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Introduction

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The aim of this book is to analyse the principal legal dimensions of the Ireland–Northern Ireland Protocol (the Protocol), which is part of the EU–UK Withdrawal Agreement (WA), negotiated to enable the United Kingdom (UK) to leave the European Union (EU) in an orderly fashion. The purpose of this Introduction is to set out some of the basic background needed to understand the scope and content of the Protocol, and how this book attempts systematically to describe and analyse it. The Protocol is most appropriately seen in the context of the desire to preserve the Belfast-Good Friday Agreement (1998 Agreement), the changing politics of the UK Parliament and government over the relevant period, and the subsequently negotiated Trade and Cooperation Agreement (TCA).

1.1 Referendum and Aftermath

The vote to leave the EU in June 2016 was perhaps the greatest shock to the politics of the UK since the Second World War. For a decision of such immense gravity, it was taken without full and proper consideration of many of the most important effects of a vote to leave the EU. In particular, the UK was soon faced with the difficulty of how to leave without endangering the unstable peace that had existed in Northern Ireland since 1998. This difficulty, however obvious it seems in retrospect, was seldom discussed before the Referendum itself, particularly in the rest of the UK.

This absence of public discussion, combined with the decision of Prime Minister David Cameron to instruct civil servants not to plan for the consequences of a 'leave' vote, meant that the full extent of the problems that disentangling the forty-five-year-old relationship between the UK and the EU would present for Northern Ireland were only fully realized by UK negotiators during the course of the post-Referendum negotiations between the two sides. The EU was much better prepared,

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since Ireland had been concerned from the time the Referendum was first announced that a leave vote could seriously destabilize Northern Ireland, and thus the island of Ireland, and had already begun serious planning. As a continuing member of the EU, it shared these insights with EU negotiators. The EU's understanding of, and approach to, the Northern Ireland difficulty was thus initially framed by Ireland's analysis, and Ireland was to remain a dominant influence.

1.2 Belfast-Good Friday Agreement

A principal difficulty identified by Ireland (and the EU) was the challenge that the UK's exit from the EU would pose for the 1998 Agreement.[1] This had helped bring about a modus vivendi between the different communities in Northern Ireland, long immersed in a violent conflict between unionists and loyalists (who want Northern Ireland to remain in the UK) and nationalists and republicans (who want Northern Ireland to unify with Ireland). The 1998 Agreement succeeded in bringing a degree of stability by setting the internal Northern Ireland conflict in the broader context of relations between the UK and Ireland generally (the East–West dimension) and between Northern Ireland and Ireland generally (the North–South dimension).

The 1998 Agreement is a wide-ranging peace agreement, with multiple moving parts. In broad outline, it provides for the establishment of devolved government in Northern Ireland, consisting of a Northern Ireland Assembly and a power-sharing Executive composed of representatives from both communities. The Executive and the Assembly have powers devolved to them from the UK Parliament at Westminster. Although Northern Ireland remains in the UK, it does so on the basis of the consent of the people of Northern Ireland who may vote to decide whether to remain or to unify with Ireland. Institutions are in place to bring together the government of Northern Ireland and Ireland to consider common interests, and several North–South bodies are established to organize and oversee particular projects in mostly non-contentious areas of activity, such as waterways and tourism. Several bodies are established to enable the governments of Northern Ireland, Ireland and the UK to meet with devolved governments in Scotland and Wales, as well as the Channel Islands and the Isle of Man, the so-called East–West dimension.

[1] See Chapter 2.

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The 1998 Agreement also set in train reforms in other major areas of contention, in particular in policing, and established mechanisms to address the legacy of armed conflict, such as decommissioning the weapons of armed groups, releasing convicted prisoners associated with paramilitary organizations, and implementing a panoply of human rights and equality measures to address long-standing grievances.[2] With the onset of peace, the border between Northern Ireland and Ireland was demilitarized (reducing the need for a contentious British Army presence), and cross-border economic activity was better able to flourish. This was also helped in part by the resuscitation of the Common Travel Area,[3] which eased the flow of cross-border employment and health-care arrangements. The establishment of an all-island economy was not simply a by-product of the 1998 Agreement, however; it was an important dimension of the overall strategy. If successful, it would help provide economic growth which would ease social change, and longer term it would help reduce the 'otherness' which has long bedevilled political, social and economic relationships on the island.

1.3 Role of the European Union

At the time that the 1998 Agreement was concluded, both the UK and Ireland were members of the EU and this shared membership did much to ease tensions between the UK and Irish governments. Set in this wider context, Irish and British polities were able to identify with a broader identity as EU member states. The constant involvement of UK and Irish diplomats, civil servants and politicians in European meetings also helped build trust, which proved invaluable when relationships came to be tested in the difficult peace process negotiations. With some justice, the EU came to identify the 1998 Agreement as a success story to which it had contributed.

The role of the EU was more than the provision of alternative narratives and opportunities to engage. It also played a positive part in providing an important supporting structure for several elements of the 1998 Agreement itself. Many of the various activities detailed above involved a role for EU law. Human rights and equality measures were underpinned by European anti-discrimination directives[4] and the EU Charter of Fundamental Rights

[2] See Chapter 12.
[3] See Chapter 14.
[4] See Chapter 12.

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(CFR).[5] Cross-border trade in goods and services was significantly facilitated by membership in the EU Single Market.[6] Barriers to entrepreneurial activity North and South were reduced by common provisions on state aid,[7] competition[8] and public procurement.[9] Labour mobility was facilitated by EU free movement requirements. Cross-border employment was eased by a common set of labour regulations. Cross-border enforcement of commercial judgments was facilitated by shared rules of private international law.[10] The EU also provided extensive funding of projects linked to the peace process and economic regeneration in deprived and border areas. The North–South bodies were able to organize co-operation across a range of areas of activity considerably more easily because these areas frequently depended on common membership of various EU bodies. Co-operation in anti-terrorism between the Police Service of Northern Ireland and An Garda Síochána was eased by common EU rules on data transfer. From the time when extradition between Dublin and Belfast was governed by EU rules, the previous long-running controversy over the extradition of terrorist suspects almost completely disappeared.[11] A cross-border public procurement market could emerge based on a common set of EU rules. And so on.

1.4 Options for the United Kingdom

What 'Brexit' involved was never clearly articulated prior to the Referendum, and it became apparent relatively quickly after the vote that there were several vitally important UK policy objectives in play, not all of which could be satisfied: to leave the EU, regain (as it was seen) its sovereignty and 'take back control' of its 'borders, money and laws';[12] to negotiate a range of free trade agreements with non-EU states to replace access to the EU market; to retain Northern Ireland in the UK, on equal terms with the other component parts, thus lessening the sense among unionists/loyalists that their British heritage might be compromised; and to preserve the close links between Northern Ireland and Ireland, ensuring that the removal of the underpinnings provided by

[5] See Chapter 13.
[6] See Chapter 21.
[7] See Chapter 19.
[8] See Chapter 18.
[9] See Chapter 22.
[10] See Chapter 24.
[11] See Chapter 23.
[12] UK Government, EU Exit: Taking back control of our borders, money and laws while protecting our economy, security and Union, CM 9741, November 2018.

EU law and practice would not destabilize the 1998 Agreement, and with it the entire peace process. A central issue in this context, though by no means the only one, was the problem of how to deal with the fact that the border between Northern Ireland and Ireland would, after the UK's exit, become an international border between the EU (Ireland) and a non-EU state (the UK).

There were (roughly) three options that the UK had available to it: (i) the UK could continue to remain closely aligned to the EU, thus enabling it to continue its close relationships between East–West and North–South, but at the cost of not fully 'taking back control' and becoming a rule-taker; (ii) the UK could fully 'take back control', retaining an ability to distance itself from EU institutions and policy, while keeping Northern Ireland aligned with the UK, satisfying unionists, but at the cost of weakening the 1998 Agreement, antagonizing Irish opinion, requiring customs and regulatory checks and controls at the Ireland–Northern Ireland border (the infamous 'hard' border), and thereby risking the return to republican violence; or (iii) the UK could create a different and distinct relationship between Northern Ireland, on the one hand, and the rest of the UK (that is, Scotland, Wales and England, known as Great Britain), on the other, with Northern Ireland remaining closely aligned to the EU, preserving important elements of EU underpinnings to the 1998 Agreement, but with Great Britain alone 'taking back control' and retaining an ability to distance itself from the EU. The costs of the third option were clear: there would be a need for a customs and regulatory 'border' between Northern Ireland and Great Britain, with the consequent significant risk of antagonizing unionist/loyalist opinion.

We shall see that the EU initially proposed something like the third option, but this was rejected out of hand by then Prime Minister Theresa May, as entirely unacceptable – not an option that any British prime minister could contemplate. The EU and the UK then negotiated 'the backstop' – a combination of the first and third options, with the UK aligned with EU customs rules but Northern Ireland alone aligned in terms of regulatory requirements. This did not, however, secure UK parliamentary support. The UK attempted, unsuccessfully, to argue in favour of versions of the second option, suggesting mechanisms that would seek to avoid physical infrastructure at the Ireland–Northern Ireland border, but these were unacceptable to the EU. Finally, the EU proposed a variation of the third option, again, which was accepted by the new (current) Prime Minister Boris Johnson, who had replaced Theresa May. The current Protocol is essentially this third option and, in this

book, we are concerned with the details of how this option was elaborated and implemented.

1.5 Westminster's Changing Politics

To understand why the third option was ultimately accepted by the UK government, we need to retrace our steps to the period immediately following the Referendum vote. A Conservative government was in power in Westminster, with an absolute majority, and then Prime Minister David Cameron, who had called the Referendum, immediately resigned and triggered a contest for leadership of the Conservative Party. Theresa May won, and also became Prime Minister. May immediately accepted the referendum result and interpreted its implications as being at the more extreme end of the spectrum. For example, suggestions that the UK should join the European Economic Area (EEA) were quickly dismissed, and with it the close alignment with the EU that this membership would have brought. The Labour Party remained as divided over the exit from the EU as it was during the Referendum campaign, and provided no credible alternative set of policies as to how to handle the aftermath of the Referendum.

At this point, a critical question arose as to *how* the government was to proceed, meaning the method of doing so, and in particular how the UK was to indicate to the EU formally that it would be leaving the EU. The government claimed that it was able to act under executive powers, termed the Royal Prerogative, while others argued that the decision to leave and to authorize the triggering of the negotiations with the EU had to be taken by Parliament, rather than by the government alone. Campaigners challenged the use of the Royal Prerogative to do this and the UK Supreme Court ultimately accepted their argument.[13] A decision of this importance, the Court held, had to be authorized by Parliament. This put Parliament in the ultimate driving seat, and so it remained for the next two years.

Partly because Prime Minister May wanted to shore up support for her government and her premiership (after all, she had become Prime Minister solely by virtue of being elected head of the Conservative Party), and partly in order to strengthen her hand in dealing with those in her own Party who

[13] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union; In the matter of an application by Agnew and others for Judicial Review; In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5.

supported an even harder Brexit than she was comfortable with, she called a General Election for June 2017. Disastrously for her, rather than increasing her majority in the House of Commons, she lost her absolute majority, leaving her even more exposed to pressure from hard-Brexit supporting Conservative MPs. After negotiations, she reached a 'confidence and supply' agreement with the Democratic Unionist Party of Northern Ireland (DUP), which meant that that party's MPs in Westminster would support the government on all major votes, including on the exit of the UK from the EU. This left May with a working majority in the House of Commons, but at the cost of being dependent on the only political party in Northern Ireland that supported a leave vote in the Referendum. All other Northern Ireland political parties had supported a remain vote, and this reflected the balance of public opinion in Northern Ireland, with 55.8 per cent voting to remain and 44.2 per cent voting to leave.

The May government staggered on for the next two years. However, her room for manoeuvre was significantly reduced, as was to become crystal clear when the leader of the DUP vetoed part of an agreement with the EU which May was about to sign off on. This led her to reject the initial compromise offered by the EU, as described earlier, and when she eventually agreed to the second compromise offered by the EU, she found herself with a depleted Cabinet (several of her ministers, including Boris Johnson, resigned because she accepted the EU's plan). Faced with a House of Commons in which it was impossible to garner enough votes to close on the deal, May was forced to resign in June 2019 – the second prime minister to leave 10 Downing Street over Brexit.

In July, she was replaced as leader of the Conservative Party (and Prime Minister) by Boris Johnson, who immediately restarted the stalled negotiations with the EU. Like May, Johnson faced a bitterly divided House of Commons which he tried to circumvent by persuading the Queen to prorogue (suspend) Parliament between 9 September and 14 October.[14] This was challenged in the Supreme Court, which decided later that month that the prorogation had been unlawful. So, although he reached an agreement with the EU in October that amounted to the third option described earlier, there remained the problem of securing sufficient support in the House of Commons to enable the deal to be delivered, and he failed to do so. With the aim of increasing his support in the Commons and, as he described it, 'get[ting] Brexit done', he then

[14] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

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called a General Election for December 2020. He succeeded in securing a large overall Conservative majority, enabling him to pass the necessary legislation to enable the UK to ratify the Withdrawal Agreement (WA), and leave the EU at the end of January 2020. Under the WA the UK essentially remained in the EU for all intents and purposes for the next year, during the so-called 'transition' or 'implementation' period.

Following the conclusion of the WA, the UK and the EU turned to the negotiation of an agreement on future relations: what became the Trade and Cooperation Agreement (TCA). Buoyed by its success in the General Election, and with a clear majority in Parliament, the UK government reconsidered its position. In particular, it needed to decide whether it wished the UK to remain closely aligned to the EU in the future or whether it wished to give itself the freedom to depart from the EU's Single Market policies. On the one hand, the closer the continuing alignment, the more that potential tensions arising from the regulatory and customs border between Northern Ireland and Great Britain could be reduced, and concerns among unionists/loyalists in Northern Ireland that they were being cut off from the rest of the UK could be alleviated. The more easily, too, would any remaining tensions on the island of Ireland, between North and South, be addressed. On the other hand, the more the UK adopted a policy of freedom to depart from EU rules, the more those who advocated a 'hard' Brexit would be satisfied, and the greater the freedom the UK would have in negotiating free trade agreements with other non-EU states, in particular the United States, which would be likely to negotiate robustly to ensure that the UK's markets would be open to products that would not conform to EU requirements. Put somewhat, but not overly, simplistically, the UK government broadly opted for the second approach, with the preservation of 'national sovereignty' high on the political agenda, but at the cost of putting additional pressure on what quickly became known as the 'border down the Irish Sea'.

1.6 Scope of Article 50 Negotiations

Understanding the British political scene during this period is critical to gaining an appreciation of what eventually emerged as the WA and the TCA, but it is only part of the story. The other important element was the EU itself. From the EU's point of view, the second option identified earlier quickly became unacceptable because it would have required a 'hard' border on the island of Ireland, and if the UK had pressed it rather than either of the other two, it is highly unlikely that there would

have been a successfully concluded WA. The first and the third options were identified by the EU as an acceptable basis for negotiation; they put in place provisions to protect the 1998 Agreement and reduced the need for a 'hard' border. The avoidance of a 'hard' border was critical, amounting at a minimum to a prohibition on any physical infrastructure, such as customs posts, at crossing points between Northern Ireland and Ireland. The first and the third options also satisfied the EU's other 'red lines': the absolute need to protect its Single Market; preserving the autonomy of the Court of Justice of the European Union (CJEU); preventing the UK from becoming a serious competitor to the EU as a whole while retaining access to EU markets; and heading off the likelihood that an easy Brexit could encourage other EU states with Eurosceptic citizens to consider leaving, thus destabilizing and disrupting the Union still further.

There was, however, another more legal dimension to the form and content of the WA. The negotiations that the UK triggered after the leave vote in the Referendum were conducted under Article 50 of the Treaty on European Union (TEU), which provided a (somewhat ambiguous) roadmap for how a member state could lawfully leave the EU. Crucially, Article 50 distinguished between negotiating to leave the EU and negotiating a new future relationship after departure. As a result, it would have been contrary to Article 50 to confuse or blur the line between the two. This meant that negotiations between the EU and the UK over future relations (including on the important questions of trade relations) could not take place unless and until an agreement had been reached on withdrawal. The question remained, however, as to what exactly could or should be included within the scope of these withdrawal negotiations.

What became critically important in determining the content of the subsequent WA was an EU–UK political agreement, early in the summer of 2017, that the withdrawal negotiations would focus on four main issues only. One issue concerned the EU budget and the UK contribution to it. A second issue was the complex question of how EU states should treat UK citizens resident in the EU, and vice versa, after the UK had exited. The third concerned how best to sequence the UK's departure, and in particular the form of any transition period. The fourth issue identified was the one on which most time was spent, and became the make-or-break issue in the negotiations, namely, how to handle Northern Ireland.

In addressing each of these issues in the negotiations, the question of trust (or, rather, the lack of trust) was a recurring theme. There has been a growing appreciation in international relations scholarship, and latterly in international legal studies, of the important role that distrust plays in the

structuring of international agreements, and the content of the WA, and in particular the Protocol, bears this out. Many of the features of the Protocol indicate the lengths to which the EU side went in attempting to guard against backsliding by the UK government after any agreement was concluded, in particular the emphasis placed on the need for effective domestic enforcement mechanisms, and the role given to international governance arrangements, including a role for the CJEU, in resolving disputes, interpreting the agreement and imposing sanctions in the event of an unresolved breach.

1.7 Withdrawal Agreement in Outline

Although this book principally concerns the Protocol, it is set in the context of the WA as a whole, the aim of which is to ensure that the UK left the EU in an orderly manner. The Agreement attempts to bring legal certainty in areas where the UK's withdrawal created uncertainty. In different parts of the Agreement, it addresses citizens' rights[15] and lays out the financial settlement, and it provided for a transition period up until the end of 2020. Elaborate governance arrangements are established, in particular a Joint Committee of representatives of the EU and the UK to consider outstanding issues and resolve disputes,[16] and an international arbitration body whose role is to adjudicate on such disputes in the event that they cannot be resolved politically.[17]

A set of common provisions at the beginning of the WA provides for general principles regarding the proper understanding and operation of the Agreement as a whole, including the Protocol.[18] In brief, the provisions of the Agreement must have the same legal effects in the UK as in the EU and its member states; the UK must engage with CJEU case law; UK judicial authorities must be empowered to disapply any inconsistent or incompatible national legislation; and the UK and the EU must ensure that the WA is capable of being invoked before national courts in the UK and the EU. In addition, there is an overall obligation on the UK and the EU to apply the provisions of the WA 'in good faith'.[19]

These provisions apply to Northern Ireland in the same way as to the rest of the UK. Special arrangements for Ireland–Northern Ireland, Gibraltar and Cyprus are to be found in a series of Protocols, attached

[15] For the implications of these provisions for the island of Ireland, see Chapter 16.
[16] See Chapter 4.
[17] See Chapter 5.
[18] See Chapters 3 and 6.
[19] See Chapter 8.

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to the Agreement, which are stated explicitly to be integral parts of the Agreement and of equal status. Put briefly, the broad aims in negotiating the Ireland–Northern Ireland Protocol were to ensure (i) that there is no 'hard' border between Northern Ireland and Ireland, while at the same time ensuring that there are arrangements to preserve the integrity of the EU's Single Market; and (ii) the protection of the 1998 Agreement 'in all its dimensions', including 'no diminution of rights' and maintaining 'the necessary conditions for continued North–South cooperation'.[20]

To accomplish the first, Northern Ireland remains aligned to a limited set of EU rules that the EU considers are indispensable for avoiding a 'hard' border, while protecting the Single Market.[21] The Single Market measures identified are only a subset of the totality of such provisions applying to Member States: rules regarding value added tax (VAT) and excise of goods; legislation on product requirements; sanitary rules for veterinary controls (the so-called SPS rules); rules on agricultural production and marketing; and state aid rules. The Protocol thus falls far short of the close alignment with the EU that membership in the EEA brings in this respect. Northern Ireland also exited the EU Customs Union, but the EU's Customs Code and other customs legislation apply to all goods entering Northern Ireland.[22] Any amendment or replacement of these rules by the EU will apply to Northern Ireland, involving so-called dynamic alignment. The controversial nature of these provisions is recognized by subjecting these provisions (but only these provisions) to a 'democratic consent' mechanism, under which Northern Ireland politicians will be given the opportunity to vote on whether to continue with these arrangements, initially at the end of 2024, and periodically thereafter.[23]

That comprises the bulk of the substantive provisions of the Protocol. The other aims are addressed more briefly. To accomplish the second set of aims, the UK commits itself to no diminution of rights, safeguards and equality of opportunity as set out in the 1998 Agreement,[24] but with significant uncertainty about the future role of the EU CFR.[25] The Common Travel Area (CTA) could continue to apply, in conformity with EU law,[26] with important implications for the role of EU, Irish and

[20] Protocol, Preamble and Article 1.
[21] See Chapter 6.
[22] See Chapter 17.
[23] See Chapter 10.
[24] See Chapter 12.
[25] See Chapter 13.
[26] See Chapter 14.

British citizenship,[27] and a provision that North–South co-operation could continue, including through the continued operation of the North–South Bodies, in the areas of environment, health, agriculture, transport, education and tourism, as well as in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. There is a specific provision preserving the Single Electricity Market on the island of Ireland.

The Protocol introduces several specific additions and modifications of the WA's common provisions and governance arrangements, notably providing (i) that UK courts could – and, where the court is one of last resort, should – refer the interpretation of the Single Market and customs arrangements to the CJEU in the event of domestic litigation concerning their interpretation;[28] (ii) that a Specialised Committee and a Joint Consultative Working Group on the application of the Protocol should be established alongside the Joint Committee;[29] and (iii) that a 'safeguards' provision be put in place permitting the suspension of aspects of the Protocol, under tightly controlled conditions.[30]

1.8 Trade and Cooperation Agreement

The WA and the Protocol are only part of the new architecture that governs EU–UK relations. Although the TCA does not replace or amend the Protocol, it may significantly affect how it will operate in practice. This is because the TCA does little to 'soften' the regulatory and customs border in the Irish Sea; it does little to align the rest of the UK to EU rules; and it significantly does not deal with a host of issues that were also left unaddressed in the WA and the Protocol, such as trade in services,[31] competition,[32] the regulation of financial markets,[33] private international law rules applying in the context of commercial disputes,[34] and mutual recognition of professional qualifications, among other issues that affect everyday activity in Northern Ireland as well as East–West and North–South issues.

[27] See Chapters 15 and 16.
[28] See Chapter 9.
[29] See Chapter 4.
[30] See Chapter 25.
[31] See Chapter 21.
[32] See Chapter 18.
[33] See Chapter 21.
[34] See Chapter 24.

The TCA is, primarily, a trade agreement of a rather rudimentary and limited kind, closer to the agreement between the EU and Canada than to that between the European Free Trade Association (EFTA) countries and the EU, for example. There are measures that go beyond trade, including important provisions on data transfers and extradition,[35] level-playing field issues (including on labour, social and environmental issues),[36] public procurement,[37] state aid,[38] and human rights including the role of the European Convention on Human Rights (ECHR),[39] but the overall result is one in which the UK exchanged access to EU markets for increased freedom to depart from EU rules in a host of areas.

The approach to interpretation of the two Agreements is illustrative of a widening gap between the WA and the TCA. Whereas the Protocol requires that ordinary rule of EU interpretation continue to apply, the TCA stipulates that international law methods of interpretation must govern.[40] Whereas the Protocol requires a continuing role for the CJEU, there is no role for that Court in the TCA. Whereas the provisions of the Protocol are substantially directly effective in domestic law, those of the TCA are explicitly not directly effective. Whereas the Protocol embraces dynamic alignment, the TCA rejects it. The full implications for Northern Ireland of the TCA are unclear, but they may be significant, given that Northern Ireland will effectively remain aligned with the EU under the WA, while the rest of the UK under the TCA may increasingly distance itself from EU rules and standards.

1.9 The UK and Ireland Implementing Legislation

We turn, finally, to the way in which the UK and Ireland sought to implement both the WA and the TCA in their respective domestic legal systems. The important point to bear in mind is that both Ireland's and the UK's general approach to international law is 'dualist', that is, domestic law will not enforce international treaties unless they have been incorporated into domestic law, usually by the Oireachtas or Parliament. So, for example, although the Agreement between the UK and Ireland concluded as part of the 1998 Agreement negotiations is binding in international law, it is not

[35] See Chapter 23.
[36] See Chapters 12 and 20.
[37] See Chapter 22.
[38] See Chapter 19.
[39] See Chapter 12.
[40] See Chapter 7.

enforceable directly in UK or Irish domestic law. In Northern Ireland, its domestic legal implementation is by way of the Northern Ireland Act 1998.[41] So too with regard to the WA and the TCA. For domestic courts and lawyers, the measures in which the UK and Ireland incorporated the two Agreements are the source of domestic legal rights and obligations, not the Agreements themselves, and it is these measures that dominate legal debate, at least initially.

Ireland's approach to implementation of the WA is relatively straightforward.[42] The UK's approach to implementation is by far the more complex of the two.[43] There are several Acts that accomplish incorporation, establishing the basic structure of implementation. The European Union (Withdrawal) Act 2018 (EUWA) provides for the implementation of the WA and the Protocol. Importantly, it also provides that the bulk of EU law applying to the UK prior to exit remains in effect after exit as 'retained EU law' but provides for extensive ministerial powers to repeal these provisions, at their discretion. The European Union (Withdrawal Agreement) Act 2020 (EUWAA) provides for the implementation of the TCA, but has also amended the 2018 legislation to address the version of the Protocol agreed to by Prime Minister Johnson in December 2020, including details of the 'democratic consent' mechanism.

These are the two principal pieces of primary legislation, but subsequent primary legislation supplements these in important respects, in particular the UK Internal Market Act 2020, and each piece of primary legislation is accompanied by a flurry of secondary legislation that provides the flesh on the bare bones of the primary legislation. From the perspective of the interpretation and application of the Protocol in domestic law, the most important single provision is section 7A of EUWA 2018 (as amended), which accords the Agreement and the Protocol essentially the same status in UK domestic law as that which section 2 of the European Communities Act 1972 accorded the EU Treaties, including according it supremacy over all other UK legislation, subject to the ability of Parliament to expressly repeal it.[44]

1.10 Initial Disputes Concerning the Protocol

The overall construction as well as the practical implications of the Protocol are complicated, in part because constructing and understanding

[41] See Chapter 10.
[42] See Chapter 11.
[43] See Chapters 9 and 10.
[44] See Chapter 10.

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the Protocol involves juxtaposing the 1998 Agreement, Brexit, devolution, the WA and the TCA, leaving aside the unprecedented idea of a region being, in effect, in two single markets and customs unions simultaneously. When this complexity is combined with a significant element of political toxicity because of the choices made by the political actors, disputes could be predicted with some confidence.

At the time of writing, four disputes illustrate the contentiousness of the Protocol, and perhaps indicate the shape of things to come. First, a wide-ranging challenge to the Protocol was launched by several unionist politicians in the Northern Ireland courts in early 2021.[45] In essence, this challenge sought to convince the High Court that the Protocol was contrary to UK constitutional law and EU law. In brief, the Protocol was alleged to breach the 1800 Acts of Union between Ireland and the UK, the Northern Ireland Act 1998 and obligations under EU law requiring democratic participation in lawmaking. At first instance, in the Northern Ireland High Court, Coulton J comprehensively rejected all the grounds of challenge.[46] This is discussed in more detail in 'Update on Developments from June to September 2021' at the front of this book, as is any appeal from this decision.

Second, during the negotiations on what became the TCA, the UK government proposed a UK Internal Market Bill, which included provisions that would have permitted the UK government to breach any international agreement that it regarded as contrary to the aims of the Bill.[47] This led to a flurry of protests, including by the European Commission, which announced that it regarded the proposed legislation as a direct breach of the WA, including the UK's obligation that it would implement the Agreement in 'good faith', and took the first steps in legal proceedings against the UK. During the course of the parliamentary debates on the Bill, these contentious provisions were removed.

Third, both the European Commission and the UK have invoked the 'safeguards' provision of the Protocol, Article 16, leading to disputes.[48] The European Commission, briefly, invoked Article 16 to justify a proposal that would have restricted the transport of vaccines to the UK (including Northern Ireland) from EU member states (including Ireland), leading to allegations that the EU was threatening to establish a 'hard' border for vaccines on the island of Ireland, despite all its

[45] Ibid.
[46] *In the matter of an Application by Allister, et al* [2021] NIQB 64.
[47] See Chapter 10.
[48] See Chapter 15.

previous efforts in trying to prevent just such a border. Within hours, the EU, highly embarrassed, withdrew its proposals, but not before substantial damage had been done to the Commission's reputation for competence and sensitivity to Northern Ireland issues.

Fourth, amid continuing anger over the implementation of the Protocol in Northern Ireland by unionist politicians and loyalist street protesters, because of the symbolic and practical effect of the regulatory and customs border in the Irish Sea, the UK government unilaterally extended several measures delaying the full implementation of a few of the customs regulations that the Protocol provides for, and that had been earlier agreed by the UK and the EU in the Joint Committee. Despite protests by the European Commission and the Irish government, the UK did not revoke the measures. The European Commission responded by initiating the dispute settlement procedures of the Protocol. The Commission argued that the UK was in breach of the relevant substantive provisions of the Protocol and, separately, was in violation of the duty of 'good faith' set out in Article 5 WA.[49]

1.11 The Future of the Protocol

Given the complexity of the architecture, the economic importance of the issues covered, and the political controversy that has accompanied each step in the Brexit process, it would be unsurprising if these disputes are merely the tip of the iceberg, providing the domestic courts and the dispute settlement procedures with work over the coming years. Part of the problem lies in the structural complexity and the Protocol's ambitions. For example, the difficulty, or, perhaps, impossibility, of being in two customs unions at once is yet to be resolved, and negotiations on what to do were continuing up to the time of writing. The UK government produced an ambitious set of proposals for renegotiation of the Protocol in July 2021.[50] These proposals are discussed in more detail in 'Update on Developments from June to September 2021' at the front of this book.

From the EU's perspective, a significant uncertainty is whether the UK intends to obey international law in the shape of the Protocol, or whether the Protocol was only ever a temporary political expedient. The as yet unresolved debate in the UK is whether to embrace a 'realist' understanding of international law, one where whether to comply is

[49] See Chapter 8.
[50] HM Government, *Northern Ireland Protocol: The Way Forward* (CP 502, July 2021).

based solely on immediate self-interest and where compliance, even when accepted, is based on the narrowest interpretation possible; or, alternatively, whether to follow a more liberal-institutionalist understanding of international agreements, in which compliance takes place irrespective of perceived immediate self-interest, and the aim is to make the system as a whole effective, not least because of the need to support a rule-based international order. Put more theoretically, there is a conflict between diachronic consistency (*pacta sunt servanda*), which provides external reassurance to the other party that their expectations will continue to be fulfilled, and the objectives of the agreement furthered in a spirit of co-operation, versus continuing popular responsiveness, providing internal reassurance to the state's political representatives and citizens that the popular will continues to be protected, so that democratic politics can take place, but at the cost of weakening the Rule of (International) Law.[51] At the time of writing, the outcome of this debate is by no means certain.

1.12 Note on Terminology

As anyone familiar with the politics of Northern Ireland knows, avoiding controversy in the use of language is next to impossible. Even this first sentence is controversial because it uses the term 'Northern Ireland' rather than 'the north of Ireland'. Where possible, we seek to employ neutral language in this book. The 1998 agreement that frequently forms the starting point for our discussion of the Ireland–Northern Ireland Protocol (and formally termed the 'Agreement reached in the multi-party negotiations') is a good example of the controversy over terminology since it is variously known as the Belfast Agreement, the Good Friday Agreement, or, more cumbrously, the Belfast-Good Friday Agreement. In this book we will describe it as the '1998 Agreement', which we will generally take as encompassing the adjustments to the Agreement made in subsequent years. On other issues of terminological controversy, we take the text of the 1998 Agreement as our guide. Thus, we refer to the six counties of the island of Ireland currently in the United Kingdom as 'Northern Ireland', reflecting the accepted legal status quo. We refer to the remaining twenty-six counties as 'Ireland'. Where clarity is needed that we are referring to the whole of the island of Ireland, we use this phrase.

[51] Sean Fleming, 'A Political Theory of Treaty Repudiation' (2020) 28(1) *Journal of Political Philosophy* 3.

There is another critical element in our choice of terminology and our frequent use of abbreviations which is much more pragmatic: to reduce the number of words in the text as well as needless repetition of the same explanations. For this reason, we have erred on the side of extensive use of abbreviations, and our explanations for these here must suffice for all of the chapters that follow. A complete set of these abbreviations is to be found earlier in the book, but some are so frequent and important that we draw special attention to them here. We apologize in advance for the alphabet soup that sometimes results.

We refer to the United Kingdom as the 'UK'; to the part of the UK that does not include Northern Ireland as 'Great Britain' or 'GB'; to the UK–Ireland Common Travel Area as the 'CTA'. As regards institutions and bodies in Europe, we refer to the European Union as the 'EU'; to the European Economic Area as the 'EEA'; to the European Free Trade Association as 'EFTA'; and to the European Convention on Human Rights as the 'ECHR'. As regards how we refer to the institutions and treaties of the EU, we follow conventional usage. We refer to the Treaty on the Functioning of the European Union as 'TFEU'; to the Court of Justice of the European Union as 'CJEU'; and to the Commission of the European Union as 'the Commission'. Cases of the CJEU are cited using the ECLI (European Case-Law Identifier) citation, where it is available for a particular case.

As regards the various EU–UK Agreements that go to form the main international legal basis for Brexit, we refer to the EU–UK Withdrawal Agreement as the 'WA'; to the Ireland–Northern Ireland Protocol as 'the Protocol'; and to the EU–UK Trade and Cooperation Agreement as the 'TCA'. The main bodies that the WA establishes to oversee the operation of the WA/Protocol are the Joint Committee (sometimes referred to as the 'JC'); the Specialised Committee on the Implementation of the Protocol on Ireland and Northern Ireland ('INISC'), which is established to facilitate and administer the Protocol; and a Joint Consultative Working Group ('JCWG'). The three principal UK statutes to which most frequent mention is made are the European Union (Withdrawal) Act 2018 (referred to as 'EUWA'); the European Union (Withdrawal Agreement) Act 2020 (referred to as 'EUWAA'); and the European Union (Future Relationship) Act 2020 (referred to as 'EUFRA').