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Peters, Dirk

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# Brexit: The Perils of Dissociation by Negotiation

Dirk Peters\*

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**Abstract:** »Brexit: Die Gefahren von Dissoziation durch Verhandlungen«. Withdrawing from an organization through an orderly negotiation process would appear as a particularly unproblematic form of leaving international institutions. However, the example of Brexit shows that negotiated dissociations have significant potential to adversely affect relations between exiting and remaining states. This study, which contributes to a forum on the impact of dissociation processes on post-withdrawal relations, argues that the management of conflict during the Brexit process had profound implications for relations between the United Kingdom and European Union member states. The negotiations on the Northern Ireland Protocol were marked by increasingly fundamental accusations against each other regarding (non)compliance with basic norms of international conduct. This led to a deterioration of relations and eventually – despite the avoidance of full escalation – to deadlock when implementation problems arose. To demonstrate this and explore the particular features of negotiated dissociations, the study examines three episodes of conflict: the disputes over ratification of the Withdrawal Agreement, over the Internal Market Bill, and over implementation of the Northern Ireland Protocol.

**Keywords:** Brexit, dissociation, UK-EU relations, Withdrawal Agreement, Northern Ireland Protocol, Internal Market Bill.

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## 1. Introduction

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The United Kingdom's (UK) decision to leave the European Union (EU) easily qualifies as the most significant dissociation event in recent decades within Western institutions. An organization that was considered a major success story after the end of the Cold War and more than doubled its membership suddenly had to accept the departure of one of its largest members. But Brexit also represents a rather peculiar kind of dissociation. States that dissociate, that is, states that turn away from international institutions, often do so without seeking agreement with their former partners. In this respect, Brexit as a “negotiated dissociation” stands in sharp contrast to other dissociations

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\* Dirk Peters, Peace Research Institute Frankfurt, Baseler Str. 27-31, 60329 Frankfurt am Main, Germany; [peters@hsfk.de](mailto:peters@hsfk.de).

discussed in this issue, notably Iran's break with the West (Bösch and Walter 2022, in this issue), Russia's dissociation from Western security institutions (Polianskii 2022, in this issue), and China's distancing from the global financial order (Chu 2022, in this issue). Rather than suddenly or tacitly distancing itself from an institution, the United Kingdom formally ended its membership in the EU, and the details of the withdrawal and of the future relationship between the former member and the organization were negotiated and eventually formalized in a legally binding agreement.

This form of dissociation appears to involve a very low risk of sustained conflict between the parties after separation. After all, their future relationships are embedded in a formal framework and the negotiation process provides an opportunity to resolve disputes before they escalate. From this perspective, dissociation by negotiation appears to be a remedy for the problem discussed in the introduction to this HSR Forum, namely that dissociation can lead to a permanent increase in tensions between the departing state and the states that remain committed to the institution (Dembinski and Peters 2022, in this issue).

But this effect of negotiation is only part of the story. Negotiated dissociations also bring an additional layer of potential problems to future relationships. Agreements must be *implemented*, creating new opportunities for conflict and tension. Moreover, while negotiations during the exit process can help defuse and resolve conflicts, they can also go awry and exacerbate existing tensions. While negotiated dissociations may appear harmless at first glance, they can pose significant risks to future relationships between former partners and lead to growing tensions.

This paper explores this double-edged effect of dissociation by negotiation. It focuses on this HSR Forum's basic hypothesis that how conflicts are handled during dissociation affects post-dissociation relations and that distributive conflicts have less-problematic effects than ideational conflicts (Dembinski and Peters 2022, in this issue). To evaluate this hypothesis, it examines the Brexit process and the subsequent implementation of the Withdrawal Agreement through the summer of 2021 focusing on one particularly salient issue during the negotiations: the Northern Ireland Protocol. It examines how the EU and the United Kingdom handled conflict over this issue during the Protocol negotiations and how this handling affected relations between the parties when problems arose during implementation.

It will become clear that dissociation by negotiation can indeed contribute to conflict between the parties involved. To be sure, violent conflict between the UK and EU members was never on the horizon (even though warships were sent to the Channel at one point). But Brexit turned out to be no friendly divorce at all and intergovernmental relations suffered as a result of the strenuous Brexit process.

The study first takes a closer look at the relationship between negotiated dissociations and future relations between the parties involved, using Brexit as an example. It will clarify why negotiated dissociations might be less prone to escalation, why Brexit in particular was unlikely to contribute to a sustained rise in tensions between the UK and EU member states, and how negotiations might nevertheless contribute to conflict in the future. Against this backdrop, the study will then examine the Brexit process. It will briefly outline the framework for analyzing this process, justify the focus on the disputes over the Northern Ireland Protocol, select three conflict episodes for in-depth examination, and discuss how the link between negotiation and implementation conflicts is analyzed. The empirical analysis itself will focus on the three selected successive conflict episodes: the conflict over the ratification of the Withdrawal Agreement under Theresa May, the conflict over the Internal Market Bill under Boris Johnson, and the early conflict over the implementation of the Protocol. It will become apparent that the parties' framing of the conflict shifted over the course of the negotiations. While they initially focused on the substantive issues at stake (ratification of the Protocol and how each side could contribute to it), they then shifted to an ideational framing (accusing each other of disregarding basic norms of international behavior). This framing was carried over to the post-Brexit period, when problems with the implementation of the Northern Ireland Protocol emerged and posed significant obstacles to the resolution of the conflict. The conclusion contextualizes the findings by reflecting on the Brexit process more broadly, its implications to date for EU-UK relations, and what the findings of this study mean for the future.

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## 2. Brexit: A Negotiated Dissociation in a Favorable Environment

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Brexit can be seen as a dissociation that had little disruptive potential at the outset. First of all, it took place in a larger institutional environment in which sustained tensions between the United Kingdom and EU member states were highly unlikely. The EU was never the central institution that would have guaranteed friendly relations between the two sides. The UK's membership in the EU was never intended to fundamentally change the quality of relations between the two sides. Unlike, for example, West Germany's membership in the European Coal and Steel Community (ECSC), a precursor to today's EU, in the early 1950s or Russia's accession to Western institutions in the 1990s, it was the result of a pragmatic economic decision between allied states, not an attempt to transform a relationship of enmity into one of friendship and cooperation. Consequently, a UK withdrawal from the organization would not

cast doubt on the UK's commitment to shared values (see Polianskii 2022 in this issue for the contrasting case of Russia). And indeed, the UK and the other EU members are held together by much more than EU membership. They are embedded in a variety of common institutions, including key Western organizations such as NATO and the G7, from which the UK has shown no signs of dissociation, and they share fundamental economic and security interests.

There were also structural features of the dissociation that mitigated its disruptive potential. As a *negotiated* dissociation, Brexit was crucially different from dissociation processes that appear more sudden and less orderly. First, the Brexit process was characterized (after a brief period of uncertainty) by a shared understanding on both sides that it would lead to the termination of the UK's formal membership in the EU. Regardless of the desirability of this outcome, at some point all parties to the negotiations accepted the fact of dissociation and disagreed only on the precise form it should take. Second, the process of dissociation was quite lengthy and included opportunities for both sides to prepare. There was no sudden withholding of contributions to the EU or of membership benefits for the UK, but rather extensive discussions about when and to what extent relations between the two sides would be severed. The negotiations even led to a kind of gradual withdrawal. Formal notification of the UK's intention to leave came more than nine months after the referendum (on March 29, 2017); formal membership ended almost three years later (on January 31, 2020); and the subsequent transition period, during which the UK was no longer a member of the EU but still bound by its rules, lasted another 11 months (until December 31, 2020).

More generally, negotiated dissociations such as Brexit should have a comparatively low potential for escalating tensions between the exiting and remaining members. During the negotiations, both sides have time to resolve their differences and reach an agreement that leads to a new set of more or less institutionalized arrangements. If an agreement can be reached, the potential for future tensions is likely to be much lower than in the case of uncoordinated dissociations, as the new framework will regulate relations and likely include mechanisms for conflict resolution.

However, the negotiation process can also go wrong. Very conflictual and tense negotiations can permanently poison the atmosphere between the parties. Trust can be built in negotiations, but it can also be damaged. Likewise, perceptions of unfairness or rhetorical abuse can leave a lasting impression on those who feel they have been wronged. In other words, the negotiation process is open to the broader mechanisms that make dissociation processes so problematic, as discussed in the introduction to this HSR Forum. The framing of a conflict is likely to affect how the parties to the conflict will interact with each other, even after the conflict is resolved. As long as conflicts are treated as disputes over the distribution of goods, concluding an agreement will likely settle the issue. However, when dissociation conflicts are treated

as conflicts of ideas that reflect fundamental differences about basic norms and values, they become much more difficult to settle.

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### 3. Studying the Link between Brexit Negotiations and Post-Brexit Relations

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A complex withdrawal process such as Brexit cannot be meaningfully studied in its entirety. Therefore, this study must be highly selective in what it analyzes. The selection is guided by three points. First, in order to study how post-Brexit conflicts are affected by the handling of the Brexit process, there must be conflict. Second, this conflict should occur during implementation to reflect the particular characteristics of a negotiated dissociation, as implementation conflicts are specific to this type of separation. And third, the conflict should not be a marginal issue, but should be politically salient.

The conflicts over the Northern Ireland Protocol fulfill all three criteria. The Protocol was of great political importance during the negotiation phase and has again become an important and contentious issue during the implementation of the Withdrawal Agreement. It was certainly not the only important issue of conflict during the negotiation and implementation phase, but it has acquired a high symbolic importance and has been for long stretches the main issue discussed in the political and public Brexit discourse. The conclusion will discuss the significance of the Northern Ireland issue in relation to the rest of the Brexit process in order to contextualize the findings.

With respect to the Northern Ireland Protocol, at the time of writing (early 2022), there were three phases of conflict: the conflict over its (non)ratification in the first half of 2019; the conflict over the UK Internal Market Bill, which included provisions to override the Protocol, in late 2020; and the conflict over implementation issues that began in 2021. In the following sections, I describe the issues at stake during these episodes and how the UK and the EU engaged in the conflict. In doing so, I am guided by the forum's hypothesis that conflicts over the distribution of goods are easier to manage and lead to lower tensions between the conflicting parties than conflicts over basic norms and values (Dembinski and Peters 2022, in this issue). I will try to determine from episode to episode whether conflict framings shifted and what this meant for conflict management.

To reconstruct how the conflicts were handled, I will focus on the intergovernmental discourse. That is, I will examine what the British government and prominent EU governmental actors, including negotiating teams, said about Brexit during the negotiation process. This may appear to be quite restrictive. After all, societal discourse will also contribute to how dissociation is perceived. Public rallies, campaigns by non-governmental organizations,

opposition statements, parliamentary committee reports, opinion pieces in print and electronic media – all of these are an integral part of the public discourse on Brexit and cannot be completely ignored. The focus on the inter-governmental side of the discourse is intended to cut through much of the noise and concentrate on the innermost interactions in the Brexit process between the partners who actually made the decisions about the agreements and will also be responsible for the future relationship. However, the rest of the public discourse will not be completely lost. Democratic governments do not invent their statements out of thin air. Rather, they reflect and respond to public discourse. Moreover, in the cases where parliamentary proceedings were a constitutive element of the conflict (especially in the first two episodes, which directly involved the House of Commons), statements by MPs will also be taken into account.

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## 4. “Like Dealing with a Failed State”: The Conflict over Ratification of the Withdrawal Agreement

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### 4.1 The Northern Ireland Protocol and Opposition against It in the House of Commons

Brexit was negotiated in two steps. The official withdrawal process began when the British government under Theresa May officially announced that the UK intended to leave the EU. The EU then insisted on first negotiating a number of fundamental issues that were eventually settled in the Withdrawal Agreement (WA) (Polak 2021). Three issues dominated these negotiations: how much money the UK owed the EU; what rights EU citizens living in the UK and UK citizens living in EU countries would enjoy after Brexit; and how the border between Northern Ireland and the Republic of Ireland would be kept open, even if the borders between the rest of the UK and the EU hardened as a result of Brexit (for a detailed overview, see Bradley 2020). The WA was accompanied by a Political Declaration, which set out what both sides wanted to achieve in the subsequent phase of negotiations. In the second phase, the UK and the EU discussed the details of their future economic and political relationship, resulting in the Trade and Cooperation Agreement (TCA).

In the WA negotiations, the Northern Ireland question proved to be by far the most contentious issue (Connolly and Doyle 2019). The militarization of the land border between the United Kingdom and Ireland had been a major element in the Troubles in Northern Ireland. The demilitarization of the border through the Good Friday/Belfast Agreement of 1998 had been helped enormously by the joint membership of Ireland and the UK in the EU. After

the UK left the EU, there was a risk that the border posts would have to be re-established, causing violence to flare up again in Northern Ireland (for more detailed reflections on the impact of Brexit on Northern Ireland and the Irish border, see Murphy 2021 and Hayward 2018). Since both the EU and the UK government wanted to maintain peace in Northern Ireland, the key issue was how the UK could opt out of EU single market rules without having to physically check goods crossing the Irish border from the UK into the EU.

The solution that was eventually agreed upon and enshrined in the Northern Ireland Protocol as part of the WA was the introduction of a “backstop.” If no other agreement was reached between the UK and the EU, Northern Ireland would continue to participate in certain aspects of the single market and the UK as a whole would remain in a customs union with the EU. This would make border controls at the Irish border unnecessary, even if further negotiations between the UK and the EU on a post-Brexit agreement failed.

The WA, which includes the Northern Ireland Protocol, was concluded between the UK government and the EU on November 14, 2018. However, the House of Commons had to approve the agreement, which proved to be a huge obstacle as Theresa May faced significant opposition to it within her own coalition government. The reasons for the House of Commons’ central but hardly constructive role in the ratification process were complex (for a detailed analysis, see Russell 2021). Part of the problem for May was that she had called an early general election in April 2017, which took place on June 8, 2017. Her apparent intention was to get a clear mandate for the Brexit negotiations. The result, however, was that the Conservative Party lost its majority in the House of Commons. May formed a coalition government with the Democratic Unionist Party (DUP), a party of Northern Irish unionists. Her government would henceforth rely on the votes of two groups with rather extreme positions on Brexit issues: her new coalition partner, which would not support any real or symbolic loosening of relations between Northern Ireland and the UK, and hardcore Brexiteer backbenchers (organized mainly in the “European Research Group,” ERG), who strongly opposed any post-Brexit arrangement that would maintain the applicability of EU law in the UK. After the election, May’s task was to work out an agreement at the international level that would simultaneously satisfy the ERG, the DUP, and the large group of more pragmatic MPs in her party who were anxious to preserve the economic benefits of access to the EU market.

The backstop was a thorn in the side of most ERG members and the DUP. They argued that it would give the EU leverage to tie the UK to EU rules indefinitely (by allowing all negotiations on other agreements to fail) and thus undermine Brexit as a whole. As a result of this opposition, May’s government was unable to organize parliamentary approval of the WA. It is hard to exaggerate the parliamentary turmoil that unfolded in the days, weeks, and months following the conclusion of the WA. The day after the agreement was



announced, several cabinet members resigned, including Brexit Minister Dominic Raab. In a process that dragged on for months, the government sought ratification by the House of Commons, MPs sought to wrest control of parliamentary procedures and the entire Brexit process from the government, and the government sought new concessions from the EU, which steadfastly rejected the idea of renegotiating the WA. The House of Commons voted against the WA three times: on January 15, March 12, and March 29, 2019. In the political turmoil that accompanied this failed ratification process, Theresa May finally announced on May 24 that she would resign on June 7, 2019. On July 24, 2019, Boris Johnson was appointed as her successor.

May's government had apparently lost control of the political process, and her attempts to win it back looked rather helpless to many observers. Theresa May's strategy after the first defeat on January 15 was not to try to build an informal coalition of supporters across party lines in the House of Commons (which would have threatened her own political survival). Rather, she sought concessions from the EU to help her convince MPs from the governing parties to support the WA.

The main point of contention between the British government and the EU in this phase of the Brexit process was thus the need to renegotiate the WA. The EU clearly rejected this. Its mantra was that the negotiations had concluded with an agreement and that it was impossible to reopen the negotiations. In the words of Irish Deputy Prime Minister Simon Coveney, "We cannot reopen the withdrawal agreement text itself, which was the product of multiple compromises and highly detailed negotiations in a very wide range of areas."<sup>1</sup> The EU offered non-binding clarifications to reassure British MPs that it would not aim to bind the UK to the EU via the backstop, and provided these clarifications in a letter from Commission President Juncker and Council President Tusk the day before the first vote on the WA in the House of Commons. However, the EU consistently ruled out any renegotiation, while the WA was repeatedly rejected in the House of Commons.

The UK government repeatedly argued that the EU needed to understand that ratification of the WA was in jeopardy and that only EU concessions could help avoid a no-deal Brexit, which was in no one's interest. Two weeks after the first defeat in Parliament and after consultations with opposition parties, Theresa May said (through her spokesman) that "in order to win the support of the House of Commons, legal changes to the backstop will be required – that will mean reopening the withdrawal agreement."<sup>2</sup> She continued to pursue this line in the weeks that followed without much success. After the second defeat, she put forward the demand for renegotiation to the European

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<sup>1</sup> O'Carroll, Lisa. 2019. MPs must stop 'wishful thinking' and back May on Brexit – Irish deputy PM. *The Guardian*, January 8, version 2.

<sup>2</sup> Watts, Joe. 2019. Brexit: Theresa May to demand EU reopen talks on key parts of her deal, so Irish backstop can be changed. *The Independent*, January 29, UK Politics, version 4.

Council, but framed it as a demand from MPs, while she herself seemed to have abandoned that option in the face of EU opposition to it, and focused instead on extending the withdrawal deadline.<sup>3</sup>

#### 4.2 Conflict Dynamics: Blame Game (Almost) Without Compromise

The conflict was tricky because there was no obvious compromise solution. The British government argued it needed legally binding changes in the WA, the EU ruled out renegotiating the legally binding parts of the package. The reasons why no side wanted to be seen making concessions were mainly internal. For the UK it was a matter of domestic politics. Due to parliamentary procedures and the inability to organize a cross-party majority in favor of the WA, hardcore Brexiteer backbenchers in the ruling coalition were in a veto position. They made two arguments to block the agreement. If the UK demonstrated clearly enough that it would not agree to the WA, the EU would finally come around and make the concessions they wanted. In the words of David Davis, who had resigned as Brexit Secretary in July 2018: “The more we prepare to leave the EU without a deal, the more likely a good deal becomes.”<sup>4</sup> And in the unlikely event that the EU did not make the planned concessions, leaving without an agreement would be preferable to leaving with this one, if only to sever ties with the European Union. Sir William Cash made this argument forcefully in the first debate on ratification of the WA on January 15, 2019:

I strongly urge the Government to conclude, after the vote is cast tonight, that enough is enough, and that we have reached journey’s end. Now is the time to walk away from the intransigence of the European Union and our failed policy of seeking to supplicate its guidelines, its terms and its paymasters.<sup>5</sup>

This willingness to walk away from the table without an agreement put them in an enormously strong position within the UK and made it imperative for May to incorporate their position into her own position toward the EU.

The EU member states, on the other hand, insisted on the existing WA for reasons of principle. The British government had signed the agreement, and it was now its task to secure domestic political support for it. The EU also insisted on this agreement with a view to the future. It did not want to set a precedent for future negotiations (with the UK or other countries) where

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<sup>3</sup> Prime Minister’s Office. PM statement on European Council: March 25, 2019. UK Government <https://www.gov.uk/government/speeches/pm-statement-on-european-council-25-march-2019> (Accessed August 30, 2022).

<sup>4</sup> Davis, David. 2019. By preparing for no deal properly, we will get the good Brexit democracy demands of us. *Daily Telegraph*, January 2 <https://www.telegraph.co.uk/politics/2019/01/02/preparing-no-deal-properly-will-get-good-brexiteer-demands/> (Accessed August 30, 2022).

<sup>5</sup> Hansard, vol. 652, col. 1050.

domestic opposition to a negotiated agreement could force the EU to reopen the agreement and make concessions.

With both sides focused on internal issues, neither side gave much weight to the need for good future relations between the UK and the EU. As a result, the other side could be portrayed as the scapegoat for the deadlock. On the EU side, the focus was on the inability or unwillingness of the UK to meet its international obligations. Even before the WA was first rejected, Irish Prime Minister Leo Varadkar said after talks with German Chancellor Angela Merkel that “what we both really agreed is that once again this is a problem created in London ... and we’re really looking to them for a solution. Those who create a problem must be the ones who have a responsibility to come up with a solution.”<sup>6</sup> After the WA was rejected in the House of Commons, this line was continued and the media was able to quote EU sources who not only blamed the UK for the situation, but also claimed that Theresa May’s government was simply not capable of governing properly. Unnamed EU officials told the media that there had been “an ‘evaporation of trust’ with London” given the turmoil there<sup>7</sup> and that their “trust in Mrs May and her government was ‘zero.’”<sup>8</sup> Other anonymous quotes described the ratification saga as a “circus beyond comprehension” that made dealing with the UK akin to “dealing with a failed state.”<sup>9</sup>

On the British side, former supporters of the Brexit campaign and ERG members never had shied away from using the EU as a scapegoat. The above quote from William Cash about EU intransigence is a case in point. In the debate over the Withdrawal Agreement with the EU in January 2019, opponents of the agreement often argued that the EU insisted on not renegotiating the WA because the WA had turned out so overwhelmingly in its favor. The EU was described as an “expansionist empire” and the WA a tool “to keep us embodied as an annexe to the EU” (Gregory Campbell, DUP)<sup>10</sup>; the Withdrawal Agreement was said to “[continue] our subjugation to EU laws” (Suella Braverman, Conservative Party)<sup>11</sup>; and the backstop was labelled a “trap” that would

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<sup>6</sup> Kentish, Benjamin. 2019. Brexit: Ireland says it will demand ‘hundreds of millions’ from EU if no deal goes ahead. *The Independent*, January 3 <https://www.independent.co.uk/news/uk/politics/brexit-no-deal-latest-ireland-border-demand-millions-eu-leo-varadkar-a8710276.html> (Accessed August 30, 2022).

<sup>7</sup> Blitz, James, and Alex Barker. 2019. Theresa May ditches Malthouse plan ahead of Brexit talks in Brussels. *Financial Times Online*, February 19 <https://www.ft.com/content/93745dd2-3476-11e9-bb0c-42459962a812> (Accessed March 10, 2022).

<sup>8</sup> Barker, Alex. 2019. EU frustration with UK rises as Brexit talks near final hours. *Financial Times Online*. March 20 <https://www.ft.com/content/80bcdb6a-4b19-11e9-bbc9-6917dce3dc62> (Accessed March 10, 2022).

<sup>9</sup> Barker, Alex. 2019. EU frustration with UK rises as Brexit talks near final hours. *Financial Times Online*. March 20 <https://www.ft.com/content/80bcdb6a-4b19-11e9-bbc9-6917dce3dc62> (Accessed March 10, 2022).

<sup>10</sup> Hansard, vol. 652, col. 1082.

<sup>11</sup> Hansard, vol. 652, col. 910.

leave the EU “holding all the cards in any negotiation on our future relationship” (Damian Collins, Conservative Party<sup>12</sup> and, similarly, Kate Hoey, Labour<sup>13</sup>). And Boris Johnson stated, “the only certainty is that the EU will keep us locked in the backstop until we comply with its wishes, and the whole debilitating wrangle will go on for years, which is why we have to get out right now.”<sup>14</sup>

The conflict was only resolved when Theresa May resigned as prime minister and Boris Johnson replaced her. The EU used this as an opportunity to reopen the WA and fundamentally renegotiate the Northern Ireland Protocol. The House of Commons finally approved the revised WA on January 23, after Johnson had called an election that was won by the Conservative Party by a wide margin in December 2019.

This episode vividly illustrates that negotiated dissociation is not necessarily an easy path to dissociation and can be highly conflictual. In this type of dissociation, the full spectrum of two-level game dynamics (Putnam 1988; Evans, Jacobson, and Putnam 1993) comes into play, and highly motivated and well-placed domestic groups can become very influential, especially when formal domestic ratification is required. In these two-level games, it can become almost impossible to develop a strategy that both satisfies domestic interests and succeeds internationally. This was Theresa May’s core problem (Biermann and Jagdhuber 2022; Schnapper 2021).

The key question for the present study, however, is how the resulting conflicts were managed and whether this had implications for the future relationship between the UK and the EU. The intergovernmental discourse during this episode focused largely on the issue at stake: would there be a renegotiation of the WA or not? The actors did not argue that the episode illustrated an ideational conflict over fundamental norms and principles between the conflict parties. This suggests that the conflict would not lead to a significant increase in tensions between the two sides. However, prevailing images of the other side were established during the conflict. The EU side consistently argued that the UK was struggling to meet its own obligations and needed to get its act together, while the UK argued that the EU was deaf to the need to build domestic political consensus in the UK. Both images were revived in the next phase of the conflict.

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<sup>12</sup> Hansard, vol. 652, col. 1083.

<sup>13</sup> Hansard, vol. 652, col. 1055.

<sup>14</sup> Hansard, vol. 652, col. 905.

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## 5. “Britannia Waives the Rules”: The Row over the Internal Market Bill

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### 5.1 Preparations to Overwrite the Protocol: The Internal Market Bill

The revised WA, which was eventually approved by the House of Commons, no longer contained a “backstop” provision in its Northern Ireland Protocol. Instead, the Protocol contained rules that would apply to Northern Ireland regardless of whether or not the EU and the UK concluded a separate agreement on their future relationship. In short, the rules were designed to align Northern Ireland closely with EU rules to ensure the free movement of goods and people across the Irish border. But they also allowed the rest of the United Kingdom, Great Britain, to deviate from those rules, which was one of the core demands of Brexit supporters. This required some form of control on the flow of goods between Northern Ireland and the rest of the UK. Otherwise, “unregulated” goods from Great Britain could enter the EU market uncontrolled across the Irish border. The precautionary measures meant that export declarations had to be submitted for goods from Great Britain that were to go to Northern Ireland. The WA also required the British government to notify Brussels of state aid decisions that would affect the market in Northern Ireland.

As the end of the transition period approached and negotiations on the trade and cooperation agreement between the United Kingdom and the EU entered their final stages, the British government became increasingly concerned about the impact of the Northern Ireland Protocol. On September 7, 2020, a few weeks before what was then considered the deadline for negotiations on the Trade and Cooperation Agreement, the *Financial Times (FT)* reported that the UK government was planning legislation that would empower it to ignore WA obligations.<sup>15</sup> The result of this report was one of the more serious disputes between the EU and the UK during the negotiations. This dispute shows that the non-ratification conflict was not forgotten and had significant implications for the way future conflicts were handled. It also showed how conflicts at this stage quickly escalated into disputes over the other side’s compliance with basic norms. However, it also demonstrates that both sides were eventually able to hold back and reach written agreements after all.

What was at stake in this particular row appeared, at first glance, as a rather obscure detail of the technicalities of the WA. The *FT* reported that the British

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<sup>15</sup> The article was published online on September 6: Foster, Peter, Sebastian Payne, and Jim Brunsden. 2020. UK plan to undermine withdrawal treaty puts Brexit talks at risk. *Financial Times Online*, September 6, <https://www.ft.com/content/9906e0d4-0c29-4f5f-9cb0-130c75a2f7a7> (Accessed September 7, 2020).

government planned legislation for inner-British trade, the “Internal Market Bill,” which would give the British government the competence to ignore some obligations from the Northern Ireland Protocol. It would be up to the Business Secretary to decide whether or not to inform Brussels about state aid decisions and businesses would not be required to file export declarations for trade between Great Britain and Northern Ireland, “notwithstanding” obligations from the WA.<sup>16</sup> The *FT* spiced up the report with quotes from unnamed sources that said, for instance, that the Bill would be “setting up UK law in opposition with obligations under the withdrawal agreement, and in full cognisance that this will breach international law.”<sup>17</sup>

## 5.2 Conflict Dynamics: Accusations of Blackmail and Law Breaking

Apparently, the leak to the *FT* caught the government by surprise and it did not have a fixed strategy in place to defend its move as necessary and unproblematic. Environment Minister George Eustice happened to be making the rounds at morning interviews for the government that day and simply tried to portray the plans as a mere technicality. He argued that they were not an attempt to override parts of the agreement, but merely to clarify some gray areas, and that the legislation would tie up “one or two loose ends where there is requirement for legal certainty.”<sup>18</sup>

The next day, however, the opposition forced the government to respond to an urgent question in the House of Commons. Northern Ireland Secretary Brandon Lewis flatly admitted that the plans would break international law. He also was at pains to downplay the issue by pointing to legal precedence and to the limited scope of the clauses:

I would say to my hon. Friend that yes, this does break international law in a very specific and limited way. We are taking the power to disapply the EU law concept of direct effect, required by article 4, in certain very tightly defined circumstances. There are clear precedents of this for the UK and, indeed, other countries needing to consider their international obligations as circumstances change.<sup>19</sup>

This open confession to breaking international law as a matter of policy produced considerable backlash within the UK and beyond. Domestically,

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<sup>16</sup> Foster, Peter, and Jim Brunsten. 2020. UK bid to circumvent Brexit deal risks far-reaching consequences. *Financial Times Online*, September 7 <https://www.ft.com/content/ad4dfabd-4e9b-4f1b-8b5e-2266287317c7> (Accessed September 7, 2020).

<sup>17</sup> Foster, Peter, Sebastian Payne, and Jim Brunsten. 2020. UK plan to undermine withdrawal treaty puts Brexit talks at risk. *Financial Times Online*, September 6 <https://www.ft.com/content/9906e0d4-0c29-4f5f-9cb0-130c75a2f7a7> (Accessed September 7, 2020).

<sup>18</sup> The comments were made on BBC Radio and are quoted from Gehrke, Laurenz, and Zoya Sheftalovich. 2020. UK denies it's planning to rip up Brexit Withdrawal Agreement. *Politico Europe*, September 7, <https://www.politico.eu/article/uk-brexit-withdrawal-agreement-rip-up-plans/> (Accessed September 7).

<sup>19</sup> Hansard, vol. 679, col. 509.

several newspapers led with the story (despite the introduction of new Coronavirus rules that dominated the tabloids).<sup>20</sup> The opposition was quick to condemn the plans and would later seek to remove the contentious clauses by tabling a series of amendments. There was also some resistance within the administration, apparent in the leak to the *FT* but also in the resignations of “the government’s most senior lawyer,” the Treasury solicitor and permanent secretary at the Government Legal Department, Jonathan Jones,<sup>21</sup> and, a week later, of the advocate-general for Scotland, Richard Keen.<sup>22</sup> There was also resistance among the Tories,<sup>23</sup> including from former Tory PMs. Theresa May, for instance, argued in the Commons that the international reputation of the UK was on the line: “How can the Government reassure future international partners that the UK can be trusted to abide by the legal obligations in the agreements it signs?”<sup>24</sup> John Major, in a joint op-ed with former Labour PM Tony Blair, called the plans “shocking” and another instance of the government “playing fast and loose with parliamentary sovereignty and the rule of law.”<sup>25</sup> Yet there were also some Tory MPs, for example David Jones from the ERG, who pressed for an even stricter requirement on the government to renege from the WA.<sup>26</sup>

On the part of the EU, it was repeatedly emphasized that this step undermined the basis for future relations between the UK and the EU. For example, Council President Charles Michel tweeted, “breaking international law is not acceptable and does not create the confidence we need to build our future

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<sup>20</sup> On September 9, 2020, *The Independent* titled “Breaking the Law,” the *Guardian* “We are breaking law with Brexit bill, minister admits,” *The Scotsman* “Britain risks Euro court battle in Brexit showdown,” and the *i* “Britannia waives the rules,” from which the title of this subsection is borrowed.

<sup>21</sup> Payne, Sebastian, Peter Foster, and Jim Pickard, Jim. 2020. Brexit withdrawal treaty dispute triggered law chief’s resignation. *Financial Times Online*, September 9 <https://www.ft.com/content/6d7594dc-e67d-4f21-a1be-9a2327ac6474> (Accessed September 9, 2020).

<sup>22</sup> Parker, George, Jim Pickard and Peter Foster. 2020. Johnson backs down in row over internal market bill. *Financial Times Online*, September 16 <https://www.ft.com/content/9ff46c2a-4fa7-4901-9247-b2cf80c27c2a> (Accessed September 17, 2020).

<sup>23</sup> Swinford, Steven. 2020. Boris Johnson faces Tory backlash over deal that breaks the law. *The Times Online*, September 9 <https://www.thetimes.co.uk/edition/news/boris-johnson-faces-tory-backlash-over-deal-that-breaks-the-law-505rdxgq3> (Accessed September 9, 2020); O’Carroll, Lisa. 2020. Brexit bill criticised as ‘eye-watering’ breach of international law. *The Guardian Online*, September 9 <https://www.theguardian.com/politics/2020/sep/09/brexit-bill-northern-ireland-criticised-as-obvious-breach-of-international-law> (Accessed September 10); Waterfield, Bruno, Oliver Wright, and Steven Swinford. 2020. Wrecker Boris Johnson on way to no-deal, Brussels warns. *The Times Online*, September 10 <https://www.thetimes.co.uk/edition/news/wrecker-boris-johnson-on-way-to-no-deal-brussels-warns-lnbq69xwd> (Accessed 10 September 2020).

<sup>24</sup> Hansard, vol. 679, col. 499.

<sup>25</sup> Major, John, and Tony Blair. 2020. This shameful bill will imperil peace and kill trust in Britain. *The Sunday Times*, September 13, 2020.

<sup>26</sup> Coates, Sam (@SamCoatesSky). 2020. Video excerpt from an interview with David Jones on *Sky*. Twitter, September 9 <https://twitter.com/samcoatessky/status/1303764163236450305> (Accessed September 10, 2020).

relationship.”<sup>27</sup> Commission President Ursula von der Leyen also shared her concern on Twitter, posting the equation “Pacta sunt servanda = the foundation of prosperous future relations.”<sup>28</sup>

Unmoved by the backlash, Cabinet Minister Michael Gove reiterated in an emergency Joint Council Meeting (the EU-UK body to oversee the implementation of the WA) that the legislation would be introduced into the parliamentary process as planned. At the same time, the EU issued a strongly worded statement in which it emphasized legal obligations that resulted from the WA, listed the violations of the WA that would result from the Internal Market Bill and set a deadline (end of September) for withdrawing the contentious measures from the Bill. It highlighted two potential sets of consequences should the UK government continue with its plans: legal measures that are foreseen in the WA should one party renege on its commitments – instruments “which the European Union will not be shy in using”; and a potential breakdown of the ongoing negotiations as the plans of the UK government “would break international law, undermine trust and put at risk the ongoing future relationship negotiations.”<sup>29</sup>

The EU thus made the issue one of legal principle which it would handle by legal means; but also one of damaged trust that could undermine future relations. The UK government responded on both levels. Legally, it sought to demonstrate that it was doing nothing wrong. It published a legal position that argued that international agreements were only binding on the UK insofar as parliament chose to make them so.<sup>30</sup> This took some of the bluntness out of the original argument that the Internal Market Bill constituted a breach of internal law. The government also worked toward heading off a potential parliamentary rebellion and struck a deal with Tory backbenchers by introducing a parliamentary lock into the Internal Market Bill. Any decision to disapply the critical WA clauses would now have to be approved by parliament, rescuing the principle of parliamentary sovereignty. On the level of general trust, the government went on the attack and turned the “betrayal of trust”

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<sup>27</sup> Michel, Charles (@eucopresident). 2020. “The withdrawal Agreement was concluded and ratified by both sides, it has to be applied in full”. Twitter, September 9 <https://twitter.com/eucopresident/status/1303675025925591042> (Accessed September 10, 2020).

<sup>28</sup> Von der Leyen, Ursula (@vonderleyen). 2020. “Very concerned about announcements from the British government on its intentions to breach the Withdrawal Agreement”. Twitter, September 9 <https://twitter.com/vonderleyen/status/1303664931485745153> (Accessed September 10, 2020).

<sup>29</sup> European Commission. 2020. Statement by the European Commission following the extraordinary meeting of the EU-UK Joint Committee. European Commission, September 10 [https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement\\_20\\_1607/STATEMENT\\_20\\_1607\\_EN.pdf](https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_20_1607/STATEMENT_20_1607_EN.pdf) (Accessed September 11, 2020).

<sup>30</sup> HM Government. 2020. HMG Legal Position: UKIM Bill and Northern Ireland Protocol, UK Government, September 10 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/916702/UKIM\\_Legal\\_Statement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916702/UKIM_Legal_Statement.pdf) (Accessed September 11, 2020).



argument against the EU. In doing so it seized on an argument that had been introduced into the debate by the tabloid *The Sun* already on September 8. According to that story the EU negotiating team had threatened to block the export of agricultural goods from Great Britain to Northern Ireland, should talks about the TCA break down.<sup>31</sup>

While the mechanism through which the EU could do so is complex,<sup>32</sup> the government boiled it down to the EU blackmailing the UK, threatening to cut off food supplies for Northern Ireland. Under the headline “Let’s make the EU take its threats off the table by passing this Bill and protecting our country,” Boris Johnson attacked the EU in an op-ed for *The Daily Telegraph* on September 12.<sup>33</sup> While reaffirming British friendship with the EU in principle he argued the EU had threatened to “stop the export of food products from GB to NI” and that it wanted to “impose a full-scale trade border down the Irish Sea.” He emphasized that all this may be due to a “misunderstanding about the terms of the Withdrawal Agreement” but that “we cannot leave the theoretical power to carve up our country – to divide it – in the hands of an international organization.” The same argument was reiterated by UK chief negotiator David Frost a day later.<sup>34</sup>

With this move, the British plans were basically depicted as a matter of self-defense against an over-reaching and imperially minded European Union, a line of argument that had served the Brexit referendum campaign well. Johnson doubled down on his accusations in an interview with *The Sun*, in which he called the EU “abusive” and said he did not believe the EU negotiated in good faith, despite the UK having been “paid up members for 45 years.”<sup>35</sup>

The EU for its part sought not to defend against these claims but to portray the British plans for the Internal Market Bill as an aberration from Britain’s character in international diplomacy. In her State of the Union address, a few days after the new accusations from the British side, Commission President von der Leyen, for example, said that implementing the WA without any escape clauses would be “a matter of law, trust and good faith” and went on:

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<sup>31</sup> Cole, Harry (@mrharrycole). 2020. “EXCLUSIVE: The dirty tactics Brussels used on Northern Ireland that enraged London enough to push button on Withdrawal Agreement bombshell” (thread). Twitter, September 8 <https://twitter.com/mrharrycole/status/1303444107658956800?s=21> (Accessed September 9, 2020).

<sup>32</sup> In a no-deal scenario, the UK would have needed to get on a list of “third countries” that are allowed to export agri-food goods to the EU. If the EU kept the UK off that list, the country would not be allowed to export those goods into the EU, and by implication no such goods could have travelled from Great Britain to Northern Ireland either.

<sup>33</sup> Johnson, Boris. 2020. “Let’s make the EU take its threats off the table by passing this Bill and protecting our country”. *The Daily Telegraph*, September 12.

<sup>34</sup> Frost, David (@DavidGHFrost). 2020. “1/7 I would like to make a few comments and state a few facts, in my capacity as the PM’s negotiator in the current and last autumn’s talks” (thread). Twitter, September 13 <https://twitter.com/DavidGHFrost/status/1305121856807211008> (Accessed September 13).

<sup>35</sup> Cole, Harry. 2020. EU are “abusive”. *The Sun*, September 17.

And that is not just me saying it – I remind you of the words of Margaret Thatcher: “Britain does not break Treaties. It would be bad for Britain, bad for relations with the rest of the world, and bad for any future Treaty on trade”. This was true then, and it is true today. Trust is the foundation of any strong partnership.<sup>36</sup>

From then on, both sides largely refrained from engaging in further rhetorical battles. Even though the dispute continued in principle until December, the issue did not receive much public attention anymore. This was due to decisions on both sides. The EU pursued a two-track strategy: confining the issue to a legal matter by threatening legal action but at the same time de-emphasizing the trust issue and continuing talks with the British.<sup>37</sup> In these talks the EU allegedly assured the UK that it would be listed as a third country which would enable it to export agri-food products to EU regulated areas, which paved the way for the government to withdraw the contentious clauses.<sup>38</sup> The British side made moves towards burying the issue but never quite went through with it until December 8. The Internal Market Bill first completed its way through the Commons, where it was passed by a margin of 84 votes with 21 Tory abstentions.<sup>39</sup> But the government signaled it would hold up the further proceedings by not tabling it in the House of Lords until after an EU summit that was scheduled for October 15 and, at the time, considered the make-or-break event for any Brexit deal.<sup>40</sup> This meant, however, that the EU’s deadline for withdrawing the problematic clauses passed and the EU actually initiated legal proceedings. The Bill, then, was debated in the Lords with the problematic clauses still included, leading to “the largest defeat in the House of Lords this century” in November 2020, with cross-party support for dropping the clauses in question.<sup>41</sup> On December 8, during the (final) end game of the TCA negotiations, the UK government and the EU

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<sup>36</sup> von der Leyen, Ursula. 2020. State of the Union Address by President von der Leyen at the European Parliament Plenary. European Commission, September 16 [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_1655](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655) (Accessed September 18, 2020).

<sup>37</sup> Brunsden, Jim. 2020. Brussels renews legal threat over UK internal market bill. *Financial Times Online*, September 22 <https://www.ft.com/content/75e3b3aa-757a-4ad2-968d-103354a7d3e3> (Accessed September 23, 2020).

<sup>38</sup> Gallardo, Cristina. 2020. UK satisfied EU won’t block food exports after Brexit. *Politico Europe*, September 23 <https://www.politico.eu/article/uk-rules-out-brexite-row-over-third-country-listings-for-food-exports/> (Accessed September 24, 2020).

<sup>39</sup> Walker, Peter, and Owen Bowcott. 2020. Brexit: internal market bill passed by Commons despite Tory concerns. *The Guardian Online*, September 30 <https://www.theguardian.com/politics/2020/sep/29/internal-market-bill-passed-by-commons-despite-tory-concerns> (Accessed June 7, 2021).

<sup>40</sup> Wright, Oliver, and Bruno Waterfield. 2020. Internal market bill: No vote until days before no-deal Brexit. *The Times*, September 23, 2020.

<sup>41</sup> Ricketts, Lord Peter. 2020. The Internal Market Bill and its rough ride through the Lords. UK in a Changing Europe, Commentary, November 12 <https://ukandeu.ac.uk/the-internal-market-bill-and-its-rough-ride-through-the-lords/> (Accessed June 7, 2021).

announced that they had found “mutually agreed solutions.”<sup>42</sup> This enabled the British government to drop the clauses in question and the Bill could finally receive royal assent on December 17, 2020.<sup>43</sup>

This conflict was handled in a considerably more antagonistic way than the previous one. Part of this was due to the change in leadership, as Boris Johnson had advocated a more confrontational stance for quite some time. In his time as foreign minister under Theresa May, Johnson had suggested a more Trumpian approach for Brexit negotiations. At the time, *Buzzfeed* quoted from a leaked audio recording, in which Johnson expressed his admiration for Trump (allegedly at a dinner reception for British pressure group *Conservative Way Forward*):

“I am increasingly admiring of Donald Trump,” Johnson said. “I have become more and more convinced that there is method in his madness [...] Imagine Trump doing Brexit,” Johnson said. “He’d go in bloody hard... There’d be all sorts of breakdowns, all sorts of chaos. Everyone would think he’d gone mad. But actually you might get somewhere. It’s a very, very good thought.”<sup>44</sup>

The British approach started with attempts to downplay the matter as a mere technicality. The criticism from the EU and also from the opposition and some Tories was, however, a principled one: that this was a move that broke a basic principle of international law – *pacta sunt servanda* – and that would harm trust in the long run. The British government then switched from defense to attack, going in “bloody hard,” and responded with a similar principled argument: that the EU was not negotiating in good faith and sought to blackmail the UK by threatening to cut off Northern Ireland from British food supplies. The conflict was no longer focused on the core issue at stake – how to reconcile UK desire for freedom of action with the EU desire for protecting its internal market. Instead, the other side was accused of not adhering to basic norms of international conduct. The experience from the previous conflict may have contributed to both side’s unwillingness to accommodate the other. The EU previously had accepted a revision of the Northern Ireland Protocol and now the UK again was unwilling to accept the commitments it had entered into internationally. The UK, in contrast, saw the EU react to its concerns with the same intransigence it had displayed at first in the non-ratification dispute.

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<sup>42</sup> Cooper, Charlie. 2020. UK to drop plan to breach international law. *Politico Europe*, December 8 <https://www.politico.eu/article/uk-to-drop-planned-laws-that-would-breach-international-law/> (Accessed December 8, 2020).

<sup>43</sup> Parliamentary Bills. United Kingdom Internal Market Act 2020. UK Parliament <https://bills.parliament.uk/bills/2775> (Accessed June 7, 2021).

<sup>44</sup> Spence, Alex. 2018. Let Trump Handle Brexit: An Explosive Leaked Recording Reveals Boris Johnson’s Private Views About Britain’s Foreign Policy. *Buzzfeed*, June 7 <https://www.buzzfeed.com/alexspence/boris-johnson-trump-brexit-leaked-recording> (Accessed August 30, 2022).

It is important to note, though, that both sides also showed some restraint in this escalating conflict. Even though they framed the issue as a principled one they also emphasized that there actually was common ground, to which the other side could easily return. The basic thrust of the arguments was “you are better than this,” not “you are beyond help”; “we are from the same world, you just seem to have forgotten about it,” rather than “we are from different worlds.” The EU also stuck to its general approach: resolving conflicts through legal means rather than endangering the talks overall, as some demanded. Eventually, this also helped to deescalate the conflict.

Yet the memory of each side’s unwillingness to compromise and of the fundamental attacks they had levelled at each other lived on. This is the problem with a “going in hard” strategy. It might not only derail the negotiations in the short run (which it did not). There is also the long-term danger that the relations to the other side are so severely damaged that the other side’s goodwill is lost for a long time. And this became apparent when problems in the implementation of the Northern Ireland Protocol came to the fore shortly after it finally went into force.

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## 6. “A Partner That Cannot Respect Its Own Commitments”: The Conflict over the Implementation of the Northern Ireland Protocol

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### 6.1 Implementation Problems and UK Unilateral Action

In 2019, the Johnson government had argued that the revised version of the Northern Ireland Protocol, which it had negotiated to break the deadlock in Parliament, would allow the Irish border to remain open without the need to introduce controls on goods between Great Britain and Northern Ireland. In January 2021, when the TCA came into force and Northern Ireland’s special status took effect, these claims were proven false.

The implementation problems concerned goods, whose transfer from Great Britain to Northern Ireland was subject to controls under the Northern Ireland Protocol. Both sides had agreed on grace periods for certain goods, as both acknowledged that setting up a control regime would require major adjustments not only by the state but also by many market participants who would have to submit new documents to trade goods inside the UK. The shortest of this was a three-month grace period that made supermarkets and their suppliers exempt from EU agri-food rules. Immediately after the Brexit transition period had been over and the TCA had entered into force, there were numerous reports (and pictures) of empty supermarket shelves in Northern

Ireland in the media.<sup>45</sup> In early 2021, the UK government complained that the grace periods were too short and instead of implementing these checks in April 2021, the government simply extended the grace periods unilaterally and without legal basis.

The issue at stake in this third conflict, then, was the actual implementation of the control provisions in the Northern Ireland Protocol by the British government. The EU insisted on the faithful implementation of the Protocol. The UK government argued that this would be practically impossible and would eventually endanger peace in Northern Ireland. Indeed, in the context of setting up checkpoints, tensions in Northern Ireland rose again and violence was threatened against the checkpoints.<sup>46</sup> Given these problems and the unwillingness of the EU to change the provisions, the UK government resorted to unilateral measures.

We will see below that the way conflicts had been managed during the negotiation phase had a significant impact on how both parties approached this implementation conflict. Since it was essentially a re-run of previous conflicts, both sides were even less willing to make concessions, leaving the conflict unresolved and straining EU-UK relations to this day.

## 6.2 Conflict Dynamics: Corrosion of Trust

EU and member state officials were quick to point out that unilateral action by the UK made it exceedingly difficult to build a cooperative relationship with the UK, not because of conflicting substantive interests but because of the unreliability of the UK that had, from their viewpoint, been on display in earlier conflict episodes as well. Irish Foreign Minister Simon Coveney issued a statement that said, “a unilateral announcement is deeply unhelpful to building the relationship of trust and partnership that is central to the implementation of the Protocol.”<sup>47</sup> The Irish Taoiseach Micheál Martin was a bit more direct, stating that “unilateral action to disapply or not to implement aspects of the Protocol does nothing but corrode trust, the only basis on

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<sup>45</sup> Pogatchnik, Shawn. 2021. Supermarket pleas mount as Brexit leaves Northern Ireland shelves bare. *Politico Europe*, January 13 <https://www.politico.eu/article/supermarket-pleas-mount-as-brexit-leaves-ni-shelves-bare/> (Accessed January 20, 2021).

<sup>46</sup> Pogatchnik, Shawn. 2021. Inspectors pulled from Brexit checks at Northern Ireland ports over threats. *Politico Europe*, February 2 <https://www.politico.eu/article/inspectors-brexit-eu-uk-checks-northern-ireland-ports-threats/> (Accessed August 30, 2022).

<sup>47</sup> Coveney, Simon. 2021. Statement by Minister Coveney on UK announcement on Ireland and Northern Ireland Protocol. Department of Foreign Affairs, March 3 <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2021/march/statement-by-minister-coveney-on-uk-announcement-on-ireland-and-northern-ireland-protocol.php> (Accessed March 14, 2021).

which sustainable long-term solutions can be found.”<sup>48</sup> The European Commission, finally, was very clear in arguing that the unilateral action by the UK continued a pattern of behavior that had already led to problems in the negotiation phase. It accused the UK not only of breaching the provisions of the Northern Ireland Protocol but also the “good faith obligation under the WA” and of acting “in breach of the mutual trust and spirit of cooperation that we managed to rebuild in the last months of 2020, after the uncertainty created by the UK Internal Market Bill.”<sup>49</sup>

In terms of concrete counter-measures, the EU took legal action as foreseen in the agreements. But it also demanded of the UK to return to a faithful implementation of the WA. To this effect, the UK government should present “a credible roadmap, with clear deliverables and milestones for the implementation of the relevant rules and requirements of the Protocol for which implementation is deficient or delayed.”<sup>50</sup> The EU stopped short, however, of setting in motion formal arbitration procedures under the WA.

The dispute continued to linger, though. Intermittently, the Johnson government threatened to use Article 16 of the Protocol<sup>51</sup> in order to suspend its application altogether. In a July 2021 Command Paper<sup>52</sup> the Johnson government took back the Article 16 threat but demanded “significant” changes to the Protocol, arguing that the Protocol proved too much of a burden to the British economy, divisive for Northern Ireland, and that it gave an inadequately prominent role to the EU’s Court of Justice (CJEU).

There was little appetite in the EU, however, to engage in renewed negotiations and a key reason cited by observers and officials alike was the experience that the Johnson government could not be trusted to comply with revisions it had demanded itself. After all, the same government had requested a revision of the WA in 2019, the EU had complied with the request and instead of implementing the revised version, the UK had first attempted to unilaterally overwrite it and now asked for revisions again. These memories were most probably still very much alive in Brussels. Especially the row over the

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<sup>48</sup> Lynch, Suzanne. 2021. Taoiseach pushes back against calls in US for referendum on Irish unity. *The Irish Times Online*, March 15 <https://www.irishtimes.com/news/ireland/irish-news/taoiseach-pushes-back-against-calls-in-us-for-referendum-on-irish-unity-1.4511044> (Accessed March 14, 2022).

<sup>49</sup> Šefčovič, Maroš. 2021. Letter from European Commission Vice-President Maroš Šefčovič to David Frost. European Commission, March 15 [https://ec.europa.eu/info/publications/letter-vice-president-maros-sefcovic-david-frost-15-march-2021\\_en](https://ec.europa.eu/info/publications/letter-vice-president-maros-sefcovic-david-frost-15-march-2021_en) (Accessed August 30, 2021).

<sup>50</sup> Ibid.

<sup>51</sup> This article allows either party to “take appropriate safeguard measures” if application of the Protocol “leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade.”

<sup>52</sup> Secretary of State for Northern Ireland. 2021. *Northern Ireland Protocol: The Way Forward*, CP 502, UK Government, July [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1008451/CCS207\\_CCS0721914902-005\\_Northern\\_Ireland\\_Protocol\\_Web\\_Accessible\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible__1_.pdf) (Accessed March 14, 2022).

Internal Market Bill had been a formative experience. In September 2021, the former EU Chief negotiator Michel Barnier called the Bill “my greatest disappointment” and said that it had caused “a collapse of trust.”<sup>53</sup> There was an obvious common thread running through the Johnson government’s actions, “a process of ‘bad faith’ which began with the Internal Market Bill, the unilateral extension of grace periods to ease trade between Britain and Northern Ireland and the command paper in July setting out the UK’s plans to rewrite the protocol.”<sup>54</sup> The EU’s uncompromising stance can therefore be read as an unwillingness to make the same mistake twice.

In a statement to parliament introducing the British demands for renegotiation, the UK government regretted that the relationship between the UK and the EU was not one “that reflects our strong common interests and values. Instead of that, we are seeing a relationship which is punctuated with legal challenges and characterised by disagreement and mistrust.”<sup>55</sup> For the EU, this mistrust resulted from the perception that the Johnson government was unwilling to comply with obligations vis-à-vis the EU to which it originally had agreed. This shadow of the conflict over the Internal Market Bill could be seen in EU reactions to the Command Paper.

Commission Vice-President Maroš Šefčovič issued a statement in which he emphasized the continued readiness of the EU to “seek creative solutions, within the framework of the Protocol, in the interest of all communities in Northern Ireland.” But he also insisted that this could and should be done without revising the Protocol: “Respecting international legal obligations is of paramount importance.”<sup>56</sup> Somewhat more bluntly, Sebastian Fischer, the speaker of the German foreign ministry, tweeted: “Is it too much to expect the [UK] to stand by what it has negotiated, signed and ratified?”<sup>57</sup> France’s

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<sup>53</sup> Coman, Julian. 2021. Michel Barnier: why is the EU’s former Brexit chief negotiator sounding like a Eurosceptic? *The Observer Online*, September 26 <https://www.theguardian.com/world/2021/sep/26/michel-barnier-french-presidency-my-secret-brexiteer-diary-interview> (Accessed August 30, 2022).

<sup>54</sup> Rahman, Mujtaba. 2021. Britain misreads the EU’s resolve on Northern Ireland. *Financial Times Online*, November 17, Opinion <https://www.ft.com/content/ee37396b-ab8e-49ad-9b4e-a2cda8c50f3a> (Accessed August 30, 2022).

<sup>55</sup> Lewis, Brandon. 2021. Secretary of State for Northern Ireland, Brandon Lewis MP, Oral Statement: Wednesday July 21, 2021, UK Government <https://www.gov.uk/government/news/secretary-of-state-for-northern-ireland-brandon-lewis-mp-oral-statement-wednesday-21st-july-2021> (Accessed March 15, 2022).

<sup>56</sup> Šefčovič, Maroš. 2021. Statement by Vice-President Maroš Šefčovič following today’s announcement by the UK government regarding the Protocol on Ireland / Northern Ireland. European Commission, July 21 [https://ec.europa.eu/commission/presscorner/detail/fr/statement\\_21\\_3821](https://ec.europa.eu/commission/presscorner/detail/fr/statement_21_3821) (Accessed March 15, 2022).

<sup>57</sup> Fischer, Sebastian (@SFischer). 2021. “A #Brexit reminder: The Northern Ireland Protocol was negotiated by the [UK] government.” Twitter, July 21 [https://twitter.com/SFischer\\_EU/status/1417884340965494791](https://twitter.com/SFischer_EU/status/1417884340965494791) (Accessed March 14, 2021).

Europe Minister Clement Beaune rhetorically asked, “How could we renegotiate with a partner that cannot respect its own commitments?”<sup>58</sup>

The sticking point, in other words, was not so much British complaints about problems caused by the Protocol; but rather the principled argument that existing agreements had to be honored. The EU’s insistence on this was so strong because this was the third time within about two years that the UK did not live up to commitments it had made to the EU. The UK, in turn emphasized the history of EU ignorance towards substantive British concerns with the agreements and the EU’s tendency to blackmail the UK that they argued had been apparent in the previous conflict episodes already.

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## 7. Conclusions

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The three conflict episodes examined in this study show that relations between the UK and the EU have deteriorated significantly over time. During the conflict over the non-ratification of the WA, the intergovernmental discourse focused on the central political question of why ratification should or should not take place and how the other side could contribute to one’s preferred solution. In the two subsequent phases, the focus shifted and the parties to the conflict accused each other of disregarding basic norms and values of international conduct. The three episodes also show that the way conflicts were handled in the negotiation phase had an impact on the implementation phase. For EU actors, the thread running through the conflicts was the unwillingness (or inability) of the British government to live up to commitments it had made to the EU. While the EU eventually compromised in the first conflict by reopening negotiations on the Northern Ireland Protocol, its position hardened in the second and third conflicts. For the British government, the EU’s principled stance and its resistance to changes to agreements that faced real problems was a reason to take matters into its own hands and eventually take unilateral action. A cursory look at events since mid-2021, after the end of the period examined here, shows that this pattern seemed to continue. In June 2022, the Johnson government tabled another bill with implications similar to those of the Internal Market Bill. The “Northern Ireland Protocol Bill” would allow the government to disapply rules of the Protocol and thus to ignore its international obligations. At the time of writing, the bill had been passed in the House of Commons but was still being scrutinized in the House of Lords.<sup>59</sup> The person responsible for drafting the bill was then Foreign

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<sup>58</sup> Rose, Michel. 2021. Exclusive-French minister rejects UK Brexit renegotiation request. *Reuters Online*, July 22 <https://www.reuters.com/article/us-britain-eu-france-exclusive-idAFKBN2E526Y> (Accessed 15 March 2022).

<sup>59</sup> Parliamentary Bills. Northern Ireland Protocol Bill. UK Parliament <https://bills.parliament.uk/bills/3182> (Accessed September 10, 2022).



Secretary Liz Truss, who succeeded Boris Johnson as prime minister in September 2022. The EU heavily criticized the bill, and when it was tabled by the government, the EU reactivated its legal proceedings against the UK which it had begun in March 2021 and halted in September 2021.<sup>60</sup>

The Northern Ireland Protocol is certainly the most prominent conflict that has arisen during the Brexit negotiations. However, there are other cases as well. Fishing rights were another highly politically charged case (The UK in a Changing Europe 2020). The issue was fiercely contested almost until the last minute of the TCA negotiations. Even after the agreement was concluded, implementation proved to be quite difficult, and the conflict between the UK and France in particular escalated to such an extent that both sides even sent naval vessels into the Channel for a few days.<sup>61</sup>

These highly contentious issues show that dissociation by negotiation is by no means a guarantee that the dissociating and remaining states will have a cooperative relationship after withdrawal. What happened during the negotiations is likely to affect the parties' conflict behavior thereafter.

That conflicts can escalate to a point where they will have lasting effects on the relationship has much to do with the fact that the general quality of this relationship is not necessarily a primary concern for the negotiating parties. Internal issues intervene. Even if both sides have an abstract interest in maintaining friendly relations after dissociation, this shared interest might be trumped by domestic or internal organizational processes that contradict it. For the UK, it was particularly the strong domestic veto position of those actors that had the least interest in maintaining good relations with the EU – hardcore Brexiteers who were willing to let the WA and TCA negotiations fail.<sup>62</sup> For the EU it was its interest in organizational survival.<sup>63</sup> There was a fear that an overly accommodating stance could invite imitators and result in further exits from the EU. In negotiated dissociations, the organization in question thus has strong incentives to set a deterrent example and make the exit particularly expensive for the leaving state even if this entails short-term costs for the organization and has a negative impact on its relation to the former member (see also Walter 2021).

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<sup>60</sup> Šefčovič, Maroš. 2022. Statement by Vice-President Maroš Šefčovič on the UK government's decision to table a bill disapplying core elements of the Protocol on Ireland/Northern Ireland. European Commission, June 13 [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_22\\_3698](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_3698) (Accessed August 30, 2022).

<sup>61</sup> Ross, Tim, and Ania Nussbaum. 2021. Brexit Fish Fight Rages After Navy Ships Sent to Jersey. *Bloomberg Online*, May 6 <https://www.bloomberg.com/news/articles/2021-05-06/brexit-fish-fight-rages-after-u-k-france-send-navies-to-jersey> (Accessed June 7, 2021).

<sup>62</sup> For the other highly salient conflict case in Brexit negotiations, fisheries, domestic and electoral interests also mattered greatly (Ruscitti 2022).

<sup>63</sup> I take here the unity of the EU during the Brexit negotiations as a given, which is itself in need of an explanation (Jensen and Kelstrup 2019). The governments of EU member states, of course, are themselves subject to domestic demands (Jurado, León, and Walter 2022) and in other contexts this could lead to additional risks for escalation.

But it is important to note that none of the conflicts ever escalated to a point where the relationship between the UK and EU members would have collapsed. They always talked to each other. In the non-ratification conflict, the EU eventually offered a renegotiation of the WA, the Johnson government eventually eliminated the controversial passages from the Internal Market Bill, and the EU halted its legal proceedings against the UK concerning the implementation of the Northern Ireland Protocol. After all, negotiation was the default mode of dealing with this case of dissociation and the parties always returned to it. Three additional factors certainly helped. First, the favorable environment in which Brexit took place. The numerous additional institutional links between the two sides, which were never questioned, kept the relationship alive and contributed to its health. Second, the legalistic approach of the EU, which is baked into its organizational culture, implied that escalation by the EU would happen via legal proceedings, which is certainly not the most dramatic type of escalation imaginable. Most importantly, legal proceedings give the opposing parties time to come up with alternative solutions. Third, given the high stakes of the peace process in Northern Ireland, no one has an interest in an uncontrolled escalation of the conflict. Nonetheless, the potential for conflict in the Brexit process is there, relations have already suffered greatly, and the conflict continues to this day (Wager 2022).

More generally, none of the factors that contributed to restraint in the Brexit case are intrinsic to negotiated dissociations as a type. Brexit shows that dissociation by negotiation can contribute to deteriorating relations and rising tensions. While negotiations themselves may help to resolve conflicts in a more cooperative manner than in other dissociation processes, the necessity to ratify and implement negotiated results increases the opportunity for conflict. In this sense, dissociation by negotiation appears to be a double-edged affair.

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## Drifting Apart: The Dissociation of States from International Cooperation and its Consequences

Matthias Dembinski & Dirk Peters

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