

Dr Austen Morgan – Written evidence (FUI0018)

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Introduction

1. I refer to the call for evidence of 13 May 2022, issued by the sub-committee (of the European affairs committee of the house of lords) on the protocol on Ireland/Northern Ireland.
2. I am a barrister in private practice who writes on the law. I am the author of a legal textbook on the 1998 Belfast agreement. My specialism is international, including EU, law.
3. I have read the sub-committee's *Introductory report*, HL Paper 55, 29 July 2021. I leave most of the 16 questions in the call for evidence to others, in order to address the UK and EU approaches following the 2016 referendum (questions 12 to 16).

4. This submission is about treaty law, which governs the 2019 withdrawal agreement and the 2020 free-trade agreement. Treaty law is part of customary international law (but is considered to be codified in the 1969 Vienna convention on the law of treaties¹). Political talk about breaching international law is invariably rhetoric rather than reasoned legal analysis.
5. I use the following terminology: United Kingdom ('UK'); Northern Ireland ('NI'); European Union ('EU'); Republic of Ireland ('ROI'); Belfast agreement; and NI protocol; avoiding contentious Irish concepts.

Executive Summary

6. I make the following argument: the EU (and Michel Barnier in particular) did not need to refer to the Belfast agreement in the negotiations with the UK from 2016; the playing of the Belfast agreement card has led substantially to the NI protocol's problems; ironically, the UK is now forced to address unilaterally the working of the Belfast agreement, given the crisis of the Irish sea border led to the resignation of the first minister, Paul Givan, in February 2022.

The Belfast Agreement

7. The Belfast agreement of 10 April 1998 (good Friday in the Christian calendar) is in fact two agreements: a short UK/ROI treaty of four articles; and a multi-party agreement. Legal obligations and political aspirations rub shoulders in the integrated text.² There is usually a world of difference between a political reading of the 'good Friday agreement', and a proper legal analysis of who is obliged to do what, when and in what circumstances by the Belfast agreement.
8. The noun border appears nowhere in the Belfast agreement, which, of course, left the 1922 international frontier – one of the most stable in

¹ This applies to the UK and EU, by a roundabout route through article 3.

² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, treaty series no. 50 (2000), Cm 4705, May 2000.

Europe - between the two states unchanged; arguably, it was strengthened by further Irish recognition of the UK.

9. On 10 April 1998, the UK and the ROI had been members of the EU from 1 January 1973. It was the 1986 single European act (a first updating of the 1957 Rome treaty) which provided for: what the UK viewed as the single market; but the EU prefers to call the internal market. At 23.00 (Greenwich mean time) on 31 December 1992 (shortly after the Maastricht treaty, a second updating), the EU removed customs controls on both sides of the Irish border.
10. To that extent, the Irish border was opened to trade from 1 January 1993. The international frontier however remained. VAT rates were different in London and Dublin, leading to cross-border shopping and continued smuggling. And again, the UK/ROI short treaty has only a recital reference to the two states being 'partners in the European Union'. On 1 January 1999 (after the Belfast agreement), while the UK retained the pound, the ROI joined the euro currency. The border hardened and no one complains about that.
11. Further to April 1998, the UK and the ROI agreed six implementation bodies in strand 2 (north-south) of the Belfast agreement.³ One was for special EU programmes, namely money from Brussels going to NI and/or the ROI. This body - with offices in Belfast, Monaghan and Omagh - was an international organization, owned by the two states.
12. The UK never agreed with the ROI to remain permanently in the EU, for the sake of NI. This was argued unsuccessfully in the supreme court in *Miller One: R (Miller) v SoS for Exiting the EU* [2017] UKSC 5 [2017] 2 WLR 583. That court decision in UK law, however, has not led to the political claims being abandoned in NI and the ROI.

How it should have been done?

³ Implementation bodies, treaty series no. 51 (2000), Cm 4706, May 2000.

13. Early in the negotiations, the UK indicated that – when it came to trade – it had no desire to make the soft Irish border hard, by reimposing customs controls on what would be the UK’s only land border with the EU after withdrawal.
14. I was one of those after the 2016 referendum – advocating bilateralism between London and Dublin - who argued for a virtual border in Ireland, to protect both the UK’s internal market and the EU’s single market, while allow trade to continue flowing.⁴
15. The Irish taoiseach, Enda Kenny, was sympathetic to bilateralism, until June 2017, but his successor, Leo Varadkar, was persuaded to go for full EU multilateralism, with Dublin talking to Brussels but not London.
16. Bilateralism was arguably required by the Belfast agreement, there being a strand 3 (east-west) which established a British-Irish intergovernmental conference: ‘The Conference will bring together the British and Irish Governments to promote bilateral co-operation at all levels on all matters of mutual interest within the competence of both Governments.’ No hard border was a shared competence between two sovereign states, even if the UK was leaving, and the ROI staying in, the EU.
17. The Irish walked away from the Belfast agreement in 2017. As a consequence, Dublin was not consulted by the UK over: the Northern Ireland Troubles (Legacy and Reconciliation) bill, now before parliament. That was a consequence of the EU’s strategy on dealing with the withdrawal of the UK.
18. Graham Gudgin has recently recalled the expert work done on an electronic Irish border, including by Lars Karlsson (former director of the world customs organization in Brussels), the European parliament publishing his *Smart Border 2.0* in November 2017.⁵

⁴ Shanker Singham, Austen Morgan, Victoria Hewson & Alice Brooks, *Mutual Interest: how the UK and the EU can resolve the Irish border issue after Brexit*, Legatum Institute, September 2017.

Monsieur Barnier trouve une idée à L'Irlande

19. Michel Barnier is a Hibernophile French Gaullist.⁶ Appointed by the EU after Brexit, and with his taskforce 50 in the commission, he quickly hit upon the Belfast agreement. It was a major failure of UK statecraft to allow him to indulge its marginal relevance. There was agreement on no hard border.⁷ So, the question of how much the EU wanted to put on the Irish border, through the ROI, was a matter for it. Barnier's greening of the problem was a failure of EU legal analysis; unfortunately, the UK could not see that, much less rebut it effectively.

20. On 24 November 2017, Barnier wrote in his (self- and commission-censored?) diary: 'Thanks to the sequencing we put in place, the unity of the twenty-seven and the wonderful technical work of my team, which enabled us to constantly stay one step ahead in the negotiation, discussions are progressing.' He continued: 'The Irish question is the stumbling block, because so much passion and emotion between the Irish and the British is bound up with it. My strategy has been to make sure that the British, who are leaving the Union, recognize their responsibility for the continuation of North-South cooperation in Ireland, set up under EU law, with EU funding, and supported by EU policies. Having recognized this responsibility, if they wish to preserve the Good Friday (Belfast) Agreement, then they will have to provide solutions. And these solutions, for each subject in question, will essentially consist in what I have called common regulatory areas covering the whole island of Ireland.'⁸

21. This was simply EU cultural appropriation of NI, aided and abetted by the ROI.⁹ Barnier was fundamentally incorrect. First, a mere five per cent of

⁵ *Spiked*, 25 May 2022.

⁶ Following his resignation as French president on 28 April 1969, the general retreated to Sneem in Co. Kerry. Barnier wanted to go on pilgrimage on 28 April 2018, but had to rush from Dublin to NI.

⁷ Joint [UK and EU] report, 8 December 2017, paras 43 & 49.

⁸ *My Secret Brexit Diary: a glorious illusion*, London 2021, p 90.

⁹ This is what he wrote on 29 April 2018: 'In Dublin I meet Sabine and Nina Obermaier, the members of my team who with great tenacity have led the difficult discussions with the British on the Irish question, while maintaining a daily privileged link with the Irish government. Dan Ferrie,

NI's turnover went to the ROI (with a further three per cent to the rest of the EU). Barnier, by choosing what he wanted to hear, adopted a nationalist belief in economic integration uncritically.¹⁰ Second, Barnier was generalizing from the tiny special EU programmes body to the not much bigger strand two of the Belfast agreement. And three, these bodies belonged to the two states: they had nothing to do with the EU, save that the ROI was remaining a member.

22. Neither Theresa May as prime minister, Gavin Barwell as her unlikely Sancho Panza, nor (Sir) Olly Robbins stood up to the Brussels Behemoth.¹¹ They agreed the so-called Irish backstop (with the UK to remain in the customs union and NI in the single market), in the context of a future trade agreement to be negotiated. It would take Boris Johnson, with David (Lord) Frost, to agree the NI protocol to the withdrawal agreement in October 2019, followed by the trade and cooperation agreement (without tariffs or quotas) in December 2020.

The Johnson Withdrawal Agreement

23. The preamble to the 2019 withdrawal agreement stresses an orderly withdrawal and legal certainty in the UK and EU. Legal certainty is therefore applicable to the NI protocol; one recital to the withdrawal agreement reads: 'CONSIDERING that in order to guarantee the correct interpretation and application of this Agreement and compliance with the obligations under this Agreement, it is essential to establish provisions ensuring overall governance, in particular binding dispute-settlement and

our dynamic and enthusiastic young Irish press officer, is also there. On an earlier visit I had briefly met his parents, Robbie and Emer, in front of the Dáil, the Irish Parliament.' (p 138)

¹⁰ Talking to business people in Newry on 30 April 2018, Barnier noted in his diary: 'It is clear to see how almost the entire economy is intertwined across a border that is currently invisible.' (p 140)

¹¹ Lord Barwell provides the only account to date: *Chief of Staff: an insider's account of Downing Street's most turbulent years*, London 2021, pp 125-150. He concludes on p 150: 'So there are a lot of reasons why it was so hard to get Brexit done, but if I was going to single out a few key ones, I would say the challenge posed by Northern Ireland, the fact that the EU was never going to make it easy, the failure to have a cross-party debate at the outset and the impact of the 2017 election on the parliamentary arithmetic and therefore the strength of the prime minister's negotiating position were most crucial.' He does indicate how Theresa May and he were essentially panicked on 5 February 2019, by five 'community leaders' predicting the collapse of the peace process because of the pursuit of Brexit (pp 160-1).

enforcement rules that fully respect the autonomy of the respective legal orders of the Union and of the United Kingdom as well as the United Kingdom's status as a third country.' Part 6 (articles 158 to 185) provides for: a continuing role for the court of justice of the EU ('CJEU') as regards citizens' rights; a joint UK/EU committee, with decisions having 'the same legal effect as this Agreement' (article 166(2)); specialized committees, including one on the NI protocol; agreed arbitration (including referrals to the CJEU); and enforcement of awards.

24. The withdrawal agreement has the character, not of an agreement, but of an agreement to agree – with a joint committee decision effectively amending the agreement (as indicated in the para above). The UK agreed to a process of a continuing debate and negotiation.
25. Nearly half the recitals to the NI protocol – contrary to legal certainty – refer to Belfast agreement aspirations; one being: 'ACKNOWLEDGING the need for this Protocol to be implemented so as to maintain the necessary conditions for North-South cooperation, including for possible new arrangements in accordance with the 1998 Agreement'.
26. The point is well taken that the EU was less keen on the aspiration regarding east-west stuff, despite the creation of two bodies under the Belfast agreement: a multi-member British-Irish council; and the bilateral British-Irish intergovernmental conference, mentioned in para 16 above.
27. The protocol makes complicated what could have been much more simple. True, it recognizes the UK as a third country: 'This Protocol respects the essential State functions and territorial integrity of the United Kingdom.' (article 1(2)) True, it refers to the customs territory of the UK, and to NI being a part of this (article 4). True, NI as part of the UK may be the subject of international trade agreements. And true, there is to be unfettered market access for goods from NI to the rest of the UK's internal market (article 6).

28. However, the protocol fails to make clear – which it could have done – that, while the UK will cease to be a member state of the EU, the territory of NI is being left in the single market for trade purposes, subject to the union customs code and to EU regulatory law. The UK may well have colluded, for obvious reasons, in this legal obfuscation.
29. Article 5 (customs, movements of goods) provides for no EU customs duties (to be collected by the UK) on east-west trade, except – and this is the rub – ‘that good is at risk of subsequently being moved into the Union’, meaning initially into the ROI. The provision goes on to effectively presume leakage across the border, it being up to the joint committee before the end of the implementation period to come up with answers. Article 5 includes: ‘The Joint Committee may amend at any time its decisions adopted pursuant to this paragraph. In taking any decision pursuant to this paragraph, the Joint Committee shall have regard to the specific circumstances in Northern Ireland.’ There is absolutely no legal certainty here, other than the means to the end being specified: continuing negotiation.
30. Article 6(2) includes: ‘The Joint Committee shall keep the application of this paragraph under constant review and shall adopt appropriate recommendations with a view to avoiding controls at the ports and airports of Northern Ireland to the extent possible.’ But the Irish sea border has been created between ports and airports in Great Britain and NI. The UK is most unlikely to have agreed an Irish sea border running through the ports and airports of Great Britain!
31. The NI protocol of 19 articles has seven annexes attached. EU law is spread across NI as follows: article 2(1) on rights of individuals, introducing annex 1; article 5(4) on east-west trade, introducing annex 2 (a leviathan text); article 8 on VAT and excise, introducing annex 3; article 9 on single electricity market, introducing annex 4; article 10 (state aid), introducing annexes 5 and 6; and article 16 on safeguards, introducing annex 7.

32. With the UK outside the EU, the people of NI would simply be on the receiving end of Brussels decisions. Thus, the recital: 'EMPHASISING that in order to ensure democratic legitimacy, there should be a process to ensure democratic consent in Northern Ireland to the application of Union law under this Protocol'.
33. Article 18(1), referring to articles 5 to 10 of the protocol, sets a deadline of 1 January 2025 for the protocol. Article 18(2) includes: '...the United Kingdom shall seek democratic consent in Northern Ireland in a manner consistent with the 1998 Agreement.' The Belfast agreement includes 'key decisions [being] taken on a cross-community basis': strand one, para 5(d). This is elaborated upon in article 18(6). Thus, designated unionists could, voting within two months of the 2025 date, prevent the NI protocol being democratically legitimized and continuing in force.
34. However, article 18(2) goes on to refer to a UK unilateral declaration, which, in treaty law, may be accepted by the EU as an instrument related to the treaty. The UK duly made a declaration on the day of the withdrawal agreement, confirming that a simple majority, of assembly members present and voting, would amount to consent to the protocol continuing in NI. It even went on to amend the Northern Ireland Act 1998 by statutory instrument, to provide for this new protocol law: section 56A and schedule 6A.
35. Any argument about a cross-community vote versus a simple majority would probably be resolved by the words: 'strictly in accordance with the unilateral declaration' in article 18(2). But why does the paragraph read 'in a manner consistent with the 1998 Agreement'? This is an issue – if the protocol survives unamended – of being litigated in UK courts. The EU seemed to be satisfied with the Belfast agreement; most likely, it was the Irish, with their more detailed knowledge of its working, which forced the unilateral declaration out of the UK.

After the Protocol

36. Boris Johnson had brought David Frost into number 10 in July 2019, established a taskforce Europe (years after the EU) on 31 January 2000, made him a peer in September 2000, and a minister in March 2021 in the cabinet office. Lord Frost resigned in December 2021, not ostensibly for Brexit reasons.
37. The NI protocol had entered into force mainly at 23.00 on 31 December 2020. On 21 July 2021, Brandon Lewis, the NI secretary of state, and Lord Frost published a command paper: *Northern Ireland Protocol: the way forward*, CP 502. 'It has already become clear,' the prime minister wrote in a foreword, 'that it is not possible to operate these arrangements in a way that can be sustained, particularly not in the inflexible way the EU seems to want.'¹² In this command paper, the UK government put forward the principle of dual regulation in NI, with traders opting for either a UK regime or a EU one. Later, government policy was articulated as: a green lane in NI for east-west trade, and (presumably) a red lane for goods destined for the ROI.
38. Following the resignation of Lord Frost, the NI protocol became the responsibility of Liz Truss, the foreign secretary. The queen's speech on 10 May 2022 (delivered by prince Charles) did not refer to legislation, but, on 17 May 2022, she announced – because the Belfast agreement was under strain – legislation 'in the coming weeks' to amend the protocol: 'The Government are clear that proceeding with the Bill is consistent with our obligations in international law and in support of our prior obligations in the Belfast Good Friday Agreement...We will cement those provisions in the protocol that are working, including the common travel area, the single electricity market and north-south co-operation, whilst fixing those elements that aren't: on the movement of goods, goods regulation, VAT, subsidy control, and governance...As co-signatory and co-guarantor of the Good Friday/Belfast agreement, we will take the necessary decisions to preserve peace and stability.'¹³

¹² P 3.

¹³ *Hansard*, HC, vol. 714, cols. 546-7, 17 May 2022.

39. There is a precedent for this, namely the United Kingdom Internal Market Act 2020, passed on 17 December 2020. Some clauses were negotiated away, by Maroš Šefčovič, vice-president of the European commission, before enactment, in the joint committee with Michael Gove.

Questions

40. I do not directly address questions 1 to 11, but the discussion above implies answers could be developed. I concentrate upon questions 12 to 16, and refer again to the discussion above.

Question 12

41. The government appears to be pursuing a strategy in order to deal with the Irish sea border. The UK is evidently playing the Belfast agreement card back to the EU. One awaits Liz Truss's bill, and especially the legal opinion on international law.

Question 13

42. The government announced legislation on 17 May 2022. The case against using article 16 of the NI protocol – namely reciprocity - was stated in the command paper of 21 July 2021.

Question 14

43. I am a serious critic of the EU's strategy since the 2016 referendum, and especially the playing of the Belfast agreement card. Its conduct since 23.00 on 31 December 2020 has been essentially a no surrender position: a refusal to amend the NI protocol in any way, including through joint committee decisions.
44. The UK hints that it expected the NI protocol to be implemented benignly. The conduct of the EU has been malign, and close to challenging the 'good

faith' principle. One is reluctant to query a common intention (defined objectively) in the making of this international agreement.

45. This point is distinct from the following common assertion: Maroš Šefčovič says this (whatever): if you disagree with the EU, that is a breach of international law ... that is EU loyalism, not a breach of international law.

Question 15

46. No, obviously.

Question 16

47. The precedent of the United Kingdom Internal Market Act 2020. However, I believe that, this time, the crisis will go further.