protocol, is the part of the Brexit withdrawal agreement that ensures that a hard border is avoided on the island of Ireland following the UK's formal withdrawal from the EU. The full text is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf

3 Presented on 25 January 2018 at the inaugural event of the Dublin City University Brexit Institute, "*Brexit, Ireland and the Future of Europe*", held in conjunction with the European Movement Ireland. See: https://dcubrexitinstitute.eu/wp-content/uploads/2017/12/Kelemen-DCU-Brexit-.pdf

were agreed as part of the Protocol and were not mitigated by the Trade and Cooperation Agreement (TCA), agreed between the EU and the UK, which sets down the terms and conditions of EU-UK trade following Brexit. These obligations are rigorous, and can lead to issues arising around soil, plants, pets and agri-food produce. There is a valid link between these practical problems and the view held by some that checks and controls at the points of entry into Northern Ireland are perceived as undermining the Union, even though some such health-related controls existed long before Brexit.

While solutions can probably be found for these two broad issues, one question lies at the heart of any consideration of the Protocol, both at a practical and a political level: what other way is there that would secure the best available means of managing the implications of Brexit for Northern Ireland, under the form of withdrawal chosen by the UK Government in 2019-20? The fact that this issue was not foreseen in 1998 means that recourse to the Belfast/Good Friday Agreement itself is not sufficient to find a way forward.

Is the UK Government seeking to solve a problem of practical disruption, or of constitutional principle – or are both inextricably linked?

Several considerations affect any honest attempt to address these issues:

- The Belfast/Good Friday Agreement, indeed, strikes a delicate balance between seemingly irreconcilable worldviews. Paragraph 1(v) of the Agreement says that "... *the power of sovereign government* [over Northern Ireland] ... *shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions* [with] ... *full respect* [for] *parity of esteem* ... *for the identity, ethos, and aspirations of both communities*." This is the primary reference to the key concept of "*parity of esteem*" contained in the Agreement. There is an abundance of language, both within the Protocol itself and in statements by the UK Government from October 2019 and through to the early months of 2021 that show implicitly that the UK Government had respected the obligation to be impartial. Any material change from the Protocol would equally be subject to that consideration.
- If any checks and controls on goods moving from Great Britain to Northern Ireland are deemed to be contrary to the UK constitution and/or the Acts of Union (1800) then this was also the case in 2019, as nothing has changed constitutionally. It was the UK Government that proposed "*continued regulatory alignment ... across the whole island of Ireland ... for as long as the people of Northern Ireland agree to that*".[4] Either the UK signed the Withdrawal Agreement (and, more than a year later the Trade and Co-operation Agreement) on a false analysis of the UK constitution, or their position now cannot include opposition to checks and controls as a matter of constitutional principle (as opposed to as a matter of practical difficulty).
- Only an outcome based on a position agreed between the EU and the UK will provide legal certainty as a basis for the movement of goods. The UK Parliament is sovereign in respect of domestic law, but the doubts (to say the least) regarding the compatibility of the NIP Bill with international law could well lead to risk-averse behaviour by traders and investors, thus undermining economic activity in Northern Ireland. Whether or not any proposal protects the EU Single Market is a matter for the EU Commission and Member States to determine, so assertions by the UK Government to that effect are

4 Johnson, B (2019), Prime Minister Boris Johnson's letter to EU Commission President Jean-Claude Juncker. "*A Fair and Reasonable Compromise: UK Proposals For A New Protocol On Ireland/Northern Ireland*", 02 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836115/PM_letter_to_Juncker_WEB.pdf

not sufficient – even if they might appear to be intellectually coherent.

- Much attention has been given to Article 13(8) of the Protocol, which provides for a subsequent agreement to supersede some or all of the provisions of the Protocol. This is a standard provision in international agreements and does not imply, in itself, an agreed expectation that change was anticipated. The obvious opportunity that this Article created was for the trade negotiations between the EU and UK in 2020 to lead to a Brexit deal that, as was the case with the 2018 Withdrawal Agreement negotiated during the administration of Theresa May (2016-2019), would have had much less significant implications for the relationship between Great Britain and Northern Ireland than is the case now. The reference in Article 6(2) of the Protocol requiring both sides to "... *use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom* ..." applies now as much as it did in 2019 and 2020. The question can be asked as to how in the negotiations in 2020, which led to the TCA, the UK fulfilled that obligation, given that the UK negotiators rejected a number of measures that would have sought to minimise the friction to trade arising from the Protocol. Also, it would clearly have been helpful if the steps proposed by the EU, including the October 2021 package, might have come earlier, as they also had a clear responsibility under Article 6(2) of the Protocol. Notably, though, the remainder of the sentence partially quoted above underlines that the UK accepted the need to respect EU legislation in October 2019 and reaffirmed that acceptance in the Joint Committee agreements of December 2020.

The 1998 Agreement, indeed, strikes a delicate balance to the effect that it can, at the very least, be argued that the UK Government has not fulfilled the obligation to act with rigorous impartiality over recent years in Northern Ireland, looking back no further than the Confidence and Supply Agreement struck between the Conservative Party and the Democratic Unionist Party (DUP) in 2017. A reasonable test of the NIP Bill is how it takes account of any view in Northern Ireland other than the concerns of unionism.

Much attention has been paid to the perceived gains brought about by the 1998 Agreement: on the one hand, esteem for Irish identity and hence, it is argued, the absence of a hard border on the island of Ireland; on the other, Northern Ireland remaining part of the UK. So, it is important to look also at the other side of each such understanding of the Agreement. The core of the Agreement depends on enormous concessions which neither side likes to highlight: unionists accepted a role for the Irish Government in Northern Ireland through the Strand 2 institutions, together with mandatory power-sharing with Sinn Féin; the Irish Government and northern nationalists accepted a change in the Irish Constitution, which, read with the text of the Agreement, explicitly accepted the status of Northern Ireland, thus essentially acquiescing with partition.

An aspect of the Agreement which is especially uncomfortable for many unionists is the fact that it provides parity of esteem for the aspirations of both of the main traditions in Northern Ireland, and makes the union with Great Britain contingent on the consent of a simple majority of the population rather than absolute. That in itself overtakes the Act of Union of 1800, which will be discussed in more detail in the subsequent section. It is much less clear and obvious how, or to what extent, that dimension of the Agreement can and should be reflected in the implementation of Brexit.

In parallel, it is uncomfortable for many Irish nationalists and republicans to recognise that new barriers between Northern Ireland and Great Britain, even if "de-dramatised" and minimised, have a significance in political perceptions. That sensitivity was known and

understood in October 2019, yet in 2019 and 2020, the UK Government clearly argued that the Withdrawal Agreement and the Protocol were compatible with the Belfast/Good Friday Agreement. Thus, key questions now include what has changed since then, and do such changes mean that there is an incompatibility with the Agreement?

Addressing the Constitutional issue

The 1998 Agreement has clear democratic legitimacy. Clause 1(c) of the NIP Bill indicates that the proposed legislation is designed to entrench the 1800 Act of Union. This raises major questions regarding the constitutional position of Northern Ireland within the UK, and regarding the democratic legitimacy of the Protocol.

Reflecting on this issue in context, the Belfast/Good Friday Agreement stands out in UK constitutional history as a development with unusual (or maybe even unique) democratic legitimacy, for at least three reasons. First, the detailed proposals were agreed between most of the political leaders of the main sections of the community in Northern Ireland and both the Irish and UK Governments. This was the culmination of a long and complex process, in which a wide range of options and considerations were discussed before agreement was ultimately reached in 1998. Many aspects of the Strand 1 (Internal Structure of Northern Ireland) and Strand 2 (North/South) institutions as finalised in the Belfast/Good Friday Agreement were developed following discussions which took place before the 1994 IRA ceasefire. While the DUP had a degree of involvement in the talks process at that stage, Sinn Féin did not. The talks continued until April 1998. This meant that before the Agreement was reached in 1998, the main issues had already been discussed extensively and there was good mutual understanding regarding most of the relevant considerations.

A second reason that the Belfast/Good Friday Agreement stands out as a constitutional development with unusual democratic legitimacy relates to the fact that it was passed by referendums in which over 70% of the population voting in Northern Ireland (and over 94% of participating voters in the Republic of Ireland) supported the Agreement.

A third reason is that the Agreement was underpinned by legislation that was passed through the UK Parliament following the standard process of parliamentary debate and scrutiny, thus maintaining consistency with the sovereignty of that parliament, which speaks to a key concern and focus for the advocates of Brexit.

It follows that, for example, the principle of power-sharing as the basis for devolved government in Northern Ireland was supported by a democratic majority. Therefore, there is no legitimate basis for any other form of government, as that would be contrary to the expressed view of the electorate and the sovereign parliament. Clearly, that position can be amended, but any such process would need to command comparable support to that which was secured in 1998. Individual parties have the power to refuse to participate, but the Agreement does not provide for that as an explicit right. Rather, it envisages full participation in power-sharing.

Brexit and the Withdrawal Agreement also have clear democratic legitimacy. The Brexit referendum has the clear merit of having been endorsed by a majority of the population voting across the UK. It could be argued that the absence of any precise definition of the meaning of Brexit before the vote took place in 2016 leaves a degree of doubt about how the result should be interpreted, and this is compounded by the fact that the likely implications of exiting the EU were not fully explained during the referendum campaign, and misleading claims were also made. However, there was clearly a responsibility on the part of the UK Government as the proposers of the referendum, as well as on the Leave and Remain campaigns, to ensure that sufficient information was available to help voters to make informed decisions. Hence it is hard to argue that there was any fundamental deficiency in the democratic legitimacy of the Brexit vote, though it is not as well founded as the Belfast/Good Friday Agreement, because of the absence of any precise definitions of

the referendum's implications.

The Withdrawal Agreement, which includes the Protocol, was not subject to a referendum. However, it was the focus and centre of the general election campaign in December 2019. Unlike the Brexit referendum, the detailed implications of exit were available for scrutiny in the documentation that had been agreed and published by the UK Government and the EU. While the government did not gain the support of more than 50% of the electorate, it did secure an 80-seat majority in the House of Commons. Hence, in UK constitutional terms at least, the ratification of the Withdrawal Agreement had strong political and democratic legitimacy – though not as strong, arguably, as the Belfast/Good Friday Agreement or the original Brexit vote. There is no contemporary evidence that supports the idea that the fundamental elements of the Withdrawal Agreement were not fully understood or were being read optimistically. Indeed, significant evidence to the contrary exists, including from the UK Government's Department for Exiting the EU's own "Impact Assessment"[5], though key aspects were indeed misrepresented during the election campaign. The implications were clear to unionist leaders, who opposed the Withdrawal Agreement in December 2019 and January 2020.

What constitutes a threat to the Belfast/Good Friday Agreement?

The very centre of the UK Government's argument regarding the NIP Bill is that Northern Ireland's devolved institutions are not functioning at present because of the withdrawal of support by the DUP for some key appointments, and that this justifies an extraordinary intervention on behalf of the UK Government.

It is clearly not the case that the Protocol was seen as inconsistent with, or a threat to, the Belfast/Good Friday Agreement when it was agreed between the UK Government and the EU in October 2019, nor at the time of the decisions reached by the Joint Committee in December 2020. Thus, the question that is begged is "what has changed?". It was known and understood at those times that the Protocol was not desirable from the point of view of many unionists, and indeed the possibility of prolonged and enduring unionist opposition to the Protocol was explicitly provided for under the Protocol's consent provisions as agreed by the UK Government and the EU in October 2019 (see Article 18 of the Protocol). So, it cannot be argued that unionist opposition, or the absence of cross community support for the Protocol, was contrary to reasonable expectations and hence would be disproportionate. On the contrary, this was in fact foreseen by the EU and the UK in relation to the Protocol. The argument can only be that unionist opposition has become so firm and intense that a change of approach is needed on the part of the Westminster Government.

A key question now is whether the refusal of a political party to participate in the institutions represents a threat to the Belfast/Good Friday Agreement itself. The prospect of this was not raised as an argument in the previous periods when the devolved institutions were on hiatus (2002-07 and 2017-19). At these times, one way or another, the stated reasons for non-participation related to claims that previous agreements had not been fulfilled. Clearly, it would set a dangerous precedent to respond to the refusal of one side to participate in the institutions by providing a concession in their favour, especially one which would run contrary to the views and interests of the majority.

How did the Protocol become a threat to the 1998 Agreement?

In reality, in the present context, it cannot be argued that previous agreements have not been fulfilled. Contrary to the DUP's repeated assertions, there was no legitimate promise in January 2020 of unfettered access for goods moving from Great Britain

5 Department for Exiting the European Union (DEXEU) (2019) "*European Union (Withdrawal Agreement) Bill Impact Assessment*," 21 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841245/EU_Withdrawal_Agreement_Bill_Impact_Assessment.pdf

to Northern Ireland. On the contrary, any reasonable interpretation of the Protocol made clear that checks and controls would be needed. This was confirmed in formal and public policy documents and statements by the UK Government, including in:

- the Prime Minister's letter of 2 October 2019 to European Commission President Juncker[6] and the accompanying explanatory note[7], which proposed explicitly that "*Northern Ireland would align with EU SPS rules*", and that agri-food goods would be subject to checks at "... a Border Inspection Post ... as required by EU law."

- the UK Government's own impact assessment of October 2019[8], which referred on pages 54, 57 and 58 to the costs associated with customs administration and compliance with agri-food regulation on goods moving between Great Britain and Northern Ireland; and

- the Command paper of May 2020[9], which says, at paragraph 33: "*Some checks will be needed, supported by relevant electronic processes, in line with the island of Ireland's existing status as a Single Epidemiological Unit, building on what already happens at ports like Larne and Belfast*."

The Prime Minister repeatedly denied that reality, including:

- on 8 December 2019, in an interview with Sophy Ridge on Sky News[10], he said that "... *there is no question of there being checks on goods going* [from] *NI (Northern Ireland)* [to] *GB* (Great Britain) *or GB* [to] *NI* ..." and said that the impact assessment was incorrect;

- at PMQs on 7 October 2020, he said that Sir Jeffrey Donaldson was correct in referring to "*unfettered access ... in either direction* ..." He claimed that the Internal Market Bill, which was then before Parliament, would "...*prevent such barriers arising*..." despite it having been shown, in the second reading debate on 14 September 2020 that that Bill had no provisions to address the movement of goods from Great Britain to Northern Ireland (Hansard 14 September 2020, columns 50-51)

- at PMQs on 3 March 2021, in response to DUP MP Carla Lockhart, Boris Johnson said that "*There is unfettered access NI-GB and GB-NI*"

These denials have no basis in fact – unless they were deliberate statements of intent to renege on the very agreement on which the government had secured electoral success in December 2019 – in which case they were direct contradictions of the commitments made by the UK Government in the Withdrawal Agreement, and indeed of the Prime Minister's own proposals of 02 October 2019[11]. Even an optimistic reading of the Protocol would show clearly that some checks and controls would be necessary. It seems at least plausible that the UK Government also told the DUP privately that it would deliver "unfettered access" for goods moving from Great Britain to Northern Ireland.

The promise that the DUP claim has been broken was set out in "*New Decade, New Approach*" (NDNA)[12], which stated:

> *we will legislate to guarantee unfettered access for Northern Ireland's businesses to the whole of the UK internal market and ensure that this legislation is in force for 1 January 2021.*

6 Johnson, B (2019), Prime Minister Boris Johnson's letter to EU Commission President Jean-Claude Juncker, 02 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836115/PM_letter_to_Juncker_WEB.pdf

7 HM Government (2019) "*Explanatory Note UK Proposals For An Amended Protocol On Ireland/Northern Ireland*," 02 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836116/Explanatory_Note_Accessible.pdf

8 DEXEU (2019) "*European Union (Withdrawal Agreement) Bill Impact Assessment*," 21 October 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841245/EU_Withdrawal_Agreement_Bill_Impact_Assessment.pdf

9 HM Government (Cabinet Office) (2020) "*Command Paper: The UK's Approach to the Northern Ireland Protocol*," May 2020, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887532/The_UK_s_Approach_to_NI_Protocol_Web_Accessible.pdf
A "Command" paper is a government document presented to Parliament "*By Command of Her Majesty*".

10 Prime Minister Boris Johnson, interview on *Sophy Ridge on Sunday*, Sky News, 8 December 2019, available at: https://www.youtube.com/watch?v=YC0m8GuBMj8

11 HM Government (2019) Explanatory Note, 02 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836116/Explanatory_Note_Accessible.pdf

12 ibid

The claim here is that the UK Government also promised unfettered access for goods moving from Great Britain to Northern Ireland, but there is no factual basis for this claim. While the earlier part of paragraph 10 of Annex A to NDNA has comforting wording on the place of Northern Ireland in the UK Internal Market, it explicitly affirms the meaning of the Protocol, which unambiguously requires checks on goods moving from Great Britain to Northern Ireland. The natural reading of NDNA is that the promise that was made by the UK Government was fulfilled in the Internal Market Act. However, at no stage of the work on the Internal Market Bill was there any proposal for unfettered access for goods moving from Great Britain to Northern Ireland – because the UK Government, while willing to breach international law in relation to some aspects of that Bill, knew that this point fundamentally contradicted the provisions of the Protocol.

This point lies right at the heart of the current issue around the relationship between the Protocol and the 1998 Belfast/Good Friday Agreement. One way or another, the UK Government's position was misleading – either to the EU, the business community, and the wider world (if they ratified the Withdrawal Agreement with no true intent to implement it) or through the Prime Minister's answers at PMQs when he said there would be no checks on goods moving from Great Britain to Northern Ireland. In that context, it is hardly surprising that the DUP insists that they were promised "unfettered access". But the argument that that justifies stalling the work of the Northern Ireland Executive is founded on a serious untruth, in that the UK Government was giving contradictory signals about the Protocol.

The genuine question, as of January 2020 and as of now, relates to the scale and degree of checks and controls that would be needed for trade between Great Britain and Northern Ireland. Between October 2019 and December 2020, it was open to the UK to negotiate a free trade agreement (FTA) with the EU that would have minimised the problem, for example, by including a veterinary and/or wider agreement on standards affecting agri-food goods in the deal.

The core argument now is that the existence of checks on goods moving from Great Britain to Northern Ireland is itself a constitutional change which contradicts the constitutional commitments agreed in 1998. However:

- some, albeit minimal, health-related checks existed long before Brexit, to protect the health status of the island of Ireland The UK Government's proposals of 02 October 2019 flowed from that well-established and uncontroversial precedent: "*Building on the existing practice established to maintain the Single Epidemiological Unit* (SEU) *on the island of Ireland … agri-food goods entering Northern Ireland from Great Britain would … be subject to identity and documentary checks and physical examination*"[13]; and
- for many aspects of the economy and the regulation of economic activity, the position of Northern Ireland remains the same as the other parts of the United Kingdom, and Brexit introduces clear differentiation from the EU (including Ireland). This applies to all aspects of the services economy and to migration policy, which is a material consideration in relation to the labour market. These matters receive less attention because they do not give rise to the need for border checks and controls. So, it cannot be claimed that all aspects of Brexit have been skewed to tilt the "parity of esteem" in favour of the north-south dimension on the island of Ireland over Northern Ireland's place in the UK. Some form of compromise was and remains essential, and the agreements of October 2019 and December 2020 were the result of legitimate and detailed negotiations between the EU and the UK.

The fact of the matter is that the current stance of the DUP is that they will not agree to a full return to the operation of the Northern Ireland Executive without a change on the issue of the Protocol that they can accept. It is questionable whether that supports the contention that the operation of the Protocol is a threat to the Belfast/Good Friday Agreement. An alternative viewpoint is that the DUP and some other unionists are (as they did from 1998 to 2007) expressing

13 ibid

opposition to the Agreement itself.

The 1998 Agreement does not provide a means of resolving binary issues

A central argument in relation to the present situation is the absence of cross-community support for the Protocol. It was agreed explicitly in October 2019 that cross-community consent would not be required for the continued application of Articles 5 to 10 of the Protocol. Indeed, it is self-evident that securing an outcome that would command cross-community support was and is challenging to say the least.

In this and many other contexts, a requirement to have cross-community consent becomes an unmanageable and unrealistic concept – which is why the Belfast/Good Friday Agreement avoided the need for cross-community consent to underpin the constitutional status of Northern Ireland as part of the United Kingdom. Indeed, the approval of the Agreement in the referendum of May 1998 may not have reflected a clear majority of support among unionists. However, the simple majority in favour, and the majority support in the Assembly as subsequently elected, was regarded as sufficient to secure the passage of Agreement. This was made all the more firm following the DUP's entry into the Northern Ireland Executive following the modifications of the original terms of the Agreement agreed at St Andrews in 2006. Hence, applying the concept of cross-community support to the implications of the Brexit trilemma, and assuming that the UK Government's determination to be outside the EU Single Market and Customs Union is immutable, it seems unlikely that checks and controls either at the land border or at the ports and airports in Northern Ireland would ever be likely to command cross-community support.

The design of the Northern Ireland Assembly and Executive (a process that dates back at least to 1992) addresses the question of what would happen in the absence of agreement on devolved issues. The default position in most such cases is that the *status quo* prevails. The clear fact today is that the Protocol is in place as part of the *status quo*. This arrangement clearly did not apply either to the principle of Brexit or to the terms of the Withdrawal Agreement and the TCA, as none of these were devolved matters.

The provisions for cross-community approval mostly relate to whether or not a proposal for change to the *status quo* can be made. These provisions allow one side or the other to prevent a change being introduced that is regarded as unacceptable from that community's point of view. The protection applies either through specification in the Northern Ireland Act (1998) or through the operation of the provisions in that Act that allow one side or the other to invoke a requirement for a cross-community vote. The few exceptions where there is no default[14] all relate to issues that are fundamental to the functioning of the institutions but (with the sole exception of the issue of appointment of a Presiding Officer) these are not binary issues, and hence it has always proved possible to secure cross-community agreement because compromise was possible.

If the UK Government's case for the NIP Bill is based on the need for an agreed position, that would appear to stand in contradiction to what they are proposing to do by introducing the NIP Bill, as it clearly does not command the support of the nationalist/republican or non-aligned parties in Northern Ireland. Indeed, a clear majority of Members of the Northern Ireland Legislative Assembly (MLAs) have stated their opposition to the NIP Bill. How can it be consistent with the Belfast/Good Friday Agreement to replace something that is unacceptable to one side with something that is equally unacceptable to the other side (and, indeed, to the majority)? If, in response to the NIP Bill, Sinn Féin were to withdraw from the Northern Ireland Executive, would the UK Government's logic then say that some extraordinary intervention would be needed to save the 1998 Agreement and restore devolution?

It is self-evidently absurd to argue that

14 Northern Ireland Act (1998) Sections 17(5) (number and functions of Ministerial offices); 28A (4) (approval of Ministerial Code); 39 (7) election of Presiding Officer; 41 (2) (approval of standing orders); 63(3) (financial acts of the Assembly) and 64(2) (approval of draft budget).

any change in the constitutional status of Northern Ireland needs to be subject to cross-community consent, and there is no foundation for that proposition in the 1998 Agreement itself, or any of the previous provisions for consent, going back to the Ireland Act of 1949.

Is the UK reverting to the idea that the Protocol is not really needed?

Some UK Government statements indicate a view that the Bill will lead to an outcome that would command cross-community support. That appears to be linked to the notion that the UK's approach will fulfil the commitment to protect the EU Single Market and hence avoid the need for North/South checks and controls. But if it were true, it would be possible for the outcome being proposed by Westminster to be secured by negotiation, within the broad terms of the Withdrawal Agreement as settled in 2019, and there would be no reason for the EU not to embrace that approach. This appears to be another manifestation of "cakeism".

Throughout the process from June 2016 to October 2019, successive UK Governments have found it very difficult to accept that the issue of the border with the EU needs a permanent and viable solution. This was shown very clearly in the pleas from the Theresa May administration for a way out of the backstop, despite the absence of a proven means of securing any meaningful level of border controls on goods entering the EU Single Market, if the land border remains open. Similarly, in September 2019 "alternative arrangements" were discussed but not agreed. If such arrangements could be effective, there is no reason for the EU to oppose them. So, the deep problem that remains is that the UK Government appears to be dismissing the EU's concerns about the consequences of the absence of controls and checks at the land border – or returning to fanciful ideas that such controls can be effective without visible interventions.

Does the democratic deficit make the Protocol illegitimate?

One further key challenge relating to the legitimacy of the Protocol is that it includes provisions which mean that there will be no role for the Northern Ireland institutions when any EU law that applies in Northern Ireland as a result of the Protocol is amended or updated (as set out in Article 13 (3)). This is a consequence of a legitimate decision taken by the sovereign parliament of the United Kingdom in approving the Withdrawal Agreement with the EU. It is similar to the decisions that have been taken by a number of sovereign and independent non-EU countries in the European Economic Area to accept EU legislation without any power over its adoption or amendment, including Norway, Iceland and Liechtenstein. Those countries judged that their interests were served acceptably by exchanging a degree of agency over economic regulation and decision-making in exchange for access to the EU Single Market. A measure of the value that those countries place on that access is their willingness to contribute financially to the EU budget.

There are very strong and reasonable arguments that can be put against such a position. However, for the United Kingdom Parliament to adopt a comparable approach in relation to Northern Ireland was and is an entirely legitimate option. Nor does it lack democratic accountability. On the contrary, the proposal to adopt Article 13(3) of the Protocol was clearly stipulated in the Withdrawal Agreement, which was subject to scrutiny and debate as part of the general election campaign of 2019, as well as during the process of debate on what became the European Union (Withdrawal Agreement) Act 2020, which paved the way for the ratification of the Withdrawal Agreement in January 2020. There may be questions now about the transparency or clarity of the presentation of these issues by the UK Government during that period, but the fundamental fact is that the decisions were taken by the sovereign parliament, on the initiative of the legitimate government of the day.

While the Government of Ireland Act of 1920

and subsequent legislation restored a devolved legislature to Northern Ireland, that legislature was given no role in relation to international relations, and that position was not amended following the Belfast/Good Friday Agreement. It follows that Northern Ireland does not have separate decision-making power on issues not delegated by the UK Parliament to the Northern Ireland Assembly and Executive. The consent provisions of the Withdrawal Agreement are a unique exception, flowing from an international agreement.

In sum, it is of course open to Parliament to change its mind, but in relation to an issue enshrined in an international agreement, any such change of mind would not be expected to lead to an attempt to overturn the agreed position unilaterally. Such a radical change of mind could even open up the question of the legitimacy of the election result – it is not unusual for manifesto commitments not to be delivered, but "getting Brexit done" on the basis of the Withdrawal Agreement was more than a routine manifesto commitment.

The Acts of Union did not have democratic legitimacy and belong in history

Given the recent focus on the significance of the Acts of Union of 1800,[15] it is worth reflecting on the degree of democratic and political legitimacy surrounding what happened then. If we were to apply 21st century standards of democratic process, the passage of these Acts would fall far short. For example, the franchise for both the Irish and Westminster parliaments in 1800 was much more limited than it is today, having excluded the vast majority of the population of Ireland, who largely opposed the union. Furthermore, the idea that the union would pave the way for Catholic emancipation did not come to fruition for several further decades.

However even by the standards of democratic legitimacy that had been established by 1800, the Acts of Union are still highly questionable. In his biography of Lord Castlereagh, who was Chief Secretary of Ireland from 1798 to 1801) John Bew draws attention to the use of secret service money as "*inducements to keep lukewarm* [Protestant] *supporters of the Union on side*". This misuse of money, which Bew describes as "*unconstitutional*", helped to secure sufficient votes from members in the old Irish Parliament to ensure the passage of the Act of Union. What's more, no thought was given to the views of the majority of the population of Ireland, and the principle of consent certainly did not apply at that time In "*The Two Unions*", Alvin Jackson says that "*For most Irish people … the Irish Union appeared to have been born in squalor, raised in squalor and killed off in squalor.*"

Thus, in the indicative hierarchy of legitimacy indicated in the preceding paragraphs, the Acts of Union of 1800 are near the bottom. Those Acts completed the inclusion of Ireland into the United Kingdom, but the truly decisive acts of inclusion were, of course, by conquest and colonisation, which were no more or less legitimate than many of the events that determined how international boundaries have evolved throughout history. What is clear is that the constitutional event in relation to the union of Great Britain, Northern Ireland and Ireland which has the soundest foundation of democratic legitimacy is the Belfast/Good Friday Agreement, as every previous event was imposed with, at best, very limited regard for the views of the population of Ireland.

The long journey from 1800 to 1998 included many steps away from the simplicity of the provision "… *that the said United Kingdom be represented in one and the same Parliament*" (Union with Ireland Act (1800), Article Third), including the successive Home Rule Bills, and, most clearly, the Government of Ireland Act 1920, which replaced the most central provisions of the 1800 Acts, by reversing the abolition of separate parliaments in Ireland. It is therefore constitutionally bizarre for the NIP Bill to reassert the relevance of the 1800 Act, not least because the latter was passed at a time, and in a context, which trading relationships with Europe were radically different – not to mention the obvious fact of Ireland becoming independent during the intervening centuries.

The Acts of Union actually

15 i.e. The "*Union with Ireland Act 1800*" passed by the Westminster Parliament, and the "*Act of Union (Ireland) 1800*" passed by the Irish Parliament.

support the legitimacy of the Protocol

The principle of the sovereignty of parliament is the cornerstone of the UK constitution and is right at the heart of the case for Brexit. This applies in Northern Ireland as a consequence of the Acts of Union of 1800. The most fundamental implication of these Acts was that Ireland (and hence, since 1921, Northern Ireland) ceased to have a separate basis for political decision-making, following the abolition of the Irish Parliament in 1801. There are deep contradictions in the case against the Protocol on this point. It is not credible both to assert the primacy of the Acts of Union and simultaneously to challenge the legitimate decisions of the sovereign parliament. In approving the Withdrawal Agreement, the sovereign UK Parliament was exercising its legitimate authority, drawing on a majority in the House of Commons that was in favour of the Withdrawal Agreement as secured by the UK Government.

Invoking the Acts of Union is a political reaction rather than a sound principle

Until the Courts ruled that the UK Parliament, in approving the Withdrawal Agreement, had overturned Article Sixth of the Act of Union, the latter had not featured much in the debate on Brexit – nor in the genesis and evolution of the Belfast/Good Friday Agreement. The more obvious interpretation is that the steps which led to fundamental change from the position in 1800 were legitimately taken by the UK Parliament over time. The inclusion of the need to in some sense reapply the 1800 Acts is transparently a *post-facto* reaction to the ruling by the UK Courts. But if the 1800 Acts have precedence now, they also had precedence in 2019 and 2020 – so, once again, either the UK Government was wrong then or it was wrong now, and it is certainly not possible to transfer blame for that issue to the EU.

And the reason for acting in this way is manifestly in breach of the UK Government's obligation under the Belfast/Good Friday Agreement to be rigorously impartial. Indeed it is very hard to see how the 1998 Agreement and the 1800 Acts can be reconciled – for example, the 1998 Agreement explicitly recognises the legitimacy of the Irish identity in Northern Ireland, yet the 1800 Acts treat all the people of Ireland as "... *his Majesty's subjects*". Then and now, many in Northern Ireland reject such a description, and those who vote for Sinn Féin know that the party will not take its seats at Westminster on the explicit basis of that party's rejection of any allegiance to the British Crown. Only the 1998 Agreement secured a legitimate, democratic basis for the union of Great Britain and Northern Ireland (and thus, the partition of Ireland). The NIP Protocol Bill risks reverting to the approach (as in the Acts of Union) of imposing arrangements without the consent of the affected population or the majority of its representatives.

In any case, attempting to reinterpret the Protocol on the basis of one reading of the Belfast/Good Friday Agreement ignores the complex and lengthy process that defined the scope for compromise and agreement set out during the negotiations leading to the Withdrawal Agreement. Put simply, all reasonable considerations had been explored at length before the settlement was reached in October 2019. In this light, regardless of the merits of the Protocol, its democratic legitimacy, including the requirement for aspects of EU law to apply, is well-established and was well-flagged, and is much more credible and reasonable than any assertion of any part of the Acts of Union of 1800.

How and why did we reach the present situation

Avoiding a hard land border was a very difficult issue throughout the Brexit negotiations. The idea that that issue was linked to the Belfast/Good Friday Agreement became received wisdom at quite an early stage of the Brexit process and is reflected in the text of the Protocol which was agreed and affirmed by the UK. The ninth recital, which follows on from the texts affirming the commitment that the Agreement "should be protected in all its parts", reads:

> *RECALLING the commitment of the United Kingdom to protect North-South cooperation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls...*

The fact is that the 1998 Agreement itself says nothing about trade borders, and there is no explicit basis for a claim that the Agreement guaranteed that there would never again be a hard land border on the island of Ireland. However, it is also a fact that many in Ireland (and Irish America) feel strongly that anything that would lead to a hard border would undermine the Agreement.

Protecting the EU Single Market

It is often stated in the current debate that the Protocol exists to protect the Belfast/Good Friday Agreement. That is a misleading simplification. The Protocol represents a compromise that seeks to protect both the Belfast/Good Friday Agreement and the integrity of the EU Single Market, including Ireland's place in that market. This is explicit in the final recital at the beginning of the text by the UK and the EU:

> *MINDFUL that the rights and obligations of Ireland under the rules of the Union's internal market and customs union must be fully respected...*

An issue arises clearly and directly from the commitment to avoid a hard land border on the island of Ireland because if anything is in free circulation in a jurisdiction without external controls (as the Northern Ireland Protocol Bill appears to propose), then whatever their asserted "destiny", goods can be transported, bought and sold freely, legally or illegally, anywhere from Strabane to Białystok or from north Antrim to western Thrace. The question really should focus on what risks arises from the absence of border controls, and how those risks can best be managed in a proportionate way, with due regard for the immense political sensitives associated with the Protocol.

The Bill glosses over the real problems in relation to goods entering Northern Ireland

Some of the rhetoric around the NIP Bill appears to suggest that the UK Government is again seeking to avoid Kelemen et al's trilemma. However, if their proposals would abolish checks and controls on goods moving between Great Britain and Northern Ireland (which would appear to be necessary to fulfil the reference to the Act of Union (1800) at the start of the Bill), the implication is that some other action would be needed to protect the integrity of the EU's Single Market. If that issue could be dismissed easily, the long debate from 2016 to 2019 would not have been necessary.

The Bill uses the word "*destined*" in relation to goods fourteen times. The UK Government claims that the Bill would protect the EU Single Market, on the basis that it is not necessary to have controls over goods "destined" to stay in Northern Ireland.

If there was any way to ensure that goods fulfil their destiny, border controls everywhere would be redundant, and the negotiations on the implications of Brexit for the island of Ireland would have been easy. The prosaic fact is that goods are transported and traded rather than "*destined*", and the worldwide infrastructure of control acknowledges the fact that not all trade and transport is legal. The concept stated in the Protocol says that goods may be "*at risk*" of moving through Northern Ireland into the EU Single Market, and tasked the Joint Committee with taking that idea from the broad concept stipulated in the Protocol into a practicable and operational definition. That was agreed in December 2020, as set out in detail in the Decision of 17 December 2020[16]. A green lane, with no information on goods moving through it, and no means of effecting control if needed, would be a very attractive outcome – but applying that unilaterally sets aside the concept agreed in October 2019, and the detailed application agreed in December 2020. It is not clear how "destiny" eliminates risk.

16 HM Government (2020) "*Decision of the Withdrawal Agreement Joint Committee on the determination of goods not at risk*", 17 December 2020, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/949846/Decision_of_the_Withdrawal_Agreement_Joint_Committee_on_the_determination_of_goods_not_at_risk.pdf

There is very good reason to recognise that if the Protocol increases the scope and incentive to move goods illegally, that is potentially a very real problem. Even the pre-Brexit scenario had some such incentives at the land border in Ireland. Furthermore, as I have sought to explain previously[17], the need for controls that protect health is valid and genuine and cannot be dismissed solely on the basis that some goods are only sold in Northern Ireland (or theoretically "destined" solely for Northern Ireland). For that reason, I did not include agri-food products in the scope of the green channel in my paper of March 2018, and the Alternative Arrangements Commission also recognised that health-related controls could not be applied effectively at the land border. What is needed is a process of engagement that addresses these real risks in a proportionate and viable way that accounts for the unique circumstances of Northern Ireland, and the relatively small scale of trade that takes place between Northern Ireland and Great Britain that could use the green/red channels concept as much as possible, while recognising its limitations.

There is no simple solution which avoids controls anywhere, as all three elements of Kelemen et al's "trilemma" need to be reconciled. The Protocol was agreed by the EU and the UK on the explicit basis that the controls that would be introduced on foot of it would not infringe on constitutional issues - as is explicitly affirmed in the text. There cannot have been any doubt in October 2019 that many unionists would see that as being at odds with their interpretation of the 1998 Belfast/Good Friday Agreement. However, it was not until early 2021 that this led to the outright rejection of the Protocol from some unionists. There is a prosaic and technical rationale for the existence of checks at ports and airports – namely, the absence of any viable alternative means of managing the health-related risks associated with the movement of agri-food products, which is perhaps not as compelling as objections linked to the possible undermining of a key interpretation of the Agreement.

A core argument underlying the case for the NIP Bill is that trade into Northern Ireland does not represent a material threat to the EU Single Market, given its limited scale, and that the need for checks is minimal. If that were a viable argument, it surely could and would have prevailed at a much earlier stage of the debate, and glossing over it now ignores the centrality of that issue to the debate that began in 2017 and culminated in the Protocol. It appears that the UK did not win that argument in 2020, in the long process that led to the UK willingly accepting the stringent and full application of EU rules in the Joint Committee decisions of December 2020. The idea that the *status quo* of extended grace periods can continue forever would fall if and when the UK applies its commitment to diverge from EU standards in relation to health-related concerns. At that point, the current tolerance of risk by the EU would be unsustainable.

Experience, for example from Northern Ireland's ill-fated Renewable Heat Incentive (RHI) Scheme,[18] shows that if provisions made by a state via legislation or regulation create opportunities for profits to be made, the market will maximise the benefits that can be obtained. The reality is that even during the UK's membership of the EU, the existence of some administrative differences across the land border (e.g. regarding excise duties) incentivised an extensive network of organised crime and smuggling activities. Increasing the scope of such incentives would risk providing increased opportunities for exploitation by criminals.

The implications of the Protocol were clear in October 2019 and again in December 2020

The asserted "necessity" of the NIP Bill hinges on the issue of the potentially disproportionate and unreasonable application of the Protocol. The concept of proportionality is, by definition, relative. It is worth considering what could have been regarded as reasonable expectations relating to the application of the Protocol before it came into operation, as well

17 McCormick, A. (2022) Why is the Northern Ireland Protocol so difficult?, *UK in a Changing Europe*, 20 May, available at: https://ukandeu.ac.uk/why-is-the-northern-ireland-protocol-so-difficult/

18 See, for example, the RHI (Renewable Heat Incentive) Scheme inquiry (2020) "*Report of the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive (RHI) Scheme*", Volume 3, paragraphs 48.74-48.95, available at: https://cain.ulster.ac.uk/issues/politics/docs/rhi/2020-03-13_RHI-Inquiry_Report-V3.pdf

as the intended purpose of the Protocol, and the risks it seeks to address.

One of the most difficult risks to manage relates to the sanitary and phytosanitary (SPS) controls on GB-NI trade, as these are health-related. No-one has proposed a viable means of managing that risk at the land border between Northern Ireland and Ireland, as there is no workable means of preventing pathogens from crossing the land border in, as quoted above, the absence of such controls. The Prime Minister's letter of 02 October 2019 to then EU Commission President Jean-Claude Juncker[19] and the accompanying explanatory note[20] proposed explicitly that the relevant risks would continue to be managed at the *Northern Ireland* ports and airports. So, far from the notion that such checks were imposed by the EU, they were in fact proposed by the UK.

It cannot be the case that controls on the entry of goods is inherently unacceptable. This is at the heart of the issue, given that both the UK and the EU have committed to avoiding controls at the land border. As a result of this, if goods are in free circulation in Northern Ireland, there is no means of preventing them from entering the EU's Single Market. Managing the risk associated with this can be stated in familiar terms. It is necessary to have a clear definition in law of which goods can and cannot move across a border and on what terms, to have the information needed to distinguish such goods in transit, and to be able to prevent the movement of goods as appropriate.

One factor that is usually cited on the question of "disproportionality" is the scale of the information requirements, notably on agri-food goods. The very large number of documents that would be required under a "standard" application of the rules arises from the business model used by large supermarkets. It is also claimed that it is disproportionate to check goods intended for sale only in Northern Ireland. However, a diseased animal can walk across a field, or an infected product sold (exclusively) in Belfast can be carried south in any number of ways. The issue is one of geography, not history, nor identity, nor constitutional politics, as the animal and plant health status of the island is a shared asset.

The Protocol envisages the application of the EU's approved and conventional approach to manage the risk associated with SPS checks based mainly on provisions that the UK agreed and adopted while it was an EU Member State. The reasons for applying that approach are very clear: in the negotiations which took place in 2020, it appears to have been accepted that there was no obvious reason why the EU should change its legal provisions to suit a former Member State. Consistency provides a clear legal defence against any non-EU state claiming unfair treatment if the UK is given more favourable access to the EU Single Market.

Of course, the actual health risks associated with the trade in agri-foods are and will remain minimal while the UK remains in practice aligned to EU standards, which is one possible basis for a "disproportionality" argument vis-à-vis the Protocol. But the settled view of the UK Government that it will not commit to ongoing alignment (or even to a "standstill" period to help with the issues around the Protocol) means that an enduring solution is required.

The negotiations in 2020 addressed these issues in detail. There is tangible evidence of what was expected, especially from December 2020 when the Joint Committee reached decisions in relation to the application of the Protocol following intensive and detailed negotiations, during which the detail of how the Protocol would work was considered fully and formally. Even if, contrary to the documentary evidence from that time, such as the UK Government's own Impact Assessment as cited above, it was to be accepted that the UK Government reached the agreement of October 2019 under duress, or with high expectations that the Protocol would not lead to extensive checks on goods moving from Great Britain to Northern Ireland. The clear fact is that the position was fully known and understood by the UK Government in

19 Johnson, B (2019), Prime Minister Boris Johnson's letter to EU Commission President Jean-Claude Juncker, 02 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836115/PM_letter_to_Juncker_WEB.pdf

20 HM Government (2019) Explanatory Note, 02 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836116/Explanatory_Note_Accessible.pdf

December 2020. The position agreed then was adopted long after any time pressure relating to "*getting Brexit done*" had disappeared as it was eleven months after the UK had left the EU. Moreover, this was in the context of a UK Government that had a strong and clear parliamentary majority. Nor was there any conceivable basis for the UK to claim that it was in any way unclear or uncertain as to what the Protocol would imply.

The decisions reached in the Joint Committee[21] in December 2020 give very clear evidence of what was expected in relation to the Protocol and provide a benchmark against which the idea of disproportionate application can be tested. The approach agreed in October 2019 and again in December 2020 was that the EU's normal rules would apply, subject only to the application of specific grace periods. In its unilateral declarations of 17 December 2020, the UK Government confirmed that it would implement the Protocol but that grace periods were required to provide time before there could be full compliance with its agreed terms. Hence, the words used in the UK's unilateral declarations implied, *inter alia*, that the full rigour of the requirements of the Protocol in relation to export health certificates for agri-food products entering Northern Ireland from Great Britain would have applied from April 2021 onwards, and the prohibitions and restrictions in relation to chilled meat products would have applied from 01 July 2021.

It is now treated as axiomatic to say that the grace periods are necessary. However, it is a clear matter of record that this was not the UK Government's view in December 2020. Many in Northern Ireland knew in 2020 that the application of standard EU rules on agri-food products entering Northern Ireland would be onerous. But it appears that that was not explored fully in the negotiations that led to the Joint Committee agreements of December 2020, and indeed it appears that the UK Government was at pains to assure the EU that it could and would comply with the full application of the Protocol and that it accepted formally that the grace periods would be short. No control system is or could be watertight. In relation to medicines, the Protocol was restricting the movement of key products from Great Britain to Northern Ireland. In addressing that problem, the EU eventually accepted the need to amend the relevant EU legislation and that precedent suggests that a proportionate approach to the issue of agri-food goods is equally potentially negotiable. Here, an ultimate outcome could be found somewhere between the *status quo*, with the grace periods in force, and the position as agreed in December 2020.

Sausages

The Foreign Secretary's statement of 10 May 2022 made reference to the prospect of 'disproportionate application' of elements of the Protocol. The example of Lincolnshire sausages was used to illustrate such a scenario. One of the unilateral declarations of December 2020 addresses the issue of meat products. It is important to emphasise that these were unilateral declarations made by the UK Government after intensive negotiations. The unilateral declaration in relation to meat products indicates that the UK was formally committed to using the six months of that grace period to allow for adaptations to be made that would lead to compliance with the relevant legal obligations of the EU *acquis* as set out in the Protocol, which would have implemented the prohibitions and restrictions that would apply in relation to chilled meat products across the EU. The declaration reads:

> *... this period...will be used by supermarkets in Northern Ireland to adjust ...*

Very clearly, the unilateral declaration does not provide any indication that the UK objected to the provision in principle or that it was proposing not to apply it.

The basis on which the EU agreed to provide "grace" periods was that the time would be used to prepare to comply with the requirements of the Protocol. It is important to emphasise that on this and other issues which were the subject of unilateral declarations on the part of the UK Government, the agreed documents clearly show that what was happening was not provided for formally

21 See: HM Government (2020) "*Unilateral declarations by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on meat products*", 17 December, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946283/Unilateral_declarations_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_European_Union_in_the_Withdrawal_Agreement_Joint_Committee_o

under EU law. The unilateral statements by the EU in response to those of the UK Government simply indicate that the EU was agreeing not to take legal action against the UK on these issues even though to have done so would have been within their rights under the terms of the Protocol.

It was therefore clear in December 2020 that the issue of sausages and other chilled meat products was highly contentious. At that time, there was hope that, within the six months grace period agreed by the Joint Committee, there could be further negotiations and any solution secured would apply in relation to the UK as a whole. Clearly this was a legitimate aspiration and consideration. However, it was clearly not something that was guaranteed or was solely within the gift of the UK Government, or something that they could insist on unilaterally.

Supermarket Consignments

The position is even more stark when it comes to agri-food products more generally, which were also covered by a unilateral declaration by the UK and by a grace period. In this case, the UK Government recognised that there was no potential for the grace period to be extended[22], despite the clear understanding of the great difficulties that could arise as a result of this. The UK declaration stated:

> *During the above-mentioned period of time, the UK authorities will take all necessary measures to ensure compliance with the Protocol and relevant Union law as of 1 April 2021. The UK accepts this solution is not renewable.*

Hence the words used in the UK's unilateral declaration would have implied that the full rigour of the requirements of a Protocol in relation to export health certificates for agri-food products entering Northern Ireland from Great Britain would and should have applied from April 2021 onwards. The fact that immense numbers of Export Health Certificates would be needed, and that goods only sold in Northern Ireland were affected, was known and fully understood in December 2020, yet the UK Government agreed to the terms set out in the unilateral declarations.

The UK knowingly accepted the rigorous application of the Protocol in December 2020

The overall position, as summed up by the Co-Chairs of the Joint Committee[23] was that

> *An agreement in principle has been found in the following areas, amongst others: Border Control Posts/Entry Points specifically for checks on animals, plants and derived products, export declarations, the supply of medicines, the supply of chilled meats, and other food products to supermarkets, and a clarification on the application of State aid under the terms of the Protocol.*

The position agreed between the UK and the EU was formally adopted at the Joint Committee meeting on 17 December 2020.

Turning from the formal documents agreed between the UK and the EU in the Joint Committee, further relevant evidence in relation to the question of disproportionate or unreasonable application of the provisions of the Protocol is available from the way in which these decisions were communicated by the UK Government in December 2020. The key record on this is the Hansard report for 9 December 2020 of the statement to the House of Commons by the Chancellor of the Duchy of Lancaster (CDL) and the questions he answered in that Parliamentary proceeding.

The Chancellor of the Duchy of Lancaster told the House of Commons:

> *I am pleased to say that … Maroš Šefčovič and I … came to an agreement in principle on a deal that meets all [the] commitments [in the UK government's Command paper of May 2020] and puts the people of Northern Ireland first.*

This record gives no indication that the UK had material anxieties about the way in which the Protocol was to be applied. The CDL was particularly pleased with the decision on the issue of goods "at risk" (see above, and the document at footnote 6), and said that over 90% of goods would be treated as "not at

22 The grace period for supermarket consignments was originally meant last for three months.

23 HM Government (2020) "Joint statement by the co-chairs of the EU-UK Joint Committee", 08 December, availableat:https://www.gov.uk/government/publications/eu-uk-joint-committee-statement-on-implementation-of-the-withdrawal-agreement/eu-uk-joint-committee-statement-on-implementation-of-the-withdrawal-agreement

risk". This followed many months of intense negotiations during which the detail of how the Protocol would be applied was considered fully and formally. This is consistent with the position taken by David Frost, then former UK Government Chief Negotiator for Exiting the European Union (2019-2021) in his speech of 27 April 2022[24] in which he said that, in agreeing the Protocol in October 2019, the UK Government was intending to discuss the issues in detail during 2020. The question that is relevant for the NIP Bill, and the claim that it is compatible with international law on the grounds of necessity, is whether there is evidence that what has happened in terms of the application of the Protocol is disproportionate and unreasonable compared to what had been expected. The clear detailed public records do not provide any support for any such argument.

Given that the UK Government subsequently unilaterally extended the grace periods indefinitely, there is at least an argument to be made that the operation of the Protocol has been much less rigorous in practice than was expected in December 2020. There is no evidence that the EU has operated the Protocol in practice more rigorously than was explicitly agreed then.

The position now is that the EU and the UK are describing the possible way ahead from different premises: as stated by the UK Government, the EU's proposals of October 2021 are indeed more onerous than the *status quo*, which represents only limited implementation of the agreed position. However, the EU's proposals represent material mitigations and easements compared to reasonable expectations about the application of the Protocol before it came into operation, as defined by the agreements of December 2020.

How can the impact of the Protocol be addressed fairly and proportionately?

A key question is whether the impact from the Protocol on political stability in Northern Ireland can be addressed proportionally and reasonably in relation to both of the stated purposes of the Protocol – namely, ensuring the maintenance of the integrity of the EU Single Market and Ireland's place within it, and protecting all the dimensions of the Belfast/Good Friday Agreement. The wholesale removal of some checks and controls on goods entering Northern Ireland from Great Britain might be seen as beneficial in relation to the first stated purpose of the Protocol but would materially compromise the second. The true exam question is what combination of actions would best secure a balanced fulfilment of the two purposes, recognising that it may not be possible to have full and complete fulfilment of either or both.

If the pretext for the Bill is the need to intervene urgently in relation to disproportionate application of the Protocol, the case is far from clear, given the following factors:

- Under the grace periods, many key provisions of the Protocol are not being applied, so they cannot be applied disproportionately.
- The issue around the jurisdiction of the Court of Justice of the EU (CJEU) is a matter of principle rather than practical proportionality, and is not a factor that has any practical impact on the experience of businesses or consumers in Northern Ireland.
- The issues of State aid and VAT are linked to the concept of a level playing field. The fact that the Protocol gives exporters in Northern Ireland a unique advantage in having unfettered access to both the UK and EU markets means that it is legitimate and necessary to ensure that that advantage is proportionate and not compounded by any other easements that could be unfair on competitors. This could also be addressed by further detailed technical discussions, though the EU will not unreasonably point out that these issues were discussed in 2020, before the Joint Committee reached a fully informed judgement on the application of the Protocol in December 2020.

Stepping further back from the details, if the current situation is having a disproportionate

24 Frost, D. (2022) "The Northern Ireland Protocol: how we got here, and what should happen now?" Keynote speech by Rt Hon Lord Frost of Allenton CMG at Policy Exchange, 27 April, available at: https://policyexchange.org.uk/pxevents/the-northern-ireland-protocol-how-we-got-here-and-what-should-happen-now-keynote-speech-by-rt-hon-lord-frost-of-allenton-cmg/

impact in relation to the Belfast/Good Friday

Agreement, the question arises as to what approach would be better. To state the point more fully, if there is a better way than the Protocol of addressing the parameters of Brexit (the form of which was decided primarily by the UK Government) in relation to its impact on Northern Ireland and the relationships set out under the Belfast/Good Friday Agreement, both between Northern Ireland and the rest of the United Kingdom, and between Northern Ireland and Ireland, it has not yet been discovered. That question was the subject of lengthy and detailed negotiations between the UK Government under both Prime Minister May and Prime Minister Johnson and it remains a matter of fact that to this point no better way forward has been found. There have been no 'alternative arrangements' identified, as such an approach was once dubbed. Any answer would also have to address the second essential purpose of the Protocol relating to the maintenance of the integrity of the EU Single Market and Ireland's place within it. That does not take away from the pressing need for redoubled efforts and engagement on an inclusive basis to explore how best to proceed.

The case for unilateral action now would have to rest on an assessment that there is no realistic prospect of securing a proportionate outcome that would deliver adequate, practical protection for the EU Single Market with materially reduced requirements in relation to goods moving from Great Britain to Northern Ireland. It is very hard to see any coherent basis for that conclusion.

What has changed since December 2020?

It is a demonstrable fact that the UK Government position has changed materially from the tone and nature of the statement to Parliament of 9 December 2020 as quoted above. It is worth reflecting on what happened in the first half of 2021 which is the time during which much of this change took place.

Many factors may have contributed to the process: two which may be relevant are discussed below, though they may not explain the situation fully.

The first is that the tangible experience of the first few months of the operation of the Protocol did indeed include many difficulties that arose for traders in January 2021. That was a very intensive period for the team in the Northern Ireland Executive Office and for civil servants both in the UK Government and in the devolved departments. Sterling, intensive work was done in that period by the teams in the Trader Support Service, HMRC, the UK Government's Department for Environment, Food and Rural Affairs (DEFRA) and the Northern Ireland Department of Agriculture, Environment and Rural Affairs (DAERA), who responded promptly and at times heroically to issues in relation to difficult individual cases that arose. However, the vast majority of the difficulties they had to help with lay not in the actual requirements of the Protocol (which were eased very considerably by the existence of the grace periods) but as a result of totally inadequate preparation by and for traders, most especially for those moving goods from Great Britain to Northern Ireland (including those using Dublin Port as an entry point for goods being transported to Northern Ireland). It is undeniable that UK Government ministers and officials would have heard of many difficulties that arose during this period. The material question is whether such instances provide supporting evidence that the Protocol was being applied in a disproportionate and/or unreasonable way, as has been claimed. There were and are real problems with the definition of "at risk" goods (see above) which suggests that the settlement reached in December 2020 was not as good as the UK Government claimed at the time – so clearly further effort is needed to address the customs issues arising from the Protocol.

The second known event which may be relevant to the change of approach by the UK Government was the European Commission's mistake in relation to the possibility of invoking Article 16 of the Protocol in the context of COVID-19 vaccines on 29 January 2021. The idea was very quickly rescinded but did appear in a Commission proposal document. It is important to remember that the unionist parties in Northern Ireland had focused on Article 16 as a potential way of changing the expected application of the Protocol as evidenced by the amendments they proposed to the motion debated in the Assembly on

30 December 2020 – amendments which were rejected by very clear majorities on the day. The Commission's proposal, while very quickly withdrawn, provided the UK Government and unionist parties with a sense of offence, and concern that at least some officials within the European Commission had considered making use of Article 16 in a way that was disproportionate. Any consideration of the actual substantive merit or otherwise of what was considered by the Commission is irrelevant to the impact it had on the debate both within the UK Government and between the UK Government and the Northern Ireland Executive.

The connection is clear in the letter sent by the UK Government to the Commission on 02 February 2021[25]. The argument was that to restore confidence and to redress the offence caused by the vaccine issue, urgent steps were needed, specifically related to the extension of the grace periods to 01 January 2023. Only eight weeks after having told Parliament that the supermarkets would be able to implement the requirements of the Protocol on their consignments of agri-food produce in three months, the UK demanded, and subsequently allowed, unilaterally, very long extensions of the supposedly temporary arrangements.

The most plausible interpretation of this sequence of events is that:

- the supermarkets were not ever in a position to comply by 31 March 2021;
- the UK Government could not say so in December 2020, as they needed a plausible basis on which to secure the TCA, and that depended on an agreement on the Protocol, to give cover for withdrawing the clauses in the Internal Market Bill that contradicted the Protocol;
- some intervention to change the position would have been needed before the grace periods expired; and
- the EU's mistake on the vaccine issue changed the tactical context and provided a plausible pretext for a radical shift of position.

It is not surprising that the grace periods as agreed in December 2020 were not sufficient. An important reason for the problem was a serious lack of candour on the part of the UK Government. It is very difficult to secure a realistic settlement in a negotiation if the substance of the issue is obscured. It appears that the letter of 02 February 2021 brought together a real and very serious practical problem (i.e. the fact that it was not realistic to expect that supermarkets could comply with the terms of the Protocol within the agreed grace period) with a tactical opportunity to put the EU on the back foot, without having to acknowledge that all that had been said a few weeks previously (i.e. that the UK could and would achieve compliance within the grace periods) was not accurate or reliable.

It is also a matter of fact that February 2021 marked a very significant change in the stance taken by the DUP in relation to the Protocol. Before that time, there had been several public statements that indicated that the DUP, while strongly opposed to the Protocol, appeared to accept that it was not likely to be changed and that it was not without some advantage for Northern Ireland. It is not clear why from February 2021 onwards the position of the DUP moved abruptly to wholesale and outright opposition to the Protocol, with the party's official line calling for it to be replaced. Two potentially important points which coincide with that decision were the Article 16 debacle as described above, and an opinion poll[26] which showed a very significant increase in support for the Traditional Unionist Voice (TUV) party at the expense of the DUP.

What also began to emerge during the period from February 2021 onwards was a more gradual but palpable change of posture and stance by the UK Government. During 2020, on several occasions, the UK Government's stated position was to say that the Protocol needed to be implemented and that the Northern Ireland Executive needed to play its part, for example in the building and operation of border control posts. From February 2021 onwards, the UK Government reduced its

25 Gove, M. (2021) Letter to EU Commission Vice-President Maroš Šefčovič,"*Next Steps on the Northern Ireland Protocol*', 02 February, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957996/2020_02_02_-_Letter_from_CDL_to_VP_Šefčovič.pdf

26 Lucid Talk (2021) "LT NI quarterly 'Tracker' Poll – Winter 2021", *Lucid Talk News*, February 03, available at: https://www.lucidtalk.co.uk/single-post/lt-ni-quarterly-tracker-poll-winter-2021

pressure on the Northern Ireland Executive to enforce the requirements of the Protocol and increasingly challenged the very approach they had proposed themselves in October 2019. That trend has now come to a crescendo in the UK Government's position that the Protocol is not working and is being applied in a disproportionate and unreasonable way.

Surely the EU could and should have done more to avoid or resolve the difficulties over the Protocol

It seems self-evident that in complex and highly charged negotiations, all participants share a degree of responsibility for any major difficulties that arise. Possible material criticisms of the EU in this regard include the following:

- An imbalanced view of the 1998 Belfast/Good Friday Agreement, with too much emphasis on the north/south dimension and acceptance of the argument that the Agreement rules out the existence of a hard land border, when there is no direct reference to this in the document.
- Unreasonable and unrealistic expectations that barriers to the movement of goods from Great Britain to Northern Ireland could have been acceptable to unionists (it is possible that my "channels" paper of 2018[27], which had proposed risk-based checks at the Northern Ireland ports and airports in a context set by the commitment of the UK Government to leave the EU Single Market and the Customs Union, contributed to such a view).
- An exaggerated concern about the risk of non-compliant goods entering the EU Single Market via Northern Ireland, leading to too rigid an application of the rules.
- Reluctance to prioritise the quest for pragmatic solutions.

The fact remains that the UK Government was party to the agreement that a hard land border on the island of Ireland had to be avoided – indeed the joint letter from the then First Minister and Deputy First Minister in August 2016 raised that concern explicitly. Also, it was the UK Government that took the initiative in proposing regulatory alignment in the negotiations that led to the Protocol in the first place (see the papers of 02 October 2019 quoted above[28]).

There is no doubt that the UK Government sought more generous and broader derogations from, or mitigations of the application of the Protocol in the negotiations in 2020 than those agreed in December 2020. However:

- The EU saw the agreement of October 2019 as the end of a long and tortuous process, and the culmination of many phases of compromise. The (then-new) UK Government could claim that some previous compromises were not their responsibility but constrained their room to manoeuvre. But the bigger question remains whether there is, in the real world, a better solution to Kelemen et al's Brexit trilemma which could be adopted if only the EU was willing to compromise.
- The Internal Market Bill had the effect of reducing trust and made it much more difficult for the EU negotiators to compromise, as the sense was that the UK Government was signalling a determination to have its own way whether or not the EU agreed (i.e. a similar tactic to that in the present NIP Bill).
- Faced with an outcome that was not as good as they had sought, it is possible that the UK Government nevertheless provided private assurances to the EU that the approach agreed in December 2020 could be delivered – consistent with the public statements quoted above. It is hard then to say that the EU should have said "*no, we know better, you won't be able to deliver that*".

The vaccine issue and Article 16 debacle of 29 January 2021 was undoubtedly a very serious error on the part of the EU. But the quest for pragmatic operational solutions remains the focus and should be pursued with vision and determination.

27 Unpublished
28 See footnote 4

Conclusion

Even leaving aside the issue of compatibility with international law, the NIP Bill is:

- based on arguments that ignore the firm and well-informed decisions taken by the UK Government in October 2019, January 2020 and December 2020;
- internally contradictory, in that it adopts a one-sided analysis of the Belfast/Good Friday Agreement while arguing that it is needed to uphold that Agreement; and
- anachronistic, in that the Acts of Union of 1800 have very limited contemporary relevance and no basis in democratic legitimacy and are overtaken by (and are arguably incompatible with) the 1998 Agreement.

The fundamental reality is that Brexit created a dilemma that was not foreseen in 1998 and which can only be resolved by a process that respects the principle of negotiation that applied throughout the 1990s. The EU argues that its understanding was that that spirit of compromise had applied in the long process from the referendum in 2016 up to the successful negotiation of the Withdrawal Agreement of October 2019. The Withdrawal Agreement clearly entailed major concessions on both sides: for the UK, this involved proposing and accepting regulatory alignment for Northern Ireland with the EU's Single Market; for the EU, this involved accepting that part of its external boundary would be enforced by a non-Member State. It is not surprising that the EU emphasises that the UK had exercised its right to choose what form of Brexit it would take and was in no doubt about the consequences of the UK Government's choices – which helps to give rise to the EU's strongly held position that the Protocol cannot be renegotiated or derogated from unilaterally by the UK.

Real engagement is clearly needed, founded on the inclusive principles expressed in the 1998 Belfast/Good Friday Agreement. It is still open to the UK Government to act properly and to participate in such a process, instead of refusing to negotiate unless the EU makes significant concessions first.

There is a critical need to put the interests of Northern Ireland first, in a way that reflects the fact that any application of Brexit disturbs the delicate balance established following the 1998 Agreement. That means respecting all the points of view in Northern Ireland as well as the principles that govern the UK and EU. A practical and reasonable way forward is clearly available. As part of that process, it should be possible to make the most of the concepts of green and red (or express) lanes and to address the practical problems of the Protocol - not as a unilateral intervention but as a possible landing zone for agreement. As above, constructive ambiguity may be more difficult to apply to trade than to the constitutional issues. Any solution will involve some dislocation compared to the pre-Brexit scenario, and it is vital that any further discussions or negotiations acknowledge that reality and seek out the best available compromise.

The key, as happened in the run up to the 1998 Agreement, is for courageous leaders to stand up and look beyond short-term and sectional interests to an agreement that can endure in the best interest of all the peoples on these islands.

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