

Into the Unknown

Implementing the Protocol on Ireland/Northern Ireland

C.R.G. Murray and Clare A.G. Rice*



Mr Colin Murray is a Reader in Public Law at Newcastle University. He is the principal investigator on the ESRC project 'Performing Identities: Post-Brexit Northern Ireland and the reshaping of 21st-Century Governance' (ES/S006214/1), examining the impact of Brexit on the relationship between Ireland and the United Kingdom (and in particular Northern Ireland).



Dr Clare Rice is a Research Assistant at Newcastle University, working on the ESRC project 'Performing Identities: Post-Brexit Northern Ireland and the reshaping of 21st-Century Governance' (ES/S006214/1). Her current work focuses on examining how structures of governance interact with citizen experience and identity in the UK in the context of Brexit.

Introduction

After the conclusion of his iteration of the UK-EU Withdrawal Agreement, Boris Johnson informed Parliament that 'this is a good arrangement, reconciling the special circumstances in Northern Ireland with the minimum possible bureaucratic consequences at a few points of arrival in Northern Ireland'.¹ And if they were ultimately unhappy with these arrangements in practice, his Brexit Secretary assured the people of Northern Ireland that their representatives in the Northern Ireland Assembly would be able to bring them to an end.² As the burdens for businesses inherent within these arrangements becomes apparent, this article explores these claims against the realities of managing Northern Ireland's economy through Brexit.

The 2019 Brexit deal shows little regard for Northern Ireland's peripheral position,³ both in terms of the UK and the EU Single Market. The challenges posed by extra administrative burdens for businesses attempting to navigate these new arrangements are not necessarily novel, indeed they mirror some of the burdens which accompanied the creation of Northern Ireland as an autonomous polity within the UK in 1921. The UK Government, however, could mitigate those historic burdens. The Withdrawal Agreement's Protocol on Ireland/Northern Ireland, by contrast, depends upon complex interactions between the UK and the EU, with limited avenues for engagement with Northern Ireland's power-sharing government. We

examine the clashes over the Protocol's implementation, and the potential ramifications for Northern Ireland of the UK Government's decision not to extend the transition/implementation period. We also explore how the Protocol's terms have contributed to, and been compounded by, pathologies of (mis)government which have dominated the implementation/transition phase.

Governing by Amnesia

The economic realities of Northern Ireland intruded little into its creation under the Government of Ireland Act 1920. The reality on the ground was that a sizeable part of the North-East of Ireland was ungovernable, no matter the formal niceties of statehood, without the consent of Unionists. From the 1920 Act onwards, successive UK Governments shaped the governance of Northern Ireland around this reality. This process was demonstrated in the 1923 Speaker's ruling that Northern Ireland-specific issues were for debate in Belfast and would not be entertained on the floor of the House of Commons.⁴ What happened in Belfast would stay a matter for Belfast, because no one could claim that the Irish Question had been solved if it remained subject to debate. Although the 1920 Act placed severe strictures on Northern Ireland's budget, the Stormont Government was able to leverage the UK Government's eagerness not to engage with running Northern Ireland to extract concessions. The most eye catching of these, for historians, were the acceptance of a negative contribution to the imperial budget in 1938⁵ and extra subventions to cover developments in the welfare state in the late 1940s.⁶ Demands from Northern Ireland became so persistent that by the 1950s the UK Treasury had become determined to force Stormont to 'pursue the path of financial rectitude'.⁷

The "fill-your-boots-at-Westminster's-expense" mindset, often ascribed to the era of power sharing after 1998, and which contributed to the Cash-for-Ash scandal over the Renewable Heat Incentive scheme,⁸ is thus much deeper-rooted in the challenges of trying to manage Northern Ireland's economy. Although much of the process of adjustment to Northern Ireland's circumstances has long been caricatured as budgetary bargaining between Westminster and Stormont, there is also a history of interaction with business and civil society concerns. The process of attribution of Northern Ireland's revenue established under the Government of Ireland Act 1920 was overly complicated at its inception; because the legislation provided Northern Ireland Government with few powers over taxes, it was to receive specific allocations ("reserved revenue") from the UK Government based upon taxes on goods purchased in Northern Ireland.⁹ As a result, in the early 1920s, businesses supplying Northern Ireland from Great Britain were required to complete specific notifications based upon their sales, in order to precisely calculate this budgetary allocation.¹⁰ Taking effect alongside partition, this requirement meant that goods shipped from Great Britain would require different documentation depending on whether they were intended to be sold in Northern Ireland or if they were in transit through Northern Ireland into the Irish Free State.

Traders balked at these requirements. Representatives of the Clyde Shipping Company pleaded, at the very least, to have the documentation applicable to Northern Ireland (known as specifications) waived if the goods in question were due to be trans-shipped across Northern Ireland into the Free State (and thereby subject to a Green Shipping Bill which had to be presented at the point of export).¹¹ But the Northern Ireland budget was funded based upon the total value of taxes charged in respect of goods subject to specifications, less the amounts associated with goods not sold in Northern Ireland but exported to the Free State. Customs and Excise worried that any relaxation of the rules could lead to 'confusion in attribution and – still worse – ... possible double payments of drawback'.¹² The UK Treasury eventually agreed

that these arrangements were becoming an internal trading barrier, but it took until the start of the new financial year in April 1924 for it to begin to ease these measures, dispensing with declarations of contents of parcels posted from Great Britain to Northern Ireland.¹³ Northern Ireland's budget thereafter received a presumptive amount based on trade flow statistics, and the number of shipments requiring specifications was gradually reduced. Arguments would continue for decades over the correct attribution of sales tax revenues and customs duties.¹⁴

The lessons from these experiences were regularly forgotten and relearned when new taxes were imposed on goods. In the 1930s, the imposition of protectionist measures, under enactments like the Abnormal Importation (Customs Duties) Act 1931, proved to be particularly challenging; every time new duties were imposed on particular goods, new groups of traders were affected. One harassed official reported that:

[I]t takes several weeks at least to rope them all in, even where no special complications are involved. ... In the meantime we shall have inflicted upon a large body of traders what they will probably regard as vexatious and unnecessary requirement, because in order to check the due lodgement of specifications for dutiable article it is necessary to insist upon specifications for all goods of the same name, including the home-grown article.¹⁵

Unsurprisingly, officials once again sought to 'dispense with specifications' and estimate the required attributions to Northern Ireland's budget 'on a presumptive basis'.¹⁶ But even after this relaxation was implemented, the UK Customs & Excise authorities emphasised that specifications continued to be required for other goods being shipped into Northern Ireland from Great Britain.¹⁷ Northern Ireland had come to be regarded as a back door into the market in Great Britain. Some thirty years later a carnet permit system continued to apply to private vehicle travel between Ireland and Northern Ireland, undermining Stormont's efforts to encourage tourists crossing the border. When this was challenged, Customs officials noted that different tax rates on car purchases in Ireland and the UK created an incentive to bring cars from Ireland to sell on in the UK; 'cheap second-hand cars may even be bought in Dublin with the intention of selling them for what they would fetch at the end of a tour through the Republic and the North'.¹⁸

The Northern Ireland conflict and the imposition of direct rule abridged any institutional memory in Whitehall of managing the interaction between devolved institutions and the UK's internal market. By the time that power sharing arrangements were introduced in 1998, alongside devolution in Scotland and Wales, a ready-made alternative existed to having to manage trade between the different parts of the UK's internal market. For as long as the UK remained in the EU, the easiest solution was to pig-a-back upon the arrangements protecting the Single European Market. Preventing the devolved institutions from introducing regulatory requirements which imposed barriers to EU trade also provided a level of protection for the UK's internal market.¹⁹ This meant, however, that the UK Government had no experience of managing internal boundaries, which would contribute to inept decision making as ministers attempted to forge special arrangements for Northern Ireland in the context of Brexit.

Governing by Brinkmanship

The Withdrawal Agreement reached between the UK and EU in late 2019 was the culmination of over two years of negotiations. For the UK, the aftermath of the 2016 Brexit referendum was a tumultuous political period. The June 2017 General Election saw Theresa May's support

in the House of Commons depleted to the extent that she was obliged to enter a confidence-and-supply arrangement with Northern Ireland's Democratic Unionist Party (DUP). The DUP used this position to assert its own ambitions for Brexit, scuppering May's 2018 Brexit deal, and ultimately her premiership, by combining with elements in the Conservative Party to withhold support for her deal in Parliament over the arrangements for the Northern Ireland 'backstop'.²⁰ Amid this furious debate, it is sometimes forgotten that the UK Government had accepted that the Good Friday/Belfast Agreement 1998 (GFA), and in particular the aspects of North-South co-operation which had developed under Strand 2, required special arrangements for Northern Ireland.

For all that opposition to May's deal appeared monolithic, the differences in the nature of the objections to it were stark.²¹ For the DUP's leadership, the backstop threatened a point at which, if the UK and EU did not agree comprehensive terms on their future trading relationship, Northern Ireland would (unless frictionless trading arrangements could be developed) be locked in a degree of alignment with the EU which would not apply to the remainder of the UK. The underlying problem for the European Research Group (ERG) and others in the Conservative Party, however, was that the logic of the backstop all-but-dictated a close UK-EU future relationship, rather than a clean break. They balked at the suggestion that ensuring minimal disruption on the island of Ireland required deep regulatory alignment between the UK and the EU post-Brexit. There is little doubt that there were also senior figures in the DUP who ardently approved of a clean-break Brexit for all of the UK. But in the final analysis, Eurosceptics within the Conservative Party were willing to reach this goal for Great Britain alone, even if doing so cast their erstwhile allies adrift.²²

After Theresa May was forced to resign as Prime Minister, the UK Government's priorities shifted. Whereas May's solution to the problems posed by Northern Ireland had prioritised preventing barriers to trade between Northern Ireland and Great Britain, her successor was more alive to the ERG's concern to limit the connections between Great Britain and the EU after Brexit. In his eagerness to escape the backstop, Boris Johnson was willing to countenance barriers emerging between Northern Ireland and Great Britain. Once he signalled this shift to his Irish counterpart, Leo Varadkar, at a meeting at Thornton Manor in early October 2019, the basis of the deal Johnson wanted was in place.²³ Up until this point, the DUP had been kept onside with proposals for a process of Assembly consent for special trade arrangements applicable to Northern Ireland.²⁴ Once his deal was presented, however, the DUP discovered that the "Stormont lock" was not what they thought it would be; it would involve a majority Assembly vote over whether to maintain special arrangements four years into their operation, and not a cross-community vote assenting to the initiation of such arrangements.²⁵ With the now politically toxic notion of the backstop replaced by provisions couched in terms which eschewed emotive references to trade barriers between Northern Ireland and Great Britain, Johnson revelled in achieving a better deal than anything Theresa May could manage.²⁶ His salesmanship of this deal brushed aside DUP protests that their 'opinion means nothing'.²⁷ After the House of Commons backed his deal he rode his image as a dealmaker to a historic victory in the December 2019 general election, allowing him to dispense with the DUP's support in Parliament. Not until after the UK left the EU on 31 January 2020 did the practical consequences of his deal start to receive close attention.

Governing by Sleight of Hand

Theresa May's deal envisaged a transition period of almost two years, between March 2019 and December 2020. The saga of attempting to gain Parliament's backing for this deal, and

then the negotiation and approval of Johnson's revised deal, however, consumed much of this window. The more complex task of negotiating the revised Protocol's implementation was to be completed between February and December 2020, alongside concluding an overarching Future Relationship Agreement. The Protocol is so complex because it is based upon a sleight of hand. Northern Ireland formally remains part of the UK's customs territory but in practice is obliged to operate the rules of the Single European Market for goods (the EU Customs Code, legislation covering the regulation of goods and protections against unfair competition).²⁸ These arrangements would see Northern Ireland placed at the intersection of a Venn Diagram, the point at which the trade arrangements of both the UK and the EU supposedly overlap, giving rise to a narrative of Northern Ireland enjoying "the best of both worlds".²⁹ Under the terms of the Protocol, however, this zone of overlap is not assured.

Having agreed the broad outline of a deal, the UK Government neglected detailed negotiations over the Protocol's trade arrangements.³⁰ Under the Protocol's terms, all goods moving into Northern Ireland from Great Britain are assumed to be at risk of crossing into the Single European Market over the open border between Northern Ireland and Ireland unless they are exempted from this categorisation through the agreed implementation of the Protocol.³¹ The Single Market's regulatory standards apply to goods produced in Northern Ireland,³² as do broad level playing field measures.³³ The UK is responsible for carrying out the checks required by the Joint Committee and administering associated charges and rebates, but it cannot simply neglect these tasks, as the Protocol allows EU officials to check enforcement.³⁴ Disputes over the adequacy of the arrangements for the management of goods entering Northern Ireland from Great Britain will be handled by the Court of Justice of the European Union (CJEU).³⁵

The EU's concerns over Northern Ireland being used as a backdoor to the Single Market are not baseless. The UK Government is seeking to conclude trade deals with countries, including the United States, which would potentially allow goods into the UK's internal market which do not meet the EU's product standards.³⁶ It has published its new UK Global Tariff, to take effect once the Withdrawal Agreement's transition/implementation period ends, which sets lower tariff levels on a wide range of manufactured goods than the EU's Common External Tariff (for example, dishwashers will be zero tariffed, down from 2.7%).³⁷ Such changes create an incentive for businesses to tranship goods through Great Britain, into Northern Ireland and thence into the Single Market at large. The Protocol's default arrangement is thus not really one of overlapping trading regimes at all, but of the Single Market encompassing Northern Ireland in terms of goods.

In terms of goods moving from Northern Ireland to Great Britain, Johnson insisted through the 2019 election campaign that businesses in Northern Ireland could throw new customs paperwork 'in the bin',³⁸ because the Protocol does not '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'.³⁹ This does not, however, mean that no barriers to West-East trade will emerge, only that the Protocol does not impose anything which raises to the level of a fetter. Its terms, for example, appear to require exit summary declarations for goods moving from Northern Ireland to Great Britain (to say nothing of the greater range of obligations where goods are covered by sanitary and phytosanitary measures).⁴⁰ Some of these constraints might be negotiated away, but they cannot be wished away.⁴¹ A future UK Government could, moreover, choose to impose novel restrictions or administrative requirements to prevent traders using Northern Ireland as a back door into Great Britain, where doing so would allow them to circumvent product standards laid down by Westminster. As yet,

ministers have not explained how they intend to 'distinguish between qualifying Northern Ireland goods and goods originating in Ireland and the rest of the EU'.⁴² Minimising East-West barriers, in short, will require the UK Government to actively facilitate goods movements between Northern Ireland and Great Britain.

The Protocol thus sets up multiple threats to Northern Ireland's economy, not all of which can be mitigated by the UK Government's unilateral action. Contrasting accounts of the Protocol's terms cannot be brushed off as mere differences of interpretation, as Michael Gove has attempted to do with regard to the 'at risk' status of goods.⁴³ Comforting as that account might be for UK policy makers, it neglects the extent to which the Protocol's terms allow the EU to control the key determinations over trade relating to Northern Ireland. If the resulting barriers to trade are to be minimised, connections between the UK and EU's diverging trade regimes need to be forged through implementation negotiations. If the Joint Committee responsible for implementing the Withdrawal Agreement does not exclude a broad range of goods from being at risk of entering the Single Market, many goods being shipped from Great Britain into Northern Ireland could be subjected to checks and charges, increasing the costs of doing business. If the trading regime between Great Britain and Northern Ireland established by the UK Government fails to meet its obligations under the Protocol, the arrangements will undoubtedly be subject to an EU Commission enforcement action before the CJEU, with all of the attendant uncertainty for traders. And if the UK Government alters product standards on any goods to a level which is higher than those set by the EU, it will become obliged to carry out regulatory checks on products entering Great Britain from Northern Ireland given the opportunity for circumventing these standards that an unmonitored trade route would create.⁴⁴ In the context of a timebound transition/implementation period, Northern Ireland's institutions and representatives may have little opportunity to mitigate these threats.⁴⁵ The UK Government's reluctance to be steered by the intricacies of trade flows involving Northern Ireland is illustrated by how little coverage these received in its July 2020 White Paper on the UK's internal market, beyond a rhetorical commitment to 'safeguarding Northern Ireland's rightful and essential place in this market'.⁴⁶

Governing by Haste

The Protocol's challenges were exacerbated by the foreshortened implementation period, and that was before the Covid-19 pandemic. In the midst of that pandemic, the possibility of seeking an extension to the transition period beyond the end of 2020, built into the Withdrawal Agreement,⁴⁷ seemed to offer a way to address the life-and-death exigencies of the pandemic without the distraction of time-limited negotiations over Brexit's aftermath. The EU negotiating team repeatedly affirmed its willingness to extend talks for up to an additional two years, and in June 2020 the Northern Ireland Assembly voted in favour of an extension being sought, in spite of opposition from Unionist parties to this motion.⁴⁸

Nonetheless, at the end of June 2020, the facility for an extension under the terms of the Withdrawal Agreement lapsed. Competing priorities influenced the UK Government's formal decision not to seek an extension.⁴⁹ First, this decision reflects the dogged determination seen at the time of the Withdrawal Agreement's conclusion to pursue a clean-break Brexit for Great Britain rather than one sculpted according to varying interests across the UK. Second, the neglect of pragmatic factors (namely the burdens which Covid-19 was imposing on the negotiation process) speaks to prioritisation of completing the transition phase, rather than the quality of the outcome of negotiations. The EU Trade Commissioner even conjectured that the UK Government could be attempting to use the pandemic to mask the economic impact

of failing to reach a future relationship agreement.⁵⁰ Third, there is clear political value to delivering on a promised date in the Brexit process, when missed deadlines have haunted Johnson's predecessors. The driving impetus of achieving a clean-break Brexit encouraged achieving that break as quickly as possible. But even if the UK Government had wanted more time in these circumstances, it found itself constrained by its introduction, through the EU (Withdrawal Agreement) Act 2020, of a statutory bar on a transition extension through executive action.⁵¹ It would have cost too much political capital with Johnson's core supporters to repeal this measure at this point.

Johnson could yet belatedly seek an extension in the form of an implementation period for a future relationship deal, having exerted maximum leverage out of the crunch point of a looming deadline with all its attendant risks for trade flows. This would match the swashbuckling narrative of last-minute deals in which Johnson revels. The legal path to such an extension is, however, more convoluted than would have been the case under the Withdrawal Agreement's terms, and in any case the time pressure cuts both ways (with the UK Government already admitting that it won't be in shape to enforce more than a light touch trade border for months after the end of the current transition/implementation period).⁵² Moreover, the UK Government might find that it has exhausted the goodwill of its EU counterparts which would be required in such an eventuality.

This possibility notwithstanding, negotiators have soldiered on under an already heavily truncated timeframe. The Covid-19 pandemic created additional challenges for the negotiations, not least lockdowns and social distancing requiring video conferencing instead of in-person discussions between early March and late June 2020. The pandemic also stretched Whitehall and Westminster resources and redirected policy makers' attention.⁵³ In Northern Ireland, a senior Executive Office official confirmed that two-thirds of Civil Service staff working on Brexit had been moved to working on Covid-19 matters.⁵⁴ When the Assembly and Executive have barely gotten back on their feet after a three-year hiatus, this lack of capacity to manage the range of EU issues which will continue to apply to Northern Ireland at the end of the transition period is particularly concerning.⁵⁵ An Executive Sub-Committee was established under the *New Decade, New Approach* deal to facilitate adaptation to Brexit and improve collaboration between Executive partners with divergent Brexit positions, but had to be suspended in May 2020 to prioritise tackling the pandemic.⁵⁶ Even at an EU level, finalising the seven-year budget and Covid-19 recovery efforts are taking priority over Brexit in the summer of 2020.⁵⁷ Against this backdrop, the lack of progress on implementing the Withdrawal Agreement or negotiating the future relationship is hardly surprising.

Governing by Afterthought

The Withdrawal Agreement is not a substitute for a fully developed post-Brexit relationship between the UK and the EU; indeed, its transition/implementation period is intended to allow that relationship to be negotiated. Talks to date have indicated that the UK Government, emboldened by the 2019 General Election outcome, has been intent on diverging from the Political Declaration on the Future Relationship which accompanied the Withdrawal Agreement in ways which would have consequences for the Protocol's implementation. The EU, by contrast, has continued to treat the Political Declaration as a roadmap for the future relationship negotiations; it can countenance changes in detail but not a complete redrawing of the expectations contained therein.

Some of the issues surrounding the Protocol will be addressed if the UK and the EU conclude

a comprehensive Future Relationship Agreement based upon zero tariffs and zero quotas, as intended in the Political Declaration.⁵⁸ Such an Agreement would, for example, negate the need to manage tariffs and quotas with regard to trade from Great Britain into Northern Ireland, at least in terms of goods produced domestically. As the implementation of the Protocol is therefore dependent upon the terms of the EU-UK future relationship, the UK Government would ideally like to approach these issues sequentially, and has been much faster to engage with the future relationship talks than with implementing the Protocol. Those dependent upon trade routes between Great Britain and Northern Ireland found themselves waiting for months for the UK Government to even outline its plans.⁵⁹ But for all that Johnson would like to speed along the future relationship talks,⁶⁰ the truncated timeframe within his Withdrawal Agreement effectively requires these negotiations and Protocol implementation to take place concurrently. Unless the UK intends to align with the EU in terms of product standards after Brexit (maintaining much of the “Brussels red tape” which has so exercised Brexiteers) and its trade policy (curtailing the ambitions around the mantra of “global Britain”) then checks on trade flows from Great Britain into Northern Ireland will remain necessary, notwithstanding a future relationship deal.

The UK Government’s explanations of Article 6 of the Protocol, particularly Johnson’s assurances of no paperwork during the 2019 election campaign, have contributed to public (mis)understanding, which has caused confusion for businesses and inhibited effective planning to address the coming requirements.⁶¹ These assurances over trade between Northern Ireland and Great Britain were, however, so totemic that ministers became reluctant to explain the operation of the Protocol, as doing so would inevitably call into question these commitments. Following extensive soundings from business groups, the Commons’ Northern Ireland Affairs Committee announced that they ‘expect “unfettered access” to mean the absence of new regulatory barriers, costs or administrative requirements to businesses moving goods from Northern Ireland to Great Britain’.⁶² Before this conclusion was reached, however, it had come to appear unattainable. Michael Gove quietly acknowledged that the Protocol’s arrangements will impose some bureaucratic requirements but, despite their attendant costs, continues to explain these away as not amounting to substantial fetters upon trade.⁶³

Some of these requirements on trade into and out of territory in which EU customs rules apply, including security declarations, could yet be mitigated by negotiations. A trade deal magicking away the Protocol’s problems must seem like a tantalising prospect for the UK Government, and it delayed publishing any account of how it intended to implement the Protocol throughout the Spring of 2020. But it is potentially a chimera. For the UK Government to have been serious about this ambition, then it would have needed to make swift progress in the future relationship talks along the lines set out in the Political Declaration, and not advance the wide divergences from the Declaration which it has been putting on the table alongside talking up the ‘very good option’ of trading with the EU on “Australia terms”, Johnson’s preferred euphemism for no overarching deal.⁶⁴ If these talks do not result in zero tariffs and quotas and broad regulatory alignment, then further burdens will become unavoidable for each sector affected by divergence. The twin-track negotiations imposed by the Withdrawal Agreement’s timeframe prevents the implementation of the Protocol being delayed until the shape of any future relationship is known and, in light of this timeframe, the EU has made some progress on the implementation of the Protocol a prerequisite for a future relationship deal.⁶⁵ If the UK Government had been serious about using the future relationship negotiations as a platform by which to minimise trade dislocations in the Irish Sea, then extending the transition period could potentially have allowed these tasks to be staggered. With the elapse of the Withdrawal

Agreement's option for an extension, both strands of negotiations became simultaneously pressing, and the UK Government was obliged to spell out its vision for the Protocol.

Governing by Misdirection

If Northern Ireland has looked like something of an afterthought to a UK Government focused upon both the future relationship negotiations and attempts to conclude new trade deals, this impression was long compounded by the UK Government's desire to disguise its shortcomings during the Protocol's negotiation. The UK's policy position on the Protocol's implementation was slow to emerge, coming only in a Command Paper in May 2020. Following months of concerns over the emergence of barriers to trade across the Irish Sea, the UK Government was eager to assert that it sees 'no need to construct any new bespoke customs infrastructure in Northern Ireland (or in Great Britain ports facing Northern Ireland) in order to meet our obligations under the Protocol'.⁶⁶ This pledge was tailored to allay DUP concerns; it promised no physical reminder of Northern Ireland's distinct status under the Protocol and nothing that will look like a border. Although 'this document has gone some way to assuaging the concerns raised by Northern Ireland stakeholders',⁶⁷ not for the first time these promises have their limits.

Despite the default position of the Protocol being that all goods are deemed 'at risk' of onward movement until the Joint Committee determines otherwise, the Command Paper challenges the EU to weaken its defence of the Single Market; 'Tariffs should only be charged if goods are destined for Ireland or the EU Single Market more broadly, or if there is a genuine and substantial risk of them ending up there'.⁶⁸ Whereas the Protocol is framed in terms of risk, the Command Paper seeks to raise this bar to a 'genuine and substantial' risk. But what could induce the EU to lower the protections for the EU Single Market against goods entering, unchecked, through Northern Ireland? The Command Paper presents such a concession as the price of protecting the GFA, and emphasises the 'constitutional position of Northern Ireland within the United Kingdom' and Northern Ireland being 'fully part of the UK's customs territory'.⁶⁹ For the UK Government, the needs of the Single Market must give way to these realities because, on the basis of the Protocol's "Stormont Lock", its 'alignment provisions might only be temporary'.⁷⁰ These provisions, however, are not necessarily temporary, they are event-limited.⁷¹ The event in question – a vote in the Assembly which supports their termination (to be held four years after the transition/implementation period ends⁷²) – will be a high hurdle to cross given the current position of the Northern Ireland parties. It should be noted that when Michael Gove asserts that if the Protocol was 'imposed in an over-bureaucratic and burdensome manner, that would lead inevitably to a greater degree of disquiet',⁷³ the UK Government is neither powerless nor neutral in this regard.⁷⁴ If the UK Government wants to create pressure towards ending the Protocol's special arrangement for goods, it is not in its interest to facilitate its smooth operation (provided that problems in the Protocol's operation can be blamed upon the EU).

The pledge of no physical customs border appears designed to distract from the acknowledgement that Northern Ireland's businesses will face new administrative requirements.⁷⁵ These extra burdens, uncertainty around potential charges upon "at risk" goods and question marks over the Protocol's durability, nonetheless combine to form a pressing concern at a time when Northern Ireland's economy has already been rocked by Covid-19.⁷⁶ In terms of the UK's relations with the EU, the Command Paper can be reduced to an unhappy ultimatum; the EU must not attempt to enforce the Protocol's terms as agreed, or the 1998 settlement will be threatened. It is the same message which accompanied the UK

Government's rejection of any EU Office in Belfast.⁷⁷ There is no small irony that this message is being delivered by a man who, 22 years ago, was one of the GFA's most ardent detractors. Gove, for his part, seems to be enjoying the opportunity to use the 1998 settlement to push back against the EU, when the UK Government had been forced to make concessions in light of the 'letter and spirit' of the 1998 Agreement during the withdrawal negotiations. But there is a distinction between the EU's ability to map specific aspects of North-South co-operation onto the operation of EU law across the land border⁷⁸ and Gove's vaguer claims, including that 'a new mission in Belfast ... would be seen by many in Northern Ireland as unnecessary and not in keeping with the spirit of the Belfast agreement'.⁷⁹ This posture is creating the impression that the UK Government is more interested in managing narratives of blame surrounding any dislocations resultant from the Protocol than in cooperating with the EU to mitigate such issues.

Governing by Discord

Johnson's 2019 general election victory has allowed his Government to marginalise the voices of devolved institutions in Brexit's transition/implementation phase. Theresa May's precarious position in the Commons had obliged not only her pact with the DUP, but also concessions over the management of UK's internal market post-Brexit to Conservative MPs with seats in Scotland.⁸⁰ As a result of these concessions, her Government came to promote a vision of the UK's post-Brexit internal market being governed by frameworks which would preserve scope for autonomous action by the devolved institutions.⁸¹ With a secure majority in Westminster, and little time to stitch together a carefully negotiated arrangement which has buy-in from the devolved institutions, Johnson has instead laid out a scheme which places much more control in the hands of the UK Government.⁸² The Scottish Government was quick to raise concerns that these proposals for centralised management of the internal market matters amount to a 'power grab' by Westminster. Its Constitution Secretary, Mike Russell, has admonished the plans, which he argues would see devolved institutions have to accept potentially lower product standards post-Brexit to align with UK-wide policy, and further, that the UK Government's conception of an 'internal market' strays into areas of devolved competence.⁸³ Northern Ireland's newly restored devolved institutions will also have to find their place within these as-yet-unfinished arrangements for structuring the UK's internal market.⁸⁴ Because they must also continue to transpose and operate a range of EU laws, and thus maintain expertise not required in any other part of the UK, these dynamics are even more significant. They will require support from Westminster in a manner which does not undermine devolved competences.

The management of trade, the internal market and constitutional affairs are not only, at best, on the fringes of Scotland and Northern Ireland's devolved competences, their representatives at Westminster will struggle to influence Johnson's Government because these parts of the UK are of limited electoral significance for the Conservative Party. Power dynamics at Westminster, however, are not the only significant factor shaping the developing struggle over how to manage the UK's internal market. The Covid-19 pandemic has highlighted the ability of devolved institutions to pursue divergent policies and encouraged comparison between these and Westminster/Whitehall's response. The UK Government is thus confronted with devolved institutions which are assertive in their own mandates and enjoy a high level of public confidence. Brexit and the Covid-19 pandemic have also emphasised pre-existing challenges to the Union in both polities. With the success of the Scottish National Party in the 2019 general election, and the momentum over debates on Irish reunification generated by Brexit, the UK Government finds itself pursuing a high-stakes agenda. The UK Government must strike a careful balance between competing priorities. Its July 2020 White Paper on the Internal Market,

however, makes no effort to understand how these issues were addressed in an earlier era of devolution to Northern Ireland.⁸⁵ Indeed, its text struggles to explain Northern Ireland's place in the UK; '[t]he Union was created in 1707 when Scotland and England and Wales became part of the Kingdom of Great Britain and the Union grew further when the United Kingdom was established in 1801'.⁸⁶ When it explains how 'EU laws (rather than UK law) provided the common UK-wide approaches and rules for market access' after the devolution settlement of 1998,⁸⁷ it is silent on the framework nature of EU directives, and the autonomy which devolved institutions have thus enjoyed, because this does not promote the ends the UK Government desires.

Against the backdrop of these internal UK tensions, these ongoing processes of managing Brexit will also influence Anglo-Irish relations. Ireland has an interest in managing Brexit's impact upon Northern Ireland, both in its role as co-guarantor to the GFA and in protecting its own economy against dislocations to trade crossing the land border. In many ways, Ireland's influence over the course of Brexit negotiations pointed to an inversion in the historical UK-Ireland power dynamics.⁸⁸ For all that it would appear to be in the UK's interest to maintain relations with Ireland through this process, the difficulties in accommodating Northern Ireland within Brexit has complicated what would otherwise be a relatively straightforward diplomatic calculus. It is difficult to see how the GFA's Strand 3 relationships can be maintained and operate free from ulterior political agendas by the UK or Irish Government, when the UK Government appears determined to treat the devolved institutions as little more than branch offices under a unitary account of the UK constitution. For all its prominence within the Brexit debate, Northern Ireland is in many ways being overlooked and the challenges it faces underestimated. How Northern Ireland's institutions and parties react to these dynamics will also have implications in Scotland, just as developments in Scotland will indirectly shape post-Brexit politics in Northern Ireland. Together, these interactions will determine the future of the Union.

Conclusion

Rather than being offered the best of all possible worlds, Northern Ireland has come to find itself viewed with suspicion. For the UK Government, the possibility of smoothing the way for the operation of the Protocol through close alignment in the Future Relationship Agreement has become anathema; an EU trap, baited with Northern Ireland, to prevent the realisation of Brexiteer aspirations. The ERG's calls for the end of the future relationship talks have consequently become increasingly shrill.⁸⁹ For some within the EU, by contrast, Northern Ireland is increasingly seen as an unquantifiable threat to the integrity of the Single Market, an impression heightened by the UK's refusal to allow an EU Commission office in Belfast and the risk that there might be inadequate monitoring of the Protocol's terms. Northern Ireland thus finds itself squeezed between these mutual suspicions, hoping that they can be resolved through the Joint Committee's work. Michael Gove's solution is for the EU to not hold the UK to the terms of the Protocol. As he informed the Northern Ireland Affairs Committee, 'the really important thing in Northern Ireland is not adhering to a maximalist approach towards the protocol' but instead 'respecting the fact that Northern Ireland has said again and again that we are part of the United Kingdom'.⁹⁰ Much as this amounts to building a narrative that the EU is acting inappropriately in insisting on the Protocol's enforcement, it is a breath-taking admission of just how much Johnson's Government conceded in its rush to abandon the backstop if the enforcement of the Protocol's terms poses an existential threat to the integrity of the UK.

It is important to establish the nature of this supposed threat to the Union. It does not come from a deal which creates distinct arrangements for Northern Ireland. The degree of documentation that the UK imposed on shipments into Northern Ireland upon its creation, for revenue attribution purposes, gives a lie to claims that new administrative obligations on trade across the Irish Sea threaten the Union. States are able to manage trade between their constituent parts, and it makes little difference to this ability that the new requirements stem from an agreement between the UK and the EU. But this is not to say that imposing such strains on a fragile and peripheral economy makes for sensible policy; the UK's statehood is not under threat from making arrangements with the EU, but from the choices UK policy makers have made and are making with regard to those arrangements. The consequences for Northern Ireland cannot continue to be underplayed if a trade agreement is not put in place or the Protocol implementation settled on terms which protect Northern Ireland's economy. Such a settlement, however, is in the EU's gift; it is unlikely to be won by the UK Government picking fights over an EU office in Belfast or needling EU leaders over their commitment to peace in Northern Ireland. In effect, the politics of the Protocol have become a battle between mitigating upheaval for Northern Ireland, and securing the UK Government's eagerness for a clean break with the EU. So deep-seated are these contentions that the implementation process could well impact upon the "constitutional question", if a majority of the people of Northern Ireland become sufficiently unimpressed with the choices the UK Government are making on their behalf.

Notes

- * This research is supported by ESRC through Grant ES/S006214/1. Paper updated and hyperlinks last accessed on 16 July 2020.
- ¹ HC Deb., vol.666, col.572 (19 October 2019).
 - ² HC Deb., vol.666, col.598 (19 October 2019).
 - ³ *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (19 October 2019), <<https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration>>.
 - ⁴ HC Deb., vol.163, col.1624-1625 (3 May 1923).
 - ⁵ Government of Ireland Act 1920 (UK), s.23. See HC Deb., vol.335, cols.1708-9 (12 May 1938).
 - ⁶ Social Services (Agreement) Act (NI) 1949.
 - ⁷ UK National Archives (UKNA), T 233/1752, E. Compton, Handwritten Note: Northern Ireland Transport (6 November 1956).
 - ⁸ See Patrick Coghlin, Una O'Brien and Keith MacLean, *The Report of the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive (RHI) Scheme* (2020) pp.48-53 and p.196.
 - ⁹ Government of Ireland Act 1920 (UK), s.24(3). See also Harry Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government* (1968), pp.241-242.
 - ¹⁰ UK Customs and Excise General Order 23/1922 and 11/1923.
 - ¹¹ UKNA, CUST 49/1298, UK Customs & Excise Memorandum (12 September 1923).
 - ¹² UKNA, CUST 49/1298, UK Customs & Excise Memorandum (18 October 1923).
 - ¹³ UKNA, CUST 49/1298, W.R. Poole, 'Memorandum: Northern Ireland Reserved Revenue' (27 May 1926) p.1.
 - ¹⁴ Peter Robson, 'Aspects of public expenditure in Northern Ireland' (1952), p.57.
 - ¹⁵ UKNA, CUST 49/1298, HM Customs Internal Memo (Mr Poole to Mr Kenney) (11 December 1931) p.2.
 - ¹⁶ *Ibid.* p.3.
 - ¹⁷ UKNA, CUST 49/1298, HM Customs Omnibus Weekly Order 3/1932 (7 January 1932).
 - ¹⁸ UKNA, CUST 49/5669, M. MacMillan to Lord Robert Grosvenor, MP (21 July 1964) p.2.
 - ¹⁹ Northern Ireland Act 1998, s.6(2)(d). See Sylvia de Mars et al, *Bordering Two Unions: Northern Ireland and Brexit* (2018) p.118.
 - ²⁰ See Mary C. Murphy and Jonathan Evershed, 'Between the devil and the DUP: The Democratic Unionist Party and the politics of Brexit' (2019).
 - ²¹ See Colin Murray and Ben Warwick, 'The Strange Case of Northern Ireland's Disappearing Rights in the EU-UK Withdrawal Negotiations' (2019).
 - ²² A 2019 YouGov poll of Conservative Party members found that a majority favoured Brexit over maintaining the UK, with 63% content to see Scotland leave and 59% Northern Ireland; <<https://yougov.co.uk/topics/politics/articles-reports/2019/06/18/most-conservative-members-would-see-party-destroye>>.
 - ²³ T. Connelly, 'High-speed political drama: How the Brexit deal was done' (*RTE News*, 19 October 2019) <<https://www.rte.ie/news/brexit-countdown/2019/10/19/1084372-brexit-analysis/>>.
 - ²⁴ R. Merrick, 'Brexit deal: Details of Boris Johnson's agreement reveal why furious DUP is set to defeat it' (*Independent*, 17 October 2019) <<https://www.independent.co.uk/news/uk/politics/brexit-deal-dup-boris-johnson-irish-border-customs-arlene-foster-northern-ireland-a9160001.html>>.
 - ²⁵ Withdrawal Agreement, Protocol on Ireland/Northern Ireland (PINI) Art 18.
 - ²⁶ 'Brexit: No better outcome than my deal, says Johnson' (*BBC News*, 18 October 2019) <<https://www.bbc.co.uk/news/uk-politics-50099540>>.
 - ²⁷ J. Shannon, HC Deb., vol.666, col.606 (19 October 2019).
 - ²⁸ Withdrawal Agreement, PINI, Art 4 and Art 5.

- ²⁹ Northern Ireland Affairs Committee, *Oral Evidence: Unfettered Access: Northern Ireland and customs arrangements after Brexit* (2020) HC 161, Q80 (Michael Gove).
- ³⁰ See Stephen Weatherill, 'The Protocol on Ireland/Northern Ireland: Protecting the EU's Internal Market at the Expense of the UK's' (2020).
- ³¹ Withdrawal Agreement, PINI, Art 5(2).
- ³² *Ibid.*, PINI, Annex 2, para.8.
- ³³ *Ibid.*, PINI, Art 10.
- ³⁴ *Ibid.*, PINI, Art 12(2).
- ³⁵ *Ibid.*, PINI, Art 12(4).
- ³⁶ T. Bawden, 'Not relaxing food standards is a deal breaker for US-UK trade deal, Washington's chief negotiator warns' (*iNews*, 18 June 2020) <<https://inews.co.uk/news/environment/not-relaxing-food-standards-deal-breaker-united-states-uk-trade-deal-washington-chief-negotiator-robert-lighthizer-warns-449323>>.
- ³⁷ 'UK tariffs from 1 January 2021' (*Department for International Trade*, 11 June 2020) <<https://www.gov.uk/guidance/uk-tariffs-from-1-january-2021>>.
- ³⁸ F. McClements, 'Business leaders puzzled after Johnson contradicts own Brexit deal' (*Irish Times*, 8 November 2019) <<https://www.irishtimes.com/news/politics/business-leaders-puzzled-after-johnson-contradicts-own-brexit-deal-1.4077085>>.
- ³⁹ Withdrawal Agreement, PINI, Art 6.
- ⁴⁰ *Ibid.*, PINI, Art 5(4) and EU Regulation 952/2013 EU Customs Code, Art 271.
- ⁴¹ Michael Gove engages in such wishful thinking when he answers questions on these issues with a claim that they are inapplicable because 'Northern Ireland and the rest of Great Britain are one customs territory'; Northern Ireland Affairs Committee, HC 161, Q111.
- ⁴² EU Committee, *The Protocol on Ireland/Northern Ireland* (2020) HL 66, para.170.
- ⁴³ Northern Ireland Affairs Committee, HC 161, Q90.
- ⁴⁴ At present, the UK Government insists that these risks can be managed by 'market surveillance and intelligence'; *Ibid.*, Q49.
- ⁴⁵ The Northern Ireland Executive contributes to the UK team involved in technical discussions on the Protocol's implementation, but it is difficult to determine how much weight its voice carries; Cabinet Office, 'Factsheet: Withdrawal Agreement Joint Committee' (30 March 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876873/Withdrawal-Agreement-Joint-Committee-Fact-Sheet-FINAL.pdf>.
- ⁴⁶ Department for Business, Energy and Industrial Strategy, *UK Internal Market* (2020) CP 278, para.116.
- ⁴⁷ Withdrawal Agreement, Art 132.
- ⁴⁸ NIA Debs, vol.128(7), p.61 (2 June 2020).
- ⁴⁹ Cabinet Office, 'Government accelerates border planning for the end of the Transition Period' (12 June 2020) <<https://www.gov.uk/government/news/government-accelerates-border-planning-for-the-end-of-the-transition-period>>.
- ⁵⁰ C. Cooper, 'EU trade chief: UK preparing to blame coronavirus for Brexit fallout' (*Politico*, 5 July 2020) <<https://www.politico.eu/article/eu-trade-chief-uk-preparing-to-blame-coronavirus-for-brexit-fall-out/>>..
- ⁵¹ EU (Withdrawal) Act 2018, s.15A.
- ⁵² P. Foster, 'UK in U-turn on full post-Brexit border controls' (*Financial Times*, 11 June 2020) <<https://www.ft.com/content/37fad070-160f-4d3b-b043-940b843a0daf>>. Note that, after Ireland broke away from the UK, the introduction of customs border was delayed until 1 April 1923; Gilbert Denton and Tony Fahy, *The Northern Ireland Land Boundary 1923–1992* (1993) p.17.
- ⁵³ Joe Marshall, 'Preparing the public for Brexit will be much harder this time around' (8 June 2020).
- ⁵⁴ A. McCormick, 'Official Report, Brexit Issues: The Executive Office' (*Committee for the Executive Office, Northern Ireland Assembly*, 27 May 2020) <<http://data.niassembly.gov.uk/HansardXml/committee-22457.pdf>>.

- ⁵⁵ See Katy Hayward, D. Phinnemore and M. Komarova, *Anticipating and Meeting New Multilevel Governance Challenges in Northern Ireland after Brexit* (UKICE, 2020) pp.43-44.
- ⁵⁶ *New Decade, New Approach* (9 January 2020), Part 2, para.16
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf>.
- ⁵⁷ T. Connelly, 'Brexit: No light ahead of the tunnel' (RTÉ News, 13 June 2020)
<<https://www.rte.ie/news/brexit/2020/0612/1147161-tony-connelly-brexit/>>.
- ⁵⁸ *Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom* (19 October 2019), para.22 <<https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration>>.
- ⁵⁹ Committee on the Future Relationship with the European Union, Oral evidence: Progress of the negotiations on the UK's Future Relationship with the EU (2020) HC 203, Q249.
- ⁶⁰ J. Crisp, 'Boris Johnson calls on EU to put "a tiger in the tank" of Brexit talks, as deal hopes rise' (*The Telegraph*, 15 June 2020) <<https://www.telegraph.co.uk/politics/2020/06/15/boris-johnson-calls-eu-put-tiger-tank-brexit-talks-deal-hopes/>>.
- ⁶¹ Northern Ireland Affairs Committee, *Unfettered Access: Customs Arrangements in Northern Ireland after Brexit* (2020) HC 161, para.36.
- ⁶² *Ibid.*, para.55.
- ⁶³ Future Relationship Committee, HC 203, Q249.
- ⁶⁴ A. Cowburn, 'Brexit: Boris Johnson says no-deal with EU "very good option"' (*Independent*, 3 July 2020) <<https://www.independent.co.uk/news/uk/politics/brexit-no-deal-boris-johnson-eu-trade-a9599816.html>>.
- ⁶⁵ See Future Relationship Committee, *The Need for Progress in the Negotiations* (2020) HC 458, para.26.
- ⁶⁶ Cabinet Office, *The UK's Approach to the Northern Ireland Protocol* (2020) CP 226, para.32.
- ⁶⁷ See Future Relationship Committee, HC 458, para.25.
- ⁶⁸ Cabinet Office, CP 226, para.25.
- ⁶⁹ *Ibid.*, Foreword and para.14.
- ⁷⁰ *Ibid.*, para.16.
- ⁷¹ The UK Government would likely be more reticent about talking about Northern Ireland's place in the UK in the same terms, even though this is also event-limited under the GFA (the people of Northern Ireland having the power to choose to leave the Union); Northern Ireland Act 1998, s.1.
- ⁷² Withdrawal Agreement, PINI, Art 18.
- ⁷³ Northern Ireland Affairs Committee, HC 161, Q69.
- ⁷⁴ Johnson, after all, promised the 2018 DUP Conference that he would not 'leave Northern Ireland behind as an economic semi-colony of the EU'; Boris Johnson, *Speech to DUP Conference* (23 November 2018) <<https://www.spectator.co.uk/article/boris-johnson-s-speech-to-dup-conference-we-are-on-the-verge-of-making-a-historic-mistake->>.
- ⁷⁵ Cabinet Office, CP 226, para.29.
- ⁷⁶ These concerns are reflected in the Northern Ireland Affairs Committee, HC 161, para.65 and 83.
- ⁷⁷ EU Committee, HL 66, para.252-255.
- ⁷⁸ During withdrawal negotiations, the UK Government and EU Commission mapped some 142 areas of Strand 2 co-operation connected to EU law; EU Commission, 'Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union', COM (2017) 847 (8 December 2017) at 9.
- ⁷⁹ HC Debs, vol.676, col.599 (20 May 2020).
- ⁸⁰ European Union (Withdrawal) Act 2018, s.12.
- ⁸¹ See D. Lidington, 'United at Home, Stronger Abroad' (26 February 2018)
<<https://www.gov.uk/government/speeches/united-at-home-stronger-abroad>>.

- ⁸² Department for Business, Energy and Industrial Strategy, CP 278, para.167.
- ⁸³ N. Pooran, 'SNP's Michael Russell fears Brexit "power grab" blow to devolution' (*The Sunday Times*, 5 July 2020) <<https://www.thetimes.co.uk/article/snp-s-michael-russell-fears-brexite-power-grab-blow-to-devolution-b92b87jbg>>.
- ⁸⁴ Legislation currently gives overlapping powers to Westminster and Stormont to address the Protocol's responsibilities; European Union (Withdrawal Agreement) Act 2020, ss.21-22.
- ⁸⁵ See Sylvia de Mars et al, *Bordering Two Unions: Northern Ireland and Brexit*, pp.126-128.
- ⁸⁶ Department for Business, Energy and Industrial Strategy, CP 278, para.2.
- ⁸⁷ *Ibid.*, para.64.
- ⁸⁸ See Mary C. Murphy, 'The Brexit crisis, Ireland and British-Irish relations: Europeanisation and/or de-Europeanisation?' (2019).
- ⁸⁹ A combative ERG letter to Michel Barnier to this effect is available to view here <<https://twitter.com/andreajenkyns/status/1277613712292155393>>, and Barnier's response here <https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/mb_letter_to_m._francois_redacted.pdf>.
- ⁹⁰ Northern Ireland Affairs Committee, HC 161, Q89.

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