

Abstract

This article is adapted from my presentation at the CCBS conference on 25 September 2020, in which I consider the global trading position of Northern Ireland with reference to three international legal texts, the WTO (Marrakesh Agreement 1994), Good Friday Agreement / Treaty of Belfast 1998, and Northern Ireland Protocol of the UK-EU Withdrawal Agreement of 2020. In my opinion each of these contains both core principles and ambiguities of relevance to Northern Ireland's future trading position, which need to be navigated carefully and flexibly in determining future arrangements. This will be made more difficult if handled in poor faith by any party in particular by using overt legalism of the texts. However it could also present opportunity, if the ambiguity can be exploited.

Introduction

Professor Katy Hayward evocatively described Northern Ireland as a 'problem child of Brexit, yet one of which the UK and EU should be proud as a joint responsibility, and should be acting accordingly.' In terms of trade arrangements for the province we've seen since 2016 the difficulties, most recently the UK government suggestion of overturning the recently agreed Withdrawal Agreement through the Internal Market Bill. I don't believe it has to be like this, for while the challenges are unquestionable, the principles and ambiguities in three key treaties, the Good Friday Agreement, the Northern Ireland protocol, and the WTO, should allow us with goodwill to find solutions, maybe even new opportunities.

The reason for any optimism is that international treaties are not a manual, as often seems to be believed. They are rather a framework adaptable to different circumstances, typically of principles which must be adopted, but flexibly implemented in mutual cooperation. Without this interpretation international relations are quickly overtaken by suspicion, as we have begun to see from the Internal Market Bill.

Rather than focus particularly on the problems facing Northern Ireland as a result of Brexit this article instead examines those principles which should underpin the trade position going forward, and the flexibilities needed. It starts by looking at the parts of international treaties of particular relevance, in order of their date of agreement.

The World Trade Organisation and Northern Ireland

The rules of the World Trade Organisation date back to 1947 (as GATT, the General Agreement on Tariffs and Trade), updated in 1994 in the Marrakesh Agreement. The fundamental principle is Most Favoured Nation, MFN, that members (UK and Ireland being two) treat other members equally with regard to market access (tariffs and services) unless they have a more detailed arrangement in place covering substantially all trade such as EU membership or a Free Trade Agreement.

In summary this should mean the UK treating imports from Dublin to Belfast in the same way as between Calais and Dover, or indeed New York to Heathrow. Whether with regard to customs formalities, product checks, or the ability of services companies to operate.

Yet there are ambiguities and exceptions. The detail of the checks will be carried out is not laid down, mutual recognition agreements which deal with fractions of trade and can remove checks possibly shouldn't be legal but they are plentiful, and exceptions are allowed on grounds such as national security, frontier trade, and public morals.

Nonetheless WTO rules clearly present an issue for Northern Ireland as a result of Brexit, in the absence of a land border. I have been asked by foreign governments whether without an FTA the Northern Ireland protocol is indeed compliant. A good question, which we examine further below, concluding that although unprecedented it could be allowed. It is certainly the case that an FTA will make the position easier.

The Good Friday Agreement

The 1998 Good Friday Agreement has been frequently debated with regard to the future trading position of Northern Ireland, though there are no direct references to trade or borders. From a trade point of view I look at Article 1v, "(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities."

It seems to me that the "identity, ethos and aspirations of both communities" places East-West and North-South trade relations on an equal basis, regardless of the original context of mutual UK and Ireland membership of the EU. In my work on Northern Ireland and Brexit in the last two and a half years I have considered this to be the heart, what does this mean for the identity of both communities?

The answer for me is that any new barriers to either east-west or north-south trade must be problematic. They are not prohibited, for both exist to a certain degree now, but they must be carefully considered and minimised. So a degree of ambiguity, but equally a clear principle.

The Good Friday Agreement isn't though a trade treaty. North-south trade must be considered in the context of WTO rules on different countries. The Most Favoured Nation principle still applies.

The Northern Ireland Protocol

The Protocol on Ireland / Northern Ireland within the UK Withdrawal Agreement from the EU is similarly not a trade treaty as it hasn't been notified to the WTO. The protocol is probably clearer than the two other treaties with regard to trade, problematic for both communities' identities when read alongside WTO rules, and yet sufficiently flexible to be standalone or supplemented with a UK-EU Free Trade Agreement.

The protocol's potential issues are often seen as only affecting east-west relations, goods trade between Great Britain and the province being subject to checks both ways on any

reasonable reading of the text. From Great Britain this takes the effect of regulatory checks appropriate to goods entering the EU single market, particularly on food products, and potential tariffs. From Northern Ireland, by effectively shifting any EU / UK border checks, and read in conjunction with WTO MFN principles, the same.

In effect the protocol places Northern Ireland in both UK and EU customs zones, and there is no obvious precedent for this in WTO rules. Taking advice from many WTO law scholars, and responding to other countries with concerns, I believe that Northern Ireland can be treated as a special case not in violation of rules as long as there is no substantial leakage of goods from Ireland to Great Britain which do not go through similar procedures to those coming in from other countries.

It is problematic that in public utterances the UK government has suggested there will be no checks on any goods arriving from Northern Ireland regardless of whether they have previously come from the Republic. Equally though, this doesn't mean all goods coming from the province to Great Britain must be checked. The methods for achieving the results can be flexible, and probably won't be challenged at WTO.

Many analyses of the protocol's trade effects have ignored the north-south issues, but these are present for trade in services, as the protocol only covers goods. The ability for example for haulage services to be delivered on an all-island basis is restricted. We move from a permissive single market basis to one where we have to check what is or is not legal according to WTO services schedules, which are difficult to follow. A less visible trade barrier perhaps, but a new one nonetheless.

Ambiguities and safeguards

The controversies over the introduction of the Internal Market Bill to Parliament had trade experts and international law scholars looking carefully at what safeguard clauses in the protocol protected north-south and east-west links, quite aside from any dispute provisions. These are present, and should guide both sides away from dramatic interpretations of text.

The safeguards seem to me to reflect the ambiguities of the Good Friday Agreement, consistent with WTO rules. Most notable is Article 16, "If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures." This gives considerable scope for action.

On north-south cooperation we can refer to Article 11 – "Consistent with the arrangements set out in Articles 5 to 10, and in full respect of Union law, this Protocol shall be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation". On east-west links we have Article 6, "Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market.", and "Having regard to Northern Ireland's integral place in the United Kingdom's internal market, the Union and the United Kingdom shall use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom".

We do not have exact definitions of “necessary conditions” and “unfettered market access”, just as we do not have an exact meaning of “identity, ethos and aspirations of both communities” but it seems to me that it is within these definitions that the UK and EU need to work, supported by the Northern Ireland Assembly. I also draw the conclusion that the protocol seems explicitly designed to work in the absence of any other trade agreement. Not easily. But we should be able to imagine how sensitively and minimally applying checks to trade north-south and east-west in collaboration with all communities allows for implementation which meets WTO core principles without significant day-to-day impacts on identity. A Free Trade Agreement would be easier though, in removing many of the required checks as well as the MFN restriction.

Conclusion

Ensuring that Northern Ireland does not remain the problem child of Brexit will be challenging. There will be some difficulties in implementing the Northern Ireland protocol. But possibly also some advantages. That Northern Ireland is clearly a special territory according to the WTO. That we respect equally both communities aspirations.

By doing so we could see Northern Ireland better able to access EU markets than the rest of the UK. And better able to access the rest of the UK than any in the EU.

Any sensible Englishman is wary of entering debates on Northern Ireland. There is some uncomfortable history and deserved suspicions. I do so in the hope of contributing to making a success of the new trade reality. The triple treaty trade ambiguity could become the foundation of something special (perhaps adding another ambiguity in an FTA). For that we need care, but also to be assertive with using the texts to create the best position we can for Northern Ireland.