Governance and dispute settlement in the Ireland/Northern Ireland Protocol

Larik, J.E.

WORKING PAPER N. 16 – 2021

Governance and Dispute Settlement in the Ireland/Northern Ireland Protocol

Joris Larik·

Abstract: The Protocol on Ireland/Northern has the questionable honour of having its dispute settlement mechanisms being activated first under the new post-Brexit agreements between the EU and UK. This chapter highlights the two main hallmarks of the Protocol: on the one hand, being an integral part of the Withdrawal Agreement and the post-Brexit legal framework more broadly, and, on the other, being one of the last and most enduring holdouts of EU institutions applying EU law in a part of the UK. These characteristics, coupled with the high political stakes in the context of North-South relations in Ireland and the peace process, merit close scrutiny of the Protocol's governance and dispute settlement provisions. Based on an analysis of the relevant provisions and informed by leading theories on compliance in international law, this chapter argues that due to fundamentally different views and strategies of the EU institutions and the UK government, the design and use of the Protocol's mechanisms have the potential to exacerbate rather than mend EU-UK relations.

Table of contents:

Keywords: Brexit, Compliance, Dispute Settlement, Governance, Protocol on Ireland/Northern Ireland, Withdrawal Agreement

· Leiden University, j.e.larik@luc.leidenuniv.nl

A revised version of this paper is forthcoming in Federico Fabbrini (ed.) *The Law & Politics of Brexit. Volume IV: The Protocol on Ireland / Northern Ireland* (Oxford University Press, 2022).

I am grateful to Federico Fabbrini for very helpful comments on an earlier version of this paper. Research for his paper has benefitted from an individual research fellowship at the Netherlands Institute for Advanced Study.

1. Introduction

This chapter analyses the rules on the operation of the Protocol on Ireland/Northern Ireland (hereinafter: Protocol), meaning both its governance arrangements and dispute settlement mechanisms. Such analysis is all the more pressing as the Protocol has the questionable honour of having its dispute settlement mechanisms being activated first under the new post-Brexit agreements. Already in October 2020, the European Commission sent a formal notice, the first step in infringement proceedings, to the United Kingdom (UK) regarding the latter's Internal Market Bill.[1] This happened during the transition period when the jurisdiction of the Court of Justice of the EU (CJEU) still applied to the UK. Also after the end of the transition, however, in March 2021 the European Union (EU) accused the UK of breaching obligations under the Protocol, leading to another formal notice and consultations between the two sides.[2] While at the time of writing, there is no case law, either from the CJEU or arbitral tribunals, yet, it is almost an understatement to say that implementing the Protocol has been 'a major issue'[3] since the entry into force of the Withdrawal Agreement (WA) and that 'challenging times lie ahead'.[4]

The two main hallmarks of the Protocol are clearly reflected in its provisions on governance and dispute settlement. These are, firstly, the fact that the Protocol is not a stand-alone agreement, but an 'integral part'[5] of the WA and of the new body of interconnected international agreements one could call more widely 'Post-Brexit Law'[6]. Secondly, it reflects one of the last, most enduring holdouts of EU institutions applying and enforcing EU law in part of the UK.[7] These characteristics, coupled with the high political stakes of the Protocol

---

[1] European Commission, Withdrawal Agreement: European Commission sends letter of formal notice to the United Kingdom for breach of its obligations, press release, Brussels, 1 October 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1798. See further Dagmar Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume III – The Framework of New EU-UK Relations* (OUP 2021) 49–70, 51.

[2] European Commission, Letter from Vice-President Maroš Šefčovič to David Frost, Brussels, 15 March 2021, https://ec.europa.eu/info/sites/default/files/lettre_to_lord_frost_1532021_en.pdf.

[3] Steve Peers, 'The End – or a New Beginning? The EU/UK Withdrawal Agreement' (2020) 39 *Yearbook of European Law* 122, 172.

[4] Jan Wouters, 'Dispute Settlement' in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP, forthcoming 2022) 55–65, 65.

[5] Article 182 Withdrawal Agreement (hereinafter WA).

[6] On this term see Joris Larik and Ramses Wessel 'The EU-UK Post-Brexit Trade and Cooperation Agreement: Forging Partnership or Managing Rivalry?' in Adam Łazowski and Adam Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Cheltenham: Edward Elgar, forthcoming 2022).

[7] See further Joris Larik, 'Decision-Making and Dispute Settlement' in Federico Fabbrini, *The Law & Politics of Brexit Volume II – The Withdrawal Agreement* (OUP 2020) 191–210.

in the context of North-South relations in Ireland and the peace process, merit close scrutiny of the Protocol's governance and dispute settlement provisions.

As these are still the early stages of the EU-UK post-Brexit relationship, it would be premature to make any definitive judgments about the operation of the Protocol in practice. What this chapter argues, instead, is that due to fundamentally different views and strategies of the EU institutions and the UK government, the design and use of the provisions on governance and adjudication have the potential to exacerbate rather than mend EU-UK relations.

The chapter is structured as follows. Section 2 offers a brief recap of the role of this particular topic in the Brexit negotiations. This is followed by an analysis of the Protocol's governance provisions in section 3 and of its dispute settlement provisions in section 4. Section 5 brings in leading compliance theories from international law to make the point about the disruptive potential of the Protocol's dispute settlement mechanism. Section 6 summarises the main arguments and concludes.

2. Governance, dispute settlement, and Northern Ireland: A controversial counterpoint

The topic of dispute settlement in the Protocol can be seen as a counterpoint of two of the most controversial topics in the Brexit saga: The post-Brexit status of Northern Ireland and the role of the CJEU.

On the one hand, as is well documented, the status of Northern Ireland in the post-Brexit arrangements was of central concern, touching on the peace process, the protection of the EU's internal market, and the territorial integrity of the UK.[8] As aptly put by R. Daniel Kelemen, Northern Ireland is at the heart of the 'Brexit trilemma', i.e., to reconcile, first, avoiding a hard border in Ireland (which would undermine the Belfast/Good Friday Agreement); second, delivering on the Brexiteers' promise of leaving the EU's internal market and customs union; and, third, avoiding a border between Northern Ireland and the rest of the UK (which would undermine the UK's Union).[9]

[8] See John Doyle and Eileen Connolly, 'Brexit and the Northern Ireland Question' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 139–59.
[9] R. Daniel Kelemen, *The Brexit Trilemma*, 20 September 2020, https://twitter.com/rdanielkelemen/status/1308301263507865601.

On the other hand, the post-Brexit role of the CJEU was another significant sticking point in the withdrawal negotiations.[10] While removing the CJEU's jurisdiction over the UK was one of the Brexiteers' 'red lines',[11] the EU negotiators insisted on a continued role, especially whenever questions of EU law were concerned. Hence, it is unsurprising that not only the Protocol as such remains contested by the UK, but also the continued role of the CJEU in particular.[12]

During the negotiations, there had been different plans for the future EU-UK relations and the position of Northern Ireland.[13] Here, the two sides could be seen wrestling with the 'Brexit trilemma' at every step.[14] These different plans also entailed different modes of governance and dispute settlement for issues concerning Northern Ireland.

The December 2017 Joint Report from the EU and UK negotiators on progress during first phase of the Article 50 TEU negotiations notes that the 'United Kingdom's withdrawal from the European Union presents a significant and unique challenge in relation to the island of Ireland', with the UK recalling 'its commitment to the avoidance of a hard border, including any physical infrastructure or related checks and controls.'[15] This logic led to what would come to be known as the 'backstop'. In case a hard border could not be avoided through the overall post-Brexit EU-UK relationship, then the UK would propose 'specific solutions'. If these could be agreed upon, then the UK was to 'maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.'[16]

The draft withdrawal agreement published by the European Commission in February 2018 aimed to keep Northern Ireland in a common regulatory area and a customs territory with the

[10] Larik (n 7) 192–94.

[11] See HM Government, *The government's negotiating objectives for exiting the EU: PM speech*, Lancaster House, London, 17 January 2017, https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech: 'So we will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain.'

[12] HM Government, *Lord Frost speech: Observations on the present state of the nation*, Lisbon 12 October 2021, https://www.gov.uk/government/speeches/lord-frost-speech-observations-on-the-present-state-of-the-nation-12-october-2021.

[13] See Federico Fabbrini, 'Introduction' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume II – The Withdrawal Agreement* (OUP 2020) 1–33, 3–27.

[14] See also the useful timeline by Institute for Government, *What is the Northern Ireland Backstop?*, last updated 24 February 2020, https://www.instituteforgovernment.org.uk/explainers/irish-backstop.

[15] Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 8 December 2017, TF50 (2017) 19 – Commission to EU 27, point 43.

[16] ibid, point 49.

EU.[17] For governance and dispute settlement, this unsurprisingly meant that on these matters, EU law would continue to operate as within an EU Member State, including the continued jurisdiction of the CJEU.[18]This was rejected by the UK government as a solution that would 'threaten[] the constitutional integrity of the UK'.[19] Instead, Theresa May Government proposed a UK-wide version of the backstop that would be time-limited and based on a 'common rulebook'. Institutionally, the proposal insisted that the 'EU institutions, including the Court of Justice of the European Union (CJEU), will no longer have the power to make laws for the UK'[20] and instead put forward a joint overarching institutional framework. Concerning the 'common rulebook', the UK was to make 'an upfront choice to commit to ongoing harmonisation with the relevant EU rules and requirements' but without a vote on relevant rule changes.[21] The proposal put forward the idea that '[w]here the UK had agreed to retain a common rulebook with the EU, the UK would commit by treaty that its courts would pay due regard to CJEU case law, insofar as this was relevant to the matter before them.'[22]For settling disputes, the UK's white paper recommended international arbitration in general, but regard to the 'common rulebook' showed a remarkable openness to bring the CJEU back in. Recognizing that 'only the CJEU can bind the EU on the interpretation of EU law … there should be the option for a referral to the CJEU for an interpretation, either by mutual consent from the Joint Committee, or from the arbitration panel.'[23] The EU, however, rejected the temporary UK-wide backstop.

The jointly published draft Withdrawal Agreement of November 2018 enshrined the idea that '[u]ntil the future relationship becomes applicable, a single customs territory between the Union and the United Kingdom shall be established.'[24] The need for regulatory alignment would only apply to Northern Ireland. In terms of supervision and enforcement, the draft

[17] European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018, TF50 (2018) 33, Protocol on Ireland/Northern Ireland, Articles 3 and 4.

[18] ibid, Article 11.

[19] 'Theresa May rejects EU's draft option for Northern Ireland', *BBC News* (28 February 2018), https://www.bbc.com/news/uk-politics-43224785.

[20] HM government, *The future relationship between the United Kingdom and the European Union*, July 2018, Cm 9593, 84.

[21] ibid, 89.

[22] ibid, 92.

[23] ibid, 93.

[24] Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018, 14 November 2018 TF50 (2018) 55, Protocol on Ireland/Northern Ireland, Article 6(1).

provided in the continued role of the EU institutions and of the relevant EU law with regard to Northern Ireland, including the jurisdiction of the CJEU.[25] However, being in a single customs territory would have required the UK to align its tariffs with those of the EU. This severely limited, if not made impossible, an autonomous British post-Brexit trade policy, which was one of the key promises made in the campaign to leave the EU.[26]

With the Irish backstop being the main stumbling block, this version of the WA was voted down three times in the British Parliament, leading to UK extensions and Theresa May's resignation as prime minister.[27] Her successor, Boris Johnson, called the backstop 'anti-democratic'.[28] After further negotiations over the summer of 2019, the idea of continued democratic consent in the Northern Ireland Assembly emerged, and found its way into the Protocol.[29] The single customs territory was scrapped, with the Protocol now stating that 'Northern Ireland is part of the customs territory of the United Kingdom'.[30] This is indeed a 'misleading advertisement',[31] considering that EU customs law and most of EU internal market law continue to fully apply in Northern Ireland, and seeing the prominent role EU law and EU institutions play in Northern Ireland under the Protocol.[32]

3. Institutions and governance

Since the Protocol is an integral part of the WA, institutions and procedures laid down in the WA also apply to the Protocol. Hence, to this extent, the WA's distinctly intergovernmental features also characterise the governance of the Protocol,[33] while the Protocol's own provision bring the EU's supranational mode of governance back in several relevant respects.

[25] ibid, Article 14(4).

[26] Tim Oliver, *Understanding Brexit: A Concise Introduction* (Policy Press 2018) 67.

[27] See Federico Fabbrini and Rebecca Schmidt, 'The Extensions' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume II – The Withdrawal Agreement* (OUP 2020) 66–82.

[28] 'Brexit: Boris Johnson says 'anti-democratic' backstop must be scrapped', *BBC News* (20 August 2019), https://www.bbc.com/news/uk-politics-49402840.

[29] See further Brendan O'Leary, 'Consent' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV – Protocol on Ireland/Northern Ireland* (OUP, forthcoming 2022).

[30] Article 4(1) Northern Ireland Protocol (hereinafter NIP).

[31] Stephan Weatherill, 'The Protocol on Ireland/Northern Ireland: protecting the EU's internal market at the expense of the UK's' (2020) 45 *European Law Review*, 222 224.

[32] See further Niall Moran, 'Customs and Movement of Goods' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV – Protocol on Ireland/Northern Ireland* (OUP, forthcoming 2022).

[33] Larik (n 10) 194–98.

3.1 The Joint Committee and its role for the Protocol

A Joint Committee comprised of representative of the EU and UK is responsible for the implementation and application of the WA, including the Protocol.[34] According to the Council decision approving the conclusion of the WA on behalf of the EU, the EU is represented by the European Commission, but the Member States 'may request' that they be represented as part of the Union delegation 'in case particular matters to be addressed at that meeting are of a specific interest to that or those Member States.'[35] The decision makes clear that Ireland in particular may request to be represented 'in the meetings of the Committee on issues related to the implementation of the Protocol … where those issues are specific to Ireland/Northern Ireland'.[36] However, this language would suggest that Ireland does not have a legal right to be represented in the delegation. The UK government invites representatives from the Northern Ireland Executive to be part of its delegation.[37]

The Joint Committee shall meet at least once a year and upon request of either of the parties and works on the basis of rules of procedure annexed to the WA.[38] The Joint Committee operates by 'mutual consent',[39] meaning that the Joint Committee 'cannot act if either the UK or the Commission is not in agreement.'[40] This highlights the intergovernmental nature of the post-Brexit EU-UK relations. As noted by Hayward, early practice has shown that its co-chairs also opted for informal 'political meetings' in addition to the official ones.[41]

The Joint Committee's decisions are binding upon the parties (the EU and UK), having 'the same legal effect as' the WA.[42] It can adopt amendments to WA 'in the cases provided for in this Agreement'.[43] These concern rather specific cases, such as amending the code of conduct

[34] Article 164(3) WA.

[35] Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of 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 [2020] OJ L 29/1, Article 2(1).

[36] ibid.

[37] This follows a commitment on part of the UK government as part of the agreement restoring of the devolved, power-sharing institutions in Northern Ireland, *New Decade, New Approach*, January 2020, 47. See Katy Hayward, 'The Committees of the Protocol' in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP, forthcoming 2022) 44–54, 47.

[38] Article 164(2) WA and Annex VIII of the WA.

[39] Article 166(3) WA.

[40] Hayward (n 37) 44.

[41] ibid 45–46.

[42] Article 166(2) WA.

[43] Article 164(4)(f) WA.

for members of the arbitration panels.[44] It can also adopt other amendments to the WA 'until the end of the fourth year following the end of the transition period', which either concern the correction of errors or omission or, more importantly, 'to address situations unforeseen when this Agreement was signed, and provided that such decisions may not amend the essential elements of this Agreement'.[45]

Under the Protocol, the Joint Committee receives some additional responsibilities. For example, the Joint Committee is responsible for establishing 'the criteria for considering that a good brought into Northern Ireland from outside the Union is not at risk of subsequently being moved into the Union',[46] thus obviating additional checks.[47] In addition, the Joint Committee plays an important role in deciding on new pieces of EU legislation being made applicable to Northern Ireland (see section 3.4 below).

3.2 The Specialised Committee on the Implementation of the Protocol

In addition, there is a Specialised Committee on the Implementation of the Protocol on Ireland/Northern-Ireland, which operates under the supervision of the Joint Committee, and equally is comprised of EU and UK representatives.[48] It, too shall meet at least once a year and upon request of the parties.[49] Like all specialised committees under the WA, it 'may draw up draft decisions and recommendations and refer them for adoption by the Joint Committee.'[50] The Specialised Committee does not have decision-making powers of its own.

The Specialised Committee's tasks include facilitating the implementation of the Protocol, examining proposal regarding the Protocol from the North-South Ministerial Council and other bodies established by the Belfast/Good Friday Agreement,[51] consider matters in the area of individual rights brought to its attention by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland,[52] discuss

[44] Article 181(1) WA.

[45] Article 164(5)(d) WA.

[46] Article 5(2)(1)(b) NIP.

[47] Moran (n 32).

[48] Article 165(1)(c) WA.

[49] Article 165(2)(2) WA.

[50] Article 165(2)(2) WA.

[51] See further Rory O'Connell, 'North-South Cooperation' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV – Protocol on Ireland/Northern Ireland* (OUP, forthcoming 2022).

[52] See also Aoife O'Donoghue, 'Non-Discrimination' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV – Protocol on Ireland/Northern Ireland* (OUP, forthcoming 2022).

any points raised by the EU or UK, and make recommendations to the Joint Committee concerning the functioning of the Protocol.[53]

3.3 The Joint consultative Working Group

Furthermore, the Protocol establishes in Article 15 also a Joint consultative working group on the implementation of the Protocol. This body is created as 'a forum for the exchange of information and mutual consultation'.[54] It has no power to take binding decisions, but serves to share information between the EU and UK, including information to be provided by the EU on planned EU acts, especially those that amend or replace these listed in the Protocol's Annexes, and which are thus applicable to Northern Ireland.[55] The UK, however, has no right to reject to those changes in EU legislation. The group is to meet at least once a month.[56]

3.4. The continued role of EU institutions

The other face of the Protocol is that of the supranational mode of EU governance. The Protocol provides for the continued operation of EU institutions with regard to Northern Ireland in several regards. This includes the jurisdiction of the CJEU as arguably the most prominent and controversial example (discussed in section 4). However, other EU bodies still play a core role too.

According to Article 12(4) of the Protocol, regarding the provisions of the Protocol on Northern Ireland's position in the EU's single market for goods (Articles 5 and 7 to 10), 'the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law.' This includes the continued application of the supervisory powers of the European Commission as well as those of EU agencies within Northern Ireland in relation to these domains.

A core aspect of the Protocol is the application of certain EU legislation to Northern Ireland. This concerns areas of non-discrimination and equal treatment (Article 2(1) and Annex 1 NIP) and Northern Ireland's continued participation in the EU's single market for goods.[57]

---

[53] Article 14 NIP.

[54] Article 15(1) NIP.

[55] Article 15(3) NIP.

[56] Article 15(5) NIP.

[57] These concern, respectively, on customs and movement of goods (Article 5(4) and Annex 2 NIP), VAT and excise (Article 8 and Annex 3 NIP), the single electricity market (Article 9 and Annex 4 NIP), state aid rules (Article 10(1) and Annex 5 NIP). See further Moran (n 32); O'Donoghue (n 52); and Graham Butler,

The legislation listed in Annex 2 is particularly detailed and extensive, including the EU's customs code and numerous other pieces of EU legislation covering topics ranging from the protection of the EU's financial interests and trade fence instruments to specifics such as electrical and radio equipment, medical devices and animal breeding.[58]

Important to note here is that this EU legislation is prone to evolve over time. These changes are brought about through the EU's legislative procedures, with the Council and European Parliament serving as co-legislators, with no involvement from the UK. In a process of 'dynamic alignment',[59] the changes then apply directly to Northern Ireland, with no approval by the UK being required.[60]

However, in case a new EU act is adopted which 'which neither amends nor replaces a Union act listed in the Annexes to the Protocol, the EU has a duty to inform the UK in the Joint Committee.[61] The Joint Committee will subsequently take a decision on whether to add new EU act to the relevant Annex, which the UK can block by withholding its consent. In case no agreement can be reached to add the new act, then 'all further possibilities to maintain the good functioning of this Protocol' will be examined.[62]

Nevertheless, a disincentive against adding new legislation to the Annexes was built into the Protocol: If no decision about the new act can be reached 'within a reasonable time, the Union shall be entitled, after giving notice to the United Kingdom, to take appropriate remedial measures.'[63] The term 'remedial measures' is not further specified, nor is the term 'appropriate'. In international trade law, this term is used as an umbrella for antidumping duties and countervailing and safeguard measures.[64] However, the context of the Protocol and lacking arrested alignment here is rather different.

'Regulation and State Aid' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV – Protocol on Ireland/Northern Ireland* (OUP, forthcoming 2022).

[58] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code [2013] OJ L 269/1 and Annex 2 to the NIP.

[59] Hayward (n 37) 48.

[60] Article 13(3) NIP: 'Notwithstanding Article 6(1) of the Withdrawal Agreement, and unless otherwise provided, where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced.'

[61] Article 13(4) NIP.

[62] Article 13(4)(2)(b) NIP.

[63] Article 13(4)(3) NIP.

[64] See in the context of the EU-UK Trade and Cooperation Agreement, Paola Mariani and Giorgio Sacerdoti, 'Trade in Goods and Level Playing Field' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume III – The Framework of New EU-UK Relations* (OUP 2021) 93–114, 106–7.

4. Supervision and dispute resolution

While the Northern Ireland Protocol contains its own provisions on supervision and dispute resolution, it is important to situate it also in the wider framework of the WA. In addition, the ultimate enforcement tool for the Protocol can be found elsewhere, i.e., the partial suspension of the Trade and Cooperation Agreement (TCA).

4.1 Under the Protocol

Article 12 of the Protocol is the central provision that regulates 'Implementation, application, supervision and enforcement'. According to its paragraph 1, in general 'the authorities of the United Kingdom shall be responsible for implementing and applying the provisions of Union law made applicable by this Protocol to and in the United Kingdom in respect of Northern Ireland.' This is both remarkable and a crux of the Protocol, as here the EU is basically relying on third country authorities to implement EU law outside the EU.

This is 'without prejudice' to paragraph 4, which bring EU institutions and other bodies back in a number of areas. These are customs and movement of goods (and information exchange on goods coming into Northern Ireland, which are 'at risk' of onward transport into the EU),[65] technical regulations, assessments, registrations, certificates, approvals and authorisations,[66] VAT and excise,[67] the single electricity market,[68] and state aid.[69] In a sweeping statement, the Protocol notes that in these areas, 'the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law.'[70]

The provision states specifically that '[i]n particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect' and that the 'second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect':[71] this means that the CJEU has the power to receive requests for preliminary rulings from UK courts in respect of Northern Ireland. In this regard, it is useful to recall the

[65] Article 5 and Article 12(2), second subparagraph, which refers to Article 5(1) and (2) NIP.
[66] Article 7 NIP.
[67] Article 8 NIP.
[68] Article 9 NIP.
[69] Article 10 NIP.
[70] Article 12(4) NIP.
[71] Article 12(4) NIP.

provisions of the WA, of which the Protocol is an integral part, can be relied upon directly in court if they 'meet the conditions for direct effect under Union law.'[72] That this applies also to the Protocol is strengthened by Article 12(5), which states that '[a]cts of the institutions, bodies, offices, and agencies of the Union adopted in accordance with paragraph 4 shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.' Moreover, case law from the CJEU, including that which was handed down after the transition period, still applies in the interpretation of the Protocol.[73]

The wording suggests that preliminary references are highlighted here but are not the only powers which the EU institutions retain here. Another important power that continues to apply is the possibility for the European Commission to bring infringement proceedings against the UK to the CJEU under Article 258 TFEU.[74] Continued non-compliance with CJEU judgments finding the UK in breach could then ultimately lead to the imposition of monetary fines on the UK under Article 260 TFEU.

The continued involvement of EU officials on the ground is set out in the second paragraph of Article 12. It states that 'Union representatives shall have the right to be present during any activities of the authorities of the United Kingdom related to the implementation and application of provisions of Union law made applicable by this Protocol, as well as activities related to the implementation and application of Article 5,' on customs and movement of goods, which includes a duty for the UK to provide relevant information upon request.[75] The UK is, moreover, obliged 'to facilitate such presence of Union representatives'. Practical arrangements in this area should be determined by the Joint Committee upon proposal from the Specialised Committee.[76] The implementation of these provisions has led to tensions between the EU and UK. For instance, plans by the EU to open an office in Belfast, which would facilitate such presence of EU representatives, have been resisted by the UK.[77]

---

[72] Article 4(1)(2) WA.

[73] Article 13(2) NIP. This derogates from the Withdrawal Agreement, where only 'due regard' needs to be paid to CJEU case law from after the end of the transition period by UK authorities (Article 4(5) WA).

[74] Wouters (n 4) 56.

[75] Article 12(2) NIP.

[76] Article 12(3) NIP.

[77] Gerry Moriarty, 'Britain rejects request for permanent EU office in Belfast', *Irish Times* (3 May 2020), https://www.irishtimes.com/news/politics/britain-rejects-request-for-permanent-eu-office-in-belfast-1.4243940. The UK also refrained at first to give the EU's delegation in London full diplomatic status and privileges,

Regarding the legal cases before the CJEU under paragraph 4, the UK may participate 'in the same way as a Member State' and lawyers authorized to practice in the UK 'may represent or assist a party before the Court of Justice of the European Union in such proceedings and shall in every respect be treated as lawyers authorised to practise before courts or tribunals of Member States representing or assisting a party before the Court of Justice of the European Union.'[78]

4.2 As part of the Withdrawal Agreement

As stated in Article 13 of the Protocol, the WA provisions on institutions and dispute settlement (to be found in its Part Six) 'shall apply without prejudice to the provisions of this Protocol.'[79] As a result, the WA's dispute settlement procedures based on arbitration apply as well.

As the procedures set out in the WA have been detailed elsewhere,[80] suffice it to recall that they are modelled on those of the World Trade Organization (WTO), but with an important difference. In case attempts to solve disputes politically in the Joint Committee prove unsuccessful, either party can request the establishment of an arbitral tribunal.[81] These tribunals can give a ruling on the original dispute, as well as on compensation to be paid, continued non-compliance, and the authorization of suspension of obligations under the WA. The major difference, however, is the continued role of the CJEU here. On the one hand, the CJEU retains, albeit with time-limits, jurisdiction over certain parts of the WA, notably its part on citizens' rights. On the other, whenever a dispute before an arbitral tribunal raises questions about EU law, including 'concepts' of EU law, then the tribunal should request a ruling from the CJEU.[82]

The existence of the WA's and the Protocol's two dispute settlement mechanisms raises legal questions regarding whether parties need to choose between one or the other (in a type of

---

Nicolas Levrat, 'Governance: Managing Bilateral Relations' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume III – The Framework of New EU-UK Relations* (OUP 2021) 219–239, 223–25.

[78] Article 12(7) NIP.

[79] Article 13(1)(3) NIP.

[80] Larik (n 10); Steve Peers, 'The End – or a New Beginning? The EU/UK Withdrawal Agreement' (2020) 39 *Yearbook of European Law* 122, 181–97; Alan Dashwood, 'The Withdrawal Agreement: common provisions, governance and dispute settlement' (2020) 45(2) *European Law Review* 183.

[81] The Joint Committee has decided upon a list of arbitrators to that effect, Decision No 7/2020 of the Joint Committee establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel under the Agreement, 22 December 2020.

[82] Article 174(1) WA.

'fork in the road' manner known from trade agreements[83]), whether they should be sequenced (in a type of duty to first 'exhaust' the specific avenue provided in the Protocol), or whether they can be relied upon in parallel.

Regarding any 'forks in the road', while the TCA contains such as clause obliging the UK and EU to choose between the that agreement's and the WTO's dispute settlement mechanism for alleged breach of 'substantially equivalent' obligations,[84] the WA mandates exclusive recourse to its dispute settlement proceedings.[85] However, regarding the relationship between Protocol and WA, we are left with the 'no prejudice' formulation of Article 13(1)(3) of the Protocol. Given that no explicit language about the need for making a choice was included here would suggest that no such obligation for a choice exists, and that therefore each party can unilaterally decide which dispute resolution mechanism(s) it wants to use. The same interpretation can be used for the question of sequencing, as no particular order is proscribed.

In the fledgling, yet tumultuous practice under the Protocol, the European Commission seems to subscribe to the view that both procedures can be used concurrently. When in March 2021, the UK government announced the unilateral extension of certain 'grace periods' for food imports into Northern Ireland, the European Commission informed the UK government in a letter that it considered this to be in violation of Articles 5(3) and (4) of the Protocol on customs and the movement of goods *as well as* a violation of the duty of good faith as enshrined in Article 5 of the WA.[86] Subsequently, the European Commission sent a letter of formal notice to the UK government, thereby initiating infringement proceedings under Article 258 TFEU, which is applicable by virtue of Article 12(4) of the Protocol. At the same time, it sent a 'political letter'[87] to the UK's co-chair of the Joint Committee to enter in consultations to find a mutually acceptable solution. This is the first official step in the dispute settlement mechanism of the WA.[88] If the consultations are unsuccessful, then a party

[83] See Cornelia Furculiță, *Fork-in-the-Road Clauses in the New EU FTAs: Addressing Conflicts of Jurisdictions with the WTO Dispute Settlement Mechanism*, CLEER Working Paper 2019/1.

[84] Article 737(1) TCA.

[85] Article 168 WA.

[86] European Commission, Letter from Vice-President Maroš Šefčovič to David Frost, Brussels, 15 March 2021, https://ec.europa.eu/info/sites/default/files/lettre_to_lord_frost_1532021_en.pdf.

[87] European Commission, Withdrawal Agreement: Commission sends letter of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland, press release, Brussels, 15 March 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1132.

[88] Article 169 WA.

can proceed to arbitration after three months.[89] In July 2021, the European Commission paused the infringement proceedings against the UK 'in order to provide the necessary space to reflect on these issues and find durable solutions to the implementation of the protocol'.[90]

One way to separate the two mechanisms would be to see the WA arbitration procedure dealing with violations of the WA and the CJEU procedures under the Protocol with violations of the Protocol. At first glance, this would seem to be supported by the Commission two-pronged approach of pointing to violations of both Protocol and WA provisions, each to be dealt with through 'their' respective procedure. It is obvious that the CJEU's jurisdiction for infringement proceedings under the Protocol does not extend beyond the relevant parts of the Protocol (Articles 2(2)(2), 5 and 7-10). However, to consider that the arbitral tribunals could not rule on violations under the Protocol seems unwarranted for two reasons: Frist, the WA's dispute settlement mechanism covers 'any dispute between the Union and the United Kingdom arising under this Agreement', of which the Protocol is an 'integral part'. Second, the obligations under the WA, the Protocol, and the applicable EU law are closely entangled.

As the Commission pointed out in the notice letter to the UK, the UK was alleged to have breached Article 5 of the WA on good faith, in particular the duty to 'refrain from any measures which could jeopardise the attainment of the objectives of this Agreement'[91] through its lacking implementation of the Protocol. The Commission also made a joint reference to Article 4 WA, which notes 'the provisions of Union law made applicable by this Agreement' and Article 5(3) and (4) of the Protocol, which in turn refers to Annex 2 of the Protocol with its long list of EU law. According to the 15 March 2021 letter, the UK's unilateral action in violation of these provisions 'amounts *in itself* to a violation of the duty of good faith provided for in Article 5' of the WA.[92]

According to this logic, one can wonder whether there is any alleged violation of the Protocol which would not 'in itself' also amount to a violation of the WA's good faith obligation. Whether this would be the case would be for an arbitral tribunal to determine. The European Commission, on its part, has an interest in keeping the door open for violations of the

[89] Article 170(1) WA.

[90] Paula Kenny, 'EU pauses legal action against UK', *Euractiv* (28 July 2021), https://www.euractiv.com/section/politics/short_news/eu-pauses-legal-action-against-uk/.

[91] Article 5(2) WA.

[92] European Commission (n 86) 3 (emphasis added).

Protocol to be addressed through the WA's procedure. Relying exclusively on the infringement proceedings at the CJEU can lead to penalty and lump sum payments being ultimately imposed by the CJEU to prompt compliance. However, with the continued jurisdiction of the CJEU under the Protocol being one of the main points of contention, and with the UK government wanting its role to be scrapped,[93] it can be doubted whether the UK would comply with such penalties, also considering that the government has already previously publicly declared a willingness to violate international law obligation under the Protocol, albeit in 'specific and limited way'.[94]

Therefore, resort to the WA's dispute settlement mechanism comes with additional tools to incentivise compliance.[95] In cases of persistent non-compliance, the complaining party can first request that the arbitral tribunal impose a lump sum or penalty payment.[96] More importantly is that if the respondent party fails to pay the lump sum or penalty payment or fails to comply with the ruling confirming continued non-compliance, then the complaining party can be authorized to suspend temporarily other obligations under the WA vis-à-vis the respondent party,[97] with the exception of the WA's Part Two on citizens' rights.[98]

4.3 The link to the Trade and Cooperation Agreement

Pursuing compliance with obligations under the Protocol through the WA's dispute settlement procedure (and the 'good faith' hinge) would enable successful complainants to wield an even bigger stick, i.e. suspending part of the TCA. This possibility for escalating specific disputes, including (and especially) under the Protocol into full-blown trade wars is a key design feature of the 'Post-Brexit Law' architecture.[99]

According to Article 178(2) WA, the successful complainant shall be entitled to suspend, alternatively, 'parts of any other agreement between the Union and the United Kingdom

[93] HM Government, Northern Ireland Protocol: the way forward, CP 502, July 2021, point 67: 'It is highly unusual in international affairs for one party to a treaty to subject itself to the jurisdiction of the institutions of the other, all the more so when the arrangements concerned are designed to mediate the sui generis relationship between the EU and its Member States. The UK refused to accept this in the negotiations on the Trade and Cooperation Agreement, and only agreed to it in the Protocol because of the very specific circumstances of that negotiation.'

[94] Northern Ireland Secretary Brandon Lewis cited in 'Northern Ireland Secretary admits new bill will 'break international law', *BBC News* (9 September 2020), https://www.bbc.com/news/uk-politics-54073836.

[95] See Larik (n 10) 207–8.

[96] Article 178(1) WA.

[97] Article 178(5) WA.

[98] Article 178(2)(1)(a) WA.

[99] See also Robert Howse, 'Safeguards' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV – Protocol on Ireland/Northern Ireland* (OUP, forthcoming 2022).

under the conditions set out in that agreement.'[100] The TCA, regulating the in-principle tariff and quote free market access between the EU and UK, then represents a veritable cornucopia of opportunities to encourage compliance. One only need to recall the EU's creative, and highly politically targeted way of applying 'trade sanctions' to the United States in past trade disputes, including Harley Davidson motorcycles, Levi's jeans, and Bourbon whiskey.[101] It is not a stretch of the imagination to think of EU tariffs being applied to Land Rovers, Stilton cheese, Scotch whisky.

There are some restrictions to be observed in this form of 'cross retaliation' (here across different agreements and sectors). Before moving to suspending part of the TCA, the complaining party needs to 'consider' whether suspension under the WA would not be appropriate. If proceeding with TCA suspensions, then these need to be 'proportionate to the breach of obligation concerned, taking into account the gravity of the breach and the rights in question and, where the suspension is based on the fact that the respondent persists in not complying with the [original] arbitration panel ruling referred to in Article 173, whether a penalty payment has been imposed on the respondent and has been paid or is still being paid by the latter.'[102] In case the respondent party considers the abovementioned suspension 'not proportionate, it may request the original arbitration panel in writing to rule on the matter.'[103] No suspensions can be made until the panel's affirmative ruling.

5. Theoretical perspectives: Economic costs, reputation, and contestation

Looking at the governance and dispute settlement mechanisms applicable under the Protocol in their entirety and in their interrelatedness invites some reflections on their function in post-Brexit EU-UK relations. At the very least, they have created an intriguing new case study to 'one of the central problems'[104] of international law and international relations, i.e., why states (and the EU) comply with their international legal obligations.

The UK has now become a third country for the EU. Their relations are now governed by international rather than EU law. Even though, as detailed above, important parts of EU law

[100] Article 178(2)(1)(b) WA.

[101] Richard Partington, 'Trump threatens car tariffs after EU sets up £2.5bn of levies on US', *Guardian* (22 June 2018), https://www.theguardian.com/business/2018/jun/22/bourbon-levis-prices-rise-eu-enforces-tariffs-us.

[102] Article 178(2)(2) WA.

[103] Article 178(3) WA.

[104] Timothy Meyer, 'Coopering without Sanctions: Epistemic Institutions versus Credible Commitment Regimes in International Law' in Harlan Grant Cohen and Timothy Meyer (eds), *International Law as Behavior* (CUP 2021) 45–73, 48.

remain applicable in relation to Northern Ireland, the applicability of this law is achieved through an international agreement. Hence, disputes over Northern Ireland will represent fertile ground for further research into compliance questions in the peculiar context of Brexit.

Various theories have been developed putting forward different explanatory factors.[105] These can roughly be divided into managerial theories noting that lack of state capacity rather than political will explains (certain cases of) non-compliance; rationalist theories stressing different material (economic) or immaterial (reputational) factors that influence states' decision to comply or not with international law; and various constructivist theories arguing that persuasion and norm internalization can eventually lead through compliance through integrative processes. These theories can help structure and refine the analysis of the Protocol's governance and dispute settlement mechanisms and its emerging practice – and perhaps of the EU's, the UK's, and other stakeholders' behaviour in post-Brexit relations.

Regarding the Protocol, the EU's insistence in the negotiations on binding dispute settlement procedures and the possibility of sanctions (the proverbial 'teeth'[106]) reflects two things. Firstly, it is another example of the EU's faith in, and insistence on, law, legal procedures, and courts as its 'weapon of choice'[107] to protect and advance its interests also in its external relations. Even disintegration, it seems, has be done 'through law'.

Secondly, especially the enforcement link to the TCA reflects the EU as a 'market power',[108] i.e., bringing its considerable economic powers to bear to ensure respect for the rules, and ultimately advance its interests. In terms of compliance theory, this can be seen as a strategy that is heavily reliant on the rationalist assumption that driving up the economic costs for non-compliance will be the best bet to actually ensure compliance. In addition, there may be an element of reputational strategy at play as well, because, at least from the EU's perspective, CJEU and arbitral tribunal rulings proclaiming the UK to be in breach of its international legal obligations should 'shame' the former member state into compliance. After all, this concerns fundamental principles of international law such as 'good faith' and

[105] See for an overview Ingrid Worth, 'Compliance' in Jean d'Aspremont, *Concepts for International Law Contributions to Disciplinary Thought* (Edward Elgar 2019) 117–26.

[106] European Commission von der Leyen, Speech by President von der Leyen at the European Parliament Plenary on the EU-UK Trade and Cooperation Agreement, Brussels, Brussels, 27 April 2021, https://ec.europa.eu/commission/presscorner/detail/en/speech_21_1967.

[107] Mark Leonard, *Why Europe Will Run the 21st Century* (Fourth Estate 2005) 36; further Joris Larik, 'The EU's Global Strategy, Brexit and "America First"' (2018) 23(3) *European Foreign Affairs Review* 343.

[108] Chad Damro, 'Market Power Europe' (2012) 19(5) *Journal of European Public Policy* 682.

pact sunt servanda. In fact, as a treaty partner, 'Global Britain' should want to preserve its general credibility as it sets out to conclude new trade and other agreements with other countries around the world. Escalating disputes over Northern Ireland, bringing the EU's economic weight to bear, and attaching the stigma of breaking international law to the UK thus appears a winning strategy to achieve compliance.

However, at least contemplating the initial disputes over the Protocol, this strategy could also backfire, not least because of a fundamentally different outlook and approach from the UK. The EU's 'legalistic' and 'technocratic' approach mismatches the current UK government's more populist style, where laws and courts are sometimes framed as obstructing the 'will of the people'.[109] Hence, rather than being conducive to ensuring compliance, the EU's strategy supplies politicians and media in the UK with fresh ammunition about 'foreign judges' and the EU 'bullying'[110] the UK, thus vindicating proponents of Brexit.

The reputational dimension, too, could take a different turn. The Protocol has been portrayed by leading figures in the UK as fundamentally illegitimate from the start, thus distinguishing it from other international agreements. In the words of Lord Frost, 'the Protocol represents a moment of EU overreach when the UK's negotiating hand was tied, and therefore cannot reasonably last in its current form.'[111] Moreover, any escalating dispute that raises the prospect of a hard border in Ireland would likely come with enormous reputational damage to the EU, even if the border was a result of UK non-compliance and/or in the service of protecting the EU's internal market, as the row in early 2021 over controlling vaccine exports to the UK illustrates.[112] Lastly, the various accusations from the EU and even the UK's public announcement of 'specific and limited' breaches of international law have thus far not

[109] Benjamin Farrand and Helena Carrapico, 'People like that cannot be trusted': populist and technocratic political styles, legitimacy, and distrust in the context of Brexit negotiations' (2021) 17(2) *Journal of Contemporary European Research* 147, 154.

[110] Mark Landler and Norimitsu Onishi, 'With Fish, Trucks and Submarines, U.K. and France Bicker Over Brexit', *New York Times* (last updated 5 November 2021), https://www.nytimes.com/2021/11/04/world/europe/brexit-britain-france-johnson-macron.html.

[111] HM Government (n 12).

[112] Gerry Moriarty, Jack Horgan-Jones, Naomi O'Leary, 'EU backs down on plan to control export of Covid-19 vaccines across Border into North amid outcry', *Irish Times* (last updated 30 January 2021), https://www.irishtimes.com/news/health/eu-backs-down-on-plan-to-control-export-of-covid-19-vaccines-across-border-into-north-amid-outcry-1.4471366. See further on Article 16 NIP safeguards Howse (n 99).

deterred the dozens of countries around the world from concluding continuity trade deals, or even new deals, with the UK.[113]

While the EU may be betting on strict rules and economic and reputational costs dissuading the UK from non-compliance with the Protocol, the UK (or at least its government) may see itself to be engaged in a noble effort of contesting illegitimate norms and fighting EU 'overreach'. If this fundamental mismatch of (self-)perceptions is indeed the case, this would not bode well for the Protocol's governance and dispute settlement mechanisms to fulfil their core function of ensuring the smooth implementation of the Protocol and preserve the Belfast/Good Friday Agreement. Adding additional capacity, for instance with the help of opening an EU office in Belfast, or hoping for norms to be 'internalized' by the current UK government when it is doing its utmost to scrap them, will do little to alleviate this problem.

6. Conclusion

As this article has shown, the governance and dispute settlement provisions of the Ireland/Northern Ireland Protocol proved highly controversial already during the negotiations due to the 'trilemma' afflicting Northern Ireland. The relevant rules of the Protocol and the WA exhibit a peculiar mix, if not convoluted compromise, of a more traditional intergovernmental approach relying on mutual consent and arbitration on the one hand, and, on the other, a considerable amount of supranational governance through the continued application of parts of evolving EU law and the continued roles to be played by the EU's institutions, in particular the CJEU, with regard to Northern Ireland. Compared to the TCA as one extreme end of an intergovernmental–supranational spectrum, the latter parts of the Protocol represent the other extreme end.

At the same time, the chapter also showed how the Protocol's mechanisms are embedded into the WA as a whole and even linked with the TCA when it comes to enforcement. This prompted, ultimately as reflection on the different expectations and strategies underlying the EU's and UK's approaches to the early practice under the Protocol, which can benefit from drawing on leading theories on compliance in international law. While, years from now, trust may have been re-established, norms will have been internalized, and compliance may have become routine, the conflict-laden start of the Protocol's implementation suggests a rocky

[113] HM Government, *UK trade agreements with non-EU countries*, last updated 19 July 2021, https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries; see further, Joris Larik, 'Brexit, the EU-UK Withdrawal Agreement, and Global Treaty (Re-) Negotiations' (2020) 114(3) *American Journal of International Law* 443.

road ahead where the Protocol's rules and procedures may kindle rather more disputes, rather than resolve them.