Northern Ireland's hybrid trade regime: an examination of the relationship between the Ireland-Northern Ireland Protocol and the UK's post-Brexit trade agreements

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Abstract

Purpose – The Ireland-Northern Ireland Protocol has been one of the most contentious aspects of the EU-UK post-Brexit trade relationship. By requiring the UK to comply with EU customs and internal market rules in relation to Northern Ireland (NI), the Protocol has created a hybrid trade regime where NI is subject to multiple, overlapping and often conflicting rules. This paper aims to examine one area in which this hybridity manifests itself. It focusses on the interplay between the Protocol and post-Brexit UK trade agreements. It examines potential areas of conflict between Protocol obligations and obligations derived from UK trade agreements. In doing so, it sheds light on the extent to which compliance with the Protocol may undermine NI's ability to export and import goods under the preferential terms negotiated under UK trade agreements. It further discusses the consequences of these incompatibilities between the Protocol and these agreements for NI and, more widely, the functioning of the UK internal market as whole.

Design/methodology/approach – Doctrinal legal research

Findings – The paper examines potential areas of conflict between Protocol obligations and obligations derived from UK trade agreements. In doing so, it sheds light on the extent to which compliance with the Protocol may undermine NI's ability to export and import goods under the preferential terms negotiated under UK trade agreements. It further discusses the consequences of these incompatibilities between the Protocol and these agreements for NI and, more widely, the functioning of the UK internal market as whole.

Originality/value – To the best of the authors' knowledge this is the first paper carrying out a comprehensive legal analysis of the interaction and potential conflicts between the Protocol on Ireland-Northern Ireland and the UK's post Brexit trade agreements.

Keywords Brexit, Protocol, Free trade agreements, EU-UK withdrawal agreement

Paper type Viewpoint

1. Introduction

The Ireland-Northern Ireland Protocol has proved to be one of the most contentious legacies of the UK's decision to withdraw from the EU. Much of the controversy has focussed on the issue of the Irish Sea Border – that is, how the UK's departure of the EU and the operation of the Protocol have led to increased border checks on goods traded between Great Britain (GB) and Northern Ireland (NI) (Duparc-Portier and Figus, 2022).

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This focus on the impact of the Protocol on intra-UK trade in goods is understandable given the economic importance for NI of trade with GB. According to the Northern Ireland Statistic and Research Agency (NISRA), in 2021, the value of NI sales to GB outweighed that of exports to the rest of the world (including the EU) (NISRA, 2023). In the same year, the value of NI purchases from GB were almost the double the value of imports from the rest of the world (including the EU) into NI (NISRA, 2023). Beyond economic considerations, the imposition of trade restrictions on GB-NI has significant political repercussions. For many in the unionist community in NI, who identify themselves as British, the existence of border checks on goods traded between GB and NI represents an attack on their identity and a threat to the long-term viability of the union between GB and NI (Henig, 2022).

By contrast, the question of how the Protocol might affect NI's ability to trade with the rest of the world has received little to no attention. Nevertheless, external trade remains an increasingly important dimension of the NI economy. Even before the UK's decision to leave the EU, the NI executive had already placed a great emphasis on developing policies that promote export led economic growth (Northern Ireland Department of Enterprise, 2016), and the available data shows consistent year-on-year increase in NI goods exports to the rest of the world (Campbell, 2022; Northern Ireland Statistics and Research Agency, 2023). With the additional trade restrictions imposed on GB-NI trade, following the UK's decision to withdraw from the EU customs union and internal market (Hayward, 2023), it is no surprise that maximising trade opportunities with the rest of the world has become an ever more pressing issue (Northern Ireland Department for the Economy, 2021). An important component of this strategy relies on NI's ability to fully maximise the opportunities created by trade agreements concluded by the UK.

However, as this paper shows, NI may not be able to fully enjoy the potential benefits of these agreements. This is because, post-Brexit, NI is subject to a hybrid trade regime with multiple overlapping customs rules and regulations. Although NI is part of the UK customs territory, it is required to comply with EU customs rules and, in some cases, apply EU tariffs [1]. And, while NI is part of the UK internal market, it is required to comply with EU internal market rules in relation to trade in goods. These overlapping customs rules and regulatory standards mean that there are instances where EU laws (listed in the annexes of the Protocol) enter into conflict with UK laws. In such cases, there is an obligation on the UK to disapply conflicting UK rules with respect to Northern Ireland in order to ensure compliance with the Protocol [2].

Such conflicts are also possible in relation to UK trade agreements: compliance with the Protocol will, in certain cases, preclude compliance with obligations derived from UK trade agreements. Such conflicts of rules are yet to fully materialise in practice. This is, in large part, due to the fact that the vast majority of trade agreements concluded by the UK are so-called "continuity agreements" – that is, agreements that simply roll over existing EU trade agreements which the UK benefitted from when it was still an EU Member State [3]. These continuity agreements were intended to preserve the UK's preferential trading terms with non-EU countries and, as such, do not deviate significantly from the content of EU trade agreements. Because UK continuity agreements merely replicate the obligations included in EU trade agreements, which form an integral part of EU law [4], conflicts with the Protocol are unlikely to arise. However, this is now changing as the UK moves beyond the process of simply rolling over EU trade agreements and starts concluding its own post-Brexit trade agreements (Hunsaker and Howe, 2023). The more the UK concludes trade agreements that substantially deviate from existing EU trade agreements or concludes trade agreements with countries that do not have agreements with the EU, the more conflicts between the Protocol and UK trade agreements are likely to arise and the more the UK will find itself

forced to set aside conflicting obligations derived from UK trade agreements to ensure compliance with the Protocol.

This paper discusses the extent to which the obligations derived from the Protocol affect NI's status within UK trade agreements. It examines potential areas of conflict between Protocol obligations and obligations derived from UK trade agreements. In doing so, it sheds light on the extent to which compliance with the Protocol may undermine NI's ability to export and import goods under the preferential terms negotiated under UK trade agreements. It further discusses the consequences of these incompatibilities between the Protocol and these agreements for NI and, more widely, the operation of the UK internal market as whole.

Section 2 provides an overview of the trade regime that applies to NI as a result of the Protocol. More specifically, it explains how the hybrid nature of this regime inevitably leads to circumstances where compliance with the Protocol means that NI is excluded from certain parts of the UK's customs and internal market legislation. Section 3 examines the conflicts that arise between the Protocol and UK's post-Brexit free trade agreements (FTAs) and highlights three areas where such conflicts arise: tariffs, trade remedies and regulatory standards. In this analysis, the paper will focus specifically on the UK-Australia FTA (UK-AUS FTA) (Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia, 2021), the EU-New Zealand Free Trade Agreement (EU-NZ FTA) (Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand, 2022) and the Comprehensive and Progressive Transpacific Partnership (CPTPP) which the UK recently agreed to accede to (but is yet to enter into force) (Accession protocol of the United Kingdom of Great Britain and Northern Ireland to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2023). The decision to focus on these three agreements is justified by the fact that these are not continuity agreements and, as a result, have a greater potential to illustrate potential incompatibilities between the Protocol and UK trade agreements.

Section 4 discusses how UK trade agreements and UK domestic legislation seek to manage to the interplay between the Protocol and UK trade agreements. More specifically, it discusses how UK trade agreements seek to resolve conflicts that arise with the Protocol and examines the extent to which the UK has a legal obligation to negotiate trade agreements that are "Protocol-compatible" to ensure that NI's place in the UK internal market is not undermined.

2. The protocol's hybridity, the Irish sea border and the Windsor Framework

Article 1.3 of the Protocol provides that the Protocol is intended "to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border". The avoidance of a "hard border" (Hayward, 2018; Phinnemore, 2020) within the island of Ireland is thus one of the key aims of the Protocol. Although the term "hard border" is not defined in the Protocol, it was broadly understood by the parties during the negotiations of the Protocol has as meaning that there should be no control or checks within the island of Ireland (Montgomery, 2021). Such checks had not been required when the UK was an EU Member State because the EU is a customs union (meaning that no tariffs are applied on goods traded between EU Member States) and an internal market (meaning there were no regulatory compliance checks applied on goods traded between the EU Member States). As explained by Murphy and Evershed, EU membership had "permitted the virtual disappearance of not just the physical, but also the metaphorical, border between North and South" (Murphy and Evershed, 2022) of the island of Ireland. However, the UK's decision to leave both the EU customs union and the internal

market created a situation where the reinstatement of controls and checks on traded goods between the EU and the UK – and, therefore, between NI and the Republic of Ireland – became an inevitably (Weatherhill, 2020).

The EU and the UK were thus faced with a particular challenge during the negotiations for the UK's withdrawal from the EU; how to ensure that the UK, in its entirety, was able to leave both the EU customs union and internal market and avoid checks on goods traded between Northern Ireland and the Republic of Ireland (Springford, 2018). Eventually, the parties were able to come to a compromise solution which subjected NI to a hybrid trade and regulatory regime. Although the UK (and NI) is no longer part of the EU customs territory and the EU internal market, under the Protocol, NI is required to comply with customs rules and procedures as well as EU laws on the free movement of goods [5]. In practice, this means that whilst NI is, formally speaking, part of the UK customs territory and the UK internal market for goods, in practice, it is subject to a different set of rules with respect to trade in goods to the rest of the UK (Jerzewska, 2022).

NI is therefore subject to a hybrid regime – both within the UK customs territory but subject to EU customs rules and within the UK internal market but subject to EU internal market rules on goods. This hybrid regime ensures that there are no checks or controls on goods traded within the island of Ireland and that NI businesses can trade with the EU as if NI was still part of the EU internal market. However, it also means that in some cases, NI is unable to fully benefit from its status as a constituent part of the UK customs territory and internal market.

One clear example of this can be found in relation to how the Protocol governs the tariffs applicable to non-EU goods imported into NI. In principle, as NI is part of the UK customs territory, goods originating from GB should have tariff free access to NI and imports from the rest of the world should pay UK tariffs (if applicable) when accessing NI. However, under the Protocol, all non-EU goods entering NI are subject to EU tariffs unless it is shown that those imports are not at risk of being subsequently moved to the EU [6]. In other words, although NI is part of the UK customs territory, in many cases, goods imported into NI (including moved from GB into NI) are subject to EU tariffs [7]. Another example can be found in relation to the regulation of goods. NI is part of the UK internal market and, as such, benefits from the market access principles under the 2020 UK Internal Market Act (IMA) which aims to ensure that goods can freely circulate across the UK [8]. The IMA requires all of the UK's constituent parts to recognise the equivalence of each other's product rules (rules regulating the physical characteristics as well as production and processing methods) [9]. In principle, this should mean that GB goods entering NI are not subject to any regulatory compliance checks. In practice, because the Protocol requires NI to comply with EU internal market rules, GB goods entering NI do not benefit from the principle of mutual recognition [10] and are subject to regulatory compliance checks.

The customs and regulatory compliances checks applied on GB goods moved into NI (often referred to as the "Irish Sea Border") have proved to be one of the most problematic aspects of the operation of the Protocol (Murray, 2022). On 27 February 2023, the EU and the UK announced the conclusion of the Windsor Framework (WF), a package of reforms to the Protocol which, from a trade perspective, is very much focussed on reducing or removing some of GB to NI trade barriers [11]. As far as the tariff treatment of goods imported into NI is concerned, the WF reform package is exclusively concerned with trade between GB and NI. It does so by, for example, expanding the categories of businesses that can be registered in the so-called "Trusted Trader Scheme" [12] – a scheme which, under certain conditions, allows its participants to move GB goods into NI without having to pay EU tariffs [13]. It also establishes a regime for the movement of parcels which, subject to certain conditions,

exempts them from paying EU tariffs [14]. In the same vein, with respect to regulatory compliance checks, the WF seeks to reduce the regulatory burden placed on key goods and medicines moved from GB to NI. For instance, GB retail agri-foods are, under certain conditions, exempted from complying with all the EU sanitary and phytosanitary standards (SPS) listed under Annex 2 of the Protocol [15], whilst GB medicines no longer require an authorisation from the relevant EU authorities [16].

Whilst the WF is focussed on GB-NI trade, it says very little on the treatment of third-country goods imported in to NI. For third-country goods imported into NI, the original regime established under the Protocol remains largely in place. Yet this regime also creates certain difficulties, not least as regards NI's ability to benefit from the UK's trade agreements.

3. Protocol hybridity and North Ireland's position under post-Brexit UK trade agreements

3.1 Overlaps and conflicts between protocol and UK trade agreements

The potential for conflicts between obligations derived from the Protocol and those from UK FTAs is something that is implicitly acknowledged in the text of the Protocol. It states that Northern Ireland "is part of the customs territory" [17] and that "[a]ccordingly, nothing in this Protocol shall prevent the United Kingdom from including Northern Ireland in the territorial scope of any agreements it may conclude with third countries, provided that those agreements do not prejudice the application of this Protocol" [18]. In other words, whilst the regime established for NI under the Protocol does not preclude NI from falling under the scope of UK trade agreements, where conflict of rules arise between the Protocol and UK trade agreements, it is the Protocol that must prevail. As discussed further on, in Section 4.1, a more explicit similar acknowledgment is made in the texts of recently concluded UK trade agreements. The UK has, in fact, adopted a practice of systematically including in its trade agreements, provisions that permit the UK to derogate from their obligations to the extent that this is required to ensure compliance with the Protocol [19]. In doing so, UK trade agreements acknowledge the existence of potential incompatibilities between themselves and the Protocol and confirm that where such incompatibilities emerge, the Protocol obligations must prevail over conflicting FTA obligations.

However, with the exception of a short, five-page, discussion included in a House of Commons International Trade Committee report on the interaction between the UK-AUS FTA and the Protocol (House of Commons – International Trade Committee, 2022), this is an issue that has not received much attention to date. The UK Government, in particular, has so far proved reluctant to openly engage with the issue of the relationship between the Protocol and UK trade agreements. In its impact assessments of the UK-AUS FTA (UK Department for International Trade, 2022), the UK-NZ FTA (UK Department for Business and Trade, 2022) and the CPTPP (UK Department for Business and Trade, 2023), the UK Government explicitly ruled out examining the impacts arising from the Protocol, and to the author's knowledge, it is yet to provide a formal explanation for this stance. This is problematic on a number of fronts. Firstly, it creates uncertainty for NI businesses involved in international trade. As explained by the NI Department for the Economy, it remains unclear to what extent NI businesses can benefit from UK trade agreements and how this may undermine NI's competitiveness within the UK [Written Evidence Submission from the Department for the Economy (AUS0030), 2020]. Secondly, from a broader perspective, a better understanding of the potential consequences of the interaction between the Protocol and UK trade agreements is important insofar as it would enhance the UK's ability to conclude Protocol-compatible trade agreements and, in doing so, provide its partners comfort that it is

able to comply with its international trade obligations. A better understanding of the relationship between the Protocol and the UK's post-Brexit trade agreements is, therefore, crucial to both ensuring NI's ability to trade with the rest of the world and safeguarding the UK's bargaining power in the context of trade negotiations. The following sections seek to highlight the key areas where UK trade agreements may enter into conflict with Protocol obligations and examines some of the potential challenges associated with such conflicts.

3.2 Protocol tariff regime and UK free trade agreements

As mentioned above, the Protocol acknowledges that NI is part of the customs territory. In principle, this should mean that goods imported from third countries into NI are subject to UK tariffs. However, in practice, this is not the case. Because, under the Protocol, goods that are in free circulation in NI can be moved to the EU without being subject to EU tariffs there is a risk that traders could be tempted to export goods to NI to avoid paying EU tariffs, where EU tariffs are higher than UK tariffs (Murray and Rice, 2020; Welsh Government, 2020). To avoid this scenario, the Protocol establishes the "at risk regime" whereby non-EU goods brought into NI are presumed to be at risk of being subsequently moved on to the EU and, as such, are subject to EU tariffs [20]. In other words, the rule is that third-country goods imported into NI are subject to EU tariffs. UK tariffs will only apply if it can be shown that those goods are *not* at risk of being moved on to the EU. This applies whether goods are imported directly from the third-country into NI or are moved indirectly, via GB, into NI.

There are two ways traders can demonstrate that a third-country good is not at risk of being moved on to the EU. Firstly, if the EU tariff is equal to or less than the applicable UK tariff, the third-country good will not be deemed 'at risk [21]. Indeed, there is little incentive to route imports to the EU, via NI, if EU tariffs are equivalent to or lower than UK tariffs. Secondly, EU tariffs are not due on imports if the importer is registered under the UK Trusted Trader Scheme and the difference between the EU tariff and the UK tariff is lower than 3% of the customs value of the good [22]. The only notable change brought about by the WF to the regime described above is that the Trusted Trader Scheme has been expanded. Whereas, under the original Protocol, the scheme was only open to NI businesses, following the WF, GB-based businesses can also register as trusted traders. Besides this, the "at risk" regime applicable to third-country good imports into NI established under the Protocol remains unchanged.

There are two important ways in which the "at risk" regime affects the ability of NI to import goods falling under the scope of UK FTAs. Firstly, the chances of third-country goods being considered at risk of being moved on to the EU will increase the lower the UK tariffs are compared to the corresponding EU tariffs. This is certainly the case where the UK enters into a trade agreement with a third-country as these, by and large, tend to include zero-tariff commitments on a significant number of product lines (AUSIK FTA Annex 2B Part 2B-4 Schedule of Tariff Commitment of the United Kingdom, 2022). The risk is further increased where the UK concludes trade agreements with countries that do not have similar arrangements with the EU as, in such cases, the tariff differentials between the EU and the UK are likely to be considerable.

The AUK-AUS FTA is a case in point. For wine products – Australia's biggest export to the UK – the UK has committed to apply zero-rate tariffs. This is in contrast to the EU which currently applies a 32.00 EUR/hl [23]. Any Australian wine imported into to NI, whether directly or via GB, will automatically be considered at risk of being moved on to the EU and subject to the applicable EU tariff. Another useful example can be found in the context of the CPTPP. According to the UK Government, 99% of goods traded between the UK and CPTPP countries will be eligible for zero tariff treatment (UK Government, 2023).

Considering that some CPTPP parties do not have trade agreements in place with the EU, the UK's accession to this arrangement will inevitably exacerbate tariffs differentials between the EU and the UK. For example, under the CPTPP, the UK has controversially agreed to entirely remove tariffs on palm oil imports from Malaysia (Beatie and Terzono, 2023) whereas the EU applies a 12.8% tariff on such products [24].

The same difficult exists in relation to tariff-rate quotas (TRQs). TRQs are measures whereby countries commit to apply reduced tariffs on an import up to an agreed quota (in-quota tariff) (Downes, 2017). However, import over and above that quota will be subject to higher tariffs. Where the UK agrees to apply a TRQ on a third-country import, it is possible that the in-quota tariff will be lower than the EU tariff. In such cases, imports covered by the TRQ will be deemed at risk of being moved on to the EU as long as the quota is not exhausted. The upshot for NI importers is that they are likely to be precluded from benefitting from lower in-quota tariffs agreed to by the UK in the context of its FTAs. This will be the case for Australia's second biggest export to the UK, bovine meat products, which are subject to a 20% in-quota EU tariff compared to a 0% in-quota UK tariff under the AUSUK FTA (UK-AUS FTA, 2022).

The EU is currently negotiating a trade agreement with Australia (Council of the European Union, 2018) and the successful conclusion of such negotiations would, of course, reduce some of these problematic tariff differentials. However, the fact that the EU and the UK may conclude trade agreements with the same partners will not entirely eradicate the problem to the extent that UK and EU are unlikely to secure the exact same levels of trade liberalisation in their respective agreements. For example, whilst both the EU and the UK have recently concluded trade agreements with New Zealand, the EU-New Zealand trade agreement maintains considerably higher tariffs on NZ agri-food imports than the UK-NZ FTA [25]. Short of a full alignment between UK and EU external tariff regimes, the tariff differential between the two will continue to affect NI's ability to benefit from the preferential treatment negotiated by the UK with third countries.

Secondly, the "at risk" regime may inhibit the ability of NI importers to bring in goods from GB where such goods contain inputs from third countries. This is primarily due to the interaction between the Protocol and the rules of origin (RoO) included in the EU-UK Trade and Cooperation (TCA) [26]. RoO are provisions that define the economic nationality of goods, their main purpose being to ensure that only goods originating from the parties to the agreement can benefit from the preferential treatment under said agreement (Augier *et al.*, 2005). Like most trade agreements, the TCA provides that goods are conferred originating status if they are wholly obtained [27] in the party exporting the good or if they have been "sufficiently transformed" [28] in that party. Third-country goods that are imported by the EU or the UK can count as originating products for the purposes of the TCA if it is shown that they have undergone sufficient transformation, as defined in the product specific requirements set out in Annex 3 of the TCA, in the territory of one of these parties. By contrast, if a good made in the UK uses inputs imported from third-countries in the manufacturing or production process in a manner that fails to comply with the TCA's product specific requirements, such goods will not be conferred originating status. This means that, if exported to the EU, such goods will not be deemed to be UK-originating goods for the purposes of the TCA and will therefore not benefit from the preferential treatment therein. Crucially, it also means that such goods will be deemed as third-country goods under Protocol. The upshot is that where such goods are moved from GB into NI, they will be subject to EU tariffs unless the tariff differential thresholds set out under the Protocol, to determine whether such goods are not at risk of being moved to the EU, are not exceeded.

It is worth noting that the same problem arises in instances where the UK and the EU conclude trade agreements with the same third-country. For example, whilst both the EU and the UK have concluded almost identical trade agreements with countries such as Canada, Japan and South Korea, goods imported from these countries into the UK do not count as originating goods for the purposes of the TCA. Where goods from GB incorporate components from the EU and UK FTA partners and fall foul of the product specific requirements under the TCA, they will be subject to EU tariffs when moved into NI.

One potential solution to this problem would be for the EU, the UK and the FTA partners they have in common to agree to rules on diagonal cumulation (Ayele *et al.*, 2021). Diagonal cumulation would allow products from these countries to count as originating products under the product-specific rules of the TCA (Soprano, 2019). In practice, this would mean that it would be possible for the inputs originating from countries such as Canada to be considered as originating materials for the purposes of the TCA. However, diagonal cumulation can only apply if all countries involved agree to it. Here, it is worth noting that whilst the UK was keen on including diagonal cumulation in the TCA, the EU rejected such proposals (House of Lords European Union Committee, 2021). Although the reasons for the EU's rejection of diagonal cumulation in the TCA have never been formally set out, some have speculated that the EU wanted to create additional incentives for firms to locate production and manufacturing facilities in the EU (Chornyi, 2022). Whatever its rationale, the refusal to countenance diagonal cumulation has exacerbated barriers to GB-NI trade and further undermined NI's ability to fully benefit from UK FTAs.

3.3 Protocol, trade remedies and UK free trade agreements

The preceding section focussed on how the operation of the Protocol may inhibit the ability of NI to benefit from preferential tariff treatment in UK FTAs. But the Protocol may also affect the extent to which NI can benefit from trade remedies adopted in the context of such FTAs. Trade remedies, or trade defence instruments, are measures that are intended to protect domestic industry from imports. These include anti-dumping measures [29] and countervailing measures [30] which protect domestic industries against unfair trading practices (e.g. dumping or illegal subsidisation) and safeguard measures [31] which protect domestic industries from unforeseen increases in imports resulting from trade liberalisation.

Trade remedies consist in the suspension of tariff liberalisation concessions (typically, temporary increases in import tariffs) and, the substantive and procedural conditions under which such measures can be applied, are governed at WTO level. Regional and bilateral trade agreements can, however, include provisions regulating the application trade remedies between the parties. For example, with respect to safeguard measures, trade agreements often include global safeguard clauses which confirm the right of the parties to the agreement to apply safeguards in accordance with WTO law (Crawford *et al.*, 2013; Viljoen, 2016). The operation of such clauses varies from one trade agreement to the next. Some FTAs merely restate the ability of the parties to exercise their rights under WTO law, but some global safeguard clauses allow for the exclusion of FTA parties under certain conditions [32]. Beside global safeguards, trade agreements will often include "bilateral safeguards" which enable parties to temporarily suspend concessions granted under the agreement. These can be either general or specific (where they only apply to a select set of goods). The nature and scope of such safeguards will vary from on country to another and from one agreement to the next. Whilst some FTAs broadly replicate WTO law, others may deviate and, in doing so, set different thresholds for the triggering of safeguards[32]. For example, whilst WTO law does not prescribe a particular form for safeguard measures,

some PTAs specify that the safeguards can only take the form of the suspension of tariff concessions [33].

Chapter 3 of the UK-AUS FTA, Chapter 8 of the UK-NZ FTA and Chapter 6 of the CPTPP contain provisions governing the application of both global and bilateral safeguards measures [34]. The parties are therefore allowed to apply WTO safeguards and apply bilateral safeguards where trade liberalisation commitments under the FTA have led to a sudden surge imports that has caused or threatens to cause serious injury to a domestic industry.

This raises the question of NI status in relation to UK safeguard measures adopted in the context of UK FTAs. Under the terms of the Protocol, NI is required to comply with EU trade defence legislation [35]. If, for example, the EU applies safeguard measures, in the form of higher tariffs targeting specific imports, NI would be required to apply those. The Protocol, however, does not apply the at-risk regime with respect to trade defence measures [36]. This means that if, hypothetically, the UK were to determine that a domestic industry had suffered an injury as a consequence of trade liberalisation commitments made in the UK-AUS FTA, the UK-NZ FTA or the CPTPP, domestic industries in NI may not benefit from the same protections as the rest of the UK.

Such an outcome would make little sense given the rationale of the Protocol, which is to ensure unfettered trade within the island of Ireland whilst protecting the integrity of the EU customs territory and internal market. Unless the EU has put in place safeguard measures on third-country goods that are higher than those applied by the UK on the same goods, the application of UK safeguard measures on those goods when imported into NI would in no way undermine the integrity of the EU customs territory. Indeed, there would be no incentive on third-country exporters affected by these safeguards to route their exports destined to the EU via NI in order to avoid the application of EU safeguards. In light of this, the extension of the at-risk regime to trade defence instruments would be desirable in that it would allow NI domestic industries to benefit from protective measures adopted by the UK Government barring circumstances where such protective measures have been put in place at the EU level.

3.4 Protocol and the regulatory dimension of UK free trade agreements

3.4.1 Regulatory commitments under UK free trade agreements. Contemporary trade agreements increasingly contain obligations that go beyond the reduction or removal of border measures (e.g. tariffs and quotas) and seek to discipline the ability of countries to regulate domestically (Young and Peterson, 2006). These so-called "deep" trade agreements (Wang, 2019) – in the sense that they pursue deep integration – will often include provisions addressing domestic regulatory issues such as technical regulations, SPS, environmental regulations, labour standards, public procurement and human rights (Horn *et al.*, 2010). The question that arises in relation to the Protocol then is whether UK trade agreements may include obligations that will require the UK to regulate trade in goods in specific ways that may conflict with EU internal market rules incorporated in the Protocol. A review of the UK-AUS, UK-NZ FTAs and, to a lesser extent, the CPTPP, suggest that such fears are, at this stage, largely unfounded [37].

By and large, the UK-AUS, UK-NZ FTAs and the CPTPP replicate the WTO regulatory framework. They include the standard non-discrimination requirements [38] and replicate the main obligations included in the WTO Agreements on Technical Barriers to Trade [39] and SPS [40]. Whilst these WTO agreements include regulatory disciplines, such disciplines only affect the regulatory process and the manner in which regulations are applied rather than the substance (Downes, 2015). In other words, whilst they impose constraints on the

regulatory process and implementation of rules, WTO Members remain free to decide how the content of domestic rules. Both the UK FTA also replicate the general exceptions provision under the General Agreement on Tariffs and Trade (GATT) [41], which allows parties to adopt measures that would otherwise be incompatible to the agreement to achieve specific public interest objectives such as the protection of public morals, the protection of human, animal and plant life or health and the conservation of natural exhaustible resources [42]. In fact, the UK-NZ FTA goes further than the GATT general exceptions provision by allowing parties to adopt measures that would otherwise be deemed incompatible with the agreement if it is considered necessary to address climate change [43]. The UK-Australia and UK NZ FTA obligations do not, as a consequence, undermine the right of the parties to regulate domestically as long as regulatory measures can be justified by reference to valid public interest objectives.

Furthermore, there is no obligation that would require the parties to recognise the equivalence of each other's standards. Under Article 4.1 of the WTO SPS Agreements, WTO Members are required to:

> Accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection.

A literal reading of this provision suggests that where an exporting country is able to objectively demonstrate that its SPS standards are equivalent to those of the importing country, the latter is required to recognise the equivalence of those standards. In practice, however, WTO Members have not read this provision in this manner and have maintained their right to decide the terms under which an equivalence decision is granted (Trachtman, 2007; Mavroidis, 2012). This practice is reinforced in the text of the UK-AUS FTA which replicates the language of Article 4.1 of the WTO SPS Agreement but also adds that "[t]he final determination of equivalence rests with the importing Party" [44]. The FTA therefore seems to give the parties greater latitude, than WTO rules, by confirming that regulatory equivalence decisions are discretionary. Similarly, the UK-NZ FTA provides that the recognition of the equivalence of SPS measures "rests with the importing party" [45]. The UK is therefore not subject to any obligation that would require it to recognise the equivalence of either Australian or NZ SPS standards.

The CPTPP adopts a slightly different approach to the UK-AUS and UK-NZ FTAs when it comes to SPS regulatory equivalence. Article 7.8 CPTPP establishes a procedural mechanism whereby a party can query decision of another party not to recognise the equivalence of the SPS measures. The importing party which has received this request must "explain its equivalence process and plan for making the equivalence determination and, if the determination results in recognition, for enabling trade" [46] and is required to recognise equivalence where "the exporting Party objectively demonstrates to the importing Party that the exporting Party's measure: (a) achieves the same level of protection as the importing Party's measure; or (b) has the same effect in achieving the objective as the importing Party's measure" [47]. Finally, if the recognition of equivalence request is denied the importing party must provide the rational for its decision. Whilst this provision does not depart from the WTO SPS obligations insofar as importing parties retain the ability to decide whether or not to recognise the equivalence of standards, it has been suggested that the application of a more burdensome administrative process to the importing parties when assessing and justifying the denial of regulatory equivalence may create an incentive towards progressive regulatory harmonisation (Wagner, 2017).

The above discussion shows that, generally speaking, post-Brexit FTAs have not required the UK to reform its regulatory standards in relation to goods or to grant access to third-country goods that do not comply with UK rules. This should perhaps not come as a surprise. Although breadth of the regulatory obligations included in modern "deep" FTAs is considerable, the provisions regulating trade in goods tend not impinge on the regulatory autonomy of states – that is, trade agreements tend to maintain the parties' ability to regulate goods domestically (Eeckhout, 2018). From a NI perspective this is important insofar as it means that there are no FTA regulatory commitments which enter into conflict with Protocol obligations. However, the fact that the risk of conflicts has not, so far, materialised does not mean that the risk does not exist. Indeed, as discussed by Dobbs and Petetin (2022), there are FTAs concluded by countries other than the UK, which have included more stringent equivalence requirements. And, as seen above, agreements such the CPTPP contain mechanisms which have the potential to engender new arrangements for the mutual recognition of rules and standards. Should this occur, such arrangements would likely not apply to NI.

3.4.2 The Windsor Framework and regulatory compliance checks on third-country goods. Although the WF does not significantly alter the tariff regime applicable to third-country goods under the Protocol, it does put forward reforms that may have the effect of reducing EU customs and regulatory compliance checks on certain third-country goods that are moved from GB into NI. One of central components of the WF is the recently adopted EU Regulation 2023/123 [48] which, amongst other things, regulates the treatment of consignments of sanitary and phytosanitary goods from GB into NI (EU SPS Regulation). The EU SPS Regulation establishes a regime whereby certain retail agri-food and fishery goods originating from GB are absolved from complying with a significant portion of EU laws listed in the annexes of the Protocol and can benefit from reduced customs formalities [49].

Subject to conditions, the EU SPS Regulation extends the same treatment to certain third-country retail goods and fishery products when these enter NI from GB [50]. More specifically, it applies to third-country commodities of animal or plant origin and composite products which are subject to the animal health requirements, requirements on the prevention and minimisation of risks to human and animal health arising from by-products and derived products and protective measures against pests and plants set out under EU agri-food legislation [51]. These commodities entering NI from GB must be destined for distributional terminals, supermarket distribution centre, whole sale outlets, points of sale or delivered directly to final consumers [52].

In order for such retail agri-food third-country imports to benefit from reduced regulatory and customs obligations, the UK must evidence that it complies the EU animal animal health plant health and by-product legislation as well as the import conditions and official control requirements set out under EU agri-food legislation [53]. For fishery products, the UK must demonstrate it applies and implements the import conditions, official controls and verification requirements set out under the EU Regulation 1005/2008 establishing a system to prevent, deter and eliminate illegal, unreported and unregulated fishing [54]. The EU can carry out audits and verification procedures to examine whether such laws are being fully applied and implemented in the UK [55], if the EU is satisfied that this is the case, it can issue a list of commodities and third-countries, from which these commodities originate, that can access NI under the same terms as GB goods [56].

The EU SPS Regulation does not impose an obligation on the EU to extend the WF regime to third-country goods where the above conditions are fulfilled by the UK. It only provides that the EU "may" chose to so [57]. Currently, the EU has not yet issued a list of third-country commodities that can benefit from this regime, nor has it provided clarity as to

whether there are additional considerations, beyond the EU SPS Regulation's conditions which will be taken into consideration when deciding which third-countries commodities can benefit from the regime. One would presume that such list would, at the very least, include third-country commodities originating from countries that have regulatory equivalence arrangements in place with the EU. When announcing the conclusion of the WF, both parties specifically name checked "New Zealand lamb and vegetables" [58] as a third-country import that might benefit from reduced customs and regulatory compliance checks when entering the NI market. The reference to New Zealand was perhaps not coincidental as both the EU and the UK have in place a mutual agreement on the recognition of equivalence on sanitary measures applicable to trade in live animals and animal products [59]. The application of this regime to commodities from countries such the parties to the European Economic Area (Iceland, Liechtenstein and Iceland) as well as Switzerland, which are all subject to huge swathes of EU internal market legislation (Lavenex, 2011; Öberg, 2020), would also make sense.

It must be noted that the EU SPS Regulation has its limits. It only applies to retail agri-food goods and fisheries products traded between GB and NI. Further, it merely reduces – rather than remove – customs and regulatory compliance checks on such goods. Nevertheless, this regime has the potential to significantly reduce checks applied on third-country goods moved between GB and NI, notably in scenarios where the EU and the UK have trade agreements in common with a third-country.

4. Managing conflicts between the Protocol and UK free trade agreements

4.1 Conflict of laws clauses

The existence of overlapping and, often contradictory, obligations under the Protocol and UK FTAs creates a conflict of laws. To address such potential conflicts the UK is now systematically including in its FTAs provisions confirming that FTA obligations cannot undermine the UK's ability to comply with the Protocol. Article 1.2(3)–(4) of the UK-AUS FTA provides as follows:

> 3. For as long as the Protocol on Ireland/Northern Ireland to 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, signed in London and Brussels on 24 January 2020 (the "Protocol") is in force,[2] nothing in this Agreement shall preclude the United Kingdom from adopting or maintaining measures, or refraining from doing so, further to the Protocol, and amendments thereto and subsequent agreements replacing parts thereof, provided that such measures, or the absence of such measures, are not used as a means of arbitrary or unjustified discrimination against the other Party or as a disguised restriction on trade.
>
> On request of either Party, the Parties shall hold consultations, in relation to the effects of a measure described in paragraph 3 the United Kingdom has adopted, or absence thereof, on this Agreement and seek a mutually acceptable solution.

This provision is replicated, almost verbatim, in Article 1.2(3)–(4) of the UK-NZ FTA and a very similar one can be found in Article 15.2 of the UK CPTPP Accession Protocol (Accession protocol of the United Kingdom of Great Britain and Northern Ireland to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2023). These provisions are conflict of laws clauses which have the effect of placing Protocol obligations above those enshrined in the FTAs concerned. Wherever a conflict arises between a Protocol and an FTA obligation, the UK cannot be precluded from applying the Protocol obligation. Further, by specifying that "*nothing* in this agreement shall preclude" [60] the UK from adopting or maintaining measures required under the Protocol, the provision makes it clear

that it applies in relation all FTA obligations. Accordingly, there are no FTA obligations that can prevail over conflicting Protocol obligations.

Where the UK applies a measure, in line with the Protocol, that conflicts an FTA obligation, it must ensure that the measure is not used as "a means of arbitrary or unjustified discrimination against the other Party or as a disguised restriction on trade". Such language, which is lifted from WTO law (specifically Article XX GATT on general exceptions) is intended to avoid situations where the UK abuses its right to adopt measures that are incompatible with its trade agreements. The terms "arbitrary and unjustified discrimination" refers to discriminatory measures that cannot be objectively linked to the Protocol [61]. This would be the case, for example, if the UK were to apply EU tariffs on Australian goods imported into Northern Ireland but not on other "like" imports from other third-countries with whom it has an FTA. In WTO case law, the reference to "disguised restrictions of international trade" [62] concerns concealed or unannounced restrictions – that is, instances where a WTO member misrepresents the protectionist aims of trade restrictive measures. The UK cannot, therefore, use compliance with a Protocol as a pretext to apply protectionist measures.

Although the UK is entitled to derogate from its FTA obligations to ensure compliance with the Protocol measures, such derogations may have the effect of depriving its partners of the benefit of concessions made under the FTAs. In recognition of these adverse effects, Paragraph 4 provides that either party can request consultations to be held in relation to the effects of trade restrictive measures adopted by the UK in compliance with the Protocol. The consultation mechanism is intended to provide the parties with an opportunity to discuss the effects of any trade restrictive measure resulting from the compliance with the Protocol and find mutually acceptable solutions.

It is noteworthy that the consultation mechanism it is not a precondition for the adoption of trade restrictive measures. The UK is under no obligation to notify its FTA partners of its intent to apply measures that may be incompatible with its obligations under the FTA. This is logical given the enormous scope of trade-related obligations covered by the Protocol and the dynamic and fluid nature of the obligations contained therein. The UK is not only required to comply with EU customs and internal market laws as they existed on the date when the Protocol was signed. It must comply with EU law, as it evolves over time and it must give effect to such laws in the same manner as any other EU Member State [63]. It would, as result, simply be practically unrealistic to require the UK to give prior notice to its FTA partners for every trade restrictive measure resulting from Protocol obligations.

However, the application of Protocol-related measures that are incompatible with obligations under UK FTAs is not consequence free. Firstly, the fact that consultations are used to "seek mutually acceptable solutions" opens the door for the possibility of compensation measures in cases where Protocol compliance deprives a party from a benefit granted by the FTA. In such cases, the parties may, for example, agree to allow the UK's FTA partner to suspend its own concessions to reinstate the balance of the negotiated FTA outcome. The suspension of concessions could take the form, for example, of the reinstatement of certain tariffs or TRQs on UK imports. The UK's accession to the CPTPP has brought additional elements to the Protocol consultation mechanism which are not present in either the UK-AUS or the UK-NZ FTAs and further reinforce the notion that the application of trade restrictive measures as a consequence of the Protocol may lead to the application of counter-measures by the UK's FTA partners. Firstly, UK CPTPP Accession Protocol provides that where the Protocol is changed in a manner that substantially affects the operation of the CPTPP, the UK must notify the other parties [64]. Secondly, it establishes an obligation to review the UK's implementation of the CPTPP in the context of the Protocol to ensure that the

balance of rights and obligations between the parties is maintained [65]. The review must occur four years after the UK's accession to the CPTPP and every 6 years thereafter[65]. The text stops short of specifying how the parties would address instances where the operation of the Protocol was to be found to disrupt the balance of the negotiated outcome, but it is not beyond the realms of possibility that redressing that balance may require the renegotiation of the terms of the UK's accession to the CPTPP. In any case, the inclusion of these procedural obligations is significant insofar, as they reflect an understanding from the UK's CPTPP partners that conflicts between the Protocol and UK FTAs can affect commitments made and concessions granted in the agreements.

4.2 The Protocol, UK free trade agreements and the UK internal market

This paper has highlighted how UK trade agreements may potentially lead to an increase in obstacles to trade faced by businesses that move goods between GB and NI [66]. By making it harder for NI firms to import goods from the rest of the UK, these trade barriers undermine NI's position within the UK internal market. This raises the question of whether UK FTA commitments that create such barriers are lawful either under the Protocol or under UK law [Written Evidence Submission from the Department for the Economy (AUS0030), 2020].

With respect to the Protocol, the key provision is Article 6 of the Protocol on the protection of the UK internal market. Article 6(1) of the Protocol provides that "[n]othing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market". This provision acts as confirmation that there are no obligations under the Protocol that could be used to justify the imposition of trade restrictions on NI goods being moved to GB. However, this sentence is immediately contradicted by the second sentence of Article 6 (1) of the Protocol which states that restrictions and prohibitions on goods moved from NI to GB can be made applicable if required by the EU's international obligations (in practice, this concerns export restrictions and prohibitions such as restriction on export of dual use goods, endangered species and the application of trade sanctions).

Moreover, Article 6 of the Protocol does not seek to provide a similar guarantee of unfettered trade in connection to GB goods moved into NI. Article 6 (2) of the Protocol also provides that:

> [h]aving regard to Northern Ireland's integral place in the United Kingdom's internal market, the [EU] and the United Kingdom shall use their best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom, in accordance with applicable legislation and taking into account their respective regulatory regimes.

The provision is limited in two specific ways. Firstly, it does not establish a legally binding obligation to facilitate trade. The EU and the UK are only required to carry out their best efforts to facilitate trade. There is no requirement to ensure that no additional barriers to trade are erected, only an invitation to strive to avoid such barriers where possible. Secondly, the provision merely requires the facilitation of trade, not the full removal of barriers to trade. There is, implicitly, a recognition that in some cases, the EU and the UK will have no choice but to apply barriers to GB-NI trade. This recognition is reinforced by the reference to the need to consider the "respective regulatory frameworks" of the parties to the Protocol when using their best efforts to facilitate trade. In short, whilst the EU and the UK must strive to facilitate trade between GB and NI, there is no requirement to do so and there is an acceptance that such barriers may arise as a consequence of the application of the respective domestic regulatory requirements of each party.

Another potential avenue to challenge the legality of GB-NI trade barriers can be found under UK law. The main domestic legislation regulating trade within the UK is the 2020 IMA[8]. Its primary purpose is to avoid restrictions on the movement of goods and services traded between the different constituent parts of the UK – that is, England, Northern Ireland, Scotland and Wales. With respect to trade in goods, the IMA establishes the mutual recognition principle according to which goods that can be lawfully sold in one part of the UK should be able to be sold in any other part of the UK without being subject to any regulatory restrictions [67]. In this way, a good that is subject to specific regulatory requirements in the part of the UK from which it originates, does not have to comply with additional requirements imposed in other parts of the UK where it may be sold (Weatherill, 2021; Armstrong, 2022).

With respect to NI, the principle of mutual recognition applies in an asymmetric manner (Barnard, 2021). NI qualifying goods that are being moved to the rest of the UK fully benefit from the principle despite the fact that NI goods are subject to EU law [68]. The same does not apply for GB goods moving to NI. Such goods are governed by the Protocol [69] and can only access the NI market if they comply with applicable EU customs and internal market rules. Therefore, the IMA only protects NI's position within the UK internal market in relation to goods that moved from NI into GB. As the barriers to trade that would result from UK FTAs concern the movement of goods from GB into NI, the IMA does not seem to provide a basis to challenge the legality of trade barriers created by FTAs.

The IMA does contain, one provision that may potentially constrain the UK's discretion in the decision-making process underpinning the negotiation of trade agreements. Section 46 establishes an obligation on UK authorities, including national government and devolved authorities, to have a special regard to NI's integral place in the UK internal market, to respect NI's place as part of the UK customs territory and facilitate the free flow of goods between GB and NI. In the Explanatory Notes to the Act, the UK Government that the purpose of this provision is to ensure that UK authorities when administering the Protocol have the "highest possible" (UK Internal Market Act Explanatory Notes, 2020) regard to NI's position within the UK customs territory and internal market. Such language suggests that reducing barriers to trade between GB and NI should be one of the primary considerations of authorities when developing and applying measures that may affect NI and the Protocol.

As suggested by Barnard, Section 46 seems to fulfil a similar function to Article 6 of the Protocol [70]. It seems to, at the very least, establish an obligation of best endeavours to facilitate trade between GB and NI. However, it is arguable that Section 46 of the IMA actually goes further than this by underlining that the facilitation of GB-NI trade should be a *primary* factor in the decision-making processes underpinning policy and regulatory measures that affect intra-UK trade. More than an obligation of best endeavours, Section 46 of the IMA, arguably, creates a procedural requirement to consider the impact of UK measures on NI's position within the internal market and customs territory. Whilst this does not equate to a requirement to ensure that no new barriers are created, it does establish an obligation to consider, before adopting a decision, how such decisions may impact NI's position within the UK internal market and customs territory. In the context of the negotiation of trade agreements, this reading of Section 46 of the IMA raises questions about the UK government's current refusal to carry our *ex ante* impact assessments focusing on the interplay between future UK FTAs and the Protocol [71]. Such impact assessments would ensure that key areas overlapping areas between the Protocol and prospective FTAs are identified prior to the initiation of negotiations which would, in turn, inform the UK's approach to negotiations. Although the UK government would maintain full discretion in relation to the final outcome of these negotiations, the impact assessments would inform the negotiation process and minimise potential conflicts with the Protocol when FTAs are being implemented.

5. Conclusion

This interaction between the Protocol and post-Brexit UK FTAs provides an interesting case study to understand the hybrid trade regime that has been established for NI post-Brexit. It is a regime which, as we have seen, subjects NI to several, overlapping and, often, conflicting rules and obligations. There are, of course, clear benefits to this regime. NI is in the unique position of being part of the UK customs territory and internal market whilst also benefiting from the ability to trade freely (in the area of trade goods) with the EU internal market. However, although NI has a foot in both words, the reality is that it does not fully belong to either of them. This becomes very evident when examining NI's status in relation to FTAs. NI complies with EU customs and internal market rules, including EU external trade law obligations, but to the extent that it is not an EU Member State it is precluded from benefitting from preferential treatment granted by third-countries to the EU. NI is part of the UK customs territory and internal market but it does not fully benefit from the preferential treatment secured under the UK FTAs.

This paper has highlighted the areas where the Protocol obligations may come into conflict with UK FTA obligations and how such conflicts may prove problematic not only in relation to NI but also the UK and its trading partners. It has also suggested certain measures that could be taken by the EU and the UK to mitigate some of the problematic consequences of these conflicts Diagonal cumulation between the EU, the UK and common FTA partners and additional clarity on the trade remedies regime under the Protocol would certainly enhance NI's ability to maximise the benefits of UK FTAs. Beyond this, as argued in this paper, further consideration must be given to NI's unique position in the context of the decision-making processes that underpin the negotiations of post-Brexit UK trade agreements. The development of inclusive and transparent processes that enhance the understanding of the impact of future trade agreements on NI and the operation of the Protocol (e.g. the conduct of *ex ante* impact assessments and consultation with relevant NI devolved authorities) is crucial to minimise conflicts between the Protocol and UK trade agreements and maximise the potential benefits that can be obtained from these agreements.

Notes

1. Article 5.2 Protocol.
2. Section 11 of the United Kingdom Internal Market Act 2020UK Public General Acts 2020 c. 27 PART 5.
3. A list of UK Continuity Agreements can be found here: www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries. See also, Fontanelli (2023).
4. Case 104/81, *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641, paras. 12–13.
5. Articles 5-10 of the Protocol.
6. Article 5(2) Protocol.
7. A Jerzewska, Springford (2018, pp. 211-216).
8. United Kingdom Internal Market Act 2020, UK Public General Acts2020 c. 27.
9. Section 2 IMA.
10. Section 7 IMA. For an in-depth analysis see S Weatherill, Murphy and Evershed (2022); Barnard (2022).
11. For a full list of the WF reforms see: www.gov.uk/government/publications/the-windsor-framework.

12. Articles 5 to 7 of EU-UK Decision of the Withdrawal Agreement Joint Committee on the determination of goods not at risk, 17 December 2020, available at: https://commission.europa.eu/publications/decision-no-42020-joint-committee-determination-goods-not-risk_en
13. Article 10 of EU-UK Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework, 24 March 2023, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1145694/Decision_of_the_Withdrawal_Agreement_Joint_Committee_on_laying_down_arrangements_relating_to_the_Windsor_Framework.pdf
14. Article 7, Article 10 of EU-UK Decision of the Withdrawal Agreement Joint Committee on laying down arrangements relating to the Windsor Framework, 24 March 2023, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1145694/Decision_of_the_Withdrawal_Agreement_Joint_Committee_on_laying_down_arrangements_relating_to_the_Windsor_Framework.pdf
15. Regulation (EU) 2023/1231 on specific rules relating to the entry into Northern Ireland from other parts of the United Kingdom of certain consignments of retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural or forestry purposes, as well as non-commercial movements of certain pet animals into Northern Ireland, *OJ* L 165, 29.6.2023 103–13.
16. Regulation (EU) 2023/1182 on specific rules relating to medicinal products for human use intended to be placed on the market in Northern Ireland and amending Directive 2001/83/EC, *OJ* L 157, 20.6.2023, pp. 1–7,
17. Article 4.1 Protocol.
18. Article 4.2 Protocol.
19. See, for example, Article 1.3 UK-Australia FTA.
20. Article 5.2 Protocol.
21. Article 3.1(a) of the Decision No 4/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 on the determination of goods not at risk [2020/2248] OJ L 443, 30.12.2020, 6–12.

OJ L 443, 30.12.2020.

22. Article 3.1(b)(b) Decision No 4/2020.
23. Commission Regulation (EC) No 948/2009 of 30 September 2009 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

OJ L 287, 31.10.2009, 1–897.

24. Commission Regulation (EC) No 2204/1999 of 12 October 1999 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, 18.10.1999.
25. M Gougeon, See Mckee (2022).
26. Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021, p. 10–2539.
27. Article 29(1)(a) TCA.
28. Article 39(1)(c) and Annex 3 TCA.

29. WTO Agreement on the Implementation of Article VI of GATT 1994, 1868 U.N.T.S. 201.
30. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.
31. WTO Agreement on Safeguards Agreement 1869 U.N.T.S. 154.
32. J Crawford, J McKeagg and J Tolstova, [Council of the European Union (2018, p. 7)].
33. W Viljoen, Council of the European Union (2018, p. 10).
34. Article 3.5-3.10 AUSUK FTA; Articles 9.1-8.5 UK-NZ FTA; Article 6.1-6.8 CPTPP.
35. Article 5.2 Protocol, Annex 2.
36. EU-UK Decision No 4 of the Joint Committee Established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland From the European Union of 17 December 2020 on the determination of goods not at risk [2020/2248] OJ L443/6.
37. Trade and Agriculture Commission: Advice to the Secretary of State for International Trade on the UK-Australia Free Trade Agreement, April 22. Last accessed <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1068872/trade-and-agriculture-commission-advice-to-the-secretary-of-state-for-international-trade-on-the-uk-australia-free-trade-agreement.pdf>
38. Article 2.3 UK-AUS FTA; Article 2.3 UK-NZ FTA; Article 2.3 CPTPP.
39. WTO Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120.
40. WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493/.
41. Article XX of the General Agreement on Tariffs and Trade (1947) 55 U.N.T.S. 194.
42. Article 31.1 UK-AUS FTA; Article 29.1 CPTPP.
43. Article 32.1(3) UK-NZ FTA.
44. Article 6.7(2) AUSUKFTA.
45. Article 5.6 UK-NZ FTA.
46. Article 7.8(4).
47. Article 7.8(6).
48. Regulation (EU) 2023/1231 on specific rules relating to the entry into Northern Ireland from other parts of the United Kingdom of certain consignments of retail goods, plants for planting, seed potatoes, machinery and certain vehicles operated for agricultural or forestry purposes, as well as non-commercial movements of certain pet animals into Northern Ireland OJ L 165, 103-139.
49. Article 1(2) Regulation (EU) 2023/1231.
50. Article 9 Regulation (EU) 2023/1231.
51. Article 9.1 Regulation (EU) 2023/1231.
52. Article 2(b) Regulation (EU) 2023/1231.
53. See Article 9.1(a) Regulation (EU) 2023/1231.
54. See Article 9.2 Regulation (EU) 2023/1231.
55. Article 9.3 Regulation (EU) 2023/1231.
56. Article 9.4 Regulation (EU) 2023/1231.

57. Article 9.4 Regulation (EU) 2023/1231.
58. European Commission, "Questions and Answers: political agreement in principle on the Windsor Framework, a new way forward for the Protocol on Ireland/Northern Ireland" 27 February 202; European Parliament, "The Windsor Framework A new way forward for the Protocol on Ireland/Northern Ireland", PE 747.095 – April 2023; UK, Policy paper Northern Ireland Retail Movement Scheme: how the scheme will work, 1 September 2023.
59. Council of 17 December 1996 on the conclusion of the Agreement between the European Community and New Zealand on sanitary measures applicable to trade in live animals and animal products (97/132/EC) OJ L 57, 26.2.1997, 4.
60. Italics added by author for emphasis.
61. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/

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62. WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3 (US –Gasoline), p. 20.
63. Article 13 (2) and (3) Protocol.
64. Article 15(4).
65. Article 15(5).
66. See Sections 3.2 and 3.4.
67. Section 2 IMA.
68. Section 11 (2) IMA.
69. Section 11(1) IMA.
70. C Barnard, fn 104, 265.
71. See section II.

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