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ARTICLE 16 OF THE IRELAND-NORTHERN IRELAND PROTOCOL: A CONTEXTUAL LEGAL ANALYSIS

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Abstract Article 16 of the Ireland-Northern Ireland Protocol (Protocol) annexed to the EU-UK Withdrawal Agreement (EU-UK WA) is an escape clause which allows the parties to deviate from their obligations under certain conditions. This paper maps out the main features of the safeguard provision in the Protocol in light of international trade law and international relations literature on treaty design. This paper is subdivided into three sections. Section two examines the international relations literature on the function and design of escape clauses included in trade agreements. Section three provides a descriptive overview of the regulation of safeguards in international trade law, focusing specifically on the law of the World Trade Organisation (WTO) and EU preferential trade agreements (PTAs). Section four provides a more detailed examination of the safeguards provision in the Protocol and highlights some of the design flaws associated with this regime as well as some potential solutions to such flaws.

I. Introduction

On 22 January 2021, a European Commission Implementing Regulation Proposal governing export restrictions on COVID-19 vaccines was leaked to the press¹. The proposal stated that such restrictions should also apply to trade between the European Union (EU) and Northern Ireland (NI) and that these would be justified as “a safeguard measure pursuant to Article 16 of that Protocol in order to avert serious societal difficulties due to a lack of supply threatening to disturb the orderly implementation of the vaccination campaigns in the Member States”². The leak led to an uproar as such restrictions would have inevitably led to North-South border checks within the island of Ireland³ - an outcome the Ireland-Northern Ireland Protocol (Protocol)) annexed to the EU-UK Withdrawal

¹ J Campbell, ‘Brexit: EU introduces controls on vaccines to NI’ 29 January 2021. Available at: <https://www.bbc.co.uk/news/uk-northern-ireland-55864442>

² Commission Implementing Regulation (EU) .../...of 29.1.2021 making the exportation of certain products subject to the production of an export authorisation, 21 January 2021 SEC(2021) 71 final.

³ J Sargent, ‘The article 16 vaccine row is over – but the damage has been done’ Institute for Government 30 January 2021. Available at: <https://www.instituteforgovernment.org.uk/blog/article-16-vaccine-row>.

Agreement (EU-UK WA) was designed to avoid⁴. The European Commission quickly dismissed the notion of these export restrictions would be applied and the proposal was ultimately never adopted⁵.

Nevertheless, this incident brought to the fore the importance of, as well as some of the potential dangers associated with Article 16 of the Protocol. The Protocol is a legal instrument whose primary purpose is to establish a trade regime for Northern Ireland that obviates the need for border checks on trade in goods between the north and the south of the island of Ireland⁶. Such checks would have been inevitable consequences of the UK's decision to withdraw from the EU and, in particular from the EU customs union and internal market. To avoid this, the Protocol requires NI, in contrast to the rest of the UK, to remain subject to EU customs and internal market rules on goods.

Article 16 of the Protocol is an escape clause that allows the parties to deviate from their obligations under the Protocol certain conditions. It has quickly become the most (in)famous and politically charged provision of the Protocol. Since Covid-19 vaccine export restrictions debacle, there have been numerous calls to “trigger” Article 16 of the Protocol from politicians and interest groups opposed to the continued operation of the Protocol⁷. There is a sense that the provision is increasingly being weaponised by politicians who see it as offering potential a way out of commitments made by the EU and the UK under the Protocol⁸. In July 2021, the UK government released a “Command Paper” on the Northern Ireland Protocol⁹ outlining its conviction that the conditions for the invocation of Protocol safeguards had been met and, at the time of writing, there are growing reports that the UK planning on “triggering” Article 16 of the Protocol¹⁰.

This paper seeks to go beyond the politics by carrying out a contextualized legal analysis of this provision. It maps out its main features in light of international trade law and international relations literature on treaty design. The paper argues that the wide scope and broadly phrased conditions for the invocation of the Protocol extend a significant margin of discretion to the parties in deciding whether or not to apply safeguard measures. This, in the context of an escape clause, is highly

⁴ OJ [2020] L 29/7.

⁵ K Adler, EU vaccine export row: Bloc backtracks on controls for NI, BBC 30 January 2021. Available at: <https://www.bbc.co.uk/news/uk-55865539>.

⁶ K Hayward, “Flexible and Imaginative’: The EU’s Accommodation of Northern Ireland in the UK–EU Withdrawal Agreement’ (2021) 58(2) *International Studies* 201.

⁷ R Black and D Young, DUP call to trigger Article 16 to be debated at Westminster, *Belfast Telegraph*, 12 February 2021; M Canning, ‘Compromise on protocol or NI will be a permanent Brexit casualty, Lords warn’, *Belfast Telegraph*, 29 July 2021.

⁸ C Rice and C Murray, ‘Northern Ireland Protocol: the UK’s updated approach’ 14 August 2021, UK in a Changing Europe, 4 August 2021. Available at: <https://ukandeu.ac.uk/northern-ireland-protocol-uk-updated-approach/>.

⁹ HM Government, “Northern Ireland Protocol: the Way Forward”, 21 July 2021, 13-15. Available at <https://www.gov.uk/government/publications/northern-ireland-protocol-next-steps>.

¹⁰ P Leahy and B Hutton, “Irish and EU prepare for UK to trigger article 16 of protocol” *The Irish Times* 8 November 2021. Available at: <https://www.irishtimes.com/news/politics/irish-and-eu-prepare-for-uk-to-trigger-article-16-of-protocol-1.4722094>

problematic as past practice suggests that such loosely termed clauses can create a temptation on parties to exercise their discretion abusively. This concern is further exacerbated by the unique nature of the Protocol as a trading arrangement – one that must be seen primarily through the lens of the Northern Irish peace process. Derogations from the Protocol, especially where politically motivated, could undermine the existence of the Protocol and the careful balancing act it seeks to achieve.

This paper is subdivided into three sections.

Section two examines the international relations literature on the function and design of escape clauses included in trade agreements. Section three provides a descriptive overview of the regulation of safeguards in international trade law, focusing specifically on the law of the World Trade Organisation (WTO) and EU preferential trade agreements (PTAs). Section four begins with a description of the Protocol, its aims and main features, whilst also highlighting its uniqueness in the world of trade agreements. It then provides a more detailed examination of the safeguards provision in the Protocol and highlights some of the design flaws associated with this regime as well as some potential solutions to such flaws

2. The Function and Design of escape clauses in International Trade Law

2.1 Flexibility in international trade agreements

When states negotiate international treaties they inevitably weigh up the benefits of international cooperation against the risks associated with binding themselves to common international disciplines. States may be reluctant to bind themselves to strong commitments where, for example, there is uncertainty regarding the potential outcome of the treaty, the reception of the treaty by domestic constituents or even the behavior of other states¹¹. One way to alleviate concerns relating to potential uncertainty is to incorporate in the treaty mechanisms that are intended to confer some level of flexibility to its members with respect to compliance. Such flexibilities facilitate both the conclusion of treaties and the negotiation of more ambitious commitments by providing governments with an insurance policy against potential risks associated with international cooperation¹².

The classic approach to conceptualising flexibilities in international relations theory is through the distinction between the policy space theory and the safety valve theory¹³. The policy space theory posits that flexibilities are intended to allow governments to pursue legitimate policy objectives that are not trade related. The release valve theory, on the other hand, explains flexibilities as mechanisms

¹¹ T L Meyer, Power, 'Exit Costs, and Renegotiation in International Law' (2010) 51 *Harvard International Law Journal*, 387. Available at: https://digitalcommons.law.uga.edu/fac_artchop/740.

¹² B Simmons, 'Treaty Compliance and Violation' (2010) 13 *Annual Review of Political Science* 271-93.

¹³ T L Meyer, 'A political Theory of Legal Exceptions' Vanderbilt Law Research Paper, No.21-18, 18. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817719

that allow governments to alleviate political pressure from domestic industries adversely affected by trade liberalisation

In his seminal work examining the function of exceptions in international trade law, Pelc adds nuance to the distinction arguing that that flexibilities in trade agreements typically address two types of uncertainties¹⁴. Firstly, they provide an insurance against exogenous shocks, namely the risk that liberalization mandated in trade agreements can expose domestic industries to costs¹⁵. Here, the main purpose of an escape clause is to quell opposition from domestic industry to the signing of trade agreements by giving them the comfort of knowing that liberalization commitments can be derogated from under certain circumstances. Secondly, escape clauses provide a form of political insurance to governments¹⁶. They are, in effect a recognition that government face significant internal pressures in implementing international commitments¹⁷. By creating mechanisms that allow governments to address concerns of domestic interest groups, flexibilities provide governments with a means to reduce internal political pressure.

One type of flexibility that has proved particularly popular in the context of international trade law are so-called ‘escape clauses’. These allow members to temporarily suspend or derogate from obligations under certain conditions. Most escape clauses included in contemporary trade agreements either replicate or take inspiration from those included the General Agreement on Tariffs and Trade (GATT) – that is, the main multilateral agreement regulating trade in goods¹⁸. These include, for instance, general exceptions provisions which enable states, under certain conditions, to derogate from trade law obligations where it is shown that derogations are intended to achieve legitimate public interest objections¹⁹ as well as national security exceptions authorizing derogations for security purposes and to the extent that certain factual scenarios occur²⁰. While such escape clauses seem to fall neatly within the category of policy space exceptions, in practice, domestic interest groups will often support and campaign for their use for to further their own protectionist goals²¹. The WTO safeguards regime – the focus of the present paper – is a notable release valve exception. Here, the goal is to allow WTO members to temporarily derogate from international commitments in order to allow domestic industries to adapt to the unintended consequence of trade liberalization. This then relieves the political pressure both on governments, keen to be seen to be responsive to the demands

¹⁴ Pelc, *Making and Bending International Rules: The Design of Exceptions and Escape Clauses in Trade Law*, (CUP, 2015) 24.

¹⁵ Ibid..

¹⁶ E Mansfield and H Milner, *Votes, Vetoes, and the Political Economy of International Trade Agreements* (PUP, 2012) 14.

¹⁷ Ibid.

¹⁸ GATT 1947: General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194

¹⁹ Article XX GATT.

²⁰ Article XI GATT.

²¹ T L Meyer, *supra* footnote 13, 7.

of domestic industries, and on the trading system as whole by legalizing non-compliance in exceptional circumstances.

2.2 Designing escape clauses

One challenge posed by escape clauses is how to design them in a manner that ensures they fulfill their functions whilst at the same time avoiding abuses (through over-use) from states. The theory of efficient non-compliance puts forward one potential solution²². This theory recognizes that there are instances where the cost of compliance outweighs those of non-compliance²³. To reflect this, escape clauses should incorporate mechanisms that impose a cost on deviation, normally by requiring the party deviating from its commitments to provide compensation to those adversely affected by the breach. The cost of deviation should be high enough to dissuade states from frivolous and unnecessary non-compliance but not so prohibitive that deviation becomes impossible.

There are, however, problems associated with the efficient non-compliance. By turning the decision to derogate into a cost-benefit analysis, it creates an incentive for domestic interest groups who are opposed to liberalization to make it politically costly for governments not to avail themselves of escape clauses. The higher the political costs associated with compliance are, the more likely governments will be to accept the economic costs resulting from compensation. The decision then becomes a purely political one in nature. In short, efficient non-compliance generates an environment where domestic interest groups can artificially fabricate the internal circumstances that will cause governments to pursue deviation of international commitments.

Another option, which has proved far more successful in practice, is the contingent flexibility theory where deviation is no longer merely a function on internal political imperatives but rather contingent upon the demonstration of “observable, exogenous hard times”²⁴. The requirement that exceptional exogenous events must occur in order to justifiably deviate from international obligations ensures that, on the one hand, escape clauses are not abused and, on the other hand, domestic constituents are not able to manufacture situations of political necessity which leave governments with little choice but to opt for non-compliance²⁵. As we shall see in the following section, WTO safeguard measures, are a successful example of escape clauses based on contingent flexibility.

3. Safeguard measures under international trade law

²² A Sykes, 1991. “Protectionism as a Safeguard” (1991) *University of Chicago Law Review* 58: 255–305; J Dunoff, L Jeffrey and JP Trachtman, “Economic Analysis of International Law.” (1999) *Yale Journal of International Law* 24 (1).

²³ E Posner & A Sykes, “Efficient Breach of International Law: Optimal Remedies, Legalized Noncompliance, and Related Issues,” (2011) 110 *Michigan Law Review* 252.

²⁴ K. Pelk, *supra* footnote 15, 35

²⁵ K Pelk, *supra* footnote 15 37

3.1 Safeguards under WTO Law

3.1.1 General framework: From efficient non-compliance to contingency based flexibility

The WTO safeguards regime allows WTO Members to temporarily re-impose trade barriers in situations where sudden increases in imports resulting from unforeseen events cause or threaten to create injury to domestic industries. They differ from other so-called 'trade remedies' permitted under WTO law whereby WTO Members can apply trade barriers to protect domestic industries from unfair trade practices - namely dumping²⁶ and illegal subsidization²⁷ – adopted or originating from other parties. Safeguards differ in that they constitute responses to difficult circumstances that result from trade liberalisation.

When the GATT was established in 1947, safeguards were governed exclusively by Article XIX GATT. Safeguard measures could be applied unilaterally where unforeseen events led to an increase in imports causing or threatening to cause serious injury. The safeguard would have to be notified to other members who could then adopt retaliatory measures – that is, suspend equivalent concessions - unless a satisfactory arrangement on compensation could be reached.

The original version of Article XIX GATT was the living embodiment of the theory of efficient non-compliance. Countries invoking Article XIX GATT would face an economic cost in the form of increased barriers to trade imposed by other GATT members. The requirement to compensate and the threat of retaliatory measures would force GATT Members considering whether to apply safeguards to weigh up internal cost of compliance against the economic cost of compensation. This did not, however, lead to widespread use of safeguards. This is because GATT membership feared that a reliance on the compensation/retaliation system would send a signal that the substantive requirements of Article XIX GATT could be ignored²⁸. It was quickly understood that a system enabling deviations exclusively via compensation was inherently unfair and would lead to instability. That it would inherently favour larger wealthier nations who would be more willing to apply safeguards whenever the political costs of maintaining market openness would outweigh the cost of compensation²⁹. The upshot is that the use of safeguards steadily declined until the establishment of the WTO in 1994³⁰.

²⁶ Agreement on the Implementation of Article VI of GATT, Antidumping Agreement, Apr.15 1994, 1868 U.N.T.S. 201.

²⁷ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

²⁸ K Pelc, supra footnote 15, 37.

²⁹ See A Eliason, R Howse and M Trebillock, *The Regulation of International Trade* (Routledge, 2013), 421; K Pelc, supra footnote 15, 140.

³⁰ K Pelc, supra footnote 15, 140.

With the creation of the WTO, the safeguards regime underwent a significant transformation. Safeguards are now governed by a revised Article XIX GATT and the Agreement on Safeguard Measures (AoS)³¹. Together these two legal instruments impose a number of substantive and procedural requirements that must be complied with in order for WTO Members to validly apply safeguards. More saliently, the current regime moved away from efficient non-compliance to become a one based on contingency based flexibility.

3.1.2 Conditions for the invocation of safeguards

At the core of the WTO safeguards regime is the requirement to demonstrate the existence of extraordinary and unexpected events that have created the need for a deviation from international trade liberalization commitments.

As a starting point, safeguards may only be applied in response to an increase in the quantity of imports into the WTO Member concerned, which can be either absolute or relative to domestic production³². But a mere increase in imports, is not enough, on its own, to justify the application of safeguards. Article XIX GATT provides that the increase in imports must also be unforeseen – that is, the result of factors which could not have been reasonably foreseeable at the time when trade concessions were made³³. In other words, increases in imports which are the consequences of trade liberalization are not covered by the safeguards regime³⁴.

The increase must also be “recent, sudden, sharp or significant enough to cause or threaten to cause serious injury”³⁵. The suddenness of the increase reinforces the extraordinary and unexpected nature of the circumstances that must be in place to trigger the application of safeguard.

WTO members wishing to impose safeguard measures must show that the increase in imports has caused or threatens to cause serious injury. Article 4.1 of the AoS defines serious injury as “an overall impairment of the domestic industry”. Article 2.2(a) of the AoS provides further guidance by listing eight factors that must be taken into consideration when assessing the existence of serious injury: (i) rate and amount of increase in imports of the product in absolute and relative terms; (ii) the share of the domestic market taken by increased imports; (iii) changes in levels of sales; (iv) production by the domestic industry; (v) productivity; (vi) capacity utilization; (vii) profits and losses; and (viii) employment. Countries applying safeguard measures must assess the impact of all such factors as well as any other additional relevant factors.

³¹ Agreement on Safeguards, Annex 1A to the Marrakesh Agreement April 15 1994, 1869 U.N.T.S. 154

³² Article 2(1) AoS.

³³ T Raychaudhur, ‘The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance’, (2010) 11(1) *The Estey Journal of International Trade Law and Policy*, 310.

³⁴ GATT Working Party Report, *US – Hatters’ Fur*, p. 10, para. 9.

³⁵ Appellate Body Report, *Argentina – Footwear (EC)*, WT/DS121/AB/R, para. 94.

Finally, WTO Members intending to use safeguards must demonstrate a causal link between the increase in imports and the existence or threat of serious injury. This typically requires an assessment of correlation in trends with respect to increase in quantity of imports and injury to the domestic industry, the conditions of competition between imports and domestic like imports and the identification of other factors that may have affected the domestic industry³⁶.

The requirements of exogeneity and unforeseeability are key features of the WTO safeguards system. If safeguards are to be imposed one must not only demonstrate that the circumstances justifying could not have been predicted at the time trade liberalization commitments were made but also that such extraordinary circumstances have caused serious harm to domestic industries. These stringent requirements remove the ability of WTO Members to manufacture circumstances to justify safeguards. This then shields governments from political pressure from domestic interest groups to reimpose protectionist measures³⁷.

3.1.3 Duration and scope of safeguard measures

Once a determination is made that the domestic industry has or is threatened by a serious injury, WTO members may apply safeguard but only to the “extent necessary to prevent or remedy serious injury or to facilitate adjustment”. The safeguard must therefore reflect the value of the injury that can be attributed directly to the increase in imports.

As safeguard measures are intended to give struggling domestic industries time to adapt to increased competition in the domestic market, they can only be applied for a time-limited period. The measures apply for an initial period of maximum of 4 years which can be extended for a further four years where it is shown that their continued application is necessary to prevent or remedy the serious injury and that there is evidence that the affected domestic industry is adjusting. Once the application of the measures has expired, the WTO member must refrain from reposing safeguard measures for a period equivalent to that of the duration of the first safeguard measures. Such grace period must not, however, be shorter than 2 years.

WTO law does not impose a specific form for safeguard measures. Article XIX GATT provides that WTO members may, under certain circumstances, suspend an obligation in whole or in part or withdraw or modify concessions. Article 5 AoS adds that WTO Members must apply measures that are most suitable to the achievement of their objectives. WTO Members are therefore free to decide which obligations they wish to suspend in order to protect the relevant domestic industry. In

³⁶ YS Lee, ‘Not Without a Clue: Commentary on “The Persistent Puzzles of Safeguards”’, (2006) 40(2) *Journal of World Trade*, 398.

³⁷ K Pelc, *supra* footnote 15, 39.

practice, safeguard measures typically take the form of increases in tariffs, tariff rate quotas or quantitative restrictions, the former being the most widely used³⁸.

Whatever form the safeguard measure takes it must be applied on a non-discriminatory basis – that is, it must be applied to all concerned imports irrespective of their origin. Exceptionally, WTO Members may exclude imports from certain countries where it can be established that imports from sources other than the excluded members satisfy, alone, the conditions for the application of a safeguard measure³⁹.

3.1.4 Procedural requirements and compensation

The AoS subjects the imposition of safeguards to a number of procedural requirements.

Firstly there is an obligation on all WTO Member States to ensure that a safeguard measure is applied on the basis of an investigation carried out at the domestic level by a competent authority⁴⁰. The investigation must address all the substantive requirements included under Articles 2 AoS (increased imports) and Article 4 AoS (serious injury) and the findings must be published. Secondly, WTO Members are required to notify matters relating to safeguards measure to the WTO Committee on Safeguards – whether it be a decision to initiate an investigation or a decision to apply or extend safeguards measures⁴¹. The notification should include all pertinent information concerning the safeguard measures and provide an adequate opportunity for the exchange of information and discussions relating to compensation of other affected WTO Members

There is therefore an obligation to enter into consultations to agree on compensation due to affected members as a consequence of the measures and if no agreement is reached, the affected WTO Members can opt to withdraw substantially equivalent concessions or other obligations.⁴² However, not all WTO Members are entitled to compensation. Only those who have substantial interests in the products targeted by the safeguards⁴³. Moreover, compensation is not due where the safeguard measures are applied for a maximum duration of three years and the measure is taken in response to an absolute increase in imports and in conformity with the AoS⁴⁴.

In short, whilst a compensatory mechanism is maintained, the AoS significantly limits its potential scope. This reflects the general sense that WTO Members should not be punished for taking emergency measures which result from exceptional circumstances factors that are beyond their

³⁸ Petros Mavroidis, *Trade in Goods* (OUP 2015) 618.

³⁹ Appellate Body Report, *US – Steel Safeguards*, para. 444

⁴⁰ Article 3 AoS.

⁴¹ Article 12.1 AoS.

⁴² Article 8.1 AoS.

⁴³ Article 5 AoS.

⁴⁴ Article 8.3 AoS.

control⁴⁵. As a result, in practice, compensation has barely featured in the operation of WTO safeguards⁴⁶.

3.2 Safeguards under Preferential Trade Agreements

3.2.1 Preferential Trade Agreements

Beyond the WTO, safeguards can also be regulated in preferential trade agreements (PTAs). Not all PTAs include safeguards⁴⁷ but, where they do, safeguards clauses can be broadly subdivided under two categories: global and bilateral safeguard clauses⁴⁸.

Global safeguard clauses confirm the rights of parties to the agreement to apply safeguards in accordance with WTO law. The operation of such clauses varies from one trade agreement to the next. Some FTAs merely restate the ability of the parties to exercise their rights under Article XIX GATT and the Safeguards Agreements meaning that parties who opt to adopt safeguards will apply these on a non-discriminatory basis, including with respect to other PTA parties. Other global safeguard clauses allow for the exclusion of PTA parties under certain conditions such as, for example, a demonstration that imports from the concerned PTA party are not significant enough to cause injury to the concerned domestic industry⁴⁹.

Beside global safeguards, PTAs often include bilateral safeguards which enable parties to temporarily suspend concessions granted under a PTA. These can be either general or specific (where they only apply to a select set of goods). Again, the nature and scope of such safeguards will vary from one country to another and from one agreement to the next. Whilst some PTAs broadly replicate the language of the Article XIX GATT and the AoS, others may deviate and, in going so, set different thresholds for the triggering of safeguards⁵⁰.

PTAs also vary with respect to the procedural requirements for the application of safeguards and the manner in which safeguards can be applied. For example, some PTAs omit the requirement under WTO law that the application to subject the application of safeguard measures be preceded by

⁴⁵ J Tumlir, 'A Revised Safeguard Clause for GATT' (1977) 7 *Journal of World Trade Law* 404.

⁴⁶ A Eliason, R Howse and M Trebilcock, *The Regulation of International Trade* (Routledge, 2013) 421.

⁴⁷ Won-Mog Choi, 'FTAs and Safeguard Norms: Their Variation and Compatibility' (2011) 6 *Asian J WTO & Int'l Health L & Pol'y* 88

⁴⁸ J Crawford, J McKeag, J Tolstova, (2013), "Mapping of safeguard provisions in regional trade agreements, WTO Staff Working Paper, No. ERSD-2013-10, World Trade Organization (WTO), Geneva, <http://dx.doi.org/10.30875/5f75873e-en>; Willemien Viljoen, 'Comparing Safeguard Measures in Recent Regional and Bilateral Trade Agreements' November 2016 IXTISD Issue Paper.

⁴⁹ J Crawford, J McKeag and J Tolstova, *supra* footnote 48, 7.

⁵⁰ *Ibid.*

a prior investigation⁵¹. Instead, they typically enable parties to apply such measures subject to compliance with a prior consultation procedure.

Contrary to the AoS, which does not prescribe a particular form for safeguard measures, some PTAs specify that the safeguards can only take the form of the suspension of tariff concessions⁵². Finally, in relation to the duration of safeguards, some PTAs will include lower time periods compared to what is required in the AoS, whilst others will merely state that measures can only be applied for the time that is necessary to prevent or remedy the injury⁵³.

3.2.2 Safeguards in EU PTAs

Generally speaking, EU PTAs tend to include global safeguards. This is the case of recently concluded EU PTAs such as the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Japan Economic Partnership Agreement (EPA) as well as the EU-UK TCA which affirm the rights and obligations of both the EU and the UK under Article XIX of GATT and the AoS⁵⁴. With respect to bilateral safeguards, the EU does not adopt a uniform approach across PTAs, although by and large they do not significantly deviate from the WTO safeguards regime. In some cases, EU PTAs will replicate the AoS language on substantive and procedural requirements verbatim⁵⁵. There are also EU PTAs that impose a more restrictive regime than the AoS by, for example, lowering the number of years safeguards can be maintained⁵⁶.

However, there are PTAs where the EU appears to have significantly departed from the WTO template. Firstly, some EU PTAs signed with developing economies have sought to relax, compared to what is required under WTO law, substantive standards relating safeguards. This is achieved by looking beyond the strict standard of “serious injury or a threat thereof” referred to under Article XIX GATT and allowing safeguards where increased imports lead to “disturbances” or “serious disturbances” of “an economic or social nature” or “difficulties which could bring about serious deterioration in the economic situation of a region of the importing Party”.

These concepts remain largely undefined but it would be reasonable to assume that by deviating from the template set at WTO level, and expanding the scope of the injury justifying safeguards, the EU and its trading partners have sought to increase their margin of discretion in

⁵¹ J Crawford, J McKeag and J Tolstova, *supra* footnote 48, 23.

⁵² Willemien Viljoen, *supra* footnote 48, 10.

⁵³ *Ibid.*

⁵⁴ Article 3.4 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11, 14.1.2017, 23-1079; Article 5. 9 Agreement between the European Union and Japan for an Economic Partnership ST/7965/2018/INIT OJ L 330, 27.12.2018, p. 3–899; Article Goods.17 TCA of the Trade and Cooperation Agreement between the European Union and the European Economic Atomic Community, on the one part, and the United Kingdom of Great Britain and Northern Ireland, on the part, OJ L 444, 31.12.2020, p. 14–1462.

⁵⁵ J Crawford, J McKeag and J Tolstova, *supra* footnote 48, 6.

⁵⁶ J Crawford, J McKeag and J Tolstova, *supra* footnote 48, 11.

escaping from their PTA obligations. However, the practical significance of this change in terminology is difficult to evaluate. Firstly, because in all of these PTAs a causal link must still be established between a sudden and unforeseen increase in imports and the adverse economic or societal effect. Secondly, because on the few occasions where the EU and its trading partners have attempted to clarify concepts of “economic deterioration” and “social” problems they have not diverged substantially from the AOS injury standard by requiring both the demonstration of an increase in imports and the resulting injury to the relevant domestic industry⁵⁷.

The EU has also adopted a *sui generis* approach to safeguards in the European Economic Area (EEA) Agreement, which governs the EU’s trading relationship with the three European Free Trade Association (EFTA) states (Norway, Liechtenstein and Iceland). Under the EEA, EFTA states are subject to most aspects of EU internal market law, including compliance with the four economic freedoms. However, the main safeguard clause, Article 112 EEA, permits safeguard measures “[i]f serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising”. Article 112 EEA was conceived as compromise solution between, on the one hand, the EFTA states who wished to secure certain permanent derogations from EU internal market law and, on the other hand, the EU’s reluctance to allow for permanent carve-outs⁵⁸. The solution was a provision which enabled EEA states to suspend their obligations under certain conditions and for a limited period of time.

However, the exact contours of Article 112 EEA are unclear. What constitutes a “serious difficulty” of either an “economic, societal or environmental nature” is not defined in the text the EEA. Neither are these concepts explored in EEA case law for the simple reason that the safeguard was only used once in the history of the EEA. In practice, it seems that the EFTA states have tended to view Article 112 EEA mostly as a tool to derogate from rules on the free movement of persons. Indeed, to date, the only instance where Article 112 EEA has been triggered relates to Liechtenstein measures restricting entry, residence and employment rights of EEA nationals⁵⁹. Further, a number of EFTA states have issued unilateral declarations confirming that the use of safeguard measures would be justified if continued unrestricted migratory flows were to lead to disturbances in the labour market and access to housing⁶⁰.

Finally, it is worth mentioning the economic safeguard provision which was included in Article 226 EEC until 1969 and has since been included in accession treaties concluded by the EU and new Member

⁵⁷ See for example, Communication from the EU and SADC States on the Economic Partnership Agreement between the EU and SADC, 3 October 2020, WTO Committee on Regional Trade Agreements WT/REG381/2; See also Article 15 EU-Mexico Global Agreement.

⁵⁸ F Arnesen, H Haukeland Fredriksen, H P Graver, O Mestad and C Vedder, *Agreement on The European Economic Area: A Commentary* (Nomos, 2018) .883

⁵⁹ Ibid, 885

⁶⁰ Ibid.

States⁶¹. These grant the European Commission, on application by a Member States, the power to allow the latter to derogate from EU Treaty obligations if difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area. These provisions have, in many instances, served a very similar function to the WTO safeguards regime insofar as they have been used to temporarily protect domestic sectors – through the reposition of tariffs and quotas - that have struggled to adjust to increased imports resulting from liberalization⁶². However, the scope of the accession safeguards is wider as they not only address difficulties experienced by specific economic sectors but also instances where accession has led to the serious deterioration in the economic situation of a given geographic area. For example, in *Chavassus-Marche*, the European Commission took into account economic and development concerns of French overseas departments in its decision to permit tax exemptions for local products in those regions⁶³. Another important distinction between accession economic safeguards and the WTO safeguards regime is that, under the former, Member States cannot unilaterally decide to derogate from EU law. Rather, a request must be submitted to the European Commission, which would issue an authorization following an assessment of whether or not the conditions for the imposition of safeguards were met. Although the European Commission has historically benefited from a considerable margin of discretion⁶⁴ when deciding whether safeguards can be applied, its role in the process is significant in that it ensures that the accession safeguards are not abused by EU Member States.

4. Safeguard measures under the Ireland-Northern Ireland Protocol

4.1 Contextualising the Protocol in the world of trade agreements

The Protocol is a trade agreement. It is, however, a peculiar one for a number of reasons.

It is not, as is the norm, a trade agreement that lowers trade barriers between two whole and separate customs territories. Rather it is one that only liberalizes trade between a customs territory (the EU) and a component of another customs territory (Northern Ireland). The upshot is that, contrary to most PTAs, which tend to lead to a substantial lowering of barriers to trade across the board, the Protocol has the effect of simultaneously liberalizing trade and increasing trade barriers. As confirmed by recent events, whilst the Protocol ensures unrestricted trade within the island of Ireland,

⁶¹ See K Inglis, 'Implications of Enlargement for EC Agri-Food Law: the Accession Treaty, its Transitional Arrangements, and Safeguard Clauses (2004) 10(5) *European Law Journal* 604.

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⁶³ C-212/96, *Chevassus-Marche v Conseil Regional de la Reunion*, 19 February 1998.

⁶⁴ C-11/80, *Piraiki-Patraiki v Commission* ECLI:EU:C:1985:18, Para. 239

it has inevitably led to an increase in barriers to trade within the UK customs territory between Northern Ireland and the rest of the UK.

The Protocol is also different in that it belongs to a very select group of trade agreements that are intended to achieve market integration rather than trade liberalization⁶⁵. Most trade agreements – whether at WTO, regional or bilateral level – can be placed in the trade liberalization paradigm in that they focus on the reduction or removal of border measures such as tariffs, but do little in terms of removing regulatory barriers to trade⁶⁶. Trade agreements such as the EU-Canada CETA or the EU-UK TCA are good examples of this. Although they are generally described as ambitious and comprehensive trade agreements, they do not remove all tariffs, customs procedures nor do they remove regulatory barriers to trade. By contrast, trade arrangements that pursue market integration, such as the European Union and the European Economic Area, not only remove border measures but also regulatory barriers to trade by mandating mutual recognition of rules across the board. And this is achieved thanks to the establishment of common institutions and rules that not only harmonise rules of parties involved but also enforce those rules. The Protocol, by requiring that Northern Ireland remains part of the EU internal market for goods, is a trade agreement that can be placed in the market integration paradigm.

At a more fundamental level, the Protocol is unique in the world of international trade agreements because of the aim it pursues. Trade agreements are typically concluded in the hope of reaping the economic benefits that classic economic theory associates with trade liberalization (increased efficiencies leading to higher levels of productivity and living standards)⁶⁷. Trade agreements are also concluded to tie the hands of governments with respect to domestic industry representatives that are opposed to economic liberalisation reforms⁶⁸. This is not to say that trade agreements do not also pursue non-economic objectives. For example, the EU's PTAs with its neighboring countries are just as much about geo-strategic goals of promoting peace and stability at its borders and expanding its sphere of influence as they are about economic growth⁶⁹. Equally, the recently concluded Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) is known to have been partly motivated by the United States' desire to counterbalance China's growing influence in the Asia-Pacific region⁷⁰. But, even in these cases, where economic concerns are perhaps secondary to political and

⁶⁵ P Eeckhout, "Future trade relations between the EU and the UK: options after Brexit" INTA Committee March 2018. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603866/EXPO_STU\(2018\)603866_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603866/EXPO_STU(2018)603866_EN.pdf).

⁶⁶ Ibid.

⁶⁷ R Sally, 'Free Trade versus Protectionism: An Intellectual History', in K W Heydon and S Woolcock (eds) *The Ashgate research Companion to International Trade Policy* (Routledge, 2017) 23-24.

⁶⁸ Supra footnote 16.

⁶⁹ S Lavenex, 'On the fringes of the European peace project: The neighbourhood policy's functionalist hubris and political myopia' (2017) 19(1) *The British Journal of Politics and International Relations* 63-76.

⁷⁰ M Sollis, 'The geopolitical importance of the Trans-Pacific Partnership: At stake, a liberal economic order', Brookings, 13 March 2015. Available at: <https://www.brookings.edu/blog/order-from-chaos/2015/03/13/the-geopolitical-importance-of-the-trans-pacific-partnership-at-stake-a-liberal-economic-order/>

security goals, the benefits of economic integration are seen as key achieving the primary aims. Creating closer economic links and increasing economic interdependence enhances political ties between countries and increased economic welfare provides a platform for regional stability and security.

The Protocol is different in this respect in that the potential benefits of trade liberalization were not a significant consideration in its creation, if at all. The aim of the Protocol is to ensure compliance with the Good Friday Agreement by avoiding hard border within the island of Ireland⁷¹. Peace and security, rather than economic welfare are the driving forces behind the Protocol. This raises questions as to whether and how legal mechanisms typically included in trade agreements, such as escape clauses, can work. To be more specific, should parties to a trade agreement that is fundamentally about maintaining peace be given the right to escape, even temporarily, from their obligations? And, if so, how should such escape clauses be operationalized?

4.2 Safeguards under the Protocol

4.2.1 Architecture and rationale

Article 16 of the Protocol on safeguards is the main escape clause included in the Protocol. It allows either party to unilaterally apply safeguard measures where the application of the Protocol “leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade”. Irrespective of the condition for invocation that is invoked, the safeguard measure must be proportionate and limited to what is strictly necessary to achieve its goal. Article 16 of the Protocol is then complemented by Annex 7 of the Protocol which details the procedural rules that parties must respect when applying safeguards.

Article 16 of the Protocol and the Annex 7 rules are inspired from the EEA safeguards regime discussed above. The text of Article 16 of the Protocol, in particular, is lifted almost entirely from the aforementioned Article 112 of the EEA on safeguard measures. The heavy influence of the EEA safeguards regime can be explained by the fact that, like the EEA legal framework, the Protocol is a trade arrangement that is premised on market integration through regulatory convergence. As discussed in the previous section, the wide set of circumstances included in Article 112 EEA reflects the fact that the EEA goes beyond the liberalization of trade in goods by also requiring compliance with the four EU economic freedoms and EU internal market legislation⁷². EEA parties wanted the flexibility to deviate from the EU *acquis communautaire* under certain circumstances – although in

⁷¹ See Article 1(3) of the Protocol.

⁷² Ulrich Schroter and Heinrich Nemescek, ‘The (Uncertain) Impact of Brexit on the United Kingdom’s Membership in the European Economic Area’ (2016) *European Business Law Review* 949.

practice this flexibility was not used to any meaningful way. Similarly, the negotiators of the Protocol may have considered that a traditional WTO-type safeguards system would be too narrow in its scope to reflect the breadth and depth of commitments under the Protocol.

4.2.2 Conditions for the invocation of safeguards

(a) Differences with the WTO safeguards regime

The conditions for the invocation of safeguards under the Protocol are very different to those applicable in relation to WTO safeguards.

Firstly, unlike Article XIX GATT, there is no requirement that the circumstances triggering the safeguards should be unforeseen. The requirement that increase in imports be the result of unforeseen circumstances is, as discussed, crucial in ensuring that the WTO and standard PTA safeguards are not abused. Its non-inclusion in the Protocol is therefore significant because it means that parties are able to apply safeguards in response to events that were entirely predictable at the time when the Protocol signed and were, even, an expected consequence of compliance with the Protocol.

Secondly, whereas Article XIX GATT limits the application of WTO safeguards to a very narrow set of circumstances, Article 16 of the Protocol casts the net much wider. There is no requirement to demonstrate that a particular domestic industry has been seriously injured, nor that the injury was caused by an increase in imports. Instead, safeguards can be envisaged where it is shown that the application of the Protocol is causing or threatens to cause serious difficulties of an economic, societal or environmental nature that are liable to persist or to diversion of trade. By outlining an exhaustive list of grounds that can be invoked to justify the adopts of safeguards, Article 16 of the Protocol combines both elements of the WTO safeguards regime and Article XX GATT on General Exceptions. The provisions recognizes that application of the Protocol may produce certain economic and non-economic negative externalities and recognizes the rights the parties to derogate from their obligations under the Protocol, under certain conditions, where these occur.

(b) Serious difficulties of an economic, societal or environmental nature

The first category of grounds for the invocation of Protocol safeguards related to instances where the Protocol leads to “serious difficulties of an economic, societal or environmental nature”. As stated above these conditions are borrowed from Article 112 EEA. And, as with Article 112 of the EEA, the Protocol does not define any of these terms.

The reference to “economic” difficulties chimes closely to the WTO safeguards regime in that it recognizes the possibility of derogating from the Protocol for economic reasons. The term is also very reminiscent of “economic safeguard” provisions typically included in the EU Accession Treaties which allow the adoption of protective measures where “difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area”⁷³. As discussed, while these safeguard provisions were, mostly, used to protect specific domestic industries from the increased competition resulting from liberalization, there were also instances where the economic profile of regions (e.g., geography, level of economic development, etc) was the primary consideration. However, the broad reference to “difficulties of an economic nature” indicates that the scope of this condition under Article 16 of the Protocol will be wider than that of the EU economic safeguards provision. This is certainly a view that was espoused by the UK in its Command Paper which identified high consumer prices, increased operating costs faced by businesses and disruptions to food and parcel supplies as evidence of difficulties of an economic nature resulting from the application of the Protocol. Under this view, any economic harm – whether at the national, regional or sectoral level – caused by the Protocol could potentially fall under the scope of Article 16 of the Protocol.

Recent events suggest that the parties to the Protocol also see the ground of difficulties of a societal nature as potentially encompassing an extremely wide variety of circumstances. The European Commission’s leaked proposal for export restrictions on Covid-19 vaccines contended that the restrictions were justified under Article 16 of the Protocol “in order to avert serious societal difficulties due to a lack of supply threatening to disturb the orderly implementation of the vaccination campaigns in the Member States”⁷⁴. In other words, the European Commission sees the term societal difficulties as encompassing measures that are intended to protect public health goals. The UK has also identified political and community instability as societal factors that could constitute sufficient grounds to apply safeguard measures⁷⁵. In theory, the term “societal” could cover any non-economic policy objective and may end up serving as a residual category of grounds that can be used by the parties for public interest goals which do not fall under the serious economic or environmental difficulties category. The “environmental” component has not yet been mentioned and is less likely to be used given the general high level of environmental protection standards maintained in the EU and the UK as well as the fact that, as it currently stands, these standards remain largely aligned⁷⁶.

⁷³ Supra footnote 62.

⁷⁴ Supra footnote 2.

⁷⁵ UK Command Paper, supra footnote 9, 14.

⁷⁶ C Burns and A Jordan, Environmental regulation in H Kassim, S Ennis and A Jordan (eds.) “UK regulation after Brexit”, UK in a Changing Europe, February 2021, 48-60. Available at: <https://ukandeu.ac.uk/wp-content/uploads/2021/02/UK-regulation-after-Brexit.pdf>

Irrespective of the grounds invoked, a party wishing to apply safeguard measures must demonstrate that these are intended to address “serious” difficulties that are “liable to persist”. It is first worth noting in this regard that the Protocol does not contemplate the use of safeguards in instances where a party considers that its continued application may lead to serious difficulties in the future. To apply safeguards, a party should demonstrate the actual existence of serious difficulties that have materialized in practice – meaning that any assessment should be based on objectively verifiable facts rather than speculative projections. That being said, the determination of the existence of difficulties resulting from the Protocol may prove more straightforward in some cases than others. Environmental difficulties that are due to differing environmental protection standards applicable in the UK and the EU would be fairly easy to spot. Economic difficulties caused by trade disruptions could be based on econometric analyses. As far as difficulties of a societal nature are concerned, in some cases, these may entail political and, therefore, subjective assessments which will be informed by complex social, historical and cultural factors. This will be the case when assessing the impact of the Protocol on community relations in NI. The UK government has pointed to the anger felt towards the Protocol by certain elements of the unionist community as a reason for the potential suspension of aspects of the Protocol. A suspension of the Protocol may, however, further exacerbate the political instability by stoking anger from the nationalist community. Any decision in this area would be highly political and one where a large margin discretion will be allowed.

It must also be determined whether the difficulties resulting from the Protocol are of a serious nature. Again, what would constitute a “serious” difficulty is not clarified in the text of the Protocol but the use of the adjective is clearly intended to underline the degree and extent of the difficulty experienced by the parties invoking Article 16 of the Protocol. The standard of “serious” difficulty is presumably a very high one that reflects the importance of the goals pursued by the Protocol and the need to ensure that derogations are reserved for exceptional circumstances. It is, therefore, not enough for a party to show that a safeguard measure is intended to address one of the difficulties identified in the provision, it must also that show the gravity and the pressing nature of the difficulty is such that the suspension of elements of the Protocol is required. The serious difficulties must also be shown to be “liable to persist” – that is, that the difficulties are not limited to a short period of time and that there is a real possibility that they will continue into the future in the absence of some form of intervention. For example, short-term trade disruptions resulting from the Protocol that can be addressed through supply-chain adjustments would arguably not constitute difficulties that are liable to persist. By contrast, the condition is more easily fulfilled where a party can show that supply chain adjustments are not sufficient to compensate for the reduction of imports of key goods,

The text of the Protocol provides that safeguard measures are intended to address scenarios where its application has led to serious difficulties. A causal link between the Protocol and the

identified serious difficulties must be established. WTO jurisprudence on safeguards has consistently held that the increase in imports can be one amongst many causal factors as long as there is “genuine and substantial relationship of cause and effect”⁷⁷. There is no requirement to show that the increase in imports is the only cause or even the primary cause for the domestic injury, only that the causal relationship between the two is significant rather than merely marginal. Given that Article 16 of the Protocol covers scenarios where the Protocol has ‘led’ to difficulties, the causal standard used in relation to this provisions is unlikely to be lower than that used in the WTO safeguards regime. A party invoking the provision would have to show that difficulty it faces is the result of the application of the Protocol and that, notwithstanding the existence of other contributing factors, the application of the Protocol is, at least, a significant cause of such difficulties.

(c) Trade diversion

Article 16 of the Protocol also permits safeguards in cases where the application of the Protocol leads to trade diversion. Substantively speaking, this is the main deviation from Article 112 EEA and it is, to put it mildly, a rather baffling one. Trade diversion is defined as an “increase in trade volume through the replacement of imports from third countries with low-priced imports from trading partners in the free-trade area”⁷⁸. In simple terms, when countries enter into PTAs, trade with more efficient third countries may decrease as a consequence of the granting of preferential trade preferences, as it is replaced by trade with PTA parties. There is a wealth of economic literature showing that PTAs can have trade diversionary effects. Trade diversion, whilst not inevitable, is a predictable consequence of an international agreement removing barriers to trade between parties⁷⁹. Indeed, three months into the application of the Protocol there were already anecdotal accounts that trade was being diverted to Ireland⁸⁰. Three months later, the UK government published a paper arguing that the mounting evidence that the Protocol had disrupted trade flows between NI and the rest of the UK could justify the exercise of Article 16 of the Protocol⁸¹. What is more, unlike the other circumstances, Article 16 of the Protocol does not require a determination of any significant or “serious” level of trade diversion. In theory, any evidence of trade diversion, however minimal, could be invoked to justify a derogation from the Protocol.

⁷⁷ Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, 22 December 2000, WT/DS166/AB/R, para. 69; For a recent overview and analysis of WTO case law see C Gascoigne, ‘The Determination of Causation in the Application of Trade Remedies’ (2021) 20 *World Trade Review* 58.

⁷⁸ W Koo, P Kennedy and A Skripnitchenko, ‘Regional Preferential Trade Agreements: Trade Creation and Diversion Effects’ (2006) 28 *Applied Economic Perspectives and Policy* 410.

⁷⁹ M Richardson, ‘Endogenous protection and trade diversion’, (1993) 3(4) *Journal of International Economics* 309-324

⁸⁰ Ganesh Rao, How Brexit has changed trade between Britain and Ireland, BBC 18 March 2021. Available at: <https://news.sky.com/story/how-brexit-has-changed-trade-between-britain-and-ireland-12247998>.

⁸¹ HM Government, ‘Northern Ireland Protocol: the way forward’ 21 July 2021. Available at: <https://www.gov.uk/government/publications/northern-ireland-protocol-next-steps>

At first sight, then, the trade diversion condition would appear to lack the requirements of exogeneity and unpredictability that the theory of contingent flexibility argues is key to avoiding abusive uses of exceptions. As discussed, the practice at WTO level suggests that escape clauses that allow parties to derogate from any obligation subject to conditions that are relatively easy to satisfy are likely to prove ineffective. Any use of the safeguard is likely to lead to abuses as it will encourage domestic interest groups who have a vested interests in non-compliance to exert pressure on the parties to trigger the application of safeguards.

There are, however, a number of questions surrounding the condition of “trade diversion”. The first question concerns the nature of trade diversion envisaged under Article 16 of the Protocol. The term trade diversion is typically understood in relation to the reduction of trade between members of a trade agreement and non-members. However, trade agreements can also affect domestic sales within the territories of member countries. In a paper assessing trade diversion effects of trade agreements, Dai, Yotov and Zylkin show that internal trade flows – that is domestic sales of members of trade agreements – are particularly vulnerable to trade diversion⁸². They find that whilst trade agreements tend to reduce imports from non-member countries, trade diversion “affected international trade an additional [...] 21.1% more so than international trade”⁸³. The distinction seems relevant given the negotiating history as well as the political discourse that has surrounded the concept of trade diversion in relation to Article 16 of the Protocol. The first reference to trade diversion in the Protocol can be traced back to the withdrawal agreement draft negotiating texts released in November 2018⁸⁴. In this first version of the withdrawal agreement, the EU and the UK would form a single customs territory with Northern Ireland remaining subject to internal market legislation⁸⁵. A number of observers have noted that the inclusion of the reference to trade diversion was made at the request of the EU and was borne out of a concern that NI would be used as a backdoor into the EU for UK exports⁸⁶. If this is the case, then trade diversion was understood by the EU in terms of its effect on trade between the parties to the agreement.

In the final version of the Protocol, although the UK is no longer part of the EU customs territory, the reference to trade diversion was maintained and, following its entry into force, much of the discussion has focused on how the Protocol has potentially caused an increase in trade between NI and the RoI at the expense of reduction in trade between GB and NI. In other words, the recent

⁸² M Dai, Y Yotov and T Zylkin, ‘On the trade-diversion effects of free trade agreements’ (2014) 122 *Economics Letters* 321-325.

⁸³ *Ibid*, 323.

⁸⁴ Draft EU-UK Withdrawal Agreement, 25 November 2018. Available at: https://www.consilium.europa.eu/media/37099/draft_withdrawal_agreement_incl_art132.pdf

⁸⁵ N Skoutaris, Whatever Happened to the Irish Backstop?, European Law Blog, 18 October 2019. Available at: <https://europeanlawblog.eu/2019/10/18/whatever-happened-to-the-irish-backstop/>.

⁸⁶ Raoul Ruparel, Twitter, 5 October 2021. Available at: <https://twitter.com/RaoulRuparel/status/1445311054301605893>

discourse on trade diversion has focused on how the Protocol may disrupt trade within the UK rather than its effect on EU or UK trade with third countries.

There are two points that are worth bearing in mind in relation to the focus on internal trade diversion. The first one is that it reflects the unique nature of the Protocol as a trade arrangement – one that is about removing barriers to trade in goods between one party and a constituent part of the other party. The focus is on how the arrangement affects trade flows within the parties rather than with third-countries. The second point speaks to the very broad language used in Article 16 of the Protocol. The provision does not clarify whether it is seeking to provide parties with a tool to address international or internal trade diversion. That being so, while it seems that the parties have been mostly concerned by the potential impact of the various versions of the Protocol on internal trade it would be possible, in theory at least, to argue that the effect of the Protocol on trade with non-Protocol parties could justify the invocation of safeguard measures under the Protocol.

The second question concerns whether there is any clear evidence of trade diversion since the entry into force of the Protocol. The UK government argued that this was the case by identifying the increase in the value of exports from the Republic of Ireland to Northern Ireland in 2021⁸⁷. However, the correlation of increased exports from the RoI to NI with the operation of the protocol or anecdotal evidence of NI firms switching suppliers is not enough to determine the trade-diversion or creating effects of a trade agreement. In practice, isolating and quantifying ex-post effects of trade agreements on trade flows is not an easy task⁸⁸. It is primarily an empirical question requiring the identification of the counterfactual and the results will vary from one case to the next depending on the initial structure of the economic relationship, the economic sectors and the level of integration pursued by the parties⁸⁹. Some trade agreements have been found to cause significant trade diversion whilst others have led to none at all⁹⁰. The magnitude of the effects can also vary depending on the statistical models used to capture the effects of trade agreements, with design choices often exaggerating the trade diverting or trade creating effects of trade agreements⁹¹.

The Protocol, of course, will present its own challenges because of its unique features. It does not remove barriers to trade between two parties but rather maintains the status quo between the

⁸⁷ Supra footnote 9, 13-14.

⁸⁸ F Soyres, J Maire and G Sublet, “An Empirical Investigation of Trade Diversion and Global Value Chains” World Development Report 2020. World Bank Policy Working Paper No 9089, 3; M Pfaffermayr, ‘Trade creation and trade diversion of economic integration agreements revisited: a constrained panel pseudo-maximum likelihood approach’ (2020) 156 *Rev World Econ*, 985–1024.

⁸⁹ L Sun and M Reed, “Impacts of Free Trade Agreement’s on Agricultural Trade Creation and Trade Diversion’ (2010) 92(5) *Amer. J. Agr. Econ.* 1352-1353.

⁹⁰ See, for example, the analysis of the different effects of the ASEAN-CHINA PTA and SADC on trade in agriculture L Sun and M Reed, supra footnote 89, 1361-1362.

⁹¹ K Muradov, ‘Toward input-output based measurements of trade creation and diversion’ (2021) 44 *World Economy* 1815-1819.

EU and one constituent part of the UK. The barriers to trade are also mostly regulatory in nature. This is potentially significant in that most studies on trade diversion have focused on trade agreements that seek to reduce or remove tariffs between members. However, recent research on so-called deep trade agreements (focusing on the removal of regulatory barriers to trade) indicate that such agreements tend to have a positive effect on trade between members and between members and non-members⁹². In short, the assessment of trade diversion is a complex matter and it cannot simply be assumed that the Protocol will inevitably lead to trade diversion nor that evidencing diversion will be straightforward.

Where trade diversion is demonstrated, there is also a question of what level trade diversion would be sufficient to justify the invocation of safeguards. Article 16 of the Protocol does not suggest a threshold above which trade diversion could be deemed sufficiently problematic to justify the temporary suspension of Protocol obligations. Nor does it specify whether parties invoking the provision must demonstrate the existence of net trade diversion (that is, that the overall value of trade diversion outweighs the value of trade creation). The absence of any qualification as to the magnitude of trade diversion falling under the scope of Article 16 of the Protocol seems incongruous in light of the fact that safeguards are tools that have traditionally been reserved for exceptional circumstances in most trade agreements. It also stands in contrast to the other conditions for invocation, which require a demonstration of the seriousness of negative - economic, societal and environmental - externalities associated with the Protocol. This terminological distinction between the first category of conditions and that of trade diversion suggests that the parties opted to subject the latter to a lower threshold. But should that mean that any trade diversion, however insignificant, can justify the application of safeguard measures? Such an interpretation would be highly problematic as it would potentially give the parties a free pass to deviate from the obligations under the Protocol and fundamentally undermine the purpose and the operation of the agreement in its entirety.

The third, and final, question relates to the establishment of a causal link between the Protocol and the diversion of trade. According to Article 16 of the Protocol, the application of safeguard measures is justified where the application of the Protocol leads to diversion of trade. On this, it is questionable whether the Protocol, on its own, has led to diversion of trade. As discussed, the Protocol did no more than maintain the status quo for NI in terms of its trade relationship with the EU in relation to goods – that is, NI continues to trade with the EU as if it was still part of the EU customs union and internal market. When the Protocol was negotiated and agreed upon, the barriers to trade which currently exist between NI and GB were not an inevitability. Such barriers were a

⁹² A Mattoo, A Mulabdic and M Ruta, 'Trade Creation and Trade Diversion in Deep Trade Agreements' (2017) World Bank Group, Policy Research Working Paper 8206; J Rollo, 'The Potential for deep integration between Australia and the European Union: what do the trade statistics tell us?' (2011) 65(4) *Australian Journal of International Affairs* 405-406.

consequence, not of the Protocol but rather of the conclusion of the EU-UK TCA, which raised barriers on trade in goods between the EU and the UK. To what extent then can any potential decrease in trade between GB and NI and corresponding increase in trade between NI and the RoI be attributed to the Protocol? And, even if it is accepted that the Protocol has, at least partially, led to trade diversion, can such diversion constitute a valid reason to suspend Protocol obligations when it is entirely self-inflicted?

At this point, it is worth circling back to the lack of any requirement to demonstrate the exceptional or unforeseeable nature of diversion to trade in Article 16 of the Protocol. This would have surely assuaged concerns that this condition provides parties with a ready-made excuse to escape their obligations. However, as discussed, validly invoking this condition may not be as easy as some may assume. Once it is established what constitutes trade diversion for the purposes of the Protocol, demonstrating the existence of diversion and a causal link with the Protocol may prove problematic.

4.2.3 Good faith requirement

Until further clarification is given, either by the parties or through case law, the meaning of the substantive standards for the invocation of Article 16 of the Protocol will remain the subject of debate. Compared to the WTO safeguards regime, Article 16 of the Protocol is wider in scope and imposes less restrictive substantive requirements potentially giving parties greater discretion in deciding whether to apply safeguards. On the surface, this could be explained by the fact that the Protocol is far more ambitious in terms of the depth of liberalisation commitments than GATT. Whilst both cover trade in goods, the former achieves market integration through the removal of regulatory barriers to trade in goods between Ireland and Northern Ireland. It should come as no surprise then that negotiators envisaged the application of safeguards in circumstances which did not relate exclusively to increase in imports in goods. It is also not particularly surprising that, in a trade arrangement requiring regulatory alignment, a safeguard system should allow for the suspension of obligations other than just tariffs and tariff-rate quotas. It is possible that the negotiators considered that such a far-reaching arrangement required a similarly far-reaching escape clause. This was, after all, one of the main concerns of the drafters of the EEA Agreement, another market integration arrangement, when they conceived Article 112 EEA, the main inspiration for Article 16 of the Protocol.

But such a broad escape clause also creates certain problems which the parties to the Protocol must now contend with. If the application of safeguards is made contingent upon the determination of circumstances that are, in some cases, neither exceptional nor unpredictable, the Protocol would confer the parties carte blanche to deviate from their obligations whenever it suits them. There is a

reason why similar provisions at WTO level as well, as Article 112 EEA, have rarely been used. Once a signal is sent to domestic interest groups that an escape clause allows parties to pick and choose when they should comply or not with their international commitments, the temptation will be there to impose political costs on governments to make use of such clause. The EU's aborted attempt to invoke the safeguard provision to impose export restrictions on COVID vaccines on trade between the EU and Northern Ireland is a perfect illustration of how vulnerable Article 16 of the Protocol is to abuse. Whilst the export restriction was never applied in relation to Northern Ireland, the mere notion that safeguard could be invoked in practice was enough to embolden domestic interest groups within the UK to call for the UK government to apply its own safeguard measures⁹³.

The issue is further exacerbated by the risk that domestic interest groups may instigate the very circumstances that could justify the invocation of Article 16 of the Protocol. For example, from the moment, the Protocol entered into force, Unionist political parties opposed to its operation have repeatedly called for the suspension of the Protocol on the basis that the border checks on GB goods destined for NI could lead to anger within the unionist community and undermine the stability in the region⁹⁴. Such claims were followed by protests that have then been held up as evidence of the societal unrest caused by the Protocol and reasons for the invocation of Article 16 of the Protocol.

There is another fundamental issue which arises from the very existence of Article 16 of the Protocol. In most trade agreements, when an escape clause is invoked, regardless of whether or not it is poorly designed, the worst that can happen is that barriers to trade will be re-imposed. There will be adverse economic, perhaps even political and social, consequences for parties involved, but very rarely do such barriers pose existential threats to the arrangement. But, in the context of the Protocol, any deviation from international commitments which leads to the imposition of a barrier to trade challenges one of the central goals of the agreement – that is, to avoid border checks within the island of Ireland. Any imposition of any sort of border checks on goods would be extremely problematic and holds the potential to destabilise the entire agreement.

The question that arises then is how to ensure that the discretionary powers under Article 16 of the Protocol are not used in an unreasonable or arbitrary manner. How do we avoid the abuse or disingenuous use of safeguards to further the interests of domestic interest groups? On this matter, the concept of good faith may prove useful. The good faith obligation is a generally accepted principle

⁹³ M McHugh, 'European Commission decision to trigger Article 16 was 'baffling' Arlene Foster says', Press Association 8 February 2021.

⁹⁴ D Young and A Madden, 'Alliance and DUP MPs clash as Irish Sea border row intensifies' 16 January 2021, Belfast Telegraph (available at: <https://www.belfasttelegraph.co.uk/news/brexit/alliance-and-dup-mps-clash-as-irish-sea-border-row-intensifies-39974481.html>); J Forsyth, 'The Northern Ireland Protocol Problem, The Spectator 13 February 2021 (available at: <https://www.spectator.co.uk/article/the-northern-ireland-protocol-problem>); Freya McClements, 'The Northern Ireland protocol: 'All shades of unionist are really angry' Irish Times, 20 February 2021

of international law, which requires rationality and reasonableness in the application of international law⁹⁵. Of particular relevance is the obligation on treaty parties not to exercise their rights in an abusive manner – that is, in a manner or for reasons that are contrary to the very purpose of the provision⁹⁶. The misrepresentation by the true reasons for the use of a safeguard would certainly fall under banner of an abuse of rights.

It is worth noting in this regard that the Withdrawal Agreement also includes a duty of good faith, which applies, to both the EU and the UK in relation to the Protocol. Article 5 of the Withdrawal Agreement “shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement”. Some have argued that the duty of good faith in the Withdrawal Agreement does not add much to the international law principle⁹⁷. Others, have posited that the interpretation of the good faith requirement should vary in accordance with the level of integration being pursued in the treaty, that “the greater the depth of integration that an agreement is thought to require, the more far-reaching the principle of good faith is likely to be”⁹⁸. To the extent that Protocol maintains Northern Ireland in the EU’s internal market for goods, one might wonder whether the EU law equivalent to the duty of good faith – the EU law principle of loyalty, or sincere cooperation⁹⁹ - could potentially reinforce the scope of the obligation. Such a conclusion is not as far-fetched as it may appear. The text of Article 5 of the Withdrawal Agreement replicates to large extent both Article 4 of the Treaty on the European Union and Article 3 of the EEA on the principle of loyalty¹⁰⁰. The exact impact of the good faith requirement in relation to the Protocol is yet to be defined and will undoubtedly play a significant role in disputes between the EU and the UK. However, irrespective of whether the duty of good faith is interpreted in the narrow sense of international law principle or its broader expression under EU law, there should be enough there to preclude the unreasonable or abusive exercise of rights under Article 16 of the Protocol.

4.2.4 Scope and duration of safeguard measures

Whilst there may be some uncertainty as to the scope of the conditions for the invocation of safeguards under Article 16 of the Protocol, the following segment of the provision imposes strict limits in terms of the manner in which safeguards measures can be applied. Safeguard measures, it is

⁹⁵ R Kolb, *Good Faith in International Law* (Hart, 2017); U Linderfak, ‘Good Faith in the Exercise of Treaty-Based Discretionary Powers’ in L Bartels and F Paddeu (ds) *Exceptions in International Law* (CUP, 2020) 260.

⁹⁶ R Kolb, ‘Principles of International Law (With Special Reference to Good Faith)’ (2006) *Netherlands International Law Review* 24.

⁹⁷ S Peers, ‘The End - or a New Beginning? The EU/UK Withdrawal Agreement’ (2020) *Yearbook of European Law* 39(1) 145.

⁹⁸ C McCrudden, ‘Good Faith’ in C McCrudden (ed.) *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP, 2022). Forthcoming.

⁹⁹ G De Baere and T Roes, ‘EU Loyalty as Good Faith’ (2015) 64 *International Comparative Law Quarterly* 829.

¹⁰⁰ C Franklin, Article 3 [Principle of Loyalty] in F Arnesen et al (eds) *supra* footnote 58, 180.

stated, should be “restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation” and that “priority should be given to measures that “least disturb the functioning of the Protocol”.

The limitation on both the scope and duration of safeguards measures is that they should be strictly necessary to rectify the difficulty. This alludes to the application of a proportionality test, akin to those developed in the context of the EU and WTO legal orders¹⁰¹, when assessing the legality of a trade restrictive measures. The practice at both EU and WTO level shows that the application of the proportionality test will often vary depending on nature of the difficulty arising from the application of the Protocol, the restrictiveness of the measure and the intended aim of the derogation. The discretion accorded to parties in terms of the level of restrictiveness that could be applied to achieve a policy goal would fluctuate depending on the importance of said goal. One would expect, for example that a party invoking a safeguard in order to address a public health or environmental concern would be given more leeway than one derogating from the Protocol to address trade diversion concerns.

However, the presence of the term “strictly” suggests the application of a strict proportionality analysis where adjudicatory bodies will assess the extent to which a no less restrictive measure could achieve the same objective¹⁰². Article 16 of the Protocol thus significantly limits the discretion of the parties in the determination of a measure’s necessity. A party wishing to adopt a safeguard measure must demonstrate that said measure is the only one that could achieve its intended goal and that there are no less burdensome options available. An assessment based on strict necessity makes sense in light of the importance of the Protocol’s aims, the highly problematic and undesirable consequences which would arise from non-compliance (notably the possibility of the introduction of border checks in the island of Ireland) and also serve to counterbalance the very broad scope and nature of the conditions for the invocation of safeguards under Article 16 of the Protocol. Whilst, in theory, it may be relatively straightforward for a party to justify the imposition of safeguards under the Protocol, demonstrating that a measure is strictly necessary to achieve one of the goals listed in Article 16 of the Protocol will prove a more arduous task.

Beyond the requirement of proportionality, there are no further limits regarding the scope of safeguard measures. The upshot is that Article 16 of the Protocol is a horizontal exception that covers all obligations under the Protocol, meaning that parties are free to deviate from Protocol obligations whose purpose is to avoid border checks between Ireland and Northern Ireland.

¹⁰¹ Peter Van den Bossche, 'Looking for Proportionality in WTO Law' (2008) 35 *Legal Issues of Econ Integration* 285.

¹⁰² A D Mitchell and C Henckels, 'Variations on a Theme: Comparing the Concept of Necessity in International Investment Law and WTO Law' (2013) 14 *Chi J Int'l L* 102.

4.2.5 Procedural requirements

Although safeguard measures can be adopted unilaterally they are subject to the procedural requirements set out under Annex 7 of the Protocol. A party considering adopting safeguard measures must notify the other party of its intention to do so and provide all relevant information¹⁰³. A formal notification would presumably include information concerning the nature of serious difficulties, the provision of the Protocol whose compliance is causing the difficulties and the proposed measures to address such difficulties. Upon notification, the parties must immediately engage in consultations in the Joint Committee “with a view to finding a commonly acceptable solution”¹⁰⁴. The role of the consultation process then is to give the parties an opportunity to discuss solutions that may obviate the need for derogations from the Protocol or, if the latter is not possible, to agree on safeguard measures that would be least problematic in terms of the operation of the Protocol.

In any event, the safeguard measures may not be adopted at least one month before the initiation of the consultation procedure unless either the consultations were terminated before the end of the time-period or where “exceptional circumstances requiring immediate action exclude prior examination”¹⁰⁵. In the latter scenario, safeguard measures should, again, be limited to measures that are “strictly necessary to remedy the situation”¹⁰⁶.

Once adopted, safeguard measures must be formally notified to the other party with all relevant information¹⁰⁷. These measures are subject to a review by the Joint Committee every three months to explore the possibility of either removing such measures prior to their expiry date or mitigating their impact¹⁰⁸.

4.2.6 Rebalancing measures

Article 16(2) provides that rebalancing measures may be taken against the party adopting the safeguard measures. Rebalancing measures can be adopted where the application of safeguard measures causes an imbalance between rights and obligations of the parties under the Protocol. To the extent that any move to derogate from an obligation in the Protocol would arguably disturb the balance of the negotiated outcome, any use of safeguard measure by one party could trigger the right for the other party to apply rebalancing measures. This means that rebalancing measures are permitted even if the safeguard measure is lawful.

¹⁰³ Paragraph 1, Annex 7 of the Protocol.

¹⁰⁴ Paragraph 2, Annex 7 of the Protocol.

¹⁰⁵ Paragraph 3, Annex 7 of the Protocol.

¹⁰⁶ Ibid.

¹⁰⁷ Paragraph 4 Annex 7 of the Protocol.

¹⁰⁸ Paragraph 5 Annex 7 of the Protocol.

The rules applicable to rebalancing measures broadly mirror those that apply for safeguard measures they are responding to¹⁰⁹. Rebalancing measures must be adopted in accordance with the procedure set out under Annex 7 for safeguard measures. They must comply with the proportionality requirement - that is, they must be strictly necessary to remedy the imbalance and the least restrictive as possible for the functioning of the Protocol. And, as with safeguard measures, the Protocol does not clarify what form rebalancing measures should take – that is, whether they should be limited to the re-imposition of tariffs or tariff-rate quotas – or whether parties are free to suspend any obligation derived from the Protocol. This mirrors the approach adopted in the EU-UK TCA where rebalancing measures are also not defined¹¹⁰.

The inclusion of a mechanism allowing parties affected by a derogation to apply rebalancing measures is a standard feature of escape clauses based on the efficient breach theory. It is a feature which, one could argue, is all the more justifiable when dealing with an escape clause which, as Article 16 of the Protocol does, allows a significant margin of discretion for parties invoking it. It could, presumably, serve as a disincentive for countries that would seek to abuse that discretion. This, as discussed in section one, is the central feature of escape clauses based on the theory of efficient breach.

However, the option of applying rebalancing measures in response to safeguards is problematic. Firstly, because as discussed in section one, the theory of efficient breach has been criticised, namely because the practice suggests that imposing an economic cost for the use of an exceptions in trade agreement is not necessarily an effective means to disincentivise the abusive use of such exception. On the contrary, it may create an incentive for domestic actors that are opposed to the trade agreement to increase costs of compliance.

Secondly, because it makes little sense to punish a party for adopting a safeguard measure that is genuinely intended to pursue a legitimate policy objective. In the context of general exceptions provisions under WTO law, for example, countries are allowed to adopt measures that would otherwise be incompatible with their obligations if they are able to show that those measures are necessary or relate to certain non-trade policy goals and that such measures are not disguised forms of protectionism. In such instances, other WTO members do not have the right to respond by suspending their commitments in relation to the WTO Member that has derogated from its obligations for valid reasons. Similarly, it is odd that either party to the Protocol should be entitled to derogate

¹⁰⁹ Article 16(3) of the Protocol.

¹¹⁰ Emily Lydgate, Erika Szyszczak, L. Alan Winters, Chloe Anthony, 'Taking Stock of the UK-EU Trade and Cooperation Agreement: Governance, State Subsidies and the Level Playing Field' UKTPO Briefing Paper 54, January 21. Available at: <https://blogs.sussex.ac.uk/uktpo/publications/taking-stock-of-the-uk-eu-trade-and-cooperation-agreement-governance-state-subsidies-and-the-level-playing-field/>

from their own obligations in response to safeguards adopted by the other party that entirely justified by reference to an important public policy goal, such as the protection of the environment.

Thirdly, rebalancing measures appear incongruous in the overall context of the Protocol. Trade agreements that pursue liberalisation as means to achieve economic welfare are the result of negotiations based on reciprocity. The upshot is that where a party opts to suspend market access concessions for economic or political purposes, it is at least arguable that the other parties affected by such measures should be able to respond in kind, to redress the balance of the negotiating outcome. However, it is debatable whether a similar logic should apply to a trading arrangement a trade agreement where one of the central objectives is to avoid border checks on traded goods. On this, it is worth considering what an appropriate rebalancing measure from the UK to EU's attempt to impose COVID-19 vaccine restrictions on EU-NI trade could have look liked. If, in this hypothetical scenario, the UK were to impose similar export restrictions on trade between the UK and the EU, then rebalancing measures would only further undermine one of the central goals of the Protocol by creating the need for more border checks.

5. Conclusion

When the EU and the UK drafted Article 16 of the Protocol, they transposed a legal mechanism which perhaps might have made sense in the framework of trade liberalization arrangements with seemingly little thought being given to whether such mechanism could work in the context of a trade agreement where the removal of barriers to trade is not a means for economic prosperity but rather for the maintenance of peace and security. Perhaps the negotiators considered that including an escape clause would make selling the Protocol to those interest groups that were opposed to it easier. And perhaps the assumption was that, like the corresponding provision in the EEA, Article 16 of the Protocol would never be used in practice. If so, this was a considerable gamble. One that may well still pay off. Still, one wonders whether the drafters of the Protocol may eventually rue not having opted for a more cautiously worded text which heeded the lessons of international relations literature and practice on escape clauses.

In any event, as discussed in this paper, whilst the conditions for the invocation of safeguard measures under Article 16 of the Protocol are broad and confer the parties a certain amount of discretion, there are also a number of requirements that will limit such discretionary powers. This includes a requirement to demonstrate the existence of difficulties of a serious nature or trade diversion and the establishment of a causal link between the application of the Protocol and these external circumstances. It also includes the application of a good faith requirement, which should preclude the exercise of the provision in an abusive manner and a high threshold for the necessity

test, which limits the scope of potential safeguard measures. Further, where safeguards are adopted, this should occur in line with the procedural requirement set out in Article 16 of the Protocol and, preferably, with the agreement of both parties. If not, to judicial review of such measures is possible, either in the context of the arbitration mechanism created by the EU-UK Withdrawal Agreement or before EU or UK courts¹¹¹. Here, the onus will be on the relevant adjudicatory bodies to use the limited tools available in Article 16 of the Protocol and interpret said provision in a manner that ensures that the use of safeguards does not undermine the delicate balance the Protocol seeks to achieve in light of the unique circumstances on the island of Ireland.

¹¹¹ B Melo Araujo and S. Brittain, 'Safeguards' in Christopher McCrudden (ed.), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP, 2022). Forthcoming.