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The Northern Ireland Protocol and Why It Still Matters

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Summary

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Brexit was a strategy for cutting loose from what its advocates regarded as the constraints of EU membership, a panacea for those hostile to what they regarded as constrained national sovereignty. It was a hubristic vision that ignored the complex interdependencies of contemporary globality that constrain national agency, especially for smaller and medium-sized states. The protracted withdrawal negotiations that followed the 2016 Brexit referendum exposed these fallacies.

Amongst the most critical of the unanticipated consequences of the 'hard Brexit' pursued by the British government was the impact on the border arrangements and management of the island of Ireland, the only place where the EU and its former member state share a land frontier. It is a problematic border because it is fraught with historical memories. Moreover, this conflict was only relatively recently pacified by the Belfast Agreement (1998), of which the EU acted as a major guarantor. The signing of this agreement led to a historic but nevertheless fragile peace, brokered between the two culturally entrenched communities in Northern Ireland. In these circumstances, what Brexiteers had confidently predicted as a straightforward withdrawal turned out to be anything but, because Brexit threatened to destabilise the peace process.

This paper examines the role the Irish border issue played in the fraught withdrawal process: that is, its consequences both for the Brexit that eventually transpired and for the peace process, and no less significantly, for the future relations between the UK its erstwhile EU partners.

Keywords Brexit – Northern Ireland – EU – European Commission – UK – Protocol – Border – Consent – Government – Belfast Agreement – Sovereignty



Brexit: where are we now?

The uncertainty over border arrangements in Ireland has hardly been resolved in the aftermath of Brexit. Prime Minister Boris Johnson's boast of an 'oven ready' withdrawal deal was anything but.¹ That being said, the return to more temperate diplomacy under Rishi Sunak's leadership has facilitated agreement on this contentious issue. The border question was always going to be a problematic one because it embodied the residual angst in Anglo-Irish relations resulting from a troubled past. For Brexiteers, the Northern Ireland Protocol does not remotely represent a 'real' Brexit, and is resented even more so by Unionists because it threatens the province's place as a constituent part of the Union state by keeping it under EU jurisdiction.

For reasons outlined in an earlier paper, Boris Johnson disavowed his own protocol almost as soon as he signed it. He did so on the grounds that it compromised national sovereignty, jeopardising Northern Ireland's constitutional status in the UK. Brexiteers view the protocol as an ideological as much as a political betrayal, even though for Johnson his about-face was more about expediency than ideological politics. It was a belated attempt by him to convince the Brexit base of his commitment to their cause. For the wider public it offered a major, convenient deflection from all that was going wrong with his unstable premiership, both in terms of Covid mishaps and personal misdemeanours.²

Coercion or consent?

Almost as soon as the protocol was signed, Johnson insisted on far-reaching changes, on the grounds that it trammelled the British constitution. A principled complaint here related to the protocol's 'democratic deficit', which had two elements. The first was the issue of taxation without representation, as some EU taxes were imposed under protocol rules but without any democratic voice available to Northern Ireland voters. The second issue was the absence of

¹ F. O'Toole, 'Why Is Northern Ireland Protocol Still an Issue? Actions Have Consequences', *The Guardian*, 23 July 2021.

² A. Menon, 'Covid Has Been an Easy Scapegoat for Economic Disruption, but Brexit Is Biting', *The Guardian*, 31 January 2022.



express public consent for the protocol per se, as required by the 1998 Belfast Agreement. This was a complaint of more concern to the Unionists, who had initially trusted Johnson but now felt betrayed by the deal that he had made with his Irish counterpart. This Unionist community has monopolised political power since 1920 and is used to defining 'consent' narrowly in a way that very much reflects its own interests.

The partition that accompanied Irish independence had been intended to ensure Protestant supremacy in the province, through discriminatory governance and gerrymandered politics that prioritised the interests of the Protestant majority. The sectarian regime provoked resentment amongst the Catholic/Nationalist minority over the levels of discrimination and social exclusion, with this eventually giving rise to civil unrest and paramilitary violence. The conflict only abated with the Good Friday Agreement (1998). It was this historic settlement that was now being threatened by the British government's pursuit of a 'hard' Brexit which required the reinstatement of the frontier that EU membership had effectively removed.

Northern Irish politics has been shaped by this bitter legacy, but the 1998 power-sharing agreement marked a historic turning point. Unionist dominance was replaced by communal parity, a consequence in no small part of social and generational changes that facilitated peace and reconciliation. This changing politics meant that the principal Unionist party, the Democratic Unionist Party (DUP), was the only one out of five parties to put forward candidates in the Northern Ireland Assembly elections in 2022 that was supportive of Brexit. Significantly, it was the principal loser in this poll.

Societal changes have given rise to an emergent 'third force' in the province, one that is opposed to the sectarianism that once defined its politics.³ There is a younger and more secularised middle ground, as confirmed by the 2021 census, which increasingly self-identifies as neither Unionist nor nationalist. For the most part, this group is progressive and socially inclusive, and in favour of constructive communal relations and closer economic and cultural links with both the Republic and the EU. The outcome of the 2022 assembly elections saw four out of the five principal non-Unionist parties winning seats, and a clear majority of voters being broadly supportive of the protocol, because for the 'silent majority' in both communities it seemed to be the only way of stabilising politics. Nevertheless, the peace in Northern Ireland is a fragile one, and the residual tensions over cultural identity are barely concealed. There is a rising

³ R. Carroll, 'Catholics Outnumber Protestants in Northern Ireland for the First Time', *The Guardian*, 22 September 2022.



cosmopolitanism on one side and a deep-rooted nativism, sharpened by Brexit, on the other. For many Unionists, the protocol represents an existential threat to their identity because it keeps the province under some aspects of EU control.

Even more alarmingly for Unionists, the protocol has raised the prospect of a poll on Irish reunification, as is already permitted in the Belfast Agreement should the circumstances permit. This eventuality has prompted Unionists, already ambivalent about power-sharing, to invoke Article 6 of the Act of Union (1800), which expressly mandates ‘free trade’ between ‘all parts of the union’, a key element of the British Union state.

Objections to the protocol

The Johnson government’s insistence on a ‘hard’ Brexit, including withdrawal from the European single market and the Customs Union, was bound to require a reinstated border ‘somewhere’ in Ireland.⁴ The protocol was a consequence of these political logics: a compromise intended to reconcile a hard Brexit with the EU’s insistence on safeguarding the 1998 peace process. However, for Brexiteers and their DUP allies, it was a concession that was seen as an outright betrayal, both of Brexit and the Union per se.

According to this nativist narrative, the protocol debases the historic and constitutional fabric that binds the province to the UK, loosening the province’s constitutional moorings by making it ‘captive’, if only in part, to what Brexiteers see as an ‘alien’ power. This power is, according to them, a malign EU that imposes ‘unnecessary’ and ‘excessive’ border checks, intended not merely to disrupt trade with Britain, but also to damage the national interest.

Of course, politics is in play here, as always with the Irish Question. For Unionists it is an existential issue, whereas nationalists, most especially Sinn Féin, broadly endorse these novel border arrangements as a convenient means to weaken the British link with Ulster. For nationalists it is by no means the end of the story, which would be the reunification of Ireland, but it is enough for now to impair economic synergies and weaken the political bonds with Great Britain.

The agreement on the protocol was thus an alarming prospect for the DUP, which was determined to reject it by every available means. Its first action

⁴ P. Hain, ‘I Negotiated a Northern Ireland Deal That Worked. Johnson’s Putinesque Strategy Will Wreck It’, *The Guardian*, 20 June 2022.



was to instruct Northern Ireland’s civil servants to cease making checks at the ‘new’ sea border, in defiance of advice from legal counsel and instructions from senior officials in London that such checks were entirely lawful. Its subsequent action was to cause the collapse of the power-sharing institutions that form the institutional bulwark of the 1998 Belfast accord.

Meanwhile, despite having negotiated and signed the protocol into international law, political objections by the Johnson and Truss governments indirectly caused the DUP to demand wholesale changes, even threatening withdrawal from the 1998 power-sharing arrangements. The patent disregard from the British government for diplomatic propriety only served to worsen the already fraught UK–EU relations, stoking anger in Dublin and exacerbating communal tensions.⁵

Protocol as proxy

The British government challenged the protocol from the outset. The senior law officer invoked Section 38(b) of the EU Withdrawal Agreement Act 2020, which affirms the principle of parliamentary sovereignty, whereby a signatory as a sovereign state is permitted to prioritise its national interest over legal obligations to other parties. This was a convenient pretext for the government’s intention to unilaterally revise any subsequent EU directive pertaining to Northern Ireland’s trading arrangements,⁶ despite it actually being an entirely self-serving move, primarily intended to keep Brexit diehards on-side as British politics descended into turmoil.

The EU, for its part, viewed the tumult in London with a mixture of anger and anxiety. It was quite prepared to discuss practicable solutions to the concerns of Northern Ireland’s business community about operational difficulties impairing Britain—Northern Ireland supply chains, not least the ‘onerous’ and ‘costly’ border and regulatory checks on traded goods and the phytosanitary arrangements. However, it refused to accede to the British government’s peremptory demands to scrap the protocol altogether.

The role of the Northern Ireland business community was critical to the EU’s calculations. While British ministers traded in political rhetoric, local business

⁵ G. Parker, ‘The Tory Politics Behind the Wrangling on Northern Ireland Brexit Bill’, *The Financial Times*, 15 June 2022.

⁶ L. O’Carroll, ‘How the UK May Try to Override the Northern Ireland Brexit Protocol’, *The Guardian*, 12 May 2022.



made the positive case for procedural adjustments. Thus moderation was endorsed by majority public opinion in the province. Four of the five principal parties and a clear majority of voters broadly approved the protocol, with only the pro-Brexit DUP as the notable outlier.⁷ The influential business organisation, Manufacturing Northern Ireland, while reporting additional annual administrative costs from enacting the protocol (at £200 million per annum), nevertheless acknowledged that this was more than offset by the benefits accruing from additional and unfettered trade between the province and the EU, calculated at some £1 billion per annum.

EU inward investment, too, markedly boosted Northern Irish manufacturing jobs by a factor of four times the rate in Great Britain. Moreover, data from the UK Office of National Statistics confirmed Northern Ireland as the *only* UK region outside of London to experience positive economic growth during the first half of 2022.⁸ And at a time of significant national cost-of-living inflation, food prices in Northern Ireland have remained lower by some 8% than for the rest of the UK.

Every relevant metric supports the case for keeping the protocol, albeit with procedural adjustments to ease supply chains between the province and Great Britain. There were always going to be difficulties ensuing from a hard Brexit, and these were made worse by the completion of the scheduled phasing out of the tri-monthly grace periods, a concession permitted by Brussels to ease the transition to post-Brexit trading arrangements.

But even these supply shocks could have been significantly mitigated by resolute government action to properly prepare for the changeover. The main complaint of local business was not about a malign EU intent to punish the UK for leaving the Union, but directed instead at the UK government's ideological fixation, administrative ineptitude and reckless squandering of precious time instead of actively preparing for the unavoidable impact of its own decision to withdraw from the single market and Customs Union.

Far from corroborating the UK government's complaint that the protocol contravened the 'spirit' of the Belfast Agreement, a clear majority of local people accepted the new arrangements as *indispensable* for maintaining communal

⁷ D. Phinnemore and K. Hayward, 'What Does the Northern Irish Public Think About the Protocol?', *UK in a Changing Europe*, 5 May 2022, accessed at <https://ukandeu.ac.uk/attitudes-to-the-northern-ireland-protocol/> on 4 January 2023.

⁸ R. Carroll, 'The Northern Ireland Protocol Is Said to Be a Blight on Regional Economy. That's Just Not True', *Observer*, 15 May 2022.



peace. This point was underwritten in law by the landmark judgment of the Northern Ireland Court of Appeal, the province's highest judicial authority, which found that the protocol was both entirely lawful and consonant with the Belfast Agreement.⁹ What these events confirm is that British objections to the protocol were much less about practical politics, let alone concern for the peace process, than a convenient alibi for the frenetic Euroscepticism that had captured the governing Conservative Party.¹⁰

British obduracy and reputational damage

The UK government's complaint against the protocol was based on a specious interpretation of Article 62 of the Vienna Convention (1969), which permits withdrawal from international treaty obligations where 'a fundamental change of circumstances [has] occurred with regard to those existing at the time of the conclusion of a treaty'.¹¹

This was an erroneous and self-serving interpretation of the Convention, offered as an alibi and a convenient justification for the spurious claim that the protocol was an existential threat to the Unionist community because it was likely to provoke a return to civil disorder. This was a remote prospect, notwithstanding Unionist angst. For while sectarianism is by no means absent in the province and the peace process remains fragile, after a full quarter of a century of power-sharing, generational change and cultural transition, residual angst is confined to diehards and fanatics.

For these reasons, the UK government's resort to Article 62 was more opportunistic than rational, prompting one legal expert to observe that 'in international law social *unrest* is not a basis for denouncing a treaty that you have signed'.¹² Indeed, the UK's intransigence over Brexit, followed by its wilful reneging on a treaty freely negotiated, surely offered the greater threat to peace. More than that, it was an affront both to prudent politics and the derogation of

⁹ J. Campbell, 'Brexit: Northern Ireland Protocol is Lawful, High Court Rules, *BBC News*, 30 June 2021, accessed at <https://www.bbc.co.uk/news/uk-northern-ireland-57666255> on 4 February 2022.

¹⁰ *Ibid.*

¹¹ *Blackstone Chambers*, 'Article 62 of the Vienna Convention on the Law of Treaties: Foreseeing the Unforeseen?', 15 March 2019, accessed at <https://www.blackstonechambers.com/news/article-62-vienna-convention-law-treaties-foreseeing-unforeseen> on 11 July 2022.

¹² M. Weaver, 'Experts Scorn UK Government Claim It Can Ditch Parts of NI Protocol, *The Guardian*, 12 May 2022; on the UK government's justification for breaking international law and the 'defence of necessity', see also G. Peretz, 'Invention Is the Mother of "Necessity"', *EU Relations Law*, 22 July 2022, accessed at <https://eurelationslaw.com/blog/invention-is-the-mother-of-necessity-the-northern-ireland-protocol-bill> on 15 October 2022.



the liberal norms subscribed to by adherents of the rules-based international order, and not least by one of its founders.

Meanwhile, Brussels stood firm throughout this turbulence, citing by way of rebuke the Convention's caveat that, as a general rule, 'fundamental change of circumstances' even if not foreseen by the parties, 'may *not* be invoked as a ground for *terminating* or *withdrawing* from a treaty'.¹³ The Commission was confident in the advice issued by its lawyers that to disapply an international treaty requires mutuality, that is, 'the consent of the two sides'.¹⁴

The UK government's belligerence over the protocol was roundly denounced by more measured voices, not least that of Tony Blair's chief negotiator in 1998, Lord Jonathon Powell, who described it as an act of 'casual political vandalism', a 'masterclass in deception' and a symptom of Britain's diminished international status.¹⁵ The historic accomplishment of 1998 had been recklessly jeopardised by a 'duplicity [that] has sabotaged Northern Ireland's delicate political settlement [and] a disreputable, dangerous manoeuvre' likely only 'to aggravate a domestic crisis and harm Britain's standing abroad'.¹⁶ Hardly then, the triumphal Brexit proclaimed by Prime Minister Johnson in his pomp.

Indeed, by now it was quite apparent to all except Brexit diehards that the protocol's novel border arrangements offered the only feasible route out of diplomatic gridlock. It was a political problem that was as much about identity politics as it was about procedural wrangling over supply chains and border checks. The compelling issue of Unionist identity was perceived by nationalists to be under threat from cultural and demographic changes as much as from EU paperwork or rules-of-origin checks. Powell's warning, then, was timely, but ignored by both Johnson and his capricious successor.

Instead of handling a sensitive issue with due care, both Johnson and his successor recklessly gambled with a brittle peace: with cant rather than caution as their diplomatic lodestone. They threatened to foreclose on the very mechanism Johnson had personally signed off on to avoid customs checks and other border paraphernalia that might incite extremists on this most sensitive of frontiers. Of course, Brussels is by no means blameless for the deteriorating

¹³ G. Peretz, 'Invention Is the Mother of "Necessity"'.
¹⁴ Ibid.

¹⁵ *Financial Times*, 'Politics Class: The UK Approach to Northern Ireland Is One of Casual Political Vandalism', 17 October 2021, accessed at <https://www.ft.com/content/8f6ca276-7266-4b07-83a7-77e0a2dd8b74> on 2 June 2024.

¹⁶ *The Guardian*, 'The Guardian View on the Northern Ireland Protocol: Make It Work', 11 May 2022.



relations following the protocol accord. Discomfited by the UK government's intransigence the Commission responded petulantly, blocking delivery of Covid-19 vaccines purchased by the UK and sourced in Belgium, refusing to abide by an agreement and even threatening to invoke the Article 16 clause that allows either side to invoke temporary emergency measures should they feel their interests are compromised. This was a rare but unfortunate example of EU ill-temper and soon reversed, but it provided a convenient stick for Brexiteers to use against Brussels.

Brexit was 'done' then, but in name only, and without resolving this most critical of issues. By now, however, Johnson was under attack from every side, not least from his own militants. Civil war was unleashed inside the governing party and exacerbated by rising discord over the protocol. Something had to give, to end both the domestic intransigence and the diplomatic impasse. History confirms that most trade disputes eventually result in compromise. This was the very reason the parties to the withdrawal negotiations had written a dispute resolution mechanism into the withdrawal treaty. But instead of cautious diplomacy, the Brexiteers in charge of the UK government had doubled down on ideology and rhetoric, preferring these and threats to measured diplomacy.

The standoff was only brought to a conclusion after a catalogue of policy mishaps and a personal misdemeanour ended Johnson's premiership, followed soon afterwards by the demise of his hapless successor. This led to a third British premier in barely two months and the unseemly spectacle of British politics in utter disarray.¹⁷ Only then did a recovery of sorts begin, with political leadership passing to the prudent Rishi Sunak, who is a 'Leaver' by preference but a pragmatist by disposition, for whom politics is the art of the possible, rather than the pursuit of ideological unicorns.

Peace 'comes dropping slow'

From the outset Sunak was amenable to resolving the border impasse. The European Commission, its aberration on vaccine exports to the UK notwithstanding, remained open to settlement. The Commission had already published extensive consultation papers containing practical proposals for reducing the cumbrous bureaucracy at the border, including the removal of sanitary and phytosanitary checks on chilled meats, granting exceptions for

¹⁷ T. McTague, 'The Liz Truss Travesty Becomes Britain's Humiliation', *The Atlantic*, 14 October 2022, accessed at <https://www.theatlantic.com/international/archive/2022/10/liz-truss-fires-kwasi-kwarteng-tax-cuts-britain/671738/> on 15 December 2022.



some British agri-foods if intended only for Northern Ireland, and a proposal for an ‘express lane’ to ease the transit of goods from Great Britain destined exclusively for the province. This was a solution even the UK government considered to be feasible, with common ground also being found regarding a trusted trader scheme to minimise disruption to Great Britain—Northern Ireland supply chains.¹⁸

In thrall to the *idée fixe* that is Brexit, both of Sunak’s predecessors had refused to seriously engage with Brussels, notwithstanding a significant goodwill gesture from Europe—a concession on the importation of generic medicines into Northern Ireland from Great Britain. EU interlocutor Maroš Šefčovič described this proposal as contributing to a ‘bespoke solution’ to Northern Ireland traders’ concerns about free movement of goods and services from the mainland.

However, instead of parleying, Johnson and Truss tabled provocative legislation intended to block significant aspects of the protocol. The UK Internal Market Bill (2020) aimed to reinforce economic sovereignty, and included measures to unilaterally disallow parts of the protocol by removing internal barriers to trade with the province by ending the need to provide exit declarations for goods leaving Northern Ireland for Britain. This was followed by the Northern Ireland Protocol Bill (2022), which permitted the unilateral interpretation of state aid rules as these apply to the province and allowed the unilateral cancellation of measures regarded as hindering free trade between Great Britain and the province.¹⁹ All of these measures were deliberately provocative and in contravention of international law, albeit as the minister responsible rashly claimed, only ‘in a limited and specific way’.²⁰

All these actions were intended to appease the Brexit nativists, but their perverse consequence was to worsen the situation in the province and further aggravate EU–UK relations. This was even more concerning in the light of the

¹⁸ L. O’Carroll, ‘Brexit Protocol Row: What Are the Issues Dividing UK and EU?’, *The Guardian*, 16 May 2022.

¹⁹ *UK Parliament*, ‘Northern Ireland Protocol Bill 2022 / 23’, 24 June 2022, accessed at <https://commonslibrary.parliament.uk/research-briefings/cbp9569/> on 23 July 2023.

²⁰ K. Hayward, ‘How Does the Internal Market Bill Relate to Northern Ireland?’, *LSE blog*, 19 October 2020, accessed at <https://blogs.lse.ac.uk/brexit/2020/10/19/how-does-the-UK-Internal-Market-Bill-relate-to-northern-ireland/> on 11 February 2021.



province's brittle politics, as it gave the DUP a pretext for withdrawing from—and thereby causing the collapse of—the province's power-sharing institutions.²¹

The eventual implosion of Johnson's credibility, even amongst Brexiteers, followed an unprecedented medley of missteps and misdemeanour, not least his reckless misuse of public office and cavalier approach to his own government's lockdown rules, which eventually took their toll, fatally degrading his authority. After three prime ministers in quick succession, and the enforced removal of Johnson and Truss by their own party, it was only with the arrival in office of Sunak, a transactional, managerial and, above all, pragmatic politician, that probity was restored as the benchmark for British governance and diplomacy.

The imperative for dynamic leadership and practicable solutions for easing post-Brexit dither remain crucial, not least given the legal requirement written into the Trade and Cooperation Agreement for a quinquennial review of Brexit's impact in 2024. This will be the first opportunity to review Brexit consequentialism as the accrual of facts rather than political spin and fantasy, and to respond to cumulative public unease, as evidenced by the plethora of opinion polls that confirm the growing support for closer economic and political ties with the UK's EU neighbours.

This is a mood shift that reflects wider anxieties about events further afield. Russian belligerency in Ukraine, the most heinous aggression to threaten continental, indeed Western security since the Second World War, is a critical accelerant here. This strategic threat has been compounded by contingent crises in regional energy supply, living costs and interest rates, in conjunction with the backwash of a mishandled pandemic. These are circumstances that have brought the otherwise parochial issue of the latest Irish Question into sharper relief, in the process injecting a sense of perspective into what, in the greater scheme of things, has been 'mere' bickering over a comparatively localised issue.

²¹ R. Behr, 'The Government Is Picking a Fight With Reality With Its NI Protocol Bill', *The Guardian*, 14 June 2022, accessed at <https://www.theguardian.com/commentisfree/2022/jun/14/ni-protocol-bill-brexit> on 12 December 2022.



End game: the Windsor framework

After Sunak's arrival, negotiations on the protocol resumed in earnest and were quickly concluded with the Windsor Framework in February 2023.²² The UK government returned to constructive parleying that confirmed 'cakeism' was no longer on the table—indeed it never had been, except in the imaginations of Brexiteers. This was a realisation that Prime Minister Theresa May had reluctantly assimilated but that had been resisted by her successors until Sunak. The Windsor Framework has worked because its signatories are now broadly on the same page, with London finally acknowledging the disparities in its power compared with that of the EU interlocutor. The UK government is now prepared to confront the ineluctable realities and is reconciled to the strategic trade-offs required by Brussels, not least prioritising the peace process and safeguarding the EU's single market. This trade-off affirmed the integrity of the British internal market and allowed Northern Ireland access to the EU market. More important even than that, the UK government is now amenable to better relations with its erstwhile partners, which in the mutable world of Europe's near and not-so-near abroad is in the continent's best interests.

British negotiators are finally focused on practicalities instead of dogma. The tone of relations is improved, yet still, for the time being, tentative—but at least cooperative rather than confrontational. The Windsor Framework, amicably negotiated by Rishi Sunak and Ursula von der Leyen in February 2023 and finalised within the month, meets the principal requirements of Northern Ireland business and of the peace process. The standout measure removes the excessive paperwork impeding Britain—Northern Ireland supply lines by establishing a 'green lane' that operates on the 'trusted trader' principle.

A catalogue of measures flank this one, including a practical approach to trade in medicine and the use of appropriate labelling to promote agri-food trade, with the EU retaining the right to suspend such 'flexibilities' in cases of serious or repeated infringements. Northern Ireland remains exempt from certain value-added tax liabilities and the UK retains discretion on the excise duty applied to alcoholic drinks, though significantly it must adhere to EU minimum duty rates. The parties have also agreed to review UK-wide and Britain-only subsidies to ease their impact in Northern Ireland, to clarify EU and UK-wide or Britain-only subsidies, and to constructively consult on any proposed regulatory change.

²² J. Sargeant, S. Savur and J. Marshal, 'The Windsor Framework', *Institute for Government*, 27 March 2023, accessed at <https://www.instituteforgovernment.org.uk/explainer/windsor-framework> on 18 June 2023.



These amendments address present concerns, with the parties committing to review any procedural concerns as they arise by means of a mechanism described as the ‘Stormont Brake’, a procedural but also symbolic concession intended to assuage Unionist anxieties over the protocol’s democratic deficit. Stormont ministers will have ‘sight’ of any new EU laws likely to affect the province’s participation in the UK’s domestic market, though only after devolved government is restored, as required by the 1998 peace accord. Moreover, the ‘brake’ may only be triggered, and any proposed measure abrogated, in the ‘most exceptional circumstances and as a last resort, having used every other mechanism’, and when a complainant demonstrates what is ‘*significantly different*’ about any new rule, and how it ‘specifically’ and ‘significantly impacts on . . . everyday life of communities in Northern Ireland’ in a way that is liable to persist.²³

Moreover, although the framework allows the UK government to refuse to discuss any matters arising with Brussels, it nevertheless requires the approval of any proposal by either side by means of a cross-community vote in the Northern Ireland assembly. This is a concession to British sensibilities about attenuated sovereignty, with the parties required in the first instance use the Trade and Cooperation Agreement dispute-resolution mechanism rather than resort to the European Court of Justice.

These latest developments are a breakthrough, with compromises and trade-offs that will markedly improve relations. Only arch-Brexiteers remain unconvinced by this diplomatic development, making persistent complaints about the absence of ‘democratic consent’. The Unionists’ insistence on a communal veto has been denied and instead the lesser interdict of a cross-party majority vote in Stormont put in place, albeit only in ‘exceptional circumstances’ and after substantive discussions between stakeholders. Thus it is hardly a veto at all, and intractable Unionists see it as yet more surrender to Brussels, with the Brexit red lines sacrificed for political convenience and at the cost of weakening the constitutional fabric of the Union state.

A more balanced account of these events sees them less as capitulation than as the indispensable accommodation that is practicable politics. It is less ‘game, set and match’ to Brussels than a return to realism as the new normal for UK–EU relations. Difficult issues remain. Regulatory and customs checks will continue at the border between the separate economic regimes. There is still

²³ UK, House of Commons Library, *Northern Ireland Protocol: The Windsor Framework* (21 March 2023), accessed at <https://researchbriefings.files.parliament.uk/documents/CBP-9736/CBP-9736.pdf> on 1 June 2023, 7.



a mutual wariness between the parties, which is unsurprising given they have only recently experienced a traumatic divorce. The most contentious issue here is the British objection to the adjudicatory role of the European Court of Justice in resolving future disputes, although the British obduracy is modulated by a shared commitment to settle differences through the protocol's joint procedures. For its part, the EU has relinquished its right to automatically commence infraction proceedings, and in the spirit of the new framework has committed to 'developing common procedures' for governing the agreement, notably a joint committee that includes key Northern Irish stakeholders.²⁴

This represents progress, though the Court's continuing adjudicatory role is a potential irritant. After all, obsessiveness over sovereignty is Brexit's execrable legacy and likely to be so for the foreseeable future, whichever party is in government. The Brexit mood music is still playing, though more *sotto voce* now. That being said, the sovereignty genie released in 2016 continues to taint British politics. Brexit is done in name, but its penumbra of unease and mistrust remains an insidious threat to politics as usual.

Finally answering *this* Irish question?

Revisions to the protocol represent a compromise between respective red lines, albeit with a greater concession on the British side. Predictably, Brexiteers condemn these adjustments as abject surrender, while more moderate voices suggest they are expedient and indicate a return to common-sense politics.

The Windsor Framework looks forward. If not (or not yet) a full reset of UK–EU relations, then it is at least a constructive re-engagement. The prospect of the normalisation of relations is unlikely for the foreseeable future. The bitterly contested withdrawal seriously eroded trust on both sides, and the post-Brexit shenanigans over the protocol only deepened the rift. The return to *post factum* starts from a low base, with the *status quo ante* far from being assured any time soon.

Nevertheless, the present state of geopolitics is a compelling incentive for recovering trust. The rising threat to Western security is reason enough for better relations after the dissonance of Brexit. Material interests and political,

²⁴ European Council, Proposal for a Council Decision on the position to be taken on behalf of the EU in the Joint Committee established by the EU–UK Withdrawal Agreement, COM 2023 final (23 February 2023), accessed at https://commission.europa.eu/publications/proposal-council-decision-position-be-taken-behalf-eu-joint-committee-established-eu-uk-withdrawal_en on 24 March 2023.



strategic and cultural challenges demand a closer engagement between the near neighbours. Economic rationality and strategic logics impel greater interdependence, if not yet the rejoining of the single market and Customs Union—no British mainstream party is likely to make that leap of faith quite yet.

There are, however, positive signs of constructive re-engagement by British officialdom with the plethora of EU sectoral programmes that offer real benefits to civil society at every level. These are, notably, the Horizon, Erasmus and Copernicus programmes. Closer alignment in sectoral matters, such as product standards, food safety, regulatory regimes, recognition of professional qualifications, mutual access to labour markets, and police and judicial cooperation, among others, will be rather more difficult terrain to cross for a country actively disengaging from functional integration with its erstwhile partners.

As such technical divergence proceeds, the challenge of reconnecting with the policy domains that drove the Brexit agenda increases, with all of these critical issues inciting the Brexit lobby to resistance. However, there is much less resistance from the senior civil service and the business sector, which is struggling to trade with the massive market on Britain's doorstep. Significantly, too, after Brexit's underwhelming outcome, the Brexiteers' resistance is failing to chime with a growing majority of public opinion.

As things stand, the likelihood of the UK rejoining the European institutions remains a distant prospect. It is a generational issue, unlikely to be settled any time soon. After all, Brexit was a seismic event for British politics and society—a cultural breach as much as a political or economic rupture, and one not easily undone. It was a challenge, too, for Europeans, who, lest we forget, did not choose the outcome that has impacted many member states just as profoundly. It was a historic inflection moment for Europeans in their troublesome relations with an awkward neighbour as much as it was a turning point for the British.

Context is everything in politics, and Brexit was the unanticipated consequence of democratic turbulence and a strategic anxiety unknown in the West for many decades. It was the incipient event in a crisis for the Continent that has conflated multiple challenges: energy insecurity and climate emergency, anxiety caused by mass migration, corrosive culture wars and, not least, the strategic threat following the invasion of Ukraine. All of these events have confirmed the urgent imperative to bolster the liberal international order, which is in serious trouble and potentially in existential peril. The pressing need now is to restore public trust and recover confidence in liberal values, repair bridges with neighbours and reaffirm established alliances.



This much is common ground, indeed it is common sense and surely underscores the need for shrewd diplomacy on a continent whose peoples have more in common, both interests and values, than divides them. That being said, history and experience also confirm that reason alone is no guarantee of prudent politics.

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Credits

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