

Evidence to the Northern Ireland Affairs Committee for its 'Implications of the EU Withdrawal Agreement and the Backstop for Northern Ireland' Inquiry

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THE PREAMBLE TO THE PROTOCOL ON IRELAND/NORTHERN IRELAND

[1] The extensive preamble seeks to reflect the steps taken to address concerns surrounding the [Protocol on Ireland/Northern Ireland](#). Indeed, it marks a major departure from the EU Commission's draft text, published in March 2018. However, it must be noted that preambles, under international treaty law, are not binding; at most they can be used to interpret the object and purpose of the text.

[2] The Preamble begins as the earlier published draft did, acknowledging that it is history that creates the necessity of this Protocol and that the specific impact that the UK's withdrawal from the EU will have on the entire island of Ireland is significant, but thereafter the two texts begin to depart. The next part of the text refers not only to the unique circumstances on the island but also the unique solutions that are required to resolve the issues that come from Brexit, foregrounding the exceptional trade arrangements that comes with the backstop. The text emphasises that Article 50 TEU is not about the permanent future relationship but about the immediate concerns of uncoupling one state from the EU. This focus is intended to assuage concerns that either transition or the backstop could become indefinite, by emphasising that this is not the object or purpose of either the Protocol or the Article 50 process.

[3] A commitment to replacing the backstop with a future relationship based on 'ambitious customs arrangements' that fully respects both the UK and the EU's legal orders is intended to re-assure readers of the impermanence of the backstop and the Protocol. It is rare to find a treaty that is so definite about its short-lived nature, even if it stresses that it is 'temporary' only by noting that it will be in place 'unless and until' replaced. The Preamble differs from the earlier draft, which was more light-touch regarding the future negotiations that would follow the conclusion of the Withdrawal Agreement.

[4] The Protocol again specifically affirms that the Good Friday/Belfast Agreement (GFA) – referencing the UK and Irish Governments as well as the other parties to the Treaty – will be protected in all its parts. This use of explicit language is significant. The use of will, rather than should, within international law is a more definitive commitment.

[5] The preamble as before references the normalisation of life on the island since the GFA's passing, the co-operation it has fostered and the role of the Executive, Assembly and the North-South Ministerial Council and cross-border provisions. It also highlights the role of EU law in assisting this process, and expressly comments on retaining the provisions of Rights, Safeguards and Equality of Opportunity under the GFA. The preamble also references the extensive mapping exercises that have been undertaken by both parties that

demonstrate the extent to which EU law and policy does assist North-South cooperation and that withdrawal does make such co-operation more difficult. It also acknowledges the importance of both North-South and East-West cooperation in political, economic, security, societal and agricultural contexts.

[6] The preamble once again references the guarantee of avoiding a hard border but now includes a commitment that nothing in the Protocol will halt market access for goods from Northern Ireland into Britain while at the same time stating that any controls at ports and airports in Northern Ireland will be avoided as much as is possible. This acknowledges that the East-West regime will not necessarily be the same as West-East. It once again reassures parties that the Joint Report outlined three scenarios to avoid the hard border and that while the Protocol is based on the third scenario, this is a contingency and not the intended outcome of the parties. The preamble also includes a commitment by the UK to facilitate transit of goods from Ireland to other Member States and third countries, a concern that many in Ireland have had.

[7] The preamble reiterates that Irish Citizens in Northern Ireland will continue to enjoy, exercise and have access to EU citizenship and rights, including the right to assert their Irish citizenship. It also once again references the definition of ‘the people of Northern Ireland’ from the GFA. The preamble also references the continuation of PEACE and INTEREGG funding beyond the current round of funding. The preamble also references the fact that the transition may be extended by mutual consent. This idea of mutual consent is repeated to allay fears of those who argued against the EU being the sole decision maker. Unilateral withdrawal from the Protocol, however, is not explicitly addressed (see discussion below).

[8] Finally, the preamble discusses the need to implement the Protocol in order to ensure North-South cooperation is maintained and that any new arrangements must be developed in accordance with the GFA rules and principles. This text opens the possibility of alteration, bounded by the GFA’s requirements. The conclusion of the preamble also addresses day-to-day life on the island and how this Protocol is not intended to impact adversely on the lives of its inhabitants. It ends with a pointed reminder that Ireland will be staying in the EU and that therefore EU obligations will continue to bind it. The importance of this statement of fact is easily overlooked. If the Withdrawal Agreement is rejected by the UK, Ireland cannot conclude a bilateral agreement with the UK in areas such as trade policy, which are covered by EU competences.

TRADE ARRANGEMENTS

[9] Articles 6 through to 12 of the Protocol on Ireland/Northern Ireland outline the so-called backstop arrangements, which differ from the Commission’s draft Withdrawal Agreement in significant ways. Article 6 sets out the basics of how a border-eliminating ‘backstop’ will operate, if no alternative solutions can be negotiated by July 2020. It establishes a ‘single customs territory’ that is comprised of the entirety of the EU and the entirety of the UK. This means that there will be no tariffs, quotas, or checks on rules of origin between Britain and Northern Ireland (Article 7 of the Protocol) and between the UK and the EU. How this will operate in detail is contained in Annexes to the Protocol, particularly Annex 2.

[10] There will also be what has been described as a ‘level playing field’ between the UK and the EU, ensuring that one side will not have a competitive advantage over the other due to the unique nature of the backstop, as detailed in Annex 4 of the Protocol. The level playing field ensures non-regression from current levels of protection, or a ‘copying’ out of current EU rules, in the areas of competition law, state aid law, standards of taxation, environmental standards, and labour and social protections.

[11] While the ‘single customs territory’ eliminates many barriers to trade between the UK and the EU, it does not cover checks on regulatory alignment. There are two elements to the Protocol which, respectively, minimise the extent to which different regulations will result in barriers to trade between either Northern Ireland and the EU, and between Northern Ireland and Great Britain. A time-limited backstop (as opposed to the current proposal, where the backstop does not take effect in the event of a comprehensive agreement

between the UK and the EU) would place an effective end date on the UK's obligations to maintain an open border on the island of Ireland.

[12] First, if the backstop activates, the UK will legislate to ensure Northern Ireland remains aligned to those rules of the Single Market that will avoid a hard border between Ireland and Northern Ireland. As such, the EU's Customs Code will apply in Northern Ireland and so good from there will be able to access the EU Single Market directly. The UK will ensure that Northern Ireland also remains aligned as regards to legislation on goods, sanitary rules, veterinary controls, agriculture rules, VAT and state aid rules (Articles 6, 8 and 9, 12). The UK has agreed to harmonize its commercial policy with the EU's Common Commercial Policy to the extent needed to continue the single customs territory. Moreover, under Article 11 the single electricity market is protected, which will at least ensure the lights stay on in Northern Ireland. Proposals for more minimal alignment than the backstop set out, for example, in the so-called Malthouse Compromise, do not address non-tariff barriers to trade and therefore would not negate the need for border controls.

[13] Second, under the backstop, Northern Ireland will remain subject to rules from which the remainder of the UK can deviate. Article 7(1) declares that the UK will act to ensure that these arrangements will not introduce any barriers for goods moving from Northern Ireland to Great Britain. The reverse, however, cannot be promised outright—Northern Ireland will be the only part of the UK which is obliged to be fully aligned with the relevant Single Market rules should the backstop come into effect. Nonetheless, recognising that Northern Ireland has an 'integral place' in the UK internal market, the parties have agreed that they will use their best endeavours to ensure that trade from Great Britain to Northern Ireland is facilitated in every possible way. This includes a commitment to avoid, as much as possible, any border checks on goods. As a result the activation of the backstop would only result in minimal *new* checks introduced in the Irish Sea; agricultural products are already checked at ports under the current rules, and industrial goods can by-and-large be checked within Great Britain, rather than at the ports. This suggests that risk-based spot checks at the Irish Sea are the only change to current movement of goods in the UK internal market.

[14] The backstop is unique in trade terms. An analogy that has been put forward is that the arrangement is like a swimming pool, with Britain and Northern Ireland at opposite ends of the pool. Northern Ireland is at the deep end, which means that it almost matches the EU (and, as such, Ireland) with regard to trade; but Great Britain is nearer the shallow end, sharing fewer areas of commonality with the EU than Northern Ireland and therefore able to diverge in other areas. The UK Government and Parliament have the flexibility to move Great Britain closer to the deeper end (and to a large extent not differ from the EU or Northern Ireland), or Britain could over time retreat into the shallow end of the pool by departing from EU rules, resulting in different regimes applying in Northern Ireland and Great Britain. The latter approach would result in increased controls; the former in fewer.

[15] If the Withdrawal Agreement is rejected, and a no-deal Brexit results, some trading barriers will be inevitable on the border in Ireland. In this instance it is almost irrelevant that neither Ireland nor the UK want such a border. The EU is obliged under international trade law to maintain the borders of the Single Market. It cannot maintain its trading arrangements with other countries with a gaping back door into the Single Market. By the same account if, following Brexit, the UK wants to conclude any new trade deals, it too has to maintain its borders. The best that can be hoped for in such a scenario are that some steps can be agreed to minimise the checks necessary at the border, but this would fall far short of the frictionless arrangements secured by the backstop.

THE UK'S CONSTITUTIONAL INTEGRITY

[16] Even if it is rapidly swept away in the rip tides of political debate around Brexit, it is worth pausing for a moment to appreciate that the skill involved in the legal drafting of the draft Withdrawal Agreement. It had to deliver on the UK's promises over a backstop in the December 2017 Joint Report (which Theresa May

flirted with shirking in July when she called on the EU to “evolve” its position) and navigate the difficulties inherent in legislation such as section 55 of the [Taxation \(Cross-border Trade\) Act 2018](#), which requires that Northern Ireland not be a separate customs territory from the UK (a restriction that cannot be repealed whilst the UK Government is reliant upon the DUP for its parliamentary majority).

[17] The apparent complexity of the Protocol has drawn considerable comment. But that should not be surprising. The first reason for its complexity has been the difficulty in meeting the UK Government’s so-called red lines. The Protocol’s form conforms to the UK’s Government’s stated negotiating priorities (protecting the GFA, maintaining an open border in Ireland, maintaining the integrity of the UK as a customs territory). This, as we have noted above, marks a considerable concession to the UK from the EU Commission’s first draft effort at a Withdrawal Agreement. The UK-wide element of the backstop marks an effort by the UK Government, with the EU’s agreement, to answer the DUP’s demand that Northern Ireland move into Brexit without the automatic creation of “internal” trading barriers between it and Britain.

[18] The second reason for the Protocol’s complexity is that Ireland and the UK’s shared EU membership provided the ecosystem in which the GFA and successor agreements functioned. The GFA did not need to deal explicitly with border arrangements, regulation of goods or the detailed substance of cross-border cooperation, because EU law provided the necessary framework. If the Ireland/Northern Ireland provisions seem complex, it is because they are designed to maintain that ecosystem.

[19] Article 1 of the Withdrawal Agreement’s Protocol on Ireland/Northern Ireland is at pains to emphasise that the backstop arrangements which will kick in at the end of the transition period are intended to be temporary and would be superseded by an agreement on the future UK/EU relationship which fulfils (and even improves upon) all of the backstop’s requirements. It is explicitly designed in light of the GFA principle that Northern Ireland’s status as part of the UK cannot be altered without the [consent of the people of Northern Ireland](#). Plans, however, can change, and from Article 2 onwards there is an acknowledgement that the backstop might not be wholly superseded by the future EU/UK agreement (and would therefore remain in effect, in whole or in part as necessary).

[20] The first element of the backstop is Article 6, the UK-wide element. The UK and EU will, after the transition period ends, remain a single customs territory until a more comprehensive UK/EU Agreement is concluded. This provision facilitates trade in goods across the whole of the UK and EU and prevents the need for customs checks either at the land border in Ireland or at ports such as Cairnryan. It also, for that matter, negates the need for additional customs checks at Dover or other British ports (and addresses many regulatory barriers to trade too). Article 7 also allows the UK to grant frictionless access for goods moving from Northern Ireland into Great Britain (but scope exists for restrictions upon goods in the other direction). As we outlined above, the subsequent provisions of the Withdrawal Agreement make it clear that Northern Ireland is tied more deeply into EU law, across more sectors, than the remainder of the UK.

[21] The provisions applying to Northern Ireland, moreover, have additional locks around them when compared to the whole-UK provisions. Notably, the CJEU’s continued jurisdiction over the elements of EU law which extended to Great Britain, and even more extensively to Northern Ireland, under the backstop (Article 14(4)) present a potential climb down by the UK Government on one of its red lines (if the backstop comes into effect).

[22] Under Article 20, the UK and the EU can agree that this Protocol can cease to apply, in whole or in part. If a fulsome future arrangement is difficult to construct, and the backstop is in effect, this provision does not prevent the UK and EU agreeing that Great Britain can diverge from the current arrangements at some future date. It is sometimes presented that the backstop locks in the UK, and is impossible to break unilaterally. But it must be remembered that the whole-UK approach is an EU concession to UK red lines in the negotiations. What might be of more likely, therefore, is that at some point in the future, perhaps when the DUP is less of

a factor in Westminster arithmetic, the UK Government will seek to use this mechanism to restrict the scope of the backstop to Northern Ireland to allow it to pursue trade deals for Great Britain.

[23] There is an important role for the GFA institutions to contribute to discussions on altering the backstop as a whole under Article 20; but this is consultative, and would not amount to the Assembly having a veto on the alteration of the backstop even if it was functioning. Moreover, Articles 4 and 16 of the Protocol establish an important role for the [Northern Ireland Human Rights Commission](#) (NIHRC). The NIHRC comes out of the Withdrawal Agreement with a guardianship role (and potentially operating in place of direct democratic input, because the Assembly remains inoperative and there are not provisions in the Agreement which operationalise EU election rights for EU citizens living in Northern Ireland). Under these provisions the NIHRC feeds concerns over equality issues (see further below) directly into the Specialised Committee on the Ireland/Northern Ireland Protocol established under Article 165 of the general Withdrawal Agreement.

THE COMMON TRAVEL AREA

[24] The status of the Common Travel Area is mentioned in the [Protocol on Ireland/Northern Ireland](#), and it is noted that the CTA can continue following Brexit insofar as the EU obligations of Ireland are not impacted by it. If the Agreement is accepted, the CTA will therefore continue underpin fundamental aspects of the UK's post-Brexit relationship with Ireland. Its importance, however, belies the facts that its specific requirements remain, at best, indistinct, and that it has no status in international law. In the settled Withdrawal Agreement, the provision is only a permissive one which does not specify any content for the CTA. As we discuss in a [recent report](#), there is therefore no legally-enforceable protection for individuals from this arrangement (indeed, the EU would not have the competence to obligate the UK or Ireland to make a particular treaty covering these arrangements).

[25] This matters because there is not, at present, a single legal agreement establishing the CTA. The core arrangements for travel and residence between the CTA's members can be altered by any one of them without breaking international law, and the rights and obligations which are so often linked to it can be altered by domestic legislation by any CTA member. The Immigration Bill, currently before the UK Parliament, seeks to make just such a unilateral amendment. In short, the CTA is written in sand, and its terms are much more limited than is often believed to be the case.

[26] Under Article 5 of the Protocol, the EU provided space for Ireland and the UK to maintain and develop the Common Travel Area arrangements. This allows Ireland and the UK to firm up these arrangements bilaterally. Efforts are under way to address these issues, and details of a proposed agreement are expected to be released in the near future. It is, however, important to remember that any such agreement will not be able to touch on issues within the EU's exclusive competences or cause Ireland to breach its EU obligations.

CATEGORIES OF RIGHTS' HOLDER

[27] The December Joint report pointed towards some [nine different categories of rights](#) for Northern Ireland's inhabitants (even before residence and the Common Travel Area were taken into account). This, [as we highlighted at the time](#) (figure 1), gave rise to a risk of administrative complexity (especially with the placing of immigration enforcement in the hands of non-experts such as landlords); did damage to the principle of parity of esteem (with those with full EU rights living next to those with only UK national rights); and would

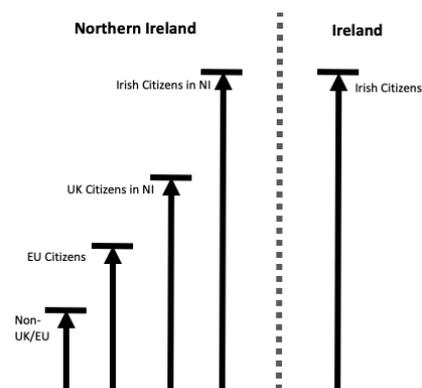


Figure 1: December Joint Report

require a substantial set of EU monitoring and enforcement mechanisms to apply within Northern Ireland to ensure the rights of Irish EU citizens were being properly vindicated. Much of this complexity, we suggested, could be resolved by ‘levelling up’ the rights afforded to all within NI, to reduce or remove disparities between those living there and to ensure that Brexit did not result in a reduction of rights (figure 2).

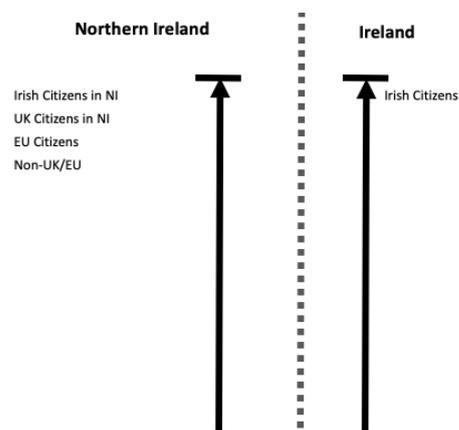


Figure 2: 'Levelling Up'

[28] The settled Withdrawal Agreement takes a different approach and reduces rights to a lower level (figure 3). In other words, Irish nationals in Northern Ireland (to whom the December Joint Report had promised full EU rights) will now not enjoy their EU rights while in Northern Ireland and will instead be treated in the same way as other EU nationals in the UK. EU nationals outside of the EU can exercise [very few](#) EU rights at all (consider, for example, the position of an EU national in Canada seeking to rely on their EU rights). This position fails to address the special position of NI.

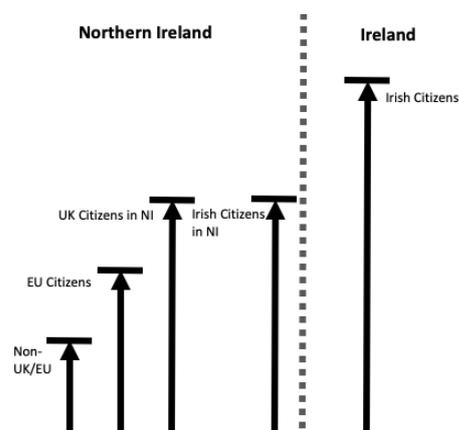


Figure 3: Levelling Down (current Withdrawal Agreement)

[29] The first and most important way in which this does not address NI’s position is in its failure to maintain an equivalence of rights protections or enforcement arrangements North and South of the border as the GFA requires. Brexit will therefore result in a hard border in terms of rights. This will be of especial significance for border communities (in particular for those who assert Irish, and therefore EU citizenship) who will find themselves with different employment and civil rights depending on which side of the border they happen to live or work at a particular point in time. This is disruptive to an idea of all-island living and the position of Northern Ireland as a hybrid space of governance.

[30] While there would of course be difficulties in constructing a regime that would allow the vindication and monitoring of EU rights within a part of a third country (i.e. NI/ the UK), it would be considerably less complex than the trade, customs and regulation aspects of the negotiations which has consumed much attention and for which something quite unique has been proposed.

[31] The Ireland/ Northern Ireland Protocol ‘should respect and be without prejudice to the rights, opportunities and identity that come with citizenship of the Union for the people of Northern Ireland who choose to assert their right to Irish citizenship as defined in Annex 2 of the British-Irish Agreement "Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship".’ It nonetheless fails in both its GFA promise and its EU ‘rights, opportunities and identity’ promise by not protecting the ability of Irish citizens in Northern Ireland to fully exercise the EU rights which are a facet of their Irish identity.

[32] It is arguable that in the midst of contentious and complex negotiations that have often been overwhelmed by trade elements, the EU and Ireland have moderated their ambitions and focussed in on the task of guaranteeing only the minimum requirements of the GFA. This has allowed them to set aside many of the more complex questions about individual rights, but in doing so, the requirement of an equivalence of rights, the need to protect border communities, and the ability to be fully Irish while living in Northern Ireland, have all been compromised.

[33] The Withdrawal Agreement does still include a commitment to non-diminution. In a general sense, this commitment ties the UK to ensuring that the rights afforded to people within Northern Ireland are not reduced following Brexit. The Withdrawal Agreement, however, thereafter only specifically commits the UK

to ensuring that Brexit causes no diminution of the rights guaranteed by the Rights, Safeguards and Equality of Opportunity section of the GFA. This limited commitment indicates that the Agreement is not attempting to underwrite broader commitments or standards for post-Brexit NI. Annex 1 of the Protocol specifies six EU Directives on equality as those aspects of EU law which are considered by the UK and EU to continue to have a bearing on this part of the GFA (the logic is depicted at figure 4). The UK's commitment to non-diminution under the GFA has therefore had a limited impact on the shape of the Withdrawal Agreement, and does not extend to protecting the operation of all EU citizenship rights as if Northern Ireland remained part of the EU.

[34] There are two additional implications following from this. The first is that the Withdrawal Agreement freezes the substantive content of the non-diminution guarantee in time. If the EU add additional equality guarantees in future, it does not appear that these will bind the UK with regard to Northern Ireland. Such changes

would, as a result, only serve to widen the gap between the North and the South of the island of Ireland in terms of rights protections and enforcement. The second implication is that the UK will be obliged to continue to afford equality protections in Northern Ireland that it is not obliged to provide in Great Britain.

[35] The content of these non-diminution provisions becomes all the more significant in light of the levelling down that has taken place in respect of Irish citizens in Northern Ireland. The general non-diminution assurance and equality directives have taken the place of the full EU rights to which the December 2017 Joint Report alluded.

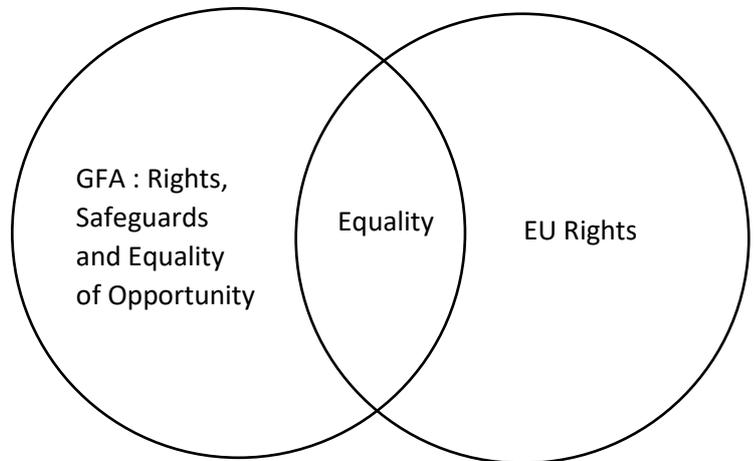


Figure 4: The logic of Article 4 of the Protocol

THE ALL-ISLAND DIMENSION

[36] Ireland comes out of these arrangements having protected the Single Market in goods on the Island of Ireland (Article 6), protected the rights for individuals provided under the GFA (Article 4) and kept arrangements like the Single Electricity Market (Article 11) and for broader North-South Co-operation under the GFA intact. The Irish Government can claim that it exerted its GFA role as a guarantor of the peace process in reaching this position.

[37] The Withdrawal Agreement also creates the basis for a future united Ireland without extreme dislocations, but importantly does not oblige any progress towards this end. It is, nonetheless, important to note that there are no votes for the Irish Government in moving jobs from Dublin to Belfast. The Withdrawal Agreement provides protections for Northern Ireland manufacturing and agriculture to access EU markets. It potentially makes it more attractive for some companies to locate there. But it does not keep Northern Ireland in the entire of the Single Market, and Ireland can potentially attract service providers on a more competitive basis than Northern Ireland under these arrangements.

UNILATERAL WITHDRAWAL

[38] The Vienna Convention on the Law of Treaties (VCLT) contains the rules which regulate the operation of treaties. These cover the validity, interpretation and termination of treaties. The VCLT also reflects

customary international law. While strictly speaking it only covers treaties between states the rules therefore reflect the general rules on treaty law. A lawful denunciation of a treaty brings that treaty to an end and is a unilateral act. Withdrawal is generally used in the case of multilateral treaties and hence is the phrasing used regarding the UK's withdrawal from the EU.

[39] Part V of the VCLT sets out the basis for the denunciation of a treaty (other than on grounds of invalidity which would not apply to the Ireland/Northern Ireland Protocol). It is standard practice for treaties to include some process for ending their effect. Article 185 of the Withdrawal Agreement is specific as regards the implementation of the backstop – commencing at the end of the transition period (31 December 2020) if no comprehensive agreement on the future UK-EU relationship has been reached at that point. Article 1(4) of the Protocol asserts that the backstop arrangements will end (or never come into effect) if such a comprehensive agreement is in effect. This is in line with Article 54(a) VCLT.

[40] A Treaty can be brought to an end by consent of *all* the parties under Article 54(b) VCLT, and this can be earlier than a duration clause in the treaty itself if *all* parties agree. A treaty can also be replaced by a latter treaty, although this requires the consent of *all* the parties, or can come to an end due to a breach of an international obligation or a breach of the treaty itself. One party can invoke another's material breach of a treaty as a basis to terminate the treaty under Article 60(1) VCLT. If the UK was in material breach of the Withdrawal Agreement, for instance by not fulfilling the terms of the Ireland/Northern Ireland Protocol, the EU could use this as a ground to terminate the entire treaty or to suspend in whole or in part.

[41] Under Article 60(3) VCLT a material breach is consists in 'a repudiation of the treaty not sanctioned by the present Convention' or 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty'. As the Ireland/Northern Ireland Protocol could be described as part of the object and purpose of the Treaty (preventing a hard border in Ireland) then if the UK chose unilaterally not to apply it, it would amount to a material breach. Furthermore, it would not be possible, under Article 44(1) VCLT, to separate the Protocol from the Withdrawal Agreement unless the Withdrawal Agreement made specific provision for this.

[42] Unilateral denunciation of a treaty that is not based on material breach by the other party or under the terms of the treaty would be in violation of that treaty and the state doing so would be responsible for the breach under international law. The most significant consequence would be the EU's right to withdraw from the entire Withdrawal Agreement; it would also impact on the UK's reputation for fulfilling its treaty obligations.

[43] Article 26 of the VCLT sets out one of the core rules of public international law and that is every treaty in force is binding on the parties and must be performed in *good faith (pacta sunt servanda)*. Before the treaty has come into force this obligation is limited, but once in force a violation of this Article would be considered to be a material breach of the Treaty. It is also closely related to Article 27 VCLT which prevents a state from using domestic law as a justification for not acting in good faith. This would include any relevant Acts of Parliament. Signing the Withdrawal Agreement with the intention of not complying with the terms of the Protocol would be an act of bad faith. Parties must also sign treaties with the intention of fulfilling them.

[44] As such, signing the Withdrawal Agreement with the intention of not fulfilling the terms of the Protocol would be an act of bad faith. Should the UK act in bad faith this would jeopardise its reputation for a commitment to fulfilling its international law obligations. This would make negotiating any future treaties with the EU or other states much more difficult.

1 February 2019