Written evidence submitted by Traditional Unionist Voice (TUV), relating to the operation of The Windsor Framework

[OWF0014]

In considering the operation of the Windsor Framework, it is vital to assess its impact constitutionally, including in relation to the Belfast Agreement, and its impact economically.

1) The Operation of the Windsor Framework: Political and Constitutional Impact

The political and constitutional impact of the operation of the Windsor Framework is becoming more pronounced over time, as more and more aspects of the Windsor Framework begin to take effect. Given the importance attached to it as a standard, one of the most useful measures against which to assess the constitutional and political impact of the operation of the Windsor Framework is by means of examining its impact on the Belfast Agreement.

The creation of the Northern Ireland Assembly in 1998 was based on the consent of the largest unionist party at the time, the UUP and its constituency. The DUP subsequently brought into this framework after alleged changes made by the St Andrews Agreement in 2006. One can argue about how honest either or both parties were in 1998 and 2006 but that is not the point of this submission.

The sticking point for unionists who could not go along with this and separated from the DUP to create the TUV was our unwillingness (like Fine Gale and Fine Fail) to enter into government with Sinn Fein which continues to hold on to its ill-gotten gain, remains over seen by the IRA Army Council and continues to glorify the terrorism of the IRA.

Additionally, TUV rejected - and continues to reject - a system which denies the two fundamentals of democracy, the right to vote a party out of government and the right to have an opposition to hold the government to account and provide the electorate with an alternative to the previous administration. In light of the repeated failure of devolution in Northern Ireland over the last 25 years we regard our position as being vindicated.

Other unionists claimed engagement with devolution post 1998 was only possible - and clearly without unionist engagement in devolution the entire 1998 framework of government would become unsustainable – because of three critical provisions.

The first was acknowledgement that, in the words of the treaty, '*it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people.*'[1] The imposition of the Irish Sea Border involved the disenfranchisement of Northern Ireland in 300 areas of law. While it did not matter where you lived in the UK before 1 January 2021, everyone could stand for election to make all the laws to which they are subject, that happy non-discriminatory settlement, was terminated from January that year. From that point onwards the operation of the Protocol and then, after its amendment, the Windsor Framework (and in this regard the amendment to the text of the Protocol that resulted in it being renamed the Windsor Framework, made no difference) has created a new arrangement that declares that while the people of England, Wales and Scotland are worthy of the right to stand for election to the legislatures making all the laws to which they are subject, the people of Northern Ireland are only worthy of the right to make some of the laws to which they are subject.

[1] The_Belfast_Agreement_An_Agreement_Reached_at_the_Multi-Party_Talks_on_Northern_Ireland.pdf

This creates a clear change in the constitutional status of Northern Ireland moving us from being a full to a partial democracy, the biggest constitutional change since the creation of Northern Ireland. The practical effect of this is that we now meet the definition of a colony. Most colonies are largely self-governing but in some areas of law, their legislation is made in an imperial Parliament in which they have no representation. That is Northern Ireland's position.

The enormity of the constitutional change has not just been recognised by unionists but also within the Republic. For example, Stephen Collins, writing in *Ireland's Call* said:

'Instead there was an unprecedented arrangement in the shape of the Northern Ireland Protocol whereby one of the four component parts of the UK remained in the EU economic zone while the other three departed. It represented the most fundamental change in the status of Northern Ireland since the partition of the island by the Government of Ireland Act of 1920.' [2]

There has been an attempt to argue in light of the Supreme Court Judgement of February 2023 that the Northern Ireland Protocol/Windsor Framework does not violate the consent provision of the Belfast Agreement. That, however, is incorrect. The Supreme Court Judgement highlights that in our dualist legal system it was only able to adjudicate on our domestic law. In this context it was compelled to rule on Section 1 of the 1998 Northern Ireland Act rather than on the Belfast Agreement. While Section 1 was certainly an attempt to translate something of the consent principle in international law into domestic law, it plainly falls short of the protection set out in international law. In this context, although the Northern Ireland Protocol does not give rise to the one, very specific change addressed by Section 1 of the Northern Ireland Act 1998, namely the complete removal of Northern Ireland from the United Kingdom and into the Republic of Ireland, it does give rise to a change in constitutional status, and a very far reaching change at that, and so is certainly caught by the commitment in the Belfast Agreement, as international law. Thus, the operation of the Windsor Framework, while consistent with binding domestic law set out in S 1 of the Northern Ireland Act 1998, it is plainly in violation of the critical 'any change' protection in international law, as set out by the Belfast Agreement.

It is possible to respond to this by saying that because the Belfast Agreement is international law, and non-binding, it can be ignored, but there is a political cost to doing so. In the first instance, it does not look good to violate a central provision of international law that was the basis for securing peace in Northern Ireland certainly from 1998 until 2020. In the second instance, if this part of international law is ignored as a long-term arrangement, then the basis for unionist engagement with the devolved institutions is removed.

The second critical provision was based on recognition of the impact of the years 1971/2. In October 1971 the nationalist community said that it was no longer willing to co-operate with being part of the people of Northern Ireland such that it could accept majority voting in which it found itself in the minority, where unionists were the majority. Nationalists instead declared that they were a people in their own right and withdrew from Stormont and set up a parallel nationalist parliament, representing the nationalist people of Northern Ireland. The UK Government intervened the following March to terminate the Parliament of Northern Ireland and from that point onwards controversial decisions regarding the governance of Northern Ireland were never (until last December) been made on a majority basis, thereby invoking a single people. It was only possible to restore devolved government when a mechanism was developed to ensure that if either nationalists or unionists felt that a proposition constituted an existential threat to their community which would

[2] Stephen Collins, *Ireland's Call: Negotiating Brexit*, 2022, Dublin, Red Stripe Press, p. 4.

likely be imposed on the basis of a simple majority vote, they could invoke cross community consent, requiring support for the measure by both communities. There is absolutely nothing in the text of the Belfast Agreement limiting the application of this protection to certain classes of decision. It plainly pertains to all Stormont decisions.[3] It is only because of this provision that devolution was possible, when Stormont was not suspended, between 1998 and 2020.

The operation of the Windsor Framework in this regard is deeply problematic on two bases.

First, on the basis of the Belfast Agreement cross community consent plainly is required in relation to all Stormont decisions if either community wishes to invoke it. The stated justification for not having cross community consent was that it was not required by law. As a matter of domestic law, expressed in the Northern Ireland Act 1998, as amended in 2020, that statement is correct. It is, however, incorrect as a matter of international law. The Safeguards Section of Belfast Friday Agreement (see text in footnote 3) requires that provision be made for cross community consent in relation to decisions made at Stormont. There is nothing in the text of the agreement limiting the application of the requirement of cross community consent to certain categories of decision. Clearly the Government felt that international law had been faithfully reflected in the language of the 1998 Act, which is why they moved to amend it in 2020 to limit the application of cross community consent to certain classes of decision by means of disapplying it to Stormont votes on the future application of the Protocol. Specifically, in November 2020 they introduced a new Schedule 6A to the Northern Ireland Act 1998, through the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020, 18 (5) of which disapplied cross community consent to Stormont votes on the application of the Protocol.[4]

Second, in approaching cross community consent in good faith, we have to approach it with common sense, recognising that the motive for cross community consent was to protect the interests of both communities in the context of dealing with perceived existential threats which are, by definition, more rather than less likely to arise in the context of controversies pertaining to 'high politics', the domain of international relations, than more mundane questions of 'low politics'. In this context it is obviously contrary to reason and absurd to try to argue that it was only ever intended that cross community consent should only apply to less controversial decisions taken at Stormont such that if it ever was asked to make determinations about ceding powers to the Republic of Ireland, the requirement for cross community consent would fall away.

Moreover, the presenting difficulty has been greatly compounded in the case of the Article 18 vote by the fact that not only did it facilitate the first majoritarian vote at Stormont in over half a century, it also pertained to a more far-reaching constitutional decision, than any made before in the history

[3] 'Safeguards 5. There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including… (d) arrangements to ensure key decisions are taken on a cross-community basis; (i) either parallel consent, i.e. a majority of those members present and voting, including a majority of the unionist and nationalist designations present and voting; (ii) or a weighted majority (60%) of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting. Key decisions requiring cross-community support will be designated in advance, including election of the Chair of the Assembly, the First Minister and Deputy First Minister, standing orders and budget allocations. In other cases such decisions could be triggered by a petition of concern brought by a significant minority of Assembly members (30/108).'

[4]'18 (5) Section 42 does not apply in relation to a motion for a consent resolution.'
The Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020

of Northern Ireland. It involved renouncing the rights of Northern Ireland/the UK, to make its legislation in 300 areas of law in favour of the Republic of Ireland and 26 other states.

From 1972 until 2017 unionists held or would have held a majority of seats at Stormont. We were told we had to sacrifice the normal benefits of having a majority out of regard for nationalist concerns. That is a lot of sacrifice. Imagine then our shock when soon after we find ourselves no longer in the majority that majority voting is imposed. This is plainly discriminatory, sending the clear message that while unionist majorities cannot be accepted other majorities are fine. In this context the Article 18 vote and inevitably been perceived as a gerrymandered vote to silence the voice of unionists.

The destabilising impact of the imposition of majoritarian voting in relation to the Article 18 vote has been further extended by the Secretary of State's response to the first use of the Stormont Brake. Every single unionist MLA rejected the EU Chemicals Regulation and yet it has been imposed and thus, once again, the protection that unionists (and nationalists) enjoyed between 1998 and 2024 has now been removed. Every unionist can object, and they can be ignored. This again completely destabilises the Northern Ireland political settlement, sabotaging stability by challenging the foundation for unionist engagement.

The third critical provision that made devolution possible from 1998 until 2024, which has now been removed by the operation of the Windsor Framework, again pertains to an ongoing provision of international law that is currently being violated by domestic law, the requirement of the state parties to uphold the right of the people of Northern Ireland to 'pursue democratically national and political aspirations.'[5] This can only be understood as an obligation to uphold the right in question from the point at which it was bestowed, when the people of Northern Ireland had the right to 'pursue democratically national and political aspirations' in relation to all the laws to which they are subject. Rather than being upheld, the operation of the Windsor Framework has resulted in that right being subject to a precipitate diminution, as the people of Northern Ireland now find that we can no longer 'pursue democratically national and political aspirations' in relation to 300 areas of law, with respect to which we could previously 'pursue democratically national and political aspirations', such that our citizenship has been subjected to far reaching truncation.

It is possible to respond to the violation of all the above: the consent protection, the cross-community consent protection and the democracy protections, by saying that they relate to protections in a non binding agreement in international rather than domestic law, and so can be ignored, but that is a politically foolish and very high risk strategy. In the first instance, it is foolish to make domestic provisions that violate the central international law provisions that have made it possible for Stormont to function as the devolved assembly of a divided society. In the second instance, even if these provisions did not exist in international law, and had just been made on the basis of goodwill, to the extent that devolution was only possible with them, their removal would be a major cause of concern and place devolution in jeopardy.

The Stormont Brake and Applicability Motion

In approaching the Brake and Applicability Motion, we need to acknowledge that the democratic deficit is a confusing and inappropriate term which fails to acknowledge the scale of the presenting

[5] 'RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY Human Rights 1. The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular: … the right to pursue democratically national and political aspirations;' The Good Friday Agreement

injustice. It should not be used when talking about the constitutional impact of the Windsor Framework.

The democratic deficit is the term used to describe the democratic shortfall that existed when we were part of the EU. The deficit arose when, notwithstanding having a seat in the Council of Ministers and MEPs in the European Parliament, the UK could be overruled on occasion by qualified majority and majority voting and by decisions of the European Court of Justice. It was a deficit, a shortfall, because it existed against the backdrop of our being represented within the EU institutions in the context of the absence of a felt European demos which would have (had it existed) transformed the experience of being overruled to the experience of being in the minority of a European people.

The experience of Northern Ireland by contrast is quite different. In the 300 areas of law in relation to which we have effectively lost our citizenship for at least the next four years, we are not looking at a shortfall but a complete negation of democracy because the laws are made for us by the bicameral legislature of the EU, the Council of Ministers (the Upper House) and the European Parliament (the Lower House) in which Northern Ireland has no representation whatsoever. Rather than generating a democratic deficit, a shortfall, these arrangements create what is in effect much more like a colonial relationship, where we are, in the 300 areas, ruled by foreigners from abroad.

In a context where we are not clear and transparent about the nature of the presenting injustice - as was the case when the Windsor Framework was announced - it is no surprise that the 'solutions' devised to address them should completely miss the target, as in the case of the Stormont Brake and Applicability Motion. When presenting the Windsor Framework on 27 February, the then Prime Minister told Parliament that their effect was one of 'eliminating the democratic deficit.'[6]

The truth is that neither the Stormont Brake, nor the Applicability Motion mechanism address the removal of our citizenship in relation to the 300 areas of law.

The first difficulty is that the Brake and Applicability Motions only apply to some imposed law and thus make no attempt to address the presenting difficulty in relation to those aspects of the 300 areas they do not touch.[7]

The second difficulty is that rather than restoring our citizenship, the right to stand for election to make the laws to which we are subject in the 300 areas, where they do apply, the Brake and Applicability Motion only provide a right to stand for election to try to stop laws that have already been made for us by a Parliament in which we are not represented. Both mechanisms, therefore, are discriminatory because they provide us with a second class, negative citizenship, limited to trying to stop laws rather than make them, and when the attempt to stop them is made, it can be overruled by the UK Government, as in the case of the first application of the Stormont Brake. The point should also be made that even had the Secretary of State agreed to the pulling of the Brake, the matter would then have been sent to international arbitration between the EU and UK, which could have sided with the EU. In other words, an international arbitration body has the right to negate even our very truncated expression of citizenship. [8]

---

[6] Commons Chamber - Hansard - UK Parliament

[7] This is made plain in the following para: 'This paragraph covers Union acts referred to in the first indent of heading 1 and headings 7 to 47 of Annex 2 to this Protocol, and the third subparagraph of Article 5(1) thereof.' DECISION No 1/2023 OF THE JOINT COMMITTEE ESTABLISHED BY THE AGREEMENT ON THE WITHDRAWAL OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FROM THE EUROPEAN UNION AND THE EUROPEAN ATOMIC ENERGY COMMUNITY of 24 March 2023 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22023D0819

The effect of the operation of the Windsor Framework constitutionally has, therefore, been deeply destabilising. The current arrangements are profoundly unjust and constitute a greater threat to peace and stability in Northern Ireland than anything witnessed in the last thirty years.

Some might respond to this by saying how can we reconcile the above with supportive submissions from nationalist parties and the Alliance Party? The answer is simply that they are not committed to the ongoing existence of the United Kingdom and have an alternative priority. In the case of nationalists/republicans, the attraction is the creation of an all-island economy for goods, upheld by an all-island legal framework, where the laws for Northern Ireland are made by Dublin and not London in any sense. For them, Windsor offers a Framework for the break-up of the UK, and insertion of Northern Ireland into the Republic of Ireland, at which point nationalists hope they will be fully re-enfranchised, but in the polity of their choice, rather than in the UK. In the case of the Alliance Party the attraction is ostensibly the location of Northern Ireland in a European Union, upheld by the Europe-wide legal framework, where the laws are made by the 27 states of the EU. To the extent that: i) it will not be possible to achieve this objective without Northern Ireland becoming part of the Republic, ii) the main impact of our life arriving from being part of the EU, would be being part of the Republic of Ireland and iii) nationalists who secured the relocation of Northern Ireland into the Republic, would also secure location in the EU, the practical consequences of the difference between the nationalist and Alliance position are really tiny. Both groups are content to surrender the UK citizenship of their constituents in the short-term to create dynamics that they will expedite the reconstruction of Northern Ireland in a Republic of Ireland/EU polity in which they hope Northern Ireland citizens will eventually be re-enfranchised.

In governing a divided society, the challenge is not to bring the objectives of the above parties into line with unionists or vice, versa, but to provide space for them to live together and in a context where, in the absence of a referendum to leave the UK, Northern Ireland's place in the UK must be upheld and respected.

2) The Operation of the Windsor Framework: The Economic Impact

In considering the economic operation of the Windsor Framework, it is useful to do so from the perspective of the following:

i) Unfettered Access

The Safeguarding the Union Command paper boasts about Northern Ireland's unfettered access to Great Britain. For example, at para 8 it talks of 'new statutory protections for Northern Ireland's constitutional position and its unfettered access to the UK's internal market.'[9] Working on the basis of the plain meaning of words, Northern Ireland's enjoyment of unfettered access to the rest of the UK, implies not just access for selling goods, it also means access for buying them. Moreover, and of particular importance for Northern Ireland as a small part of the UK economy, this does not just refer to buying and selling finished products. It also relates to buying and selling inputs to manufacturing processes from the wider UK. In reality, however, the claim to provide Northern Ireland unfettered access is confounded by the operation of the Windsor Framework on two bases:

[8] See: 'In case the arbitration panel has ruled, in accordance with Article 175 of the Withdrawal Agreement, that the United Kingdom has failed to comply with Article 5 of the Withdrawal Agreement in relation to a notification under Article 13(3a) of the Windsor Framework, swift compliance with the ruling of the arbitration panel should be achieved, as set out in Recommendation No 2/20234' Microsoft Word - Joint Declaration by the United Kingdom of Great Britain and Northern Ireland and the European Union in the Withdrawal Agreement Joint Committee on Article 13(3a).docx

[9] https://assets.publishing.service.gov.uk/media/65ba3b7bee7d490013984a59/Command_Paper__1_.pdf

First, the legislation in question only addresses the movement of goods one way, from Northern Ireland to Great Britain. Second, Section 45B of the Internal Market Act nullifies the claim to unfettered access, by applying export procedures to the movement of goods in five areas from Northern Ireland to Great Britain.[10] Thus the operation of the Windsor Framework has not provided unfettered access to GB in the manner people were led to believe.

ii) Replacing the Green Lane with the UK Internal Market System

The Safeguarding the Union deal also said that it was replacing the Green Lane with the creation of the UK Internal Market Scheme. On Page 14, Safeguarding the Union states:

'43. The measures the Government is committing to comprise:'

It then lists the actions it would take: a) to z)

On page 15, we are presented with the action:

'e. Replacing the green lane with a UK internal market system governing the movement of goods which will remain within the UK, backed by new protections for historic trade flows and reductions in burdens and formalities.'[11]

The sense here is that the Green Lane, introduced by the Windsor Framework, was what had been, and was now, thanks to the new deal, *Safeguarding the Union*, being replaced in this respect by something better, the UK Internal Market Scheme.

The operation of the Windsor Framework has, not surprisingly, defied this, since, if one looks back, the Green Lane always has been the UK Internal Market System. Paragraph 10 of the Windsor Framework Command paper states:

'10. The agreement puts in place a full set of new arrangements, through a new UK internal market system (or green lane) for internal trade.'[12]

Indeed, all the guidance that already existed for the UK Internal Market System/Green Lane, continued to be held online and described as the Green Lane.

The logical problem is that you cannot replace something with itself.

Operationally the fundamentals of the Windsor Framework in relation to the movement of goods from GB to NI remain unchanged. Indeed, to the extent that Safeguarding the Union generated legislation inserting Section 45B into the Internal Market Act, requiring the application of customs procedures on the movement of goods from NI to GB, it actually represented, to that extent, a deterioration in Northern Ireland's position.

iii) The UK Internal Market System

Having established that the UK Internal Market System was introduced by means of the Windsor Framework from 2023 and not by means of any amendment to it through Safeguarding the Union, it is important to interrogate the operation of the UK Internal Market System that it introduced. To this end it is helpful to cite the whole of para 10 of the Windsor Framework.

---

[10] https://www.legislation.gov.uk/ukpga/2020/27/section/45B

[11] https://assets.publishing.service.gov.uk/media/65ba3b7bee7d490013984a59/Command_Paper__1_.pdf

[12] https://assets.publishing.service.gov.uk/media/63fccf07e90e0740d3cd6ed6/The_Windsor_Framework_a_new_way_forward.pdf

'10. The agreement puts in place a full set of new arrangements, through a new UK internal market system (or green lane) for internal trade. This will mean that goods being sold in Northern Ireland will be freed of unnecessary paperwork, checks and duties, using only ordinary commercial information rather than customs processes or complex certification requirements for agrifood. In contrast, trade moving into the EU will be subject to normal third country processes and requirements. These new arrangements will be underpinned by new data-sharing arrangements, using commercial data and technology to monitor trade flows, rather than relying on international customs procedures that were inappropriate for UK internal market movements. In the process we have removed the border in the Irish Sea for internal UK trade, protecting Northern Ireland's integral place in the UK internal market.'[13]

It is through the UK Internal Market System so called, that the clearest attempt to mislead is located. This should be confronted both in terms of the terminology of the 'UK Internal Market System' and the claims made about it in this paragraph.

The term 'internal market' has an established meaning. If you are in an 'internal market' you can move goods without encountering the costs of having to negotiate a customs or international SPS border. (There are two aspects to the costs of a customs border, one is the paperwork which exists regardless of whether duties must be paid, and the second is any duties that may have to be paid.) As soon as you arrive at such a border, you reach the geographical limit of the internal market in which you have been located, its boundary, and if you cross that boundary, you cross over into another internal market.

In this context the use of the term UK Internal Market System for the Green Lane arrangements is deeply misleading because the arrangements in question remove neither the customs nor the international SPS border. They simplify some of the paperwork, but they do not remove the reality of the border which conveys the end of one internal market and the beginning of another, that of the EU single market. Thus, rather than giving effect to a UK internal market for goods, the so-called UK Internal Market System is concerned with manging the movement of goods from the Great Britain Internal Market for goods to the EU Single Market for goods. This is obvious to see, not least by means of comparing and contrasting: a) the requirements for moving goods from England to Wales, in relation to which one has unfettered access, and b) crossing the end of the GB Internal Market for goods, into the EU Internal Market for goods where, by contrast, one must fill in and submit a customs and if necessary an SPS declaration and be subject to 10 to 5% identity checks at a border control post entering Northern Ireland (the EU Internal Market for goods). It is true that on the green lane the customs and SPS forms are simplified, but the critical point is that they are not removed and that the border exists marking the end of the Great Britain internal market and the beginning of the EU single market. (Indeed Article 14 of EU Regulation 2023/1231 makes it clear that the underlying default arrangement is not just the existence of a normal expression of an international border in the Irish Sea border in relation to the red lane, but also in relation to the green lane). Moreover, the benefits of simplification are offset by additional requirements, having to successfully apply to join, and remain on a trusted trader scheme (something you don't have to do in trading within the GB internal market), having to provide 'Not for EU' labels and having to demonstrate that the goods do not enter the Republic of Ireland. Thus, the costs associated with negotiating the international border are better understood as having been redistributed rather than removed. These green lane costs are very considerable, especially demonstrating that goods don't

[13] Ibid.

enter the Republic, such that some traders are choosing either to stop selling to NI, or to use the red lane.

Moreover, in order to fully appreciate the sense in which the UK Internal Market for goods no longer exists, we have to remember that we are not just looking at goods moving from Great Britain to Northern Ireland having to negotiate the border dividing the Great Britain Internal Market System from the EU Internal Market System with simplified customs and SPS forms in exchange for additional balancing 'Not for EU' costs. We also have to remember that the border exists first and foremost in the conventional way. There are many goods that are not eligible for the green lane and that have to travel on the red lane, that is cross the border between the GB Internal Market and the EU Internal Market with full customs and SPS forms but without the burden of having to be accredited, provide Not for EU labels and prove the product does not reach the Republic.

The principal impact of the operation of the Windsor Framework UK Internal Market System is therefore to propagate confusion, because of its misleading name. If it was a product for sale, it would not meet the Trade Descriptions Act. It conveys the impression of an effect that is entirely contrary to its actual effect. It is a bit like taking a product that is highly calorific, and marketing it as unusually un-calorific. It should be renamed to acknowledge its true purpose and effect, along the lines of 'the Windsor Framework GB – EU Border System.'

iv) Dual Market Access

However, in some ways the greatest deceit surrounding the operation of the Windsor Framework in the economic sphere, has been propagated with respect to 'dual market access.' This opportunity, and specific term, are referenced by para 151 of *Safeguarding the Union*. It has also been given expression through talk of it becoming 'the Singapore of the Western Hemisphere.'

Dual market access suggests that Northern Ireland is in a privileged position in that it is part of the UK Internal Market for goods, thus having access to the rest of the UK, while also enjoying access to the EU Single Market, as if it was part of the EU as well. Given that all countries in the western world enjoy market access to each other, subject to the need to negotiate a customs and SPS border, if dual market access is to confer a distinct benefit it must involve more than this, specifically being able to access both the markets as if one is actually located in both markets, able to access them without having to negotiate a customs and international SPS border ordinarily between them. If true, this certainly would confer an advantage on Northern Ireland, but, as we have already seen, it is not true because the removal of the NI-ROI border has been in return for the creation of the Irish Sea border. While Northern Ireland's position is unusual, it does not amount to dual market access in the above sense and the practical impact of its usual situation actually confers upon us a distinct disadvantage not an advantage.

When we get past the term 'dual market access' which suggests a balanced benefit, both ways, to the actual operation of the Windsor Framework, what we find is a striking asymmetry. On the one hand, dual market access is a two way access, unfettered access to sell both to the Republic and GB, but only unfettered access to buy from the Republic. The damage caused by this asymmetry is obscured for presentational purposes by a deliberate attempt to encourage people to think that what an economy needs to thrive is the freedom to sell its goods and that because NI goods can move freely to Great Britain as well as the Republic of Ireland we are afforded a massive advantage. Where dual market access breaks down is in relation to the ability to equally procure things from the Republic and Great Britain. While we can procure things freely from the Republic of Ireland/EU

without crossing a customs and international SPS border, we can only procure things from Great Britain subject to having to negotiate a customs and international SPS border.

If one thinks simplistically, as if the Northern Ireland economy was a self-sufficient economy that only engages with the outside world for the purpose of selling completed products, this would not matter. In truth, however, we must engage, first, with the fact that in the contemporary global economy no economies are internally self-sufficient - rather they depend on inputs from other parts of the world into their production process - and, second, with the fact that in the case of Northern Ireland this point is compounded many times because far from being an economy in its own right, it is only a small part of the UK economy into which it has been completely integrated for two hundred years. As such its ability to make things has been based on its ability acquire inputs from the rest of its home economy, Great Britain. Thanks to the Irish Sea border, however, these inputs now have to negotiate the cost of a full customs border (they don't qualify for the Green Lane and even if they did this still amounts to the border for the reasons set out above), as if they are coming from a foreign country, significantly increasing costs, denting profit margins and the viability of production. Businesses might be able to sell their goods freely to GB, but they can no longer do so competitively because their input production costs increase significantly.

Furthermore, although it has been said that goods moving from NI to GB will have unfettered access such that the Irish Sea border is a one-way border (West East) the truth is more complicated. Section 45B of the Internal Market Act sets out five bases upon which goods moving from Northern Ireland to Great Britain will be subject to customs procedures as if moving to a foreign country.

In addition to the above economic difficulties that arise from the impact of the border as it relates to goods from GB moving to NI and vice versa, we also have to factor into the equation that the Irish Sea border is the border over which goods entering Northern Ireland from the rest of the world, beyond GB, must also cross. This is a huge issue because the EU is more protectionist than the UK and so manufacturing businesses located in Northern Ireland again find themselves operating at a distinct disadvantage, compared with comparable manufacturers based in Great Britain. Not only do they have to pay for the cost of negotiating all the border processes, as if trading with a foreign country when taking inputs from the rest of its own country, none of which apply in GB (or in any other country), they also have to negotiate the costs of paying significantly higher customs duties if receiving goods from outside the EU because EU tariffs on goods outside the EU tend to be higher than UK tariffs.

In this context, rather than the operation of the Windsor Framework affording Northern Ireland the opportunity to become the 'Singapore of the Western Hemisphere', we have instead been subject to very serious disadvantage. Far from giving us the best of both worlds, it has actually given us the worst of both worlds. One the one hand, the operation of the Windsor Framework joins us with a smaller proximate economy with which we have, for many economic purposes, very little in common,[14] and in relation to which we usually cannot source our raw material requirements. On the other hand, it frustrates our access to the larger proximate economy in which we have fully integrated for over 200 years, and from which we have been able to source many of our raw material requirements. As such the operation of the Windsor Framework has placed our economic wellbeing in relation to the goods economy in jeopardy, although we have been protected so far by a buoyant service sector in relation to which the Windsor Framework does not apply.

[14] Policy Exchange - The Island of Ireland Two Distinct Economies, 2022

The Northern Ireland Department of economy should stop confusing the public by talking about 'dual market access' and acknowledge that the price paid for full access to the small proximate economy with which we are not well integrated (the Republic of Ireland) has been to have been pushed out, to a very significant degree, of the much bigger proximate economy of which we have been a fully integrated part for more than two centuries (the UK). Some might say, well, are we not connected to 500 million consumers in the EU? The answer is yes, but much of want Northern Ireland produces are the kinds of products that don't tend to travel great distances because of the cost. That means that the key is not how big is your single market, but how big is your proximate single market. We were much better served by being a fully integrated part of the sixth biggest economy in the world than in the Republic of Ireland.

The facts speak for themselves. Despite the former President on the United States promising £6 billion of inward investment on the back of the Windsor Framework there has not been a single inward investment project in the last four years. The suggestion by various people, including the economy minister, that businesses need to be made more aware of dual market access and are interested when told, is not credible. Businesses are clever at spotting opportunities. If there was significant opportunity to exploit in Northern Ireland, companies would have piled in.[15] No doubt when a new business is first told about dual market access they are interested, but they will quickly work out that, rather than conveying an advantage, 'dual market access' conveys a disadvantage and vote with their feet.

The Impact of Services Booming and the Border Not Yet Fully Implemented

There is a sense in which the economically destructive implications of the application of the Windsor Framework have hitherto been obscured by: i) the fact that the services sector is booming, something we will not always be able to reply upon and ii) the fact that the Windsor Framework is not yet being properly implemented.

i) Business to Business Parcels Border

A key aspect of the red lane that still has not even been commenced, and which is causing NI manufacturers real concerns, is the business to business parcels border, which comes into effect on 31st March. The Trader Support Service made a presentation in April 2024 on the application of the business to business red lane parcels border, looking forward to its commencement at the end of September. They were upbeat and talked about the fact that there would be multiple webinars, three months out from commencement, two months out from commencement and one month out from commencement. The feedback to the seminar in April 2024 was very negative because businesses and hauliers deemed it unworkable and sought clarification. No further webinars materialised and in mid September, just two weeks before its implementation, it was postponed, not by one or two but by 6 months. The 31 March is now fast approaching and yet businesses remain, just as much in the dark about how the system will actually work and concerned about whether they will be able to survive in their current forms.

ii) Border Control Posts Becoming Operational

In some ways, however, the most concerning consideration is the fact that, notwithstanding the application of aspects of the border at the present time, it is widely recognised that it is not properly being enforced because there is not the port infrastructure to do so. However, border control posts

[15] https://niassembly.tv/committee-for-the-economy-meeting-wednesday-16-october-2024/ 1 hour 16 minutes

are under construction and due to be completed and ready to come into operation in July. It will be completely impossible to fully appreciate the divisive nature of the Windsor Framework until the border control posts become operational.

The Operation of the Windsor Framework and Biosecurity

In responding to a debate on the Official Controls Amendment Regulations 2024, and how those regulations governing GB, relate to the Windsor Framework governing NI, the UK Government has effectively conceded that the biosecurity of Northern Ireland is ultimately the responsibility of the EU. This is a huge development because the provision of security to one's citizens is one of the most basic essential functions of the state, and biosecurity constitutes a key element of this state function. Notwithstanding the fact that Article 1 (2) of the Windsor Framework states that it 'respects the essential state functions of the UK', it is now clear that its operation is not having this effect. For biosecurity purposes, and notwithstanding attempts to adjust the language used, Northern Ireland is now effectively on a par with the rest of the world for biosecurity purposes. While it is the case that the whole island of Ireland has been treated as a single epidemiological unit for some time, prior to 2021 this never changed the fact that the biosecurity of Northern Ireland was just as much the responsibility the UK Government as the biosecurity of Great Britain and that, notwithstanding the fact that Northern Ireland is joined to the Republic with a land border, and the island of Ireland treated as a single epidemiological unit, this did not change the fact that Northern Ireland was ultimately part of the UK security identity because it was fully part of the United Kingdom. The effect of the operation of the Windsor Framework has been to change this.

When challenged on the fact that the UK Government has through the operation of the Windsor Framework abdicated an essential biosecurity on 29 January, the Government did not deny it. The Minister said:

'Northern Ireland continues to be protected under the biosecurity regime of the EU, in line with the Windsor Framework. Under this regime, Northern Ireland implements official controls and additional protections in response to risks, such as measures related to pest-free areas, traceability and additional notification requirements for the highest-risk goods to maintain the biosecurity of the island of Ireland.'[16]

And when challenged specifically about this in relation to the biosecurity of Northern Ireland with respect to the recent Foot and Mouth outbreak in Germany the minister said:

'I want to stress that the EU takes its biosecurity responsibilities for something like foot and mouth extremely seriously. There had not been a foot and mouth outbreak in Germany since 1988, so this is very significant for them'[17]

Conclusion

There is a need to find an alternative way of managing the border with the EU. The Official Controls Amendment Regulations 2024 concede that it is acceptable to have an SPS border without any border infrastructure to deal with the movement of goods from the Republic and EU into the GB part of the UK by way of Northern Ireland and thus remove the stated justification for moving the border from the international border to the Irish Sea, namely the imperative to a avoid a hard border across the island of Ireland. If a border without infrastructure is acceptable, then there can be no justification for moving it from the international border. To do so means needlessly

[16] Official Controls (Amendment) Regulations 2024 - Hansard - UK Parliament
[17] Ibid.

disenfranchising 1.9 million people in 300 areas of law, destroying the UK single market for goods, effectively removing Northern Ireland from the UK biosecurity identity and disrespecting the territorial integrity of the UK. The better way forward is to adopt the solution for managing the border along the international border without any infrastructure – without a hard border – as proposed initially within the EU by Sir Jonathan Faull then a Director General at the EU together with Prof Joseph Weiler and Prof Daniel Sarmiento.[18] The TUV has embraced this proposal and the leader of the TUV, Jim Allister KC MP, introduced a Bill in Parliament to give effect to it, the EU (Withdrawal Arrangements) Bill, sponsored by all Northern Ireland unionist MPs and the former Conservative Party leader Rt Hon Sir Iain Duncan Smith MP, the leader of Reform, Nigel Farage MP and the Labour MP Graham Stringer, which is currently in the Commons.[19] The Bill would make the Windsor Framework redundant and facilitate: i) the re-enfranchisement of the people of Northern Ireland, ii) the recreation of the UK single market for goods and full integration of NI with it, iii) the restoration of NI in the UK biosecurity identity and iv) restore the territorial integrity of the UK without introducing a hard border across the island of Ireland. It would further bring us back into full conformity with the consent, cross community consent and democracy protections of the Belfast Agreement. It would also make a trade deal with the United States possible, something that will remain beyond our grasp for so long as part of the UK remains in the EU. It is striking that ahead of Second Reading, Sir Jonathan Faull, Prof Joseph Weiler and Prof Daniel Sarmiento issued a statement:

"On Friday of this week, the House of Commons will be debating a Bill which attempts to address some of the difficulties resulting from the Brexit divorce agreements between the EU and the UK, which might be of interest to readers. In 2019, we proposed a solution which would have obviated any need for these complicated and divisive legal manoeuvres. The UK and the EU could have respected each other's positions and saved everyone a great deal of time and effort. The Financial Times characterised the proposal as a 'win-win solution'. Regrettably, it was not followed."

February 2025

[18] https://verfassungsblog.de/an-offer-the-eu-and-uk-cannot-refuse-ii-faq/
[19] https://publications.parliament.uk/pa/bills/cbill/59-01/0018/240018.pdf