

## Written evidence submitted by Dr Graham Gudgin (NIP0001)

### Submission to NI Affairs Committee Inquiry Brexit and the NI Protocol

#### Summary

The Northern Ireland Protocol is a bad agreement for the UK, largely written to protect EU and Irish interests, with a weak level of acceptance by the May Government and with too few amendments in October 2019 in the difficult parliamentary circumstances faced by the Conservative Government under the new leadership of Boris Johnson. The protections for the EU Single Market and for North-South co-operation tend to be maximalist while the stated aim of protecting the territorial integrity of the UK is largely ignored. It should be possible to protect the EU Single Market while respecting the territorial integrity of the UK by interpreting the Protocol sensitively within the Specialised Committee, but it appears that this has not been done. It is thus not surprising that the Johnson Government has proposed legislation to guard against some of the worst aspects of the Protocol in the event of these matters not being resolved in a free trade agreement.

The impact of the protocol on Northern Ireland depends on whether a free-trade agreement is signed with the EU. **With an FTA**, there should be few or no tariffs and quotas on trade with the EU. The need for east-west customs checks on the Irish Sea would be then limited to regulatory issues. Since UK firms are currently fully compliant with EU regulations there is little practical need for checks in the short term, but they will occur anyway under the Protocol, alongside customs declarations in both directions. Such checks should be banned under UK law. If regulatory divergence occurs in future then this could be dealt with, preferably by other means than customs checks and for example by legislation to outlaw exports from NI to the EU which do not observe EU law, backed by stronger anti-smuggling measures for the Irish land border.

**Without an FTA**, tariffs and quotas will be applied to exports to the EU from GB but not from NI. Customs declarations will be required for trade between NI and GB in both directions and checks will be required for east-west trade. Tariffs may be charged on all imports to NI from GB with a cumbersome method of rebates for goods which remain in NI. In this scenario, the Internal Markets Bill is correct to propose doing away with export declarations from NI to GB since these serve no useful purpose for anyone. Preventing a carry-over of EU state aids rules from NI to GB is also reasonable. If goods from subsidised GB firms endanger EU Single Market via NI, then this should be dealt with by the EU through normal anti-dumping methods. Because NI firms will enjoy free trade with both the EU and GB this may lead to additional inward investment from GB to take advantage of this situation.

The main danger to NI from 'no deal' occurs not to its producers but to its consumers if prices rise on imports and some goods are barred from NI. For instance, food products such as cheap hormone treated beef, permitted in GB, may be barred from NI in case they leak into the EU across the Irish land border. The issue of tariffs checks and bans on goods flowing from GB to NI are not dealt with in the Internal markets Bill but may be addressed in the next Finance Bill (which cannot be amended in the Lords). Already the proposed Trade Support Scheme will defray the costs of customs declarations for firms importing to NI from GB, but other measures are needed to prevent tariffs and checks on trade which remains fully within the UK. Again, other measures can be used to prevent NI becoming a conduit for goods flowing from GB to the Republic of Ireland.

This submission begins with comment on the contextual issues of democratic consent, the Good

Friday Agreement and bad faith on behalf of the EU in the Withdrawal negotiations.

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## Introduction

Thankyou for the invitation to make a submission to the Committee’s inquiry on Brexit and the Northern Ireland Protocol. The inquiry aims to cover a wide range of issues and I will try to confine my remarks to my own areas of economic expertise. I would like, however, to initially comment on the context for the Protocol elements of the Internal Market Bill by discussing the principle of consent and the Good Friday Agreement and the issue of EU bad faith in the negotiations.

I should say at the outset that I regard the Protocol in its present form as a flawed and damaging set of arrangements potentially upsetting the precarious equilibrium achieved in the GFA. The Protocol is clearly largely drafted by the EU and in my view the UK input to its drafting has been weak, although late additions such as Article 18 on Democratic Consent in Northern Ireland were attempts to redress the damage of earlier versions. I accept that there was neither time nor opportunity in October 2019 to fundamentally rectify the many detailed weaknesses in the original Backstop. It is thus unsurprising to me that the present government has attempted to insert further safeguards through its draft Internal Markets Bill. The Protocol clearly fails to meet its objectives set out in article 1 including the objective of respecting the essential State functions and territorial integrity of the United Kingdom (at. 1.2) and protecting the 1998 Agreement in all its dimensions (art 1.3). However, we are where we are, and the task is now to make what we can of a thoroughly bad job.

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## The Principle of Consent and the GFA

Article 1 of the Protocol says that it is without prejudice to the constitutional status of Northern Ireland which can only be altered with the consent of the people of Northern Ireland. Lord Trimble, an architect of the Good Friday Agreement, argued forcibly in a [Policy Exchange article](#) that consent in the GFA goes much wider than ultimate constitutional status. Consent, he argues, underpins the GFA in STV elections, operating rules for the Assembly and Strand 2 arrangements with their delicately balanced structures for the North South Ministerial Council (NSMC). The GFA succeeded because it was a bottom-up agreement based on consent carefully avoiding the possibility described by SDLP advisor Hugh Logue at Sunningdale of “trundling NI into a united Ireland”. Lord Trimble argues that “*It was agreed that any further cross-border developments would require the consent to both legislatures*”. “*The protocol ignores the very thing that makes the GFA work - consent*”. “*Top-down arrangements [in the Protocol] make it easy for Dublin to insert things apparently to ‘protect’ the all-Ireland economy but in reality are an attempt to create one – part of a decades-long agenda to move NI towards a united Ireland*”.

Article 11 of the Protocol overrides all of this consensual architecture on N-S co-operation within the GFA with imposed top-down provisions, i.e:

*In full respect of Union law, the United Kingdom and Ireland may continue to make new arrangements that build on the provisions of the 1998 Agreement in other areas of North-South cooperation on the island of Ireland.*

*The Joint Committee shall keep under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North-South cooperation. The Joint Committee may make appropriate recommendations to the Union and the United Kingdom in this respect, including on a recommendation from the Specialised Committee.*

Lord Trimble continues: *“If the committees created by the Protocol of the WA can operate without the consent of the NI Assembly and the parties, then that is completely destroying the basis of the GFA...It is a complete abandonment of the principles that led to the success of the 1998 Agreement and a return to the methods that failed in 1973-4, 1985 and 1995....The Protocol is not capable of upholding the GFA, it has run a coach and horses through it; it has driven it into the ditch”. “In contrast [to 1998] the Protocol emerges out of a closed negotiation, apparently set in stone, with no participation from the communities most affected.... [it] cannot claim to address the unique circumstances of the island of Ireland when one of the two communities rejects the Protocol”. “So far from protecting the GFA, as claimed by the EU27, the Protocol breaches it, and undermines it in many significant ways. The status of NI is substantially changed by the Protocol, the internal governance of NI is altered, and its democracy is undermined” (p11).*

It is an irony, to say the least, that the praise lavished upon the late John Hume for his role in negotiating the GFA should be accompanied by an almost complete ignoring of the views of his Nobel-prize-winning co-negotiator Lord Trimble. That Lord Trimble’s views were ignored, in my view, reflected firstly the abjectly poor negotiating record of the May government, leading of course to a failure to ratify her WA, and then to the very weak negotiating position of the Johnson Government undermined by the Benn amendment and the then parliament’s wider attempts to thwart the 2016 referendum result.

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### **The Issue of Good Faith**

A lack of EU good faith was evident from the start of the Brexit negotiations and was built into the Guidelines issued to the EU’s negotiators. The principal respect in which the Guidelines contravene the provisions of EU legislation on the exit of a member state (i.e. Article 50 of the Treaty on the Functioning of the EU) is their direct disregard of the requirement in paragraph 2 that "the Union shall negotiate *and conclude* (italics mine) an agreement with that state, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union"

Instead the EU unilaterally adopted, on April 29 2017, guidelines which are gratuitously in contravention of the provisions of Article 50, and grossly to UK disadvantage. The key factor was that the Withdrawal Agreement did not take account of the future relationship except through a non-binding document and refused to even begin negotiating a future trade deal until after the UK had left the EU and until matters of most concern to itself had been agreed in a treaty. The European Council further insisted that their guidelines should be the sole basis for the negotiations.

While making a free-trade agreement between two countries which already had free trade and with uniform regulations should have been a formality, we have reached a point where there might be no agreement at all. There are still accusations of the UK seeking its cake and eating it, while in practice the UK only asks for the level of FTA which the EU also has with Canada. While the rolling over of an existing agreement has taken a few weeks of talks with Japan, with the EU it comes with layers of

unprecedented demands. No other trade agreement demands dynamic alignment with EU regulations. Neither do trade agreements demand unrestricted access to a third country's raw materials – in this case fishing grounds.

As former MEP [Daniel Hannan](#) wrote in the Daily Telegraph on Sept 12th the idea of a NI Backstop was developed in the new EU spirit of 'delighted obduracy' which followed the 2017 general election result. EU officials were incredulous, he states, that Theresa May accepted the unpalatable options offered on Northern Ireland. Her sole purpose in his view was to get anything through the Commons that could be labelled 'Brexit'.

The wording of the backstop, now largely carried across into the Protocol, is weak from a UK perspective giving unnecessary hostages to fortune in the preamble including irrelevant references to the GFA which have dogged the UK negotiators ever since, appearing most recently in unfounded comments from the US Congress. These include:

*RECALLING that the Union and the United Kingdom have carried out a **mapping exercise** which shows that North-South cooperation relies to a significant extent on a common Union legal and policy framework.*

The details of the mapping exercise were concealed for a long time but when revealed (following an FOI request in June 2018) caused outrage even among neutral commentators. Andy Pollak, founding director of the Institute of Cross-Border Studies in Armagh, [described](#) as 'erroneous' the claim that '*a very important sector initiated by the Belfast Agreement is now imperilled by Brexit... Such co-operation is a tiny element of the governmental activities of both administrations*'.

Newton Emerson, respected Irish Times columnist, went further and [reported](#) that the mapping exercise found that only 16 of the 142 listed cross-border activities depended on or are linked to EU membership. The UK's National Audit Office found that the important health co-operation did not depend on EU membership. Emerson pointed out that the absence of EU membership does not prevent co-operation, which the NSMC was established to deal with. Unaccountably, UK officials co-authored what was close to a charade, serving Irish interests and wrong-footing the British. When Taoiseach Leo Varadkar widened Irish concerns from avoiding a hard border to also protecting the Belfast Agreement, Emerson commented that '*extending the definition of the Agreement so widely instead imperils it*'.

In a similar vein, are the following unnecessary elements of the Protocol's preamble;

*NOTING that therefore the United Kingdom's withdrawal from the Union gives rise to substantial challenges to the maintenance and development of North-South cooperation,*

*RECALLING that the United Kingdom remains committed to protecting and supporting continued North-South and East-West cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks for cooperation, including the continued operation of the North-South implementation bodies,*

*ACKNOWLEDGING the need for this Protocol to be implemented so as to maintain the necessary conditions for continued North-South cooperation, including for possible new arrangements in accordance with the 1998 Agreement,*

Much of this takes on the nature of what the Chinese in their dealings with the Soviet Union called 'unequal treaties'. Much was conceded that was unnecessary. These elements should have been

discarded in agreeing the new Protocol in October 2019 but in the fraught circumstances of the Benn Amendment were left in.

It is possible for the EU to repair the aggressive and one-sided elements of the Protocol, including by taking a responsible line within the Withdrawal Agreement's Joint Committee, set up to interpret the Agreement including the Protocol. Although few details have emerged of the discussions in the Joint Committee's Specialist Committee on Northern Ireland, it seems that few moves have been made to meet UK concerns. In particular, it seems little has been done to honour those elements of the Protocol's preamble which protect UK interests, including:

*NOTING that nothing in this Protocol prevents the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom's internal market,*

*UNDERLINING the Union's and the United Kingdom's shared aim of avoiding controls at the ports and airports of Northern Ireland, to the extent possible in accordance with applicable legislation and taking into account their respective regulatory regimes as well as the implementation thereof,*

*RECALLING that Northern Ireland is part of the customs territory of the United Kingdom and will benefit from participation in the United Kingdom's independent trade policy,*

*HAVING REGARD to the importance of maintaining the integral place of Northern Ireland in the United Kingdom's internal market,*

*DETERMINED that the application of this Protocol should impact as little as possible on the everyday life of communities in both Ireland and Northern Ireland,*

In these circumstances, a presumption of bad faith from the EU seems reasonable. The entire negotiation has been conducted to ensure that the UK does not gain economically from leaving the EU, and the loss of sovereignty in Northern Ireland appears to be an important part of teaching the UK a lesson. The latest EU threat, to block NI food supplies from GB, is the latest example of bad faith and one which the UK Government cites as a reason for the NI measures in the Internal Markets Bill. Newton Emerson [has no doubt](#) that this threat has been made by the EU through its failure by September 2020 to agree trade facilitations for UK supermarkets and more seriously through its extreme threat not to list Britain as a permitted exporter of live animals and food of animal origin.

The Internal Markets Bill is a belated, albeit poorly handled, attempt to recover lost ground. As some of the clauses quoted above show, the Protocol is ambiguous and in places contradictory. Whether the UK's implicit interpretation of the Protocol constitutes a breach of international law can be a matter of arbitration. Whether it is, or is not, the status of Northern Ireland within the United Kingdom should be given great attention, and the agreement to protect the EU Single Market should be conducted with greater sensitivity to the issue of UK sovereignty. It is to be hoped that this might be achieved within the Specialist Committee, but if it cannot then UK legislation should be used instead to avoid the weakening of UK sovereignty.

Contrast the relaxed attitude of the UK to customs controls on imports from the EU which of course are produced under exactly the same regulatory framework as the UK itself. For all the anguish about imports to the EU across the Irish land border, there has been almost none about imports from Ireland into the UK via Northern Ireland. There will eventually be a need to check Irish exports travelling to GB via Northern Ireland ports, probably using the red and green channel

approach advocated in 2017 by senior NICS officials Andrew McCormick and David Sterling (and suppressed by the May Government). The UK is taking a limited and pragmatic approach while the EU demands maximalist solutions with, thus far, even a refusal to list the UK as a third country for animal imports.

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### **Implications of the Protocol for the Northern Ireland economy and for investment in Northern Ireland;**

The key elements of the Protocol from an economic point of view are:

- the need for customs checks and potentially also tariffs for trade between GB and NI and for customs declarations between NI and GB
- The requirement for NI firms to observe existing and future EU regulations for any activity likely to affect trade with the EU
- The need for NI to observe EU state aid rules including setting upper limits on support for agriculture and the possibility that EU rules impinge also on state aids in GB.
- The role of the new Joint Committee's Specialised Committee on Northern Ireland in deciding what customs checks are required and the scope of regulations to be observed

### **NI Trade Patterns**

As is well known, firms in NI sell far more goods and services into GB than into the Republic of Ireland – usually three or four times as much. The latest NISRA figures suggest that exports of goods and services into the Republic comprise 6% by value of all goods and services produced in Northern Ireland. What is less well known is that close to a third of the goods exported into the Republic are classified as coming from the distribution sector. These goods are mainly new and second-hand cars and oil. Neither of these categories are of course produced in NI. Rather they are passing through. Although a small number of employees may be involved in such distribution plus distributors profits, the value of income from these activities in NI is likely to be small. For goods and services actually produced in NI only 4% go to the Republic. This is more than a footnote, but not that much more. Documents connected with the Backstop/Protocol often refer to the all-Ireland economy, but as these figures show, an all-Ireland does not really exist and frequent mention of it should be seen as propaganda. There are some activities which do have integrated cross-border production chains, mainly in the dairy sector, but this accounts for only around 1% of the total value of output in NI.

### **FTA or No FTA**

In general, the impact of the Protocol will depend on whether a Free Trade Agreement is signed between the UK and EU before the end of the current transition period. With an FTA there should be no or few tariffs and quotas on UK goods entering the EU and thus no need to charge tariffs on goods entering NI from GB which risk passing on into the EU across the Irish land border. Without an FTA tariffs and quotas will apply, and the Irish Sea border between GB and NI, constituting the economic border of the EU, is likely to require the collection of tariffs (which may be remitted for goods from GB which remain in NI). In the case of no FTA, firms in NI will continue to be able to sell

goods into the EU across the Irish land border free of tariffs and quotas and without customs checks. This advantage may lead some British and other firms to locate in NI in order to avoid tariffs and quotas which apply to trade from GB to the EU. If there is an FTA, much of this advantage for NI producers over GB producers will disappear since firms throughout the UK will be able to export tariff-free to the EU. NI producers may retain a small advantage in facing no customs checks into the EU, but this will be offset by a need for some customs checks on imports from GB into NI.

### **Export Declarations from NI**

The need for customs declarations for goods passing from NI to GB is inconsistent with the Protocol's Article 6 claim that *'nothing in this Protocol prevents the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to the rest of the United Kingdom's internal market'*. However, article 6 is complex and appears self-contradictory. Immediately after asserting unfettered access it implies that some fetters can apply: *"Provisions of Union law made applicable by this Protocol which prohibit or restrict the exportation of goods shall only be applied to trade between Northern Ireland and other parts of the United Kingdom to the extent strictly required by any international obligations of the Union"*.

Article 6 also says that the EU and UK will use best endeavours to facilitate trade between NI and GB in accordance with applicable legislation and the Joint Committee *"shall adopt appropriate recommendations with a view to avoiding controls at the ports and airports of Northern Ireland to the extent possible"* (my emphasis)". These ambiguities make it important for the UK to assert its interpretation that unfettered trade means what it says and applies to export declarations as well as other aspects of customs controls. This could have been settled within the Joint Committee, but it appears that this has not happened, and the UK Government has decided to apply UK law to this issue.

Even if export declarations are a minor encumbrance and not hugely opposed by the business community, they are unnecessary for protecting the EU Single Market and of course irrelevant for UK needs. The Protocol applies the entire Union Customs Code (Regulation(EU) 952/2013) to Northern Ireland including the requirement for export declarations. The Code does not say why such declarations are needed, but reasons include the controls of sensitive items such as weaponry and also for statistical purposes. None of this is relevant for trade within the UK and there is no good reason why the EU should maintain it in the unusual circumstances of applying the UCC to a region of a third country.

The Northern Ireland Department of the Economy (DoE) estimated that almost 40,000 jobs were in sectors which exported to the Republic. Perhaps inevitably this was described in the media as a prediction that a hard Brexit would cost 40,000 jobs. It would have been more accurate to say that some proportion of these jobs might have been lost. In a relentlessly negative assessment, the DoE failed to calculate any offsetting gains, for instance due to substitution by local firms of imports lost by southern producers. Nor was there any attempt to assess what Brexit would mean for the UK, whose taxes support a significant proportion of jobs in Northern Ireland. The October 2019 Protocol has removed the likelihood that jobs will be lost due to EU tariffs, but the wider impact on NI through the post-Brexit growth path of the UK as a whole, of course, remains an issue.

The impact of the Protocol on NI businesses will also depend on whether any FTA which is signed maintains existing EU rules on service sector trade, such issues as mutual recognition of services. The Northern Ireland Department of the Economy commissioned a study from Shepherd et al (Feb

2019) of Developing Trade Consultants of New York. This estimated that no deal on EU:UK trade would lead to high additional costs for service sector exports from NI to the EU (and presumably vice versa). These costs were calculated as equivalent to tariffs of 15% (logistics) to 80% (legal services). For a range of reasons these estimates were probably exaggerated and in any case NI service sector exports to Ireland are relatively small at just over 1% of the value of output of goods and services in NI. In addition, NI service sector firms may have gained shares of the NI domestic market if firms from Ireland were frozen out by UK regulations. The Protocol means that Northern Ireland firms will not now face these net costs. With no FTA this would give some advantage to NI service sector exporters especially in legal and business services. These sectors are small and under-developed in Northern Ireland and could gain from inward investment in the case of no deal. If an FTA is signed which maintains existing access to EU markets for all UK service sector producers, then there will be no such advantage.

### **Trade from GB to NI**

The big issue for NI trade is for imports from GB. The Protocol applies the Union Customs Code to all goods passing from GB directly to NI. All goods deemed at risk of passing through NI to the Republic will be eligible for tariffs and customs checks in the event of no deal. Even with a trade deal, goods at risk will be subject to checks. Irrespective of a trade deal all goods will also require customs declarations. The UK Government's proposed Trade Support Scheme (TSS) will mean that an HMRC agent will act as a customs broker free of charge to the traders. Firms will still require some additional administration but presumably this will be based on their usual invoices and will not present a large burden. The TSS scheme may take business from existing customs brokers and a legal challenge has been mounted.

With an FTA, there should be no tariffs and the number of regulatory checks can be minimised and perhaps restricted to animals and food products. Only around 1% of consignments currently coming into the Republic of Ireland from outside the EU are actually checked. Checks are usually conducted on an intelligence-basis after tip-offs on drugs etc. The EU appears relaxed about customs facilitations, including trusted trader status for supermarkets, but my understanding is that none of this has actually yet been agreed in the Joint Committee.

The problem arises without an FTA when tariffs will be payable. One possibility is that tariffs will be charged on all goods entering NI from GB with firms able to reclaim the tariff if they can prove that the goods remained in NI and were not exported into the EU. This involves a huge administrative burden and should be avoided. It is much better to restrict the 'at risk' list to a small number of sensitive commodities, but again there is no indication that the Joint Committee will agree this. One key issue is what happens when there is no agreement in the Joint Committee. The dispute resolution procedure described in Article 170 of the Withdrawal Agreement involves a 5-person arbitration panel with members nominated by both sides under the aegis of the Permanent Court of Arbitration in the Hague. Rulings of the arbitration panel are binding. Presumably such arbitration will apply to measures adopted in the Internal Markets Bill and potentially in a Finance Bill, but if these measures are part of UK law again presumably the 'binding' arbitration may be ignored if it goes against the UK.

The public debate on the impact of Brexit and specifically of the Protocol has focussed on the impact upon producers in Northern Ireland. Little has been said about consumers in Northern Ireland even though these may be the main losers from a customs border in the Irish Sea. A tariff border, in the event of 'no deal' will inevitably raise costs even if admin costs are funded by the TSS. If firms have to pay tariffs and then reclaim the cost, there will be a financing cost. There may also be a diversion of NI imports way from GB and towards Ireland and the EU, weakening UK



economic links and strengthening those on an all-Ireland basis.

Even without tariffs, in the event that there is a trade deal, customs declarations and checks for compliance with EU regulations will be a problem. If UK regulations diverge over time from those of the EU, as they well might if an FTA is signed with the USA, then certain products may be banned from Northern Ireland. It is easy to imagine that cheaper hormone treated beef will be available in GB but not in NI. The OECD find that food is currently 6% more expensive in the EU compared with average world prices and a similar difference may emerge between NI and GB. If greater competition with low-cost world producers reduces food production costs in GB, NI's food producers may lose some domestic UK markets.

The issue of east-west trade was not included in the Internal Markets Bill and the Government is said to intend to legislate for this in a future Finance Bill. One advantage to the Government in this approach is that Finance Bills cannot be overturned in the Lords.

### **VAT Rules in NI**

Article 8 of the Protocol states that EU regulations on VAT and Excise duties shall apply in NI. EU rules state that each member state shall apply a VAT rate not less than 15%. Although the UK and NI are not member states, this has been taken to mean that the VAT rate in NI will be set by the UK. Problems may arise if the UK wished to set rates below 15% (as it might have done in response to Covid) or indeed abolish VAT in favour of a sales tax or other alternative. If the eventual outcome is a different system of indirect taxation in NI from that in GB this would create another difference between NI and GB, further weakening the (UK) union.

It is true that the Joint Committee can adjust these arrangements as in para 5 of Article 8:

*The Joint Committee may review the application of this Article, taking into account Northern Ireland's integral place in the United Kingdom's internal market, and may adopt appropriate measures as necessary.*

The question once again is what happens when the Joint Committee is deadlocked on the issue.

### **State Aids**

Article 10 of the Protocol compels the UK to apply EU state aid rules in NI. This article list more than 20 sets of sectoral state aid guidelines and rules plus another 25 EU regulations, decisions and communications on the matter. Somewhere in this tangle of rules, apparently, is the implication that state rules in GB are also caught by EU rules if subsidised products are likely to enter Northern Ireland with the risk of being sold into the EU. If the UK decided, for example, to subsidise its loss-making steel plants in ways prohibited in the EU and the steel was used in cars sold in NI, then these subsidies could be over-ruled by ECJ judgments. However, none of this is apparent from a reading of the Protocol itself. One has to delve deep into EU law to discover it. The Internal markets Bill has wisely moved to avoid this possibility which should be confined to the main trade negotiations with the EU and not imposed through the backdoor of the Protocol.

Although the Internal Markets Bill does not specifically state that its proposed legislation on the Protocol applies only in the event of no FTA, UK Government spokespersons have said that this is the intention and a proposed amendment to the Bill may make this clear. The implication is that the Government expects an FTA to prevent a cross-over of EU state-aid rules from NI into GB. The UK Government's intention is that a post-Brexit UK will be free to use state-aids to improve the

competitiveness of the future UK economy. A Conservative Government is unlikely to wish to use state aids to support so-called 'lame ducks' except in extremis (the 1971 rescue of Rolls Royce is an example of a constructive use of lame duck rescue), but the backing of state funds for new technology firms is envisaged. Instead of an overreach into third country sovereignty the EU should consider protecting itself through a policy of emergency tariffs and quotas as it currently does to combat 'dumping'.

## Conclusions

The implications of the Protocol present an extraordinary situation for the UK, finding itself with a customs border between parts of its territory in contravention of the Act of Union of 1801. At a time of continuous pressure for a united Ireland this state of affairs does nothing to strengthen the union and is seen by many unionists as weakening it. There were alternatives that could have avoided a border in the Irish Sea, as demonstrated by the [Alternative Arrangements Commission](#) headed by Greg Hands and Nicky Morgan. The refusal of the EU and Irish Government to give a hearing to proposals for a soft land border (at least after the resignation of Enda Kenny as Taoiseach in 2017) was met by a supine reaction from the UK. This led to the UK accepting the EU's insistence that NI remain in the EU Single Market and Customs Union either alongside the UK, or as eventually happened, on its own.

The Protocol maximises EU and Irish interests – in the latter case advancing long-term ambitions towards Irish Unity. However, it does so in ambiguous and contradictory ways which fail to live up to its stated aims in article 1 of the Protocol. The Protocol was signed by the current PM under circumstances of abject weakness as the UK Parliament did its utmost to prevent the UK leaving the Single Market and Customs Union or even the EU as a whole. The Government is thus correct to interpret the Protocol as far as possible to UK advantage. If the EU, or even some in the Government, claim that this contravenes international law then this can be taken to the appropriate international tribunal.

Much more constructive however is a sensible agreement between the UK and EU. The first element would be a free-trade agreement between the EU and UK based on a broad understanding of UK intentions on commercial regulations and state aid. The second would be a reasonable interpretation of the Protocol, reached within the Joint Committee. This would provide reasonable protections for the EU recognising that the UK starts life beyond the transition period still fully compliant with all EU regulations. At the same time, it should avoid all fetters on trade within the UK.

The trail of bad faith and over-tough EU negotiating positions do not suggest that goodwill can bring forward a sensible outcome based on trust, and this pessimism is the real rationale for the Internal Markets Bill. The UK Government should hope not to have to use its threats but should nevertheless apply them if necessary. The threat of losing international reputation has some force but not much. An obscure disagreement about EU attempts to apply its legal order to a region of a sovereign third country will not overcome vested interests across much of the world. This much has been demonstrated by Japan in its haste to complete an FTA. Attempts by the Irish American lobby to damage UK interests, including from IRA-supporting congressman Pete King, are par for the course. Economic self-interest is likely to dominate in the long-term as Mike Pompeo has suggested. In any case, free trade agreements have more limited macro-economic impact than many believe. Nobel Prize winner Paul Krugman takes this [view](#), and analysis of OECD countries' growth trajectories shows few cases of a clear benefit from FTAs and some like Canada of a clear detriment.

The Protocol, with its border between NI and the rest of the UK, has caused dismay in unionist and loyalist circles in Northern Ireland. If there is a danger to peace it now comes from this direction. However, the dangers to the union are fairly limited since the economic impact of the Protocol may be little noticed in practice. If there were to be an unfavourable impact for consumers, through higher prices or limited access to goods, then article 16 of the protocol provides a remedy through a vote of the Assembly. A built-in nationalist majority for anything that damages the union will make it difficult for unionists to win such a vote, but it is nonetheless there to be won.

At the same time Brexit has provided a further wedge between Northern Ireland and the Republic. Both may remain commercially linked, but in every other sense Northern Ireland is now outside the EU like the UK as a whole, while Ireland remains inside the EU with a different currency. Now that Ireland is a significant net contributor to the EU budget the future could well be one of cooling Irish ardour for the EU. At the same time Northern Ireland is likely to continue as a prosperous part of the UK, with living standards above the UK average once housing costs are allowed for (see [ONS experimental household accounts](#)). Ireland's [distorted national accounts](#) disguise the fact that living standards in the South are [not higher](#) than in the North where a subvention maintains high standards of public service in the HNS, education and elsewhere. As long as this is sustained support in NI for Irish unity is likely to remain as low as the authoritative [Life and Times Survey](#) consistently shows.

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Not obvious that FTAs improve economic growth (as claimed by SoS last week) eg Uk joining EU and Canada NAFTA.  
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*September 2020*