Brexit and the Irish border: consequences for the peace process

MICHAEL O'NEILL, NOTTINGHAM TRENT UNIVERSITY

Abstract: The decision of the 2016 British referendum on EU membership to take the United Kingdom out of EU will have significant and lasting consequences. For the United Kingdom and its relations with European neighbours, for the constitutional fabric of the British State, and for the EU itself at a time of rising public anxiety over the future of the European project. The consequences of this decision will have no greater impact however, than on the still-fragile peace process known as the Belfast Agreement of 1998 negotiated by parties representing the provinces' principal cultural communities and the governments of the United Kingdom and the Republic of Ireland. This historic event brought to an end decades of political violence and centuries of sectarian bitterness, or so it was thought by participants on every side. Brexit throws the future of that peace process into doubt.

The EU was an important guarantor of that historic reconciliation, and a paradigm too for peaceful coexistence and 'ever-closer' integration within a framework of multi-level governance. As such, it that offered a positive exemplar of what can be achieved by the setting aside of ancient quarrels. The EU has continued to play a signal role as a key agency for facilitating and funding projects on the ground that have consolidated the peace process and minimized inter-cultural conflict, gradually replacing outright animosity by rising political trust. The most signal achievement here was to reduce the visible 'fact' and symbolism of a 'hard' border between the two Irelands. Brexit threatens to reintroduce what had become an invisible and mostly insignificant border, and by doing so sending the peace process into reverse. The paper reviews how the imminent threat to peace in this turbulent region might be avoided, reviews competing proposals for border management, if a return to violence is not to be the most calamitous consequence and casualty of Brexit.

RESOLVING AN ANCIENT QUARREL: FROM 'THE TROUBLES' TO THE PEACE PROCESS

Conflict rooted in cultural difference is a familiar feature of Irish politics. Independence achieved in 1921 translated an ancient quarrel between nationalists and unionists loyal to the British crown into embittered politics in the newly created province of Northern Ireland, occasionally spilling over into violence.[1] The principal reason was the monopoly of political and social power granted by London to the Protestant majority, an asymmetrical relationship that caused resentments on one side and a sense of entitlement and cultural exceptionalism on the other.

Resentment by the Catholic minority at institutionalized discrimination, the monopoly of power in the hands of the Protestant majority gave rise in the later 1960s to a civil rights movement.[2] Peaceful protests against institutional discrimination brought violent reaction from militants in the majority community, and

---

[1] Ian McBride, Introduction: Memory and National Identity in Modern Ireland, in Ian McBride (ed), *History and Memory in Modern Ireland* (Cambridge University Press, 2001), pp.1-42.

[2] Niall Ó Dochartaigh, Northern Ireland since 1920, in Richard Bourke and Ian McBride (eds), *The Princeton History of Modern Ireland. (*Princeton University Press, 2016), pp. 141-67.

the situation quickly deteriorated into armed struggle between rival militias. The British army was deployed to keep the peace, and in March 1972 London suspended the regional parliament and imposed direct rule.[3] Military involvement was no solution to this ancient quarrel, merely serving to legitimize insurgency, with bombs and bullets replacing the ballot box as the medium for politics.[4] Three decades of mayhem known locally as 'The Troubles' spilled over the border with the Republic and occasionally across to the mainland, with frequent terrorist atrocities against official targets and civilians.[5] Over time, public weariness of perpetual civil strife encouraged tentative moves for a ceasefire, resulting in the Belfast Agreement of 1998 that established an historic power-sharing arrangement for devolved government based on 'parity of esteem' between both warring communities.[6]

Although the principal parties in the peace process were the governments in London and Dublin, both the EU and Washington acted as international guarantors, diplomatic interlocutors between the Northern Ireland parties and communities on both sides of the border.[7] The 1921 border symbolized a cultural fault line, manifested by barbed wire, fortifications and military presence. EC / EU accession by both governments in 1973 had already begun to heal this division, with greater transit of goods services and people in both directions, facilitating cross-border collaboration on a range of social, economic and infrastructural projects. The peace process after 1998 exponentially increased cross-border co-operation, much of it financed by EC / EU structural funding.[8]

---

[3] David McKittrick and David McVea, *Making Sense of the Troubles: A History of the Northern Ireland Conflic*t (3rd edition Viking Press, London, 2012).

[4] Bernadette C. Hayes and Ian McAllister, *Conflict to peace: Politics and society in Northern Ireland over half a century* (Manchester University Press, 2013).

[5] Brendan O'Leary, *The Politics of Antagonism: Understanding Northern Ireland* (2nd edition, Athlone Press, 1996)

[6] Cecelia Clegg, Embracing a Threatening Other: Identity and Reconciliation in Northern Ireland, in Sebastian C. H. Kim, Pauline Kollontai and Greg Hoyland (eds), *Peace and Reconciliation: In Search of Shared Identity*. (Ashgate, Abingdon 2008), pp.81-93.

[7] E. Meehan, Britain's Irish Question: Britain's European Question?: British-Irish relations in the context of the European Union and the Belfast Agreement', *Review of International Studies*, 26 (1) 2000, pp. 83-97.

[8] John Doyle, Governance and Citizenship in contested states: the Northern Ireland peace agreement as internationalised governance, *Irish Studies in International Affairs*, 10 1999, pp.201-219.

The Belfast Agreement was a step change in reconciliation and seemed finally to have ended this ancient quarrel, in the process making the physical border both invisible and redundant. Or so it seemed, until the Brexit vote. Brexit has raised many challenges for future EU / UK relations, but none of greater significance than the status of the Irish border, reviving anxieties all round about renewed threat to what is still a fragile peace in this troubled region.

AN ISLAND DIVIDED: CROSS-BORDER CO-OPERATION BEFORE AND AFTER BELFAST

Even after EC accession, Ireland both North and South experienced continuing economic fragmentation and cultural disconnection.[9] The Single Market (1992) boosted cross-border trade, but its extent was modest. Both parts of Ireland continued to trade more with the United Kingdom than with each other. The Single Market project did increase trade and business contacts, and facilitated greater civic co-operation between communities, both in the North and on either side of the border through the agency of EC /EU programmes intended for that purpose.[10] This too represented progress, yet the legacies of British occupation before 1921 and partition thereafter remained obstacles to deeper functional integration and cultural reconciliation.

The diplomacy that culminated in the Belfast Agreement (1998) was a game changer, and one expedited by EU membership, its principal outcome an international treaty underwritten by the EU and imposing legally binding requirements on all parties to maintain peace.[11] New political institutions based on power sharing and parity of esteem embedded a rights-based legal order, overseen by an elected Assembly and subsequently an executive drawn from both communities.[12] However, differences in administrative practices between North and South meant continuing frictions over the management of

[9] J. Bradley, The Two Economies of Ireland: An Analysis', in M. D'Arcy and T. Dickson (eds), *Border Crossings: Developing Ireland's Island Economy*, (Gill and MacMillan, Dublin 1995), p.40.

[10] E. Tannam, Cross-Border Co-operation between Northern Ireland and the Republic of Ireland: Neo-Functionalism Revisited', *British Journal of Politics and International Relations*, 6 (2) 2006, pp.256–276.

[11] Matthew O'Toole, Belfast Agreement constitutionally binds the UK to Europe, *The Irish Times*, December 18 2017.

[12] Daniel Bar-Tal and Gemma H. Bennin, The Nature of Reconciliation as an Outcome and as a Process, in Yaacov BarSiman-Tov (ed), *Conflict Resolution to Reconciliation* (Oxford University Press, New York 2004), pp.11-38.

'common' EC / EU programmes, with both governments and the European Commission working assiduously to minimise difficulties and improve mutual trust.[13] The EU's role as a principal stakeholder in the peace process was confirmed for example by the INTERREG programme that established joint management structures and trans-border co-operation for state enterprises local government and other agencies. Loans from the European Investment Bank (EIB) and the EU framework programmes, including Horizon, likewise promoted collaborative research and development initiatives that have signally contributed to economic development and cross-border infrastructure.[14] Significant here was the European Commission's new criteria for regional funding with the border region on both sides designated a single zone with 'Objective One' status. A positive inducement for political authorities other public business stakeholders and communities on either side of an increasingly meaningless border to make positive response to Brussels' call for institutionalised partnership arrangements.

Cross-border co-operation increased and on every level, economic and political, much of it within an EU framework. Between 1998 and 2015, for instance, intra-Irish trade virtually doubled in value to some €2988.3m, and in view of the present Brexit conundrum by a differential that consistently favoured trade from Northern Ireland to the Republic rather than vice versa.[15] The Belfast Agreement was about more than trade, nevertheless trade flows and related economic activities in both directions confirm clear linkage between peace and prosperity in this troubled region, as they have elsewhere in Europe where former enmities are mitigated if not quite resolved by the functional dynamic of closer integration.[16] Accordingly, the peace process lessened, even if it has not ended sectarianism.

---

[13] D. Kennedy, The Northern Ireland Question and the European Union, in B. Barton and P. Roche (eds) *The Northern Ireland Question: Perspectives and Policies (*Ashgate, Aldershot 1994).

[14] M. Adshead and J. Tongue, *Politics in Ireland: Convergence and Divergence on a Two Polity Island* (Palgrave Macmillan Basingstoke 2009), pp.220-22.

[15] InterTrade Ireland, Potential Impact of WTO Tariffs on Cross-Border Trade, 2017.

[16] Frank Schimmelfennig, Liberal Theory and European Integration, in Rebekka Friedman, Kevork Oskanian Ramon Pacheco Pardo (eds), *After Liberalism?The Future of Liberalism in International Relations* (Palgrave Macmillan, Basingstoke 2013), pp.253-69.

THE EUROPEAN DIMENSION OF THE BELFAST AGREEMENT AND BEYOND

The Belfast Agreement was always about more than domestic politics, with shared commitment to European values integral to the process. The accord requires signatories to take full account of common interests in every aspect of the agreement.[17] The new institutional arrangements acknowledge the cross-border and EU dimensions of an historic peace process. A British-Irish Council is tasked with reviewing EU-related matters, and an all-Ireland North-South Ministerial Council with members from the governments of the Republic and Northern Ireland is concerned with improving intergovernmental co-operation.

The EU's framework programmes and structural funds have contributed to this remarkable transformation.[18] By facilitating and intensifying co-operation across a range of activities: commercial / economic development, capital flows, business and enterprise, agriculture, tourism, and not least social inclusion and civic engagement.[19] The EU's 'four freedoms' (movement of goods, services, people and money), markedly increased with the onset of the Single Market, have continued to bind communities across a porous border.[20] Free movement of persons as required by the rules of the Single Market has enhanced this sense of shared purpose, conferring additional citizens' rights in a common space defined not merely by market making, but also socially and politically.

The principal EU agencies for facilitating cross-border co-operation arrangements are the Support programme for Peace and reconciliation (SPPR), INTERREG, and Leader II programmes. Of particular

---

[17] British-Irish Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Belfast, 10 April 1998, at para 1.

[18] B. Laffan, The EU context of change in state and nation post- 1973', in N. Ó Dochartaigh, K. Hayward and E. Meehan (eds) *Dynamics of Political Change in Ireland: Making and breaking a divided Ireland* (Routledge, London, 2017), pp.44-60.

[19] J. Bradley and D. Hamilton Bradley, Making Policy in Northern Ireland: A critique of Strategy 2010, *Administration*, 47 (3), 1999 pp.32-50. (1999).

[20] See the comparisons cited by in E Tannam, The European Union and Business Cross-Border Co-Operation: the case of Northern Ireland and the Republic of Ireland', *Irish Political Studies*, 11 1996, pp.103- 129 and idem Cross-Border Co-operation between Northern Ireland and the Republic of Ireland: Neo-Functionalism Revisited', *British Journal of Politics and International Relations*, 6 (2) 2006 , 256–276.

importance for North-South collaboration is the Special European Union Programmes Body (SEUPB) that expedites and monitors the EU Programme for Peace and Reconciliation in Northern Ireland.[21] To date, these programmes have disbursed some 2.3 billion euros, conspicuously contributing to improved trans-border relations at every level, from community to intergovernmental co-operation.[22] The scale of this fiscal support has been crucial to progress, with the border region in receipt of some 3.5 billion euros under the current 2014-20 Multi-annual Financial Framework, notwithstanding considerable subsidies and structural payments from the CAP. Overall, something in the order of fully 8 percent of Northern Ireland's GDP derives directly from EU funds.[23]

Closer integration on the island is nowhere better illustrated than in the matter of monetary union. The extent to which, and notwithstanding Ireland's membership of the Eurozone and Northern Ireland's retention of sterling the border region has become a common business space, with both currencies accepted for transactions at every level. Co-operation not merely confined to economic matters, but with police and other agencies authorities on either side of an increasingly invisible border committed to maintaining security in what was formerly a contested political space, indeed a conflict zone.[24]

BREXIT AND UNANTICIPATED CONSEQUENCES

Brexit has called this progress into question, reviving anxieties in Ireland and beyond about the inimical consequences of reinstating a physical border. After 1998 the border became invisible, more conduit than barrier between Ireland North and South and at every level. Cross-border trade expanded exponentially and increasing civic engagement normalized the peace process on both sides of the border.[25] The border region became as much a shared civic and political as a merely functional space, and made easier by removing

---

[21] E. Meehan, Europe and the Europeanisation of the Irish Question 1972-1998, in M. Cox, A. Guelke and F. Stephens (eds) *A Farewell to Arms? From 'Long War' to Long Peace in Northern Ireland* (Manchester University Press, 2000).

[22] C. Irvin and S. Byrne, Economic Aid and its role in the Peace Process, in J. Neuheiser and S. Wolff (eds) *Peace at Last? The Impact of the Good Friday Agreement on Northern Ireland* (Berghann, London 2002).

[23] Brexit: UK-Irish relations, European Union Committee, 6th Report of session 2016-17, House of Lords 12 December 2016, at p.46.

[24] P. Teague, The EU and the Irish Peace Process', *Journal of Common Market Studies*, 34 (4) 1996,pp. 549-70.

[25] J. Goodman, *Single Europe, Single Ireland? Uneven development in process*. Dublin (Irish Academic Press, 2000).

insignia and signage denoting national allegiance or exclusive sovereignty.[26] The prospect of a reinstated border is concentrating minds in both communities, at government level and in Brussels about possibly malign consequences.

Brexit will likely have constitutional consequences beyond Ireland, not least for the constitutional status of the British State and its four constituent territories. A majority of voters in Scotland and Northern Ireland voted in the 2016 referendum to remain in the EU. The most politically contentious issue here is whether or how far the ramifications of the 'remain' vote in two of the United Kingdom's constituent polities might cause further constitutional dislocation, potentially even the disintegration of what only a few short decades ago was a stable and unitary state. Brendan O'Leary amongst other expert commentators sees the Belfast Agreement as permitting altogether more flexible constitutional arrangements between the constituent parts of the United Kingdom than presently exist, not least in the context of an increasingly devolved British polity. A degree of constitutional discretion that would permit both Northern Ireland, and should voters there will it Scotland too to enjoy a distinct and to a degree even a separate political status from the rest of the British State.[27]

On this imaginative if unorthodox interpretation of Britain's constitutional future, Northern Ireland and Scotland might feasibly retain EU membership, even as they remain within the British State, or they might do so pending the outcome of further referenda in both countries. A border poll in Northern Ireland to determine the province's status vis à vis the United Kingdom and a further referendum in Scotland to review relations with the rest of the United Kingdom, and prospectively even to endorse outright independence. According to this permissive reading of the present constitutional situation, enforced exit of both countries from the EU solely on the grounds of a majority pro-Brexit vote in England could be deemed to be principled if not strictly legal grounds for these countries to choose their own constitutional futures. To remain within the United Kingdom, or to withdraw and with each nation determining its own relations with the EU. Whether any such claim to self-determination would have constitutional validity let

---

[26] A. Guelke, International dimensions of the Belfast Agreement, in R. Wilford (ed.) *Aspects of the Belfast Agreement (*Oxford University Press, 2001), pp. 245-263.

[27] Brendan O'Leary, Detoxifying the UK's exit from the EU, a multi-national compromise is possible, available online at https://blogs.lse.ac.uk/brexitvote/2016/06/27/de-toxifying-the-uks-eu-exit-process-a-multi-nationalcompromise-is-possible/, 27 June.

alone political credibility is quite another matter. Nevertheless, its exercise would almost certainly propel the United Kingdom into political crisis, provoking rebellion by insurgent elements in the smaller constituent nations committed to the break-up of the British.[28] A far-fetched scenario maybe, but Brexit has brought all manner of uncertainty to Ireland, the United Kingdom, and no less so to the EU.

Brexit threatens to end projects connecting formerly hostile border communities, thereby risking the peace process itself. The signatories to the Belfast Agreement never remotely considered that the United Kingdom and the Republic would not remain EU Member States in perpetuity. Although the Agreement did not explicitly refer to the status of the signatories as EU Member States, and as such does not preclude either government withdrawing from the European Union.[29] Brexit is then a clear challenge to such assumptions of continuity, both in Anglo-Irish relations and for the peace process per se. The likelihood is that the significantly altered status of the border will have far-reaching and negative consequences for future relations on the island of Ireland, and at every level. A fundamental shift in political relations that means North-South co-operation cannot continue on present terms. Certainly not, as is likely, significantly different economic and regulatory arrangements apply in the respective political jurisdictions on the island demarcated by a reinstated border.

BREXIT RISKS THE PEACE PROCESS

All of this now called into question by Brexit.[30] Current debate about the border is only in part about technical matters or legalistic concerns related to border management. There is just as much uncertainty

---

[28] Fintan O'Toole, United Ireland will not be based on '50 per cent plus one'. Brexit has made Irish unity more likely, but we need to reunify people first, *The Irish Times*, August 15 2017.

[29] A case heard in October 2016 in the Belfast High Court case ruled that there was nothing in the Good Friday Agreement to prevent the triggering of Article 50. In its ruling, the High Court declared that EU membership was no constitutional requirement of the Good Friday Agreement which would be breached by notification of Article 50. See R (Miller) and others versus the Secretary of State for Exiting the European Union, 29 October 2016, The UK Supreme Court upheld the Belfast High Court position in its ruling in January 2017, maintaining that the principle of consent for constitutional change contained in the Good Friday Agreement referred only to whether Northern Ireland remained in the UK or was unified with the rest of Ireland.

[30] Duncan Morrow, The Rise (and Fall?) of Reconciliation in Northern Ireland, *The Canadian Journal of Peace and Conflict Studies* 44 (1) (2012), pp. 5-35.

about political outcomes, not least reviving sectarianism, with the prospect of a return to political violence. What are the likely consequences of Brexit for political stability on this troubled island? More important still, what are the most suitable means for avoidance of a formal or 'hard' border between Ireland north and south that will mitigate this patent threat? Three distinct but related issues merit consideration here. The first of these post-Brexit challenges is the generic threat to peace and political stability in Northern Ireland. Secondly, those matters related to functional challenges, the practicalities of managing cross-border transactions (notably, passage of goods and persons) that are unavoidable outcomes of a reinstated 'hard' border. Finally, and by no means the least of these challenges is the future state of inter-communal relations. In light of the historic acceptance in 1998 of parity of esteem in public administration, legal practice and governance, the status of equality and civil rights for every citizen, those very issues supposedly resolved by the peace process but now threatened by fallout from Brexit.

These problematic issues, each one a direct consequence of Brexit, translate as five critical questions facing all parties to the current negotiations. The British Government which initiated Brexit, the political authorities and the two communities on either side of the Irish border who will be most directly affected by it, and the EU that has invested considerable political capital and actual 'treasure' in fulfilling its role as a principal guarantor of the peace process.

(1) Political stability and the condition of inter-communal relations: Brexit has no immediate consequences for the status or functioning of the power-sharing institutions. However, the fact that it will revive political tensions and on several fronts has major implications for the peace process. Uncertainty is no friend of stability and anxiety over the legal status of the border, unease about future relations between governments in London and Dublin, between the political authorities in Stormont and Dublin and between local governments on both sides of the border threatens a return of febrile politics.

Reinstating a physical border freighted with all the symbolism of statehood, whether political insignia or documentation checks, may revive old resentments, attracting malign attention from extremist

paramilitaries marginalized after 1998.[31] All of this in addition to functional concerns, not least costly disruption to elaborate transnational supply chains that are an increasing facet of modern production and transnational markets. As such, boding badly for trans-border trade, and no less so for political trust between still divided communities. These are pressing matters for Anglo-Irish relations and for both communities, as they are too for current negotiations between London and Brussels over the terms of Britain's EU withdrawal. On the British side, there is rather more wishful thinking than clear-sighted realism. The official letter from the Prime Minister to the European Council formally triggering Article 50, acknowledged the ''important responsibility to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and (the commitment) to continue to uphold the Belfast Agreement''. The official government position paper on Northern Ireland and Ireland, likewise confirmed the Belfast Agreement as 'the bedrock of the peace process', and that ''nothing agreed as part of the United Kingdom's exit in any way undermines the Agreement''.[32] Noble intentions but followed by diplomacy that focused on Britain's preoccupation with securing favourable trade terms post-Brexit, with the border issue almost an afterthought, relegated some down London's list of priorities.[33]

The EU negotiators too have prioritised their own interests, not least securing Britain's financial obligations under the EU Multiannual Financial Framework 2014-2, and ensuring continuing rights for EU citizens' resident in the United Kingdom. The border issue became a priority only latterly when these more pressing issues were resolved, and even then only tangentially in response to nebulous British proposals for future UK-EU trade relations. The European Parliament has given the issue rather more attention, with representatives of the border communities lobbying hard to ensure the achievements of the peace process are not sacrificed to political expediency. In a resolution of 3rd October 2017, the Parliament affirmed that, ''the unique position and special circumstances confronting the island of Ireland must be addressed in the withdrawal agreement and this in a manner fully consistent with the Good Friday Agreement in all its

[31] Brian Walker, The Irish government is pursuing Northern Ireland's interests more actively than the UK government, The Constitution Unit, UCL May 23 2017 available online at https://constitution-unit.com/2017/05/23/the-irish-government-is-pursuing-northern-irelands-interests-more-actively-than-the-uk government/.

[32] Northern Ireland and Ireland. Position Paper, HMG 16 August 2017,pp. 1-6.

[33] Prime Minister's letter to Donald Tusk triggering Article 50, London, 29 March 2017, available online at https://www.gov.uk/government/publications/prime-ministersletter-to-donald-tusk-triggering-article-50.

parts…. in order to ensure the continuity and stability of the Northern Ireland peace process.''[34] These assurances have risen up the EU's agenda, making meaningful British proposals for managing the border a likely deal-breaker.

(2) Practicalities of border management: Brexit will disrupt border arrangements on the functional as well as the political level. Reversion to separate economic, and in some instances legal orders in Ireland will require reinstatement of formal procedures at the border, in conformity with WTO rules. The critical issue here is how 'hard' or 'soft' a border will follow from the negotiations. In an increasingly interdependent globalizing economy, production is transnational as much as merely local or national activity. Products at various stages of manufacture transit between Member States, and sometimes more than once in what are complex production processes and elaborate supply chains. The rules governing the Single European Market are designed to ensure ease and speed of passage across borders. Britain's exit from the SEM and the customs union will severely hinder these arrangements.

A principal issue for both sides in the negotiations is how to meet the challenge of exponential economic interdependence, and no less important limit the impact of imminent reversal of functional integration on what is still a brittle peace. Formal border arrangements will re-politicize the border, as well as hindering transit of goods and people, impeding commerce and disrupting trans-border supply chains, ratcheting business costs, and inhibiting free movement of labour in either direction. This latter outcome is especially disruptive given that many thousands of citizens live in one part of Ireland yet work, study or do business in the other.

One solution proposed by officials in Brussels and Dublin is to relocate customs and other procedural checks away from historic crossing points, for instance by establishing customs' clearing stations that avoid politically sensitive crossing points. How feasible is it, the encumbrances of history notwithstanding, to relocate the Irish border if only for administrative convenience? Arrangements already exist, notably between the United Kingdom and France under the terms of the 2003 Le Touquet Treaty for repositioning

---

[34] European Parliament, State of play of negotiations with the United Kingdom, P8_TA-PROV(2017)0361, 3 October 2017, available online at https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8- TA-2017-0361+0+DOC+PDF+V0//.

Britain's 'border'.[35] This protocol was a response to particular circumstances, whereby Britain had become a destination of choice for thousands of non-EU migrants, many without legal status or entitlement to reside in Britain. Accordingly, Eurostar rail (and seagoing passengers at the Channel ports) technically 'depart' from the United Kingdom and 'enter' France (and Belgium) when they cross the British border at Eurostar's London terminus, and for incoming passengers cross the United Kingdom border at termini in Paris and Brussels respectively, and at the Channel ports on the Continental side.

There is no technical reason that prevents similar arrangements at the Anglo-Irish border, relocating requisite administrative checks to the port of Liverpool, or indeed any other British and Irish airport or ferry terminal. Not technical barriers as such, but certainly political objections in view of the visceral symbolism of the present British border with the Republic for militant unionists in Ulster, and for nativists in the governing Conservative Party who see control of the border as emblematic of inalienable sovereignty. For many Northern Irish unionists the 1921 border remains a potent symbol of their British allegiance, more than merely an administrative demarcation but an incontrovertible political fact. One invested with existential meaning about identity, the sort of nativist sentiment that rallied behind Brexit during the referendum campaign.

Common sense and practical solutions can only go so far, make no convincing response to the primordial instincts that mobilises identity politics. Most especially in Ireland, where historical memory transcends 'mere' reason, retains potency as the primary and for many remains the primal determinant of political attachment and belonging. The prospective threat to ease of transit across what is presently a merely notional border presents a real challenge to British negotiators whose determination to recover control of their own borders has given political oxygen to unionists in Northern Ireland and Tory ideologues at Westminster alike. Accordingly, it precludes any 'solution' to the border issue likely to be acceptable to the EU, Irish nationalists, and most especially to the Irish government.

---

[35] Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning the Implementation of Frontier Controls at the Sea Ports of both Countries on the Channel and North Sea Le Touquet, 4 February 2003, HMG Command Paper 6172.

(3) Disruption of cross border regimes: Many aspects of public sector activity and private commerce alike are administered on an all-Ireland basis, materially assisted by the Special EU Programmes Body (SEUPB) that manages the PEACE and INTERREG programmes.[36] Programmes that have considerably strengthened cross-border contacts, delivering the peace process on the ground as practical citizen-based as much as top-down elitist projects. Co-operation in both public sector projects and business ventures intended to reinforce cross-border and inter-communal integration are the functional ballast of the peace process. Notable here are improvement of transportation and communication links that increase physical contacts, rules on food safety, coastal lights and navigation of internal waterways that traverse the Irish border, and cultural exchanges and civic engagement between formerly disconnected and ideologically estranged communities.

These programmes and others will be hindered or cease altogether in Northern Ireland post-Brexit, and notwithstanding the British Government's confirmation that community programmes will continue, for instance by guaranteeing funding to the current EU Peace IV and INTERREG programme up to 2020, the future of cross-border initiatives essential for sustaining the peace process at ground level remain in doubt. The same might be said about common regulatory arrangements that embody the classic functionalist paradigm of European integration: *inter alia* the integrated energy market for the generation and supply of electricity and mutual sanitary-phytosanitary arrangements for monitoring animal health, the latter critical for the agricultural and especially for the dairy industry crucial for the economy of the border region.[37] The prospects for regulatory divergence post-Brexit, in these and other aspects of administrative and commercial integration will in some degree diminish present regulatory approximation in goods, as well undermining common arrangements for consumer protection and health and safety.

Another negative externality from reinstating a formal border will be discontinuance of public procurement contracts. Agencies on either side of the notional border have become used to pooling public resources, developing common programmes and other shared endeavors for delivering economies of scale

---

[36] B. Laffan and D. Payne, The EU in the Domestic: Interreg III and the Good Friday Institutions, *Irish Political Studies*, 17.1, 2002, pp. 74-96.

[37] See https://www.daera-ni.gov.uk/articles/cattle-imports-gb UK Withdrawal ('Brexit') and the Good Friday Agreement.

in service provision, notably in public health, social services and education. All of that activity and interdependence now certain to be disrupted or even discontinued.

(4) Free movement of people: A Common Travel Area (CTA) exists between the United Kingdom and the Republic without any requirement for immigration controls. This arrangement is not a direct consequence of EU accession, and neither does its legitimacy depend on the EU legal order, although it does reinforce the EU's requirement of free movement. The CTA is a legacy, indeed an affirmation of close albeit ambivalent historical links and cultural ties between the two states following their formal separation.[38] The Republic was a constituent part of the British State until Home Rule in 1921 and thereafter a Dominion of the British Empire, until unilaterally proclaiming its sovereign independence in 1937. Irish citizens have nevertheless enjoyed special status in the United Kingdom, including the right to reside, access to certain social benefits, and even to exercise the franchise in British general elections.[39] These unique arrangements do not derive as such from EU membership but they are confirmed in protocols appended to the EU treaties. Most especially in Article 2 of Protocol No.20 of the Lisbon Treaty, which confirms that both countries, ''may continue to make arrangements between themselves relating to the movement of persons between their territories''.[40]

Brexit is both a political and juridical challenge to these novel arrangements, as it is for other aspects of this special post-imperial relationship. Freedom of movement between these islands post-Brexit raises the important issue of how to distinguish between categories of citizens, whether Irish or British citizens, and those of other EU countries. Neither country is signatory to the Schengen Agreement and both exercise border controls on arrivals from elsewhere in the EU. The British 'solution' to this conundrum, as with so many other Brexit-related technicalities is to simply affirm a 'determination' to avoid a rigid system of passport controls at the Irish border, to maintain visa free access to the EU by its citizens and vice versa.

---

[38] See the evidence from Professor Bernard Ryan to House of Lords European Union Committee (2016) 'Brexit: UK Irish relations', House of Lords Paper 76, pp.32-33.

[39] UK Government, The United Kingdom's exit from and new partnership with the European Union, CM 9417, 2 February 2017.

[40] At https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN, p.293.

However, the reality of ingress and egress across a reinstated and indeed a politically controversial border will present difficulties for citizens of the Republic, even if they do retain the privileges conferred by the Common Travel Area. More problematic still, is the incentive of a less restrictive border between EU and UK domains than the present EU-UK border at Calais and elsewhere for non-EU citizens intent on reaching the United Kingdom. Depending on the final withdrawal arrangements, former EU partners (notably France and Belgium) might have less incentive to police their own borders on behalf of the United Kingdom than they presently do.

There is no agreement yet on an issue critical for the sovereignty imperative of those who campaigned and voted for Brexit, for whom controlling immigration was a principal motivation. To resolve this issue will require more than merely bland assurances or reassuring words from politicians. A rigorous border regime for deterring illicit entry to the United Kingdom via the geographically porous Irish border can only mean the reinstatement of the 'hard' border that London disclaims. This is the very crux of the border conundrum: avoidance of a 'hard' border realistically means remaining at the very least within the customs union. Yet to do so, will contravene the pledge of arch-Brexiteers to recover national sovereignty.

The dilemma facing the British Government is then the wholly discrepant one of both delivering uncompromising Brexit, whilst avoiding what objective observers regard as the unavoidable reality of making unpalatable compromises in order to make a future trade deal with the EU.[41] One can quite see why. Some thirty thousand people on both sides of the border live in one part of Ireland whilst working or studying in the other. To say nothing of managing cross border traffic flows that have grown exponentially since 1998, a complex web of social, commercial and civic activities for which rigorous border checks will be severe impediment, imposing additional costs on business, placing further strain on official agencies mandated to implement them, and not least ratchetting political tensions.[42]

(5) Assurance of civil rights and equality: Rights equivalence is the normative fundament of the Belfast Agreement, the *sine qua non* of the peace process. A legal denominator of communal reconciliation

---

[41] HM Government, 'The United Kingdom's exit from and new partnership with the European Union' London: HMSO, CM9417.

[42] House of Lords European Union Committee (2016) Brexit: UK-Irish relations, House of Lords Paper 76, p.18.

and shared civic purposes enshrined in EU law, providing assurance to citizens against unwonted discrimination regardless of cultural origin or religious affiliation. A particular concern about these arrangements post-Brexit is how far rights affirmed in the Belfast Agreement and deriving from EU membership will be impaired or even curtailed.[43] That Agreement gave assurance of equivalence in the standard of rights protection, both in the Republic and in Northern Ireland, a principal gauge of 'parity of esteem' as between the unionist and nationalist communities in the North.

Whether or how far British withdrawal from the EU's supranational legal code might devalue or otherwise diminish these legal guarantees to the citizens of Northern Ireland remains a source of anxiety, even as the United Kingdom remains, for the time being at least, adherent to the European Convention of Human Rights. Fundamental rights are elemental to the peace process. The question of trammelling such rights is also a matter of concern, for all citizens of the United Kingdom and not merely those in Northern Ireland, although this a broader constitutional matter and properly the subject for separate consideration.[44] For the minority community in the North, long time victims of civil rights abuses that gave rise to insurgent politics, Brexit is an uncomfortable reminder of decades of official and informal discrimination.

A fact acknowledged by the government in Dublin and the Brussels institutions alike, indeed by anyone concerned to protect fundamental rights as the fundament of liberal and democratic politics that is essential to the peace process.[45] To remove the EU as a principal interlocutor of the peace process while not in itself implying a downgrading of fundamental rights in Northern Ireland. Though to do so will undoubtedly undermine brittle trust across the communal divide, weaken the institutional mainstay of a rights-based order in a polity where prior to 1998 rights were frequently compromised or merely arbitrary.

A related concern is the prospect (widely anticipated) of British withdrawal from the ECHR, another indicator of the United Kingdom's present isolationist mind-set. A late signatory to the Convention after the Blair Government incorporated it into British law it was never entirely acceptable to many in the

---

[43] C. McCrudden, *The Good Friday Agreement, Brexit and Rights* (British Academy London and Royal Irish Academy Dublin 2017), at p.16.

[44] See Vernon Bogdanor, Brexit And Our Unprotected Constitution, The Constitution Society, 2018.

[45] European Commission, Guiding principles for the Dialogue on Ireland/Northern Ireland, Brussels, 20 September 2017, at p. 4.

Conservative Party who regard it as a constraint on judicial sovereignty. Exiting the Convention remains a distinct possibility, although to do so would further weaken what is a fundamental underpinning of the Belfast Agreement, and signify erosion of London's commitment to the transnational legal order and the demise of an important safeguard for minority rights in Northern Ireland. A risk widely acknowledged by EU authorities and institutions although rather less so by Westminster politicians intent on 'taking back control' of British laws. The familiar assertion by those who regard a sovereign Parliament as the surest, indeed from this nativist standpoint the *only* guarantor of fundamental rights is hardly convincing, bearing in mind the precept adduced by the eminent English jurist William Blackstone, that what Parliament has done any successive parliament may just as readily undo.[46]

A final consideration here is the likely consequence of Brexit for the singular arrangement that is citizenship in Northern Ireland. The unique status that predates British and Irish EU accession is the right of anyone born on the island of Ireland to hold Irish citizenship without relinquishing British nationality. There is no reason why Brexit should alter this status, unless either government determines otherwise: the Irish government withdrawing the right to duality, or London prohibiting it for its own citizens in Northern Ireland. As things currently stand, both are unlikely occurrences. Exercising their right to EU citizenship post-Brexit is however altogether more problematic. National citizenship is the legal requirement for acquiring the status and rights of European citizenship. Citizens in the province who opt for singular British nationality will automatically lose those rights, unless they opt for dual nationality.[47]

This may be accounted no great loss for those nativists who see 'Europe' as entirely 'other' and EU citizenship as essentially meaningless. Yet for some citizens, especially amongst the young, multi-layered arrangements for political belonging confirm new opportunities for expressing a nuanced political and cultural identity. A mirror to the emerging and multi-faceted socio-cultural reality that is contemporary cultural attachment, what some scholars describe as post-national citizenship.[48] Arrangements that confer a degree of choice about cosmopolitan or multiple identity, altogether novel ways of manifesting ontological

---

[46] *Commentaries*, Volume 1 (1765 edition), at pp. 160-162.

[47] Brian Ó Caoindealbháin, Citizenship and borders: Irish nationality law and Northern Ireland, IBIS working paper no. 68, Working Papers in British-Irish Studies No. 68, Institute for British-Irish Studies, University College Dublin 2006.

[48] G. Delanty, Habermas and post- national identity: Theoretical perspectives on the conflict in Northern Ireland, *Irish Political Studies*, 11 (1) 1996, pp.20-32.

ideas about 'self' and prospects for transnational attachments and plural identities that in the case of Ireland Brexit now threatens to foreclose.

PROSPECTIVE 'SOLUTIONS'?

It is apparent from the foregoing discussion that the prospect of Brexit has serious implications for the peace process in Ireland. The Brexit negotiations have raised prospective 'solutions' for addressing the problems outlined above, by no means all of them offering convincing answers or appropriate solutions. How then should we evaluate the feasibility of various options proposed by the respective parties for resolving the border question?

(i) Moving the border: The most controversial 'solution' for avoiding a 'hard border' in Ireland and endorsed by EU27 negotiators, some Irish politicians and British business interests is to relocate the 'border' to the middle of the Irish Sea. The United Kingdom, or rather more contentiously Northern Ireland alone of the constituent parts of the British State, would remain in the customs union and / or the Single Market.[49] This argument is predicated on pragmatism, the practical advantages of Northern Ireland remaining in the present customs and / or SEM arrangements. A proposal disavowed by staunch Brexiteers, not least Northern Ireland's unionists who see this proposal merely as cover for malign intentions by Dublin and its EU allies to bring about a united Ireland. A 'plot' intended to break the political ties, loosen the cultural bonds, and sever constitutional links between the province and the United Kingdom. Wholly unacceptable to unionists, whether in Northern Ireland and the mainland committed to maintaining the constitutional fabric of the British State. Unionists who utterly disbelieve Dublin's assurances that its intention here is not ''a land grab'' but merely avoidance of a formal border.[50]

To this end, EU negotiators have proposed what is described as a 'back-stop' arrangement: avoidance of formal customs and regulatory controls at the UK-Irish but not the EU-UK border, with closer

---

[49] C. Gallagher and K. Report on How Designated Special Status for Northern Ireland Within the EU can be Delivered Doughty Street Chambers, London) Policy Department for Citizens' Rights and Constitutional Affairs 2017..

[50] Lisa O'Carroll, Michel Barnier: Brexit talks at risk of collapse over Irish border, *The Guardian* (London), 30 April 2018.

regulatory alignment across the Irish border, thereby avoiding the paraphernalia of a formal border. Accordingly, Northern Ireland would continue to conform to EU technical standards and other regulatory requirements, remain within the Common External Tariff, and continue to abide by EU customs rules and duties. At least until a bespoke British customs arrangement obviates the need for entirely separate customs and other regulatory arrangements for Northern Ireland.

This outcome would permit free movement of goods, services and people across the border. Arrangements that since 1973 have contributed much to cross-border integration facilitated civic co-operation and functional interdependence between border communities on both sides. In the process, ensuring mutual access by stakeholders and communities on either side to EU structural funds and framework programmes indispensable for maintaining peace through managed prosperity. A logical 'solution' certainly, but one altogether easier to prescribe than to deliver, precisely because it puts common sense and functional logics before visceral emotion and prioritizes economic rationality over raw politics, both unlikely outcomes on this island where politics is shaped more by visceral sentiment than by pure reason.

Described as a 'backstop' arrangement and appended by EU negotiators in response to insistent lobbying by Dublin to the agreement to extend the United Kingdom's withdrawal period, the Commission gave the proposal legal form as a draft protocol. As one commentator sees it, ''if (this 'backstop' arrangement) came into effect, this would inevitably entail checks on goods arriving from the rest of Britain into Northern Ireland, erecting a border within the United Kingdom. Thus, many in the UK, from across the political spectrum, view the proposal as an implicit attack on the United Kingdom's constitutional order. Theresa May said that 'no prime minister could ever agree' to it''.[51] So it has proved, with the British Government reformulating the backstop on terms altogether more conducive to its own narrow interests than to those of Ireland, let alone to ensuring the integrity of the peace process.

(ii) Median solutions, differential arrangements: Anxiety about the future of the peace process is the critical factor in proposals for ensuring an invisible Irish border, or it is for the Dublin authorities, and on

---

[51] Sam Lowe, UK must swallow the unpalatable Irish backstop, CER INSIGHT, Centre for European Reform, 15 May 2018.

their insistence negotiators in Brussels. In this narrative Northern Ireland's turbulent past, the fragility of the peace process requires every effort to avoid complete rupture between Ireland North and South. Moderate unionists and some Brexiteers accept the case for continuity, so long as this avoids compromising the province's constitutional status as a constituent part of the United Kingdom. One proposal particularly amenable both to Dublin and Brussels is Northern Ireland's continued 'association' with the Single Market through membership of the European Economic Area.[52]

This median solution would permit unhindered movement of goods, services, capital and people, as well as giving businesses in Northern Ireland continuing access to public procurement opportunities throughout the EU, and especially in the Republic their principal market for this type of trade. Moreover, it would guarantee Northern Ireland's continuing participation in EU programmes and activities: *inter alia* the Erasmus programme, cross-border co-operation on environmental matters, accessing EU financial and programmatic support for initiatives in tourism, public health, and not least police and judicial co-operation, including participation in the European Arrest Warrant scheme and continued access to EU data-bases on criminal intelligence. The principal objection here from the British side is that any such arrangement confutes the very idea of the United Kingdom's status as a singular and sovereign constitutional entity.

The British Government has responded to the particular challenge of the Irish border with its own median arrangements. Firstly, a bespoke 'customs arrangement' to apply not only at the Northern Ireland border as in the EU backstop but to EU-UK customs arrangements per se, and ''in a way that removes the need for a UK-EU customs border''.[53] Described as 'a new customs partnership' this is the preferred option of the Prime Minister and those in her Cabinet who prefer to stay as closely aligned after Brexit to the EU's customs union as possible. As such, the United Kingdom would leave *the* customs union, replacing it with altogether looser arrangement that, while permitting continuing access to lucrative EU markets would avoid compliance with the full complement of common legal obligations and ECJ

---

[52] B. Doherty, C. McCrudden, L. McGowan, D. Phinnemore, D. Schiek, and J. Temple Lang, *Northern Ireland and Brexit: the European Economic Area option* (European Policy Centre, Brussels 2017), at p.39.

[53] HM Government HM Revenue and Customs) . *Future customs arrangements. A Future partnership Paper*, 15 August 2017, p.2.

jurisdiction required of EU Member States, notably on free movement, thereby avoiding compromising autonomy in trade policy.

The motivation here is less about assuaging anxieties in Ireland than it is insuring British businesses against a 'cliff-edge' Brexit, falling out of the EU without agreed customs arrangements in place.[54] Predictably, the Europeans have responded by dismissing this proposal as merely an attempt to 'cherry pick' the advantages of continuing access to the common market without assuming any of the obligations of full membership. Or to use another comestible metaphor, an attempt to have 'cake and eat it'! Brexiteers in the Cabinet and on the parliamentary backbenches likewise object to this median solution but on antithetical grounds, that it is merely an insidious ploy by 'remainers' to defer Brexit, or even to avoid it altogether.

A key aspect of this and other median solutions is a calculated avoidance of stark choices and clear-cut outcomes, preferring nuance to exactness as the best, indeed the only means for squaring the circle that is Brexit. Meanwhile, assurances from the British Government, that in the event of failure to agree a mutual and comprehensive free trade deal between the EU and the United Kingdom, Northern Ireland would have the right to decide whether to follow United Kingdom or EU rules in the case of future divergence, merely adds to confusion in an already convoluted situation. A customs partnership in some form would require the United Kingdom to replicate EU rules on imports from the rest of the world where their final destination is the EU, with the UK customs service collecting duties at its borders on behalf of the EU. Some members of the British Government, including Prime Minister May, see this as a convenient way of aligning with the EU without being part of its institutional order. Whereas Brexiteers repudiate this 'solution' for its complexity, but principally on grounds that the United Kingdom would remain subject to the EU's legal jurisdiction, a 'rule taker' but not a 'rule maker', and with its sovereign right to trade on its own terms with third parties utterly compromised. An arrangement one leading Brexiteer has described as being that of a 'vassal state'.[55]

---

[54] Pippa Crerar and Frances Perraudin, May: customs backstop to only apply in 'very limited' circumstances *The Guardian* (London) May 21 2018.

[55] Steven Poole, What is a 'vassal state'? Jacob Rees-Mogg's mid-Brexit vision explained, *The Guardian* (London), 2 February 2018.

Any even interim arrangement that temporarily postpones Brexit-day seems to its most zealot advocates to invalidate the referendum pledge to 'take back control' of the British border, and with that to fully recover national competence over immigration and trade policy. These objectives were the principal drivers of the Brexit campaign, and subsequently the leitmotif of the official British approach in the negotiations. In the meantime and in response to what it sees as EU intransigence, lack of progress on a satisfactory customs arrangement and with time fast running out, the British Government has proposed its own interim or 'backstop' arrangement for continuing customs and regulatory alignment with the EU. A proposal to apply to the EU-UK border per se and not only in Ireland that would avoid reinstating a hard border between Northern Ireland and the rest of the United Kingdom, but above all to prevent the United Kingdom exiting without any customs arrangements in place. A 'solution' that raises another critical problem for hard-line Brexiteers, who see it less as insurance against economic disaster than as retreat, indeed as outright defeat. In effect, Brexit in name only, exiting the EU institutions but not escaping their jurisdiction or their rules, and as such outright denial of the express 'will of the people' as expressed in the referendum.[56] As they see it, any such outcome is nothing less than mendacity by Britain's liberal internationalist establishment opposed to the 'real' national interest.

At the time of writing, each of these median solutions for border management remains in play, but neither has found consensus in the British Cabinet, and certainly not between Dublin or Brussels, peremptorily dismissed by chief EU negotiator Michel Barnier as merely ''magical thinking''.[57]Brussels has rejected both the proposal for a customs 'partnership' and a bespoke British backstop, the latter on grounds that it does not entail regulatory standards for goods, thereby precluding a soft border; but primarily because it prioritizes British economic interests over the survival of the peace process.

(iii) Technological 'solutions': A less politically contentious although no less problematic 'solution' to border management is the so-called technology 'fix', which HMG proposed in its official position paper on future customs arrangements. One of two distinct though hardly incompatible proposals for avoiding a

---

[56] Alasdair Smith, The EU should agree an all-UK backstop, UK Trade Observatory, 22 May 2018, available online at

https://blogs.sussex.ac.uk/uktpo/2018/05/22/the-eu-should-agree-an-all-uk-backstop/.

[57] Jennifer Rankin, UK accused of 'magical thinking' over Brexit plan for Irish border, *The Guardian* (London) 25 August 2017.

'hard' Irish border, the first of these a customs 'arrangement' (whether a permanent or temporary backstop) discussed above. Both proposals intended to avert complete rupture in the smooth transit of goods between the United Kingdom and the EU, by reducing time-consuming paperwork and procedural checks at the actual border, wherever located. This objective is linked to complementary proposals for a supposedly ''highly streamlined customs arrangement'' described in official jargon as 'maximum facilitation' (max-fac). Digital monitoring designed to ''continue some of the existing (border) arrangements between the UK and the EU; put(ting) in place new negotiated and potentially unilateral facilitations to reduce and remove barriers to trade; and implement technology-based solutions to make it easier to comply with customs procedures''. To do so by employing smart technology, and in the case of the Irish border with special 'exemptions' from the customs checks for small businesses, and all supposedly facilitated by mutual 'goodwill' in order to minimise formal procedures and unnecessary red-tape.

A mix of reciprocity, technology and, ''utilising the UK's existing tried and trusted third country processes for UK-EU trade, building on EU and international precedents, and developing new innovative facilitations to deliver as frictionless a customs border as possible.''[58] The technology 'solution' is frequently cited by British politicians as appropriate means for the avoidance of formalised customs arrangements that, as they see it, would require formal legal and rule-taking obligations with the EU legal order. That said, advocates of the technology fix offer little convincing evidence that digital monitoring of cross-border traffic can adequately address the immensely complicated logistical, and no less so the political challenges of the Irish border.

Technology is in use elsewhere for facilitating rapid transit of goods and people across international borders, for example: biometric passport checks at airports, electronic scanning of vehicle registrations or cargo declarations and advance electronic transmission of customs manifests to avoid delays. British politicians have particularly cited light-touch transit procedures at the Norway-Sweden border. Experts such as Eurotunnel's director of public affairs and the CEO of HMRC, the latter giving evidence before the House of Commons Treasury Committee remain distinctly underwhelmed by the technology solution, on

---

[58] *Future customs arrangements. A Future partnership Paper*, HM Government HM Revenue and Customs, 15 August 2017 at p.2.

grounds of procedural oversimplification and the cost of installing smart technology.[59] Moreover, the very scale of traffic flows at the UK-EU border (whether in Ireland or at the Channel ports) is altogether greater than at the Scandinavian border, and with delays in transit unavoidable even there.

The principal issue at the Irish border however is less the matter of volume or cost than quotidian politics. Traffic flows either way across that northern border are politically less problematic: in part, because Norway, as a member of the European Economic Area, is fully participant in the Single Market. The critical issue for Ireland however is residual history. It is doubtful whether merely technical or procedural solutions can manage a border defined by factious history and complicated geography, with innumerable official and many unofficial crossing points. Difficulties further complicated by the administrative challenge of monitoring mixed cargoes, and subject to multiple technical standards and product regulations.

(iv) 'Regulatory alignment' and 'standards equivalence': Wishful thinking about a bespoke outcome is apparent too in another contrived British 'solution' to the border predicament. A proposal that complements the Government's second-best 'solution' to the border issue, rather glibly described above as 'maximum facilitation'. Pragmatism is a familiar reflex of British political culture, although on occasions sometimes merely cover for hubris: a convenient mix of virtuous 'exceptionalism' and administrative inventiveness wrapped in complacent national self-regard. In this particular instance a familiar British meme that conveniently juxtaposes native resourcefulness with the European dogmatism and bureaucratisation.[60]

The intention here is to maintain as much complementarity as possible post-Brexit between British and EU regulatory norms and technical standards, in order to preclude the need for elaborate regulatory checks

---

[59] Jessica Fina, "Max fac" customs system could cost £20bn a year, *economia*, 28 May 2018, available online at https://economia.icaew.com/en/news/may-2018/max-fac-customs-system-could-cost-20bn-a-year.

[60] See for instance the discussion of John Stuart mill's liberal empiricism in Simon Glendinning, The work of J.S. Mill shows the danger in eliminating the differences between European nations**,** available online at http://blogs.lse.ac.uk/europpblog/2013/09/30/the-work-of-j-s-mill-shows-the-danger-in-eliminating-the-differences-between-european-nations/.

and customs procedures at the border. A scaled down variant of this proposes that only selective UK-EU regulatory alignment and complementarity be applied to those products, procedures or services deemed to be essential for cross-border trade between the Republic and the North, notably though not exclusively in sanitary and phytosanitary regimes, rules on food safety and animal and plant health standards.

On the purely pragmatic level, common sense confirms, even commends this approach. After all, at the very moment of Britain's withdrawal from the Union complete regulatory alignment will exist, and on every level between the United Kingdom and EU27, the legacy of the UK's assimilation of the Community *acquis* over its forty-six years of membership. As part of its intention to maintain close trading relations with the EU regulatory proximity has featured and prominently in the British Government's strategic response to Brexit. The principal vehicle here has been the transposing of much of the present *acquis* directly into British statute law. At the point of the United Kingdom's departure, quite separate yet parallel legal orders and regulatory regimes will exist, transferred at least for the time being into British law as a singular and complementary regulatory order, albeit framed as singularly national and no longer as EU law. The pitfalls of this 'solution' are both political and temporal. Certainly complementary legal and proximate regulatory orders at the point of departure: but following the logics of Brexit to cultivate global rather than merely regional trade, concurrent for how much longer?

Future UK / EU regulatory relations are bound to diverge over time, shrinking their present normative 'fit'. This after all is perhaps the present government's principal aspiration for Brexit The bilateral trade deals it anticipates negotiating with prospective global trade partners will more likely than not be positive-sum bargains, and as such likely to require greater concessions from the party with least leverage. The side with the greatest economic heft in any bi-lateral trade bargain will always impose more of its own preferences, not least its regulatory standards as a requirement for signing off on the deal. The logics of the United Kingdom's future engagement with the world's economic super-powers, from China to the USA and beyond suggest that the *demandeur* in these bargains will more often than not be Britain. What will the prospects be then for continuing regulatory alignment with the EU, and more to the point here, between erstwhile partners on either side of the border in Ireland?

As an afterthought and with the Brexit deadline drawing rapidly closer Britain's chief negotiator, David Davies, proposed along similar lines perhaps the most bizarre of 'solutions' to the border conundrum to

date. A ten-mile wide 'special economic zone' along the entire 310-mile border, with a 'double hatted' customs arrangement (described by some Government insiders as 'max fac 2') similar to that operating in Liechtenstein, that would permit businesses to operate simultaneously in accordance with UK and EU rules.[61] This proposal was widely derided, but is indicative of the logics of British proposals on the border issue thus far: intended less as a long term let alone a workable solution than as short-term stratagem, evidence of London's desperation to move things forward on the negotiations. The proposals by the British side for resolving the border issue are less a reflection of principled concern, than an attempt to assuage the 'markets', reassure a nervous domestic public, persuade Brussels to agree to a bespoke trade deal, and thereby outflank British 'remainers'. To convince critics at home and abroad that smooth transition from EU membership is feasible, outright chaos of the 'doomsday' scenario avoidable by equipping the United Kingdom with a comprehensive regulatory order and custom's arrangement.

The British Government's transposition of the entire *acquis* into domestic law is less a gesture of accommodation, let alone cultural respect for of the EU regime, but an entirely functional response to the fundamental challenges of Brexit. On the one hand, the imperative to decouple from the EU regulatory order and as soon as possible, recovering what its tribunes proclaim as the 'prize' of national sovereignty; and on the other, to retain as many benefits accruing from EU membership as possible, whilst minimizing the legal obligations that accompany them without wrecking the British economy.

What is patent from the negotiations to date is that the British Government will have to decide and soon which of these by no means co-ordinate 'solutions' reviewed above will be its settled position on the border issue, and linked to that its preferred outcome for trade relations with erstwhile EU partners. Otherwise time will eventually run out, the United Kingdom crashing out of the Union without preparing businesses, consumers and the population at large for the immense challenges facing post-Brexit Britain.

POST SCRIPTUM: ANSWERING ANOTHER IRISH QUESTION?

---

[61] Andrew Woodcock, Irish border could get 'buffer zone' under new Brexit proposals, *Independent, ie*,1 June 2018, available online at https://www.independent.ie/business/brexit/irish-border-could-get-buffer-zone-under-new-brexit-proposals-36967919.html.

This overview of the challenges raised by Brexit for the management, and not least the security of the only EU-UK land border shows that difficulties are more apparent than practical solutions. The proposals reviewed above for resolving the border conundrum are each dependent on willingness to compromise, on forbearance by protagonists with quite different preferences, a quality that is in short supply both in the official British approach to European integration, and even more so in Ireland's fractious politics.

None of these prospective solutions has so far proved acceptable to the respective parties in these negotiations. Moreover, none has proved capable of healing the deep ideological rift in the governing Conservative party. A party whose factions at every level nevertheless remain formally committed to the principles enshrined in the Belfast Agreement, or so they claim. The same can be said about the protagonists in Ireland who continue to view the objective of a 'mutually satisfactory' solution to the border question through lenses that reflect quite different histories, distinct and contending political preferences and clashing cultural identities, competing ideas of national and communal interests.

In the end, and notwithstanding two decades of peaceful coexistence and constructive engagement, facilitated in no small part by the centrifugal logics of European integration, culturally embedded identities continue to shape political identity in this small corner of Europe. After all Brexit is a touchstone for an ideological encounter residing at the very core of the discourse on the 'European idea' and its historic project from the outset. On one side, are those for whom inalienable sovereignty is the first principle of politics, a reflex captured by the talismanic promise of Brexiteers promising to 'take back control.' On the other side, are those who discount the very idea of nation statehood as merely antediluvian politics. The question of the Irish border, indeed the entire Brexit imbroglio is but the latest episode and in microcosm of that enduring stand-off, Europe's own 'ancient quarrel' about the very meaning and purposes of the national state.

At the micro level of politics, protagonists on either side of this ideological fault-line over the 'meaning' and prospects for 'Europe' nevertheless share an ethical responsibility to avoid outright catastrophe in this querulous region: to balance competing notions of self-interest against the risk of reviving sectarian divisions that threaten a still-tentative peace. Nothing less is at stake here than the reversal of history, rekindling anxieties that might propel a long-troubled land back to less happier times.

For many in Ireland, but also those international partners who were principal sponsors of the peace process, the prospect of reinstating a 'hard' border threatens that momentous achievement.

Brexit has many negative consequences but none more potentially pernicious than opening the Pandora's Box that is the Irish border.[62] A point categorically made by Guy Verhofstadt, the European Parliament's Brexit representative, when he asserted that Ireland "cannot become the collateral damage of Brexit." [63] The onus is on the British Government to resolve the present uncertainty over future relations with its nearest neighbour. Only when London has stopped negotiating with itself, decided on its strategic preference amongst the competing options reviewed above and embarks on candid negotiations with Brussels will the border issue, indeed the United Kingdom's future relations per se with the EU finally be resolved.

June 2018

Key words: Brexit; Ireland; customs; Europe; peace process

---

[62] Monica McWilliams and Avila Kilmurray, We helped negotiate the Good Friday Agreement. We cannot allow Brexit to destroy it, *New Statesman* 7 March 2018.

[63] Speech in the European Parliament, cited in *The Parliament Magazine*, 13 December 2017.