Dr. Billy Melo Araujo – Written evidence (NIP0023)

The Protocol on Ireland/Northern Ireland

Written evidence submitted to the House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland

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What is your assessment of the Government's legal justification for the Bill? What would you identify as the principal legal issues and consequences arising in relation to the Northern Ireland Protocol Bill?

1. The UK government's legal justification of the Protocol Bill is primarily based on the position that the non-performance of obligations under the EU-UK Withdrawal Agreement (WA) can be justified by reference to the defence of necessity. Necessity is a ground for precluding, under certain conditions, the wrongfulness of an act incompatible with an international obligation. It is recognised as customary international law and has been codified under the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles).
2. The first question that arises in relation to the use of the defence of necessity is whether the defence is available to the UK government in relation to the Bill. More specifically, the question is whether the existence of Article 16 of the Protocol – a treaty-based derogation – precludes the UK from invoking the customary defence of necessity. The answer to this question depends on the rule governing the relationship between the Article 16 of the Protocol and the customary defence of necessity.
3. One possibility is to apply the *lex specialis* principle under Article 55 of the Draft Articles. It provides that '[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law'. If Article 16 of the Protocol were to be considered *lex specialis* to the customary defence of necessity this may lead to the displacement of the defence of necessity or, alternatively, the cumulative application of these legal mechanisms. In the latter case, the customary defence of necessity applies only to the extent that it includes requirements going over and above those imposed under Article 16 of the Protocol.

[1] This evidence is submitted as part of three-year academic research project on *Governance for 'a place between': the Multilevel Dynamics of Implementing the Protocol on Ireland/Northern Ireland* funded by the Economic and Social Research Council. For further details see: www.qub.ac.uk/sites/post-brexit-governance-ni.

4. It is not clear that the *lex specialis* rule is an appropriate tool to govern the relationship between Article 16 of the Protocol and the defence of necessity. This is because, despite the substantive overlap between the two mechanisms, they fulfil very different normative functions. Circumstances precluding wrongfulness under customary international law such as the defence of necessity only apply in cases where states have committed breaches of international law that are considered wrongful. However, an act which is incompatible with an international law is not wrongful if it can be justified or saved by reference to an exception. Article 16 of the Protocol is such an exception in that it permits the parties of the Withdrawal Agreement to adopt measures that would otherwise be deemed incompatible with the Protocol under certain conditions. As a consequence, the defence of necessity can only be validly invoked if it is shown that the Protocol Bill cannot be justified under Article 16 of the Protocol

5. The second question concerns whether the substantive conditions for the invocation of the necessity defence are met in relation to the Bill. Article 25 of the Draft Articles provides that necessity may only be invoked as a ground for precluding the wrongfulness of an act not in conformity with an international obligation if said act '(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole'. Further, necessity may not be invoked where '(a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity'.

6. It is unclear whether the above conditions are met in relation to the Protocol Bill.

7. It is questionable whether the Bill is the 'only way' to safeguard the UK's essential interests. Firstly, the decision to invoke the necessity defence before exploring the possibility justifying the Protocol Bill under Article 16 of the Protocol would suggest that not all lawful means of deviating from Protocol obligations have been exhausted. Secondly, the ILC Commentary on the Draft Articles emphasises that the necessity defence is excluded 'if there are other (otherwise lawful) means available, even if they may be more costly or less convenient'. On this point, the fact that the UK government has opted not to pursue other options that would have significantly reduced checks at the Irish Sea border (e.g., the negotiation of an EU-UK veterinary agreement on mutual recognition of sanitary and phytosanitary measures is an option that was favoured by Northern Irish industry[2]) could also be problematic. Thirdly, according to the ILC Commentary, the defence of necessity precludes 'any conduct going beyond what is strictly necessary for the purpose will not be covered'. The UK government has not explained how the disapplication of Protocol provisions on value-added tax, state aid and the jurisdiction are limited to what is strictly necessary to safeguard its essential interest against a grave and imminent peril.

[2] J Curtis, 'Securing a veterinary agreement in the Northern Ireland Protocol', House of Commons Library, 13 December 2021, CDP-0214 (2021).

8. It can also be argued that the UK has contributed to the state of necessity by signing the Withdrawal Agreement. The UK was aware of the border checks that would result from the application of the Protocol when the agreement was concluded. For example, the barriers to GB-NI trade that would result from the Protocol were outlined in an economic impact assessment carried out and published by the NI Department for the Economy in December 2020 prior to the entry into force of the Withdrawal Agreement[3]. And, as outlined by Andrew McCormick - former Director General of International Relations for the NI Executive Office, the fact that many unionists were opposed to the Protocol was 'known and understood'[4] by the UK government when the negotiations on the text of the Protocol were formally concluded in October 2019.

What will be the practical and legal impact of the UK Government's proposals for a dual regulatory regime for goods (clauses 7-11 of the Bill)?

9. It is difficult to assess the impact of the proposals for the establishment of a dual regulatory regime in Northern Ireland because of the lack of detail provided by the UK government as to how such regime would operate in practice.

10. From a legal perspective, the proposal to allow NI businesses to lawfully place goods in the Northern market that comply with either UK or EU regulatory standards would be incompatible with the Protocol obligations. This aspect of the Protocol would be unlawful unless justified by reference to an exception under international law.

11. In practical terms, GB goods would not have to comply with EU regulatory standards in order to be lawfully placed in NI. This would give the UK more flexibility to pursue regulatory divergence without further exacerbating barriers to GB-NI trade. For the EU, the main concern in relation to the dual regulatory regime proposal is the risk that goods that do not comply with EU regulatory standards are placed in NI and are subsequently moved on to the EU internal market.

12. The most likely beneficiaries of the dual regulatory regime would appear to be the GB businesses selling goods to final consumers in NI. The benefits for NI businesses are less obvious to the extent that, under the 2020 Internal Market Act, NI goods produced/manufactured in line with EU regulatory standards already benefit from unfettered access to GB. A number of NI industry representatives have raised concerns about the potential effects of the dual regulatory regime. The Northern Ireland Business Brexit Working Group has explained how the regime would work for some sectors (e.g., retail) but not for others (e.g., agri-food industry)[5]. The difficulties would be felt most acutely by industries that rely on the continued operation of all-

[3] Direct Economic Impact of the Northern Ireland Protocol on the NI Economy Department for the Economy December 2020. https://www.economy-ni.gov.uk/sites/default/files/publications/economy/direct-economic-impact-ni-protocol-on-ni-economy.pdf.

[4] A McCormick, 'The Northern Ireland Protocol Bill' IIEA, 2 August 2022.

[5] Written evidence submitted to the House of Lords European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland, 7 June 2022 Submission from the Northern Ireland Business Brexit Working Group

island value chains. The dairy sector, in particular, would be severely affected[6].

What will be the practical and legal impact of the disapplication of EU customs and goods regulations for specific goods destined for the UK or non-EU countries only, and to allow for the introduction of a system of red and green lanes (clauses 4-6)?

13. The disapplication of EU customs rules, procedures and regulatory compliance checks on goods destined for the UK or non-EU countries only would be incompatible with Protocol obligations. Such disapplication of a Protocol obligation would be unlawful unless justified by an exception under international law.
14. The Protocol Bill proposes the establishment of red lanes and green lanes for goods imported from GB into NI. The green lane would be for goods that remain in Northern Ireland and would not be subject to EU border checks. According to the UK government the green lane would be reserved for non-commercial goods (e.g., post, baggage and parcels) and goods brought into NI by businesses registered under a trusted trader scheme[7].
15. The lack of detail surrounding the operation of the green/red lane system as well as the fact that the EU has not agreed to application of this systems means it is very difficult to assess its practical implications. If applied unilaterally, this system would create problems for NI-EU flows and raise the risk of border controls within the island of Ireland. A joint EU-UK implementation of the system may lead to a reduction of barriers to GB-NI trade but it would not entirely remove them. Goods entering NI via the red lane would be subject to EU border checks and NI businesses registered under the trusted trader scheme would still face administrative costs.

What are the economic and legal implications of the Government's proposals to disapply the provisions of the Protocol on State aid (clause 12)?

16. The disapplication of obligations under Article 10 of the Protocol would constitute a breach of the Protocol unless justified by an exception under international law.
17. The main concern, from a UK perspective with regards to Article 10 of the Protocol, is that any UK measure (whether adopted at devolved level or national level) that has an effect on trade in goods between Northern Ireland and the EU would be subject to EU state aid rules.

[6] Written evidence submitted by the Dairy Council for Northern Ireland, related to Brexit and the Northern Ireland Protocol inquiry (NIP0038).
[7] Foreign, Commonwealth and Development Office, 'NI Protocol: The UK's solution', 13 June 2022, 4.

18. The application of Article 10 of the Protocol, in its current form, has been criticised. It creates a system whereby UK measures are subject to two separate subsidy regimes at the same time: EU state aid law and UK anti-subsidy legislation[8][1].The proposal to disapply EU state aid law would address these criticisms by subjecting UK measures to a single anti-subsidy regime (UK anti subsidy law). The UK would, however, remain subject to the subsidy control provisions and the EU-UK Trade and Cooperation Agreement

What are the practical and legal implications of removing the jurisdiction of the European Court of Justice in the UK to oversee the implementation of the Protocol and stating that UK courts are not bound by decisions of the CJEU on matters related to the Protocol?

19. If the Bill enters into force and the Protocol provisions relating to the jurisdiction of the Court of Justice is disapplied, the only role left for the Court of Justice would relate to instances where a question on the interpretation of EU law arises in the context of arbitration proceedings established under the Withdrawal Agreement.

20. From a legal perspective, the exclusion of the Court of Justice's jurisdiction in relation to the application of EU law under Protocol would undermine the operation of the Protocol. The Court of Justice plays a central role in safeguarding integrity of the EU internal market and the autonomy of the EU legal order by ensuring that EU law is applied effectively and uniformly throughout the EU. The replacement of the current regime with one where UK courts are, potentially, given the authority to interpret EU law would undermine the Court of Justice's ultimate authority to interpret EU law. In the absence of any guarantees that UK courts continue to respect, in substance, EU law as interpreted by the Court of justice, one of the core conditions underpinning NI's continued participation in the EU internal market would no longer be present.

What would be the economic, political and legal implications of a decision by the UK Government to invoke Article 16? How would the EU respond?

21. Prior to the invocation of Article 16 of the Protocol, the UK must notify the EU of its intent to do so and via the EU-UK Joint Committee. Once this is done, the parties must immediately enter into consultations to find a 'commonly acceptable solution' and the UK is precluded from adopting safeguard measures until one month after the formal notification of its intention to apply safeguard measures under Article 16 of the Protocol. Under paragraph 3 of Annex 7 of the Protocol, the UK may apply protective measures prior to the aforementioned deadline if 'exceptional circumstances requiring immediate action exclude prior examination'. The Protocol does not define the term 'protective measure' nor is there any guidance provided

[8] Written evidence submitted by George Peretz KC (FRE0037).

as to the extent to which 'protective measures' measures may be qualitatively different to safeguard measures.

22. The UK must, without delay, notify safeguard measures to the EU-UK Joint Committee and provide all relevant information. If the EU agrees with the application of safeguard measures in relation to the Protocol Bill, such measures must be reviewed every 3 months from the date of their adoption. Either party can also request the Joint Committee to review the safeguard measures.

23. The EU can apply rebalancing measures in response to the UK's decision to apply safeguard measures. The right to apply rebalancing measure exists irrespective of whether or not the EU considers the UK's safeguard measures compatible with the conditions set out under Article 16 of the Protocol.

24. However, rebalancing measures are subject to both substantive and procedural conditions. Firstly, rebalancing measures can only be applied if the safeguards create an imbalance between rights and obligations. This condition would be met in the context of the Protocol Bill to the extent that the UK is proposing the suspension of a number of its obligations under the Protocol. Secondly, the procedural requirements and the requirements of proportionality that apply in relation to safeguard measures also apply to rebalancing measures. As a consequence, if the EU decides to apply rebalancing measures, these would not be immediate and would be limited in scope.

25. If the EU considers that the UK's decision to apply safeguard measures is unlawful there are a number of legal mechanisms it could resort to pressurise the UK to remove such safeguards. Any dispute between the parties concerning Article 16 of the Protocol can be brought before the state-to-state dispute settlement mechanism created under the EU-UK Withdrawal Agreement. The parties must first seek to resolve a dispute amicably, via the EU-UK Joint Committee, 'by entering into consultations in good faith, with the aim of reaching a mutually agreed solution'(Article 168 WA). Where no amicable solution is found, disputes may be referred to an arbitration panel which must deliver a ruling within twelve months of its establishment (Article 173 WA).

26. Once delivered, the Panel's ruling will be binding on both parties who must 'take any measures necessary to comply in good faith with the arbitration panel ruling' (Article 175 WA). Where the respondent has not complied with the ruling within a reasonable period of time, the complainant can request the Panel to impose temporary remedies which will take the form of either a lump-sum or penalty payment' (Article 178 WA). If payment is not made by the non-complying party, within a one-month deadline following the determination of the remedy, the other party can temporarily suspend any part of the WA or of any other agreement between the EU and the UK (Article 178(2) WA). The EU could, for example, suspend tariff and market access concessions negotiated under the EU-UK TCA. Any suspension should, however, be proportionate to the breach of the obligation concerned' and only apply so long as the breach of the WA persists (Article 178(2) WA).

27. There are other avenues which the EU may explore in the context of the EU-UK TCA. Firstly, the EU can decide to terminate the agreement by notifying the UK its intention to do so. The termination would occur 12 months after the date of the notification (Article 779 TCA). Secondly, the EU can make use of the so-called 'essential elements' clause under the EU-UK TCA (Article 771 TCA). The EU could opt to terminate or suspend the TCA by arguing that the UK's decision to unilaterally disapply Protocol obligations constitutes a serious and substantial failure of its obligation to uphold the rule of law. To do so, the EU would have to demonstrate that the gravity and nature of the non-compliance is of an exceptional sort that threatens pe ace and security. Moreover, the measures can only be adopted following a 30-day consultation period.