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Law and scale: lessons from Northern Ireland and Brexit

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Abstract
All aspects of law possess scaler elements, but critiques from the 'politics of scale', a concept well established in political geography, remain rare in legal analysis. Brexit, especially as regards Northern Ireland, provides a key opportunity to consider scaler analysis both in a descriptive and theoretical sense. Scale deepens our understanding of how law co-constitutes multiple scales but also highlights where a flat understanding of law tied to vertical jurisdictional frames foils attempts to garner a full understanding of its operation. Northern Ireland, a legal and political space that from one perspective lends itself to an apparently clear-cut vertical description of legal scales, actually presents a rich space where networked, rhetorical and nodular scales and structures continuously (re)contest scaled solutions. The Brexit outcome of what used to be known as the Protocol on Ireland/Northern Ireland and is now known as the Windsor Framework – and specifically how the Framework is intended to operate in practice – provides an opportunity to not only understand Northern Ireland within a scale and law frame, but also to highlight the shortcomings of law's traditional scaler approach and what lessons may be learned when analysing or engaging with the intersection of law and politics in similar future situations.

Keywords: scale; Brexit; Northern Ireland; Windsor Framework; devolution

Introduction

Scale is everywhere in law. From territorial and temporal jurisdictions to delineations of the public and private, or (within academia) between the comparative, international or domestic or the nitty gritty of monism and dualism, scale is omnipresent – to the point where it is almost an unremarkable legal certitude.[1] Yet, the Windsor Framework[2] (formerly known as the Protocol on Ireland/Northern Ireland[3]) demonstrates that the forms that scale takes in law are far from certain. The Framework, which is at once an inevitable and an entirely challengeable outcome of the decision of the United Kingdom to leave the European Union, is suffused with scale. In its production, its lasting contestation and its (limited/intended) operation, it provides insight into the ways in which law reacts to, co-opts

[1]M Valverde *Chronotopes of Law: Jurisdiction, Scale and Governance* (Abingdon: Routledge, 2015) p 58.

[2]The Windsor Framework is not a Treaty, unlike the Withdrawal Agreement concluded in 2020, but instead is a set of decisions agreed between the UK and the EU under the Withdrawal Agreement. It was formally adopted on 24 March 2023 in the Withdrawal Agreement's Joint Committee (Decision 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 (2023), available at https://commission.europa.eu/system/files/2023-03/Joint%20Committee%20Decision%20No%201-2023.pdf).

[3]Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019) OJ C 384I 1, Protocol on Ireland/Northern Ireland.

and challenges (new) scales to produce outcomes that themselves are never as static as may be assumed from scale's near-absence from legal commentary.[4]

The 'politics of scale' is an attempt 'to capture the interplay of prevailing power mechanisms and political struggles', where scales serve not only as a mechanism of 'constraint and exclusion' but also 'a weapon of expansion and inclusion'.[5] Legal scales are entirely socially constructed, albeit often presented as natural and objective. Scales achieve their apparent ontological status partially because the jurisdictional and geographical scales of sub-national, national, regional, supra- and inter-national are (re)presented as untroubled categorisations of objective fact.[6] The 'politics of scale' reconsiders such sites of governance, but also their formations, their relationships and how they are reconfigured and contested.[7] Multi-level governance, the nested categories of sub-national to international, is a familiar concept in analysis across trade and human rights law but is present also in other legal areas such as constitutional or family law. Jurisdiction, both temporal and territorial, is a scale-based legal construct, and one that is deployed repeatedly. Northern Ireland, as a sub-national unit, fits within the United Kingdom, which at the time of Brexit fit within both the European Union and the Council of Europe – which in turn then fit within the United Nations or the World Trade Organisation. Presented like this, we are faced with an international legal order matryoshka doll, simple and neat.[8] Yet, viewing the Framework through the lens of the 'politics of scale', another perspective emerges: one where neatness is eschewed in favour of messiness, and political (and consequent legal) compromise, where the final determinant of the settlement is not per se the largest of the matryoshka dolls, as traditional international relations theory would assume.

This paper looks to jurisdictional processes of scaling and re-scaling in the context of Brexit, and specifically, Northern Ireland's Brexit settlement. Using a 'politics of scale' framework, it critiques prevailing nested hierarchical scale models, showing how overlapping temporal moments and turning points produce assemblages of non-linear networked nodes apparent in Northern Ireland, but pertinent elsewhere. There are many examples of scaler complexity in Northern Ireland's Brexit settlement that this paper will address, including the multiplication of borders of a variety of kinds, the incorporation of human rights bodies into oversight structures, processes of consent and dynamic alignment of temporal compression and extension and geographic distance. Some of these scales have deep historic roots, where others are novel. It is somewhat of a cliché to suggest that Northern Ireland is exceptionally situated; nevertheless, it is this uniqueness that enables an imagining of scale-based explanations hitherto unseen or rare in law.

This paper will assess the way that scale helps account for not only the negotiations that produced both the Protocol and the Framework, but also for the Framework's operation in practice. It first outlines the various phases of the Brexit negotiations with respect to Northern Ireland, before moving to the Windsor Framework, and highlights that simplistic depictions of 'nested scales', pervasive in international relations, do not account for the existence of the Framework or its operational contents. The remainder of the paper considers the 'politics of scale' and how its insights do a better job of explaining not only how the UK and the EU arrived at the Framework as a legal structure, but how it is that an international agreement concluded between the UK and the EU is full of mechanisms that rely on disparate local and regional actors rather than supranational ones.

The 'politics of scale' framework is relevant across legal scholarship; it is, as we argue, ever-present. Here, however, we use it for a specific purpose: in situations where legal or political complexity lends itself to arguing that a situation is exceptional (or *sui generis*, as EU scholars would say), applying

[4]An exception being our previous work: S de Mars and A O'Donoghue 'Beyond matryoshka governance in the 21st century: the curious case of Northern Ireland' in A McHarg et al *The Brexit Challenge for Ireland, and the United Kingdom: Constitutions under Pressure* (Cambridge: Cambridge University Press, 2021).

[5]J Blakey 'The politics of scale through Rancière' (2021) 45 Progress in Human Geography 623; see also N Brenner 'The limits to scale? Methodological reflections on scalar structuration' (2001) 25 Progress in Human Geography 591 at 599.

[6]SA Marston 'The social construction of scale' (2000) 24 Progress in Human Geography 219.

[7]D Delaney and H Leitner 'The political construction of scale' (1997) 16 Political Geography 93 at 93.

[8]de Mars and O'Donoghue, above n 4.

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scaler analysis enables us to find some commonality in that complexity. Carr and Lempert have argued that:

> the fact that scaling involves vantage points and the positioning of actors with respect to such vantage points means that there are no ideologically neutral scales, and people and institutions that come out 'on top' of scalar exercises often reinforce the distinctions that so ordained them.

While this will undoubtedly accurately describe many legal and political outcomes, what Northern Ireland and Brexit demonstrate is that it is far from inevitable.[9] If 'determining scale means determining the mechanics of power',[10] the Brexit processes (especially with regard to the Framework) can tell us something about the scale-based mechanics of law and power. While the 'politics of scale' cannot explain all of what occurred and now operates regarding Brexit and Northern Ireland, it does, we argue, explain a large part of its dynamic. We conclude by arguing that the exercise of applying 'politics of scale' to legal and political developments produces lessons that are not necessarily limited to Northern Ireland – and that scaler reimagining should be engaged in more widely by both legal scholars and by other actors who find themselves at the bottom of what is usually conceived of as a 'nested' hierarchy.

1. The politics of scale

(a) Why scaler analysis?

Scaler analysis offers an opportunity to consider the many varied and intermingling scales apparent in the Protocol and its replacement Framework, and to consider its ostensibly messy and frustrating current (and intended final) state. The 'politics of scale' is about both fixity and motion and the dynamics that emerge and continuously evolve within that politics.[11] Scale is also, as Jones argues, a representational trope.[12] It frames what is knowable and, in doing so, gives spaces within that frame meaning, and, at times, apparent additional ontological heft.[13] Scale is a very common form of legal machinery, so common that it mostly operates without comment, yet scale frames how we create, implement, challenge and change law and the governance orders that laws underpin. The dynamics that produce both nested governance scales, the familiar sub-national to global, as well as the more complex ideas of networked, nodal, rhetoric, and rhizomic dynamics of governance, are all operational across law. Fundamental to legal scaler analysis is acknowledging the contested nature of these structures, which, contrary to how we often understand them, are far from immutable. Rather, scales as social constructions are both malleable and open to debate.

Scale reflects issues of core and periphery and of majority and minority, but also of temporalities, rhetorical and rhizomic patterns as well as processes of re-scaling. While not every one of these issues is relevant in every context, together they provide a rich framework of analysis to draw from. Scaler analysis exposes the possibilities inherent in jumping scales – as could be seen, for instance, when during Brexit, meaningful dialogue took place between the sub-national (Northern Ireland) and the supranational (EU), side-stepping the national (the UK). It also highlights the possibilities of rhizomic transnational networks or nodes contesting hegemonic tendencies, visible in Brexit in the role played by human rights and civil society bodies both within and across jurisdictions in establishing and enforcing continuity of rights. Such patterns become visible with the application of scaler theory to

[9]S Carr and M Lempert 'Introduction' in S Carr and M Lempert (eds) *Scale* (Oakland: University of California Press, 2016) p 3.

[10]D Nonini and I Susser 'Introduction – the tumultuous politics of scale history, class, and agency revisited' in D Nonini and I Susser (eds) *The Tumultuous Politics of Scale* (Abingdon: Routledge, 2020) p 2.

[11]N Brenner 'Between fixity and motion: accumulation, territorial organization and the historical geography of spatial scales' (1998) 16 Environment and Planning D: Society and Space 459.

[12]KT Jones 'Scale as epistemology' (1998) 17 Political Geography 25.

[13]S Springer 'Human geography without hierarchy' (2014) 38 Progress in Human Geography 402 at 419.

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situations when power and law combine to produce what outwardly appears as ontologically certain scale-based governance. Networks displace and circumvent familiar nested legal, social and economic scales, producing new, often non-linear nodular scales that displace or run alongside hierarchical orders; this is the scenario that played out during the Brexit negotiations. Jumping scales produces similar displacements – as seen, for example, in the meetings of local community groups on the Ireland/Northern Ireland border with the EU Chief Negotiator Michel Barnier – but as Cox suggests, it is the relationships that produce those 'jumps' that are essential to understanding the dynamics underway and, in our case, how that impacted on Brexit and Northern Ireland.[14]

Historically, legal scholarship rarely engaged with scaler scholarship, but more recently a rich discourse is emerging which embraces its possibilities.[15] Law uses this (and other) techniques to both claim exhaustive authority over certain decisions and to present these decisions as legally literate constructs.[16] This includes producing linear temporalities and uncomplicated narratives. But as feminist judgments projects demonstrate, it is entirely possible to reframe the same events, including as regards Northern Ireland, to suit legal and political narratives and exertions of power.[17] Davies shows how the state is the fulcrum of legal scale, often obfuscating other scaler dynamics, including, for the purposes of Brexit, how the sub- and supra-national are regarded.[18] This state-centric scaler dynamic was a key aspect of the debate on the Protocol, the difficulties in its operation and its implementation since it was adopted, and finally the content of the Framework. What Davies describes as the forefronting of the state is key to the Westminster Brexit dynamic, which was directly challenged by both the sub-national (Northern Ireland) and the supranational (EU).[19] Traditional nested scales – the sub-national, national, regional, and international – were confronted and upended by other scaler practices. Critically for this piece, the challenges to pre-Brexit nested scales transformed and re-oriented both the processes of negotiations and their subsequent outcomes.

(b) Unpacking the 'politics of scale'

The 'politics of scale' can be unpacked into the various dimensions of scale already referenced above; those dimensions explored in this paper are set out here. Rhetorical scale is the process by which actors frame and reframe their political and/or legal manoeuvres by placing their point of negotiation, their legal decision making, their intended audience or their asserted correct interlocutors within their interventions. In Brexit discourse, just one example – considered in more detail in section 2 – would be Ireland's repeated statements that, as an EU Member State it was not in a position to undertake unilateral negotiations, an intervention rescaled by the Varadkar/Johnson meeting in the Wirral to finally settle the Protocol.[20] Rhizomic scale, meanwhile, is a flat theory where politics are interlinked

[14]KR Cox 'Spaces of dependence, spaces of engagement and the politics of scale, or: looking for local politics' (1998) 17 Political Geography 1.

[15]A Riles 'The view from the international plane: perspective and scale in the architecture of colonial international law' (1995) 6 Law and Critique 39; Valverde, above n 1; L Eslava *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge: Cambridge University Press, 2015); M Davies *Law Unlimited: Materialism, Pluralism and Legal Theory* (Abingdon: Routledge, 2017); R Parfitt 'Fascism, imperialism and international law: an arch met a motorway and the rest is history…' (2018) 31 Leiden Journal of International Law 509; H Jones 'Property, territory, and colonialism: an international legal history of enclosure' (2019) 39 Legal Studies 187; J Hohmann and D Joyce *International Law's Objects* (Oxford: Oxford University Press, 2019).

[16]B de Sousa Santos 'Law: a map of misreading: towards a postmodern conception of law' (1987) 14 Journal of Law and Society 279 at 281.

[17]This includes as regards Northern Ireland and its previous settlements: M Enright et al *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (London: Bloomsbury, 2017) p 221.

[18]Davies, above n 15, p xi.

[19]Ibid.

[20]'Brexit: Boris Johnson to meet Leo Varadkar for last-ditch talks' *The Guardian*, 10 October 2019, https://www.theguardian.com/politics/2019/oct/09/boris-johnson-to-meet-leo-varadkar-over-brexit-compromise.

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via non-hierarchical patterns, as described by Deleuze and Guattari.[21] As a non-linear form, it talks directly to social structures that appear to not follow any distinct pattern or coherent order but nonetheless contest and shape outcomes. As will be explored in section 2, the continued and important role of non-executive bodies, including civil society, commercial traders and various human rights bodies, indicate that non-hierarchical patterns were part of the formation, and now the operation, of the Framework. In Northern Ireland, such patterns are not unusual: the lead-up to the 1998 Agreement demonstrates a similar rhizomic pattern.

Temporal scale also plays an important role. Hutchings suggests that 'temporal assumptions form part of the analysis, interpretation, and normative judgement of (world) politics',[22] while Valverde and Davies each contend that law requires a scaler account that includes temporalities to provide fully critical analysis.[23] Law is embedded in temporalities, but so are politics and philosophy. Temporality is also an important aspect of the Framework, in both its formation and, critically, in the choices that were made in the forming of its structures.[24] Multiple timescales suffuse the Framework, both linear and non-linear, including in using the past as part of its rationale (in the shape of the 1998 Agreement[25]) as well as its potential legal futures (in the shape of the democratic consent mechanism, dynamic alignment and the Stormont Brake). The instability of non-governance that lasted from January 2022 to February 2024 when the DUP finally returned to Stormont and agreed to form an Executive was purposeful, even if circumstances eventually shifted. This, again, is explored further in section 2; for now, it suffices to say that within the Framework, there is a multiplicity of scaled temporalities all crowded into a few short articles.

Copley and Giraudo describe rescaling as the processes by which existing and emerging scales compete to establish a new anchor around which other scales are then organised.[26] They argue that this, as well as other factors, explains some of the political and legal shifts in UK law over the past 30 years. While not all the parameters they consider are salient to Northern Ireland, contestation of legal and political scales is an ever-present discourse. Since at least the Home Rule crisis in the 1870s – one of the first examples of the so-called 'Irish Question' coming to dominate and fundamentally alter UK politics – the 'politics of scale' have been at the core of contestation and settlement in Northern Ireland (and to an extent Ireland).[27]

The Home Rule crisis began just over 50 years after Ireland and Britain were conjoined in 1801; the UK was its utmost geographical border, but also has its legacies in the creation of the border whose softening and hardening forms part of the unfolding of Brexit.[28] The Home Rule crisis should also be viewed as part of the end of the British Empire, and examined in the context of India's Home Rule Debate, part of a transnational rhizomic scale of inter-anti-colonial agitation.[29] The 1886 Home

[21]G Deleuze and F Guattari *A Thousand Plateaus. Capitalism and Schizophrenia* (trans B Massumi) (London: Bloomsbury, 1988).

[22]K Hutchings *Time and World Politics: Thinking the Present* (Manchester: Manchester University Press, 2008) p 4.

[23]See also RHS Tur 'Time and law' (2002) 22 Oxford Journal of Law and Society 463 at 463.

[24]CJ Greenhouse 'Just in time: temporality and the cultural legitimation of law' (1989) 98 Yale Law Journal 1631; T Chowdhury *Time, Temporality and Legal Judgment* (London: Routledge, 2020); SM Beynon-Jones and E Grabham (eds) *Law and Time* (Abingdon: Routledge, 2019); R Mawani 'Law as temporality: colonial politics and Indian settlers' (2014) 4 UC Irvine Law Review 65 at 71; E Grabham *Brewing Legal Times: Things, Form and the Enactment of Law* (University of Toronto Press, 2016).

[25]Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (1998) 2114 UNTS 473.

[26]J Copley and ME Giraudo 'Depoliticizing space: the politics of governing global finance' (2019) 37 Environment and Planning C: Politics and Space 442 at 445, P Taylor 'World systems analysis and regional geography' (1988) 40 Professional Geographer 259.

[27]An Act for a Union of the Two Kingdoms of England and Scotland 1706 (6 Ann c 11); see C McCorkindale 'Scotland and Brexit: the state of the union and the union state' (2016) 27 King's Law Journal 354.

[28]S de Mars et al *Bordering Two Unions: Northern Ireland and Brexit* (Bristol: Policy Press, 2018) pp 11–22.

[29]J Anderson and L O'Dowd 'Imperialism and nationalism: the Home Rule struggle and border creation in Ireland, 1885–1925' (2007) 26 Political Geography 934.

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Rule Bill was defeated in the Commons; the 1893 Bill was defeated in the Lords; and the third Bill passed only after the introduction of the 1911 Parliament Act and the neutering of the Lords.[30] The Home Rule crisis resulted in the end of the House of Lords veto, the introduction of the first experiment in devolution, and the now borders of the UK.[31] The three Home Rule Bills were critical moments for UK politics which re-defined its borders and its wider constitutional structures, led by actors both within and beyond the UK-recognised constitutional scales.[32]

Home Rule was vehemently opposed by Dicey, who argued – correctly – that such contestations by Ireland would lead Scotland and Wales to follow, and that re-configurations of governance were at odds with the UK constitution's own self-understanding, an issue of parliamentary sovereignty that would recur in Brexit.[33] These are recognisable scaler debates, and they continue. Brexit re-centred them in the discourse, but the debates and reconfigurations are familiar to those paying attention.[34] We have the 'nested', most natural according to Dicey's scale, and we have the networked rescaling of Ireland, Scotland and Wales – the peripheries – achieved across different temporalities, in non-linear trajectories that are still unfolding. There is the rhetorical scaling of parliamentary sovereignty, reframed by Home Rule, and in Ireland's case, independence. 'Politics of scale' dynamics, in other words, are present across much of the UK's modern history –and as we argue, continue to play a marked role in Northern Ireland's Brexit settlement.

The following section of this paper examines the Protocol and the Windsor Framework and what led to them using the key dimensions of 'politics of scale', such as issues of core and periphery, scale-jumping, temporalities, rhetorical and rhizomic patterns as well as processes of re-scaling. The aim in what follows is both to better understand the processes and outcomes of Brexit but also to shine a light on how we might reconsider, or even engage differently with, other legal governance structures both within the non-local dynamics at play here.

2. Scaling Brexit and Northern Ireland

(a) Arriving at the original Protocol

The Article 50 TEU process of leaving the EU, on account of significant Irish Government lobbying and a European Commission that clued into the problem fast, quickly pivoted from being about the UK leaving the EU to also needing to make specific accommodations for Northern Ireland that would avoid the land border on the island of Ireland hardening and would protect the 1998 Agreement. Yet the Irish Government were not the sole actors involved. The Northern Ireland Human Rights Commission, the Irish Human Rights and Equality Commission, the Joint Committee composed of representatives of both Human Rights Commissions, and the Equality Commission of Northern Ireland all held multiple meetings in Brussels, Dublin and London, while civil society actors, especially those from the border regions, campaigned and were in direct contact with the main players.[35] These actors jumped their scales from the sub- to the supra-national; they slowed the repeated rhetorical scaling from London of getting Brexit done in accordance with its timelines and priorities, and

[30]Parliament Act 1911 (c 13).

[31]The Conversative Party of the latter half of the nineteenth century opposed Home Rule and it resulted in a re-aligning of political parties in Westminster, with Liberal Unionists led by Chamberlain joining the Conversative Party.

[32]Government of Ireland Bill 1886, Government of Ireland Bill 1893, Government of Ireland Act 1914 (4 & 5 Geo 5 c 90), Government of Ireland Act 1920 (10 & 11 Geo 5 c 67), Articles of Agreement for a Treaty Between Great Britain and Ireland 1921, Constitution of the Irish Free State (Saorstát Eireann) Act 1922, Irish Free State (Agreement) Act 1922 (12 & 13 Geo 5 c 4); see also later Statute of Westminster, 1931 (c 4).

[33]A Dicey *England's Case Against Home Rule* (John Murray, 1886); see also *R (Horvath) v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWCA Civ 620 at [57]; A Greene 'Parliamentary sovereignty and the locus of constituent power in the United Kingdom' (2021) 18 International Journal of Constitutional Law 1166.

[34]F Davis 'Brexit, the Statute of Westminster 1931 and zombie parliamentary sovereignty' (2016) 27 King's Law Journal 344.

[35]A O'Donoghue 'Non-discrimination: Article 2 in context' in F Fabbrini (ed) *The Law & Politics of Brexit Part IV* (Oxford: Oxford University Press, 2022) p 89 at p 93.

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they made use of the rhizomic, non-hierarchical patterns they were embedded in to directly impact on how negotiations unfolded. Rather than their concerns and Northern Ireland being a 'periphery' issue, as its geographic and geopolitical location within traditional multi-level governance would suggest it should be when polities like the EU and the UK negotiate, it became one of the three 'musts' in early negotiations on exit.[36]

Even at this early point, the 'matryoshka' doll structure fails to explain the outcome of Article 50 TEU: the entire stack of dolls risked toppling because one of the internal dolls proved more important than its size. More than this, both traditionally-constructed political and legal scales were in the early stages of being undone. The political and legal scales interacted at each point in these negotiations with social, rhetorical, cultural and temporal forms, particularly of rhizomic scales; the Brexit process disrupted traditional 'law' and 'politics' scales, and resulted in outcomes that, if viewed strictly through the prism of nested scales, were not imaginable.

The fact that Northern Ireland was always going to present issues for those that wished for a Brexit which created a UK entirely unaligned with the EU did not become fully apparent to the UK Government until the Article 50 TEU negotiations to leave the EU actually commenced.[37] At the heart of the problem that Northern Ireland posed for the Brexit negotiators is a simple geographic reality: as the UK, in its entirety, left the EU, Ireland is the most proximate EU external border, and without knowledge of the context, the logical location for that border would be between Ireland and Northern Ireland. However, creating a hard border between Ireland and Northern Ireland puts the peace cemented under the 1998 Agreement at significant risk, as it would prove economically, socially and culturally provocative and, quite probably, unworkable. The history of tariff (and security) barriers at that border is complicated because of the histories that created the border, the sheer number of its (vast majority) rural crossings and the ways in which both the peace process and EU membership had contributed to making it all but invisible.[38] The temporalities of these constructions overlap, and reach forward and backward, both shortening the time since EU membership and peace made the border disappear and lengthening it so that to many, the securitisation alongside the trade paperwork and the time taken at the land border disappeared from memory. Bordering, as a social process, is common across Northern Ireland, but the actual physical international border had become one of the least significant examples.

The global trade scale featured more as a trope in often inaccurate claims, as it and international law more generally would during the period leading up to the Framework, than as a set of substantive actors. Active as rhetorical scale, the notion of trading solely on the terms of the World Trade Organization (WTO), a trade policy no state undertakes, was floated as a possibility in the UK, and while theoretically legally possible, was more used as a threat than a reality. The WTO as an organisation stayed largely aloof, only reminding of its internal requirements that the UK as a member had to fulfil, clearly stepping back from any attempt to include it in the discourse.[39] Other states largely did the same, with the exception of the US, which produced regular direct interventions on Northern Ireland from both the US Presidents at the time and, significantly from a US trade perspective given the role US Congress plays in it, also Congressional actors. The US had been a significant player in the run up to the 1998 Agreement, and ensuring the ongoing implementation of that Agreement became a pillar of the US Congress' position in relation to a future trade deal with the UK.[40] Here, we

[36]For analysis, see de Mars and O'Donoghue, above n 4.

[37]For an overview of the Brexit negotiations, see T Connelly *Brexit and Ireland: the Dangers, the Opportunities and the Inside Story of the Irish Response* (London: Penguin, 2nd edn, 2017) ch 9; T McTague, 'How the UK lost the Brexit battle' *politico.eu*, 27 March 2019, https://www.politico.eu/article/how-uk-lost-brexit-eu-negotiation/.

[38]de Mars et al, above n 27, pp 11–22.

[39]World Trade Organisation 'The United Kingdom's withdrawal from the European Union Communication from The United Kingdom' WT/GC/206 1 February 2020.

[40]'Pelosi says "no chance" of US-UK trade deal if Irish peace undermined' *Financial Times*, 9 September 2020, https://www.ft.com/content/fb2e4e0b-de51-49b8-af25-967d4f99e3b6.

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see the political structures of the hierarchal US-UK 'special relationship' sitting awkwardly alongside the social, networked patterns of the Irish diaspora amongst US political actors.

The May and Johnson premierships took very different approaches to Northern Ireland. Theresa May, though dependent on DUP votes for a Parliamentary majority, still committed to avoiding a hard border on the island of Ireland for the sake of the 1998 Agreement, but *also* committed to avoiding a border in the Irish Sea. Two scale-based promises clashing incoherently marked her approach. Her government understood that the EU would never agree to a border between Ireland and the continent – and so an extended period of 'magical thinking' ensued, with various wholly impractical and untested solutions to avoiding a hard border on the island of Ireland being floated at levels below those where the official negotiations were taking place. Once again, these were about driving rhetorical scaler narrative at different groups in England and Northern Ireland, but not at other actors like the EU.

Before the May government could devise a solution that both met its promises to the DUP and its own commitment (alongside the EU's) that there would be no hard border on the island of Ireland, the Commission made its own proposal – which effectively would wrap Northern Ireland up into the Single Market, and thus place a customs border in the Irish Sea, between Great Britain and Northern Ireland.[41] Theresa May infamously responded to this proposal by saying that 'no UK Prime Minister could ever agree to it'[42] – and countered with a significantly more complex proposal that required concessions from both the EU and the UK in terms of their primary negotiating priorities in Brexit. In making that statement, May made visible her view of what the 'core', London, regarded as the limits of the possibilities within the UK's territorial constitution – in other words, she set out the limits on rescaling that were politically plausible. The proposed UK solution, known as the 'Backstop', would mean that both the UK and Ireland would form a 'single customs territory' for trade purposes, in which EU Single Market law on the free movement of goods and the EU Customs Code would apply – and so there would be no barriers between Great Britain and Northern Ireland, nor would there be any between Northern Ireland and Ireland.[43] The Backstop was advertised as being temporary, until permanent solutions to avoid a hard border could be agreed – but was perceived by some as a capitulation on the part of the May government, and deeply disliked across parts of the UK political spectrum. Still, as a negotiating outcome, it reflects an interesting compromise that challenges traditional notions of legal 'nested scales' and what is imaginable in a process of rhetorical scaling.

Agreeing to the Backstop required the EU to permit 'cherry-picking' – in that it would allow the entirety of the UK, after Brexit, to benefit from the rules on free movement of goods – but also required the UK to tolerate ongoing alignment with relevant EU rules on free movement of goods and customs. The fact that the EU and UK governments both made these concessions demonstrates the outsized importance of Northern Ireland in these negotiations. But it also shows that processes of rescaling can offer solutions, even if (as in here) they are not taken up. May could not get her proposal through Parliament, despite three attempts to do so, because of opposition both from those desiring closer relations to the EU than what was on offer *and* those wanting an exit from all of EU law leaving no entanglements.[44] Two years of negotiation between the UK and the EU consequently fell apart because of Northern Ireland: something that 'nested scales' cannot account for on their own.

[41]European Commission Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (28 February 2018), https://commission.europa.eu/publications/european-commission-draft-withdrawal-agreement-withdrawal-united-kingdom-great-britain-and-northern_en.

[42]Theresa May, *Hansard* HC Deb, vol 636, col 823.

[43]Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018 (25 November 2018), <objidref>https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf, Protocol Art 6.

[44]See for the final votes, https://ig.ft.com/brexit-exit-deal-vote/.

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Following May's third defeat, Johnson's government recommenced negotiations with the EU. When he returned with a new version of the Withdrawal Agreement, he faced the same Parliamentary numbers that defeated May's deal three times. He thus called an election in 2019, and while Northern Ireland was not the sole issue, it once again forced a re-alignment of Westminster. To push through *his* deal, a comfortable Conservative majority was needed, enabling him to effectively ignore DUP protests on what he claimed was his renegotiated 'oven-ready deal'.[45] In reality, the 'oven-ready deal' was a return to the Commission's original proposal to place a border in the Irish Sea: the deal that May argued 'no UK Prime Minister could ever agree to'. Johnson tried to downplay objections to his version of the Protocol, claiming repeatedly that it would not result in checks of products crossing the Irish Sea – but a re-scaling, both rhetorically and rhizomically, had once again occurred.[46]

Despite DUP opposition, the Withdrawal Agreement and the Protocol were both passed by Parliament in early 2020 – and so the Northern Ireland Protocol became binding law on both the UK and the EU.[47] The DUP went from core kingmaker to peripheral Parliamentary actor over the course of a few months, rescaled down to the local, and the UK government advocated for an agreement that 'periphery' actors met with mixed responses. One might almost conclude that this represented a return to 'nested' international relations, and so that the Article 50 TEU process represented an aberration. But Westminster was not the only place where this was playing out, and the other actors involved in Northern Ireland's 'Brexit' – be it the Irish Government, the US Congress, or statutory human rights bodies and civil society – were perhaps more successful in achieving (some) of their aims. In its implementation, the Protocol once more reflects something besides a 'nested' scale solution.

(b) The original Protocol

As the Protocol formed part of an international agreement between the UK and the EU, international law would suggest that the primary actors of relevance are the two 'states' (or state-like entities) that concluded the agreement; these types of agreements may include references to other bodies as being responsible for enacting the wishes of the relevant state actors, but they retain ultimate control of proceedings under the Protocol, as the respective 'largest' matryoshka dolls. The Protocol, however, once more eschewed those expectations in various ways, and so in examining its contents as well as the lasting UK objections to that content in detail, it forms a different but equally interesting example of how scaler analysis can benefit legal understanding. We will look at key examples next.

(i) Institutions[48]

At first glance, the Protocol was designed to work much as the rest of the UK-EU Withdrawal Agreement does: decisions about its operation are taken in a single over-arching UK-EU Joint Committee, composed of an equal number of UK and EU representatives.[49] Because of a commitment made by the UK in the *New Decade, New Approach* agreement that restored power-sharing in Northern Ireland in January 2020, the UK delegation would always include representatives from Northern Ireland[50] – and so the local is continuously present in these intergovernmental negotiations,

[45]See eg D Wooding 'Boris Johnson urges Sun readers to vote Tory and he'll "bang Brexit through"' *The Sun* 3 November 2019, https://www.thesun.co.uk/news/10267938/boris-johnson-vote-tory-brexit/.

[46]J Campbell 'Brexit: no checks on goods from NI to UK, says PM' *BBC News* 15 November 2019, https://www.bbc.co.uk/news/uk-northern-ireland-50430815.

[47]Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019) OJ C 384I 1.

[48]For more analysis see K Hayward 'The committees of the Protocol' in C McCrudden (ed) *The Law and Practice of the Ireland-Northern Ireland Protocol* (Cambridge: Cambridge University Press, 2022); J Larik 'Governance and dispute settlement' in F Fabbrini (ed) *The Law and Politics of Brexit: The Protocol on Ireland/Northern Ireland* (Oxford: Oxford University Press, 2022).

[49]Article 164 WA.

[50]See Hayward, above n 47, p 47.

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jumping their position in the 'nested' scale. More generally, however, stressing that the Joint Committee is *intergovernmental* oversimplifies how decisions pertaining to the Protocol were meant to be taken in practice.

Under Article 165 of the Withdrawal Agreement, a standing Ireland/Northern Ireland Specialised Committee was created. Its functioning is set out in Article 14 of the Protocol, but Article 14 does not actually specify what is unique about its operation. While it, in principle, is also composed of a 'UK delegation' and an 'EU delegation', the UK delegation again at least occasionally includes members of the NI Executive (when it exists) as the most direct stakeholders in discussions about the Protocol.[51] That said, Hayward reports that actually keeping stakeholders *informed* of the work taking place in the Specialised Committee posed more of a problem during the years when tension around the Protocol was high: in 2020 and 2021, she found that '[o]fficials from the Northern Ireland Civil Service are present at official [Specialised Committee] meetings at the invitation of the UK government; whether they are kept informed of the background work of [Specialised Committee] officials is rather more ad hoc'.[52] At time of high political tension at the intergovernmental level, then, the local was kept on the sidelines more than it otherwise might have been.

The Standing Committee nonetheless has a remit that makes it explicit that non-state actors are some of the primary contributors to its work. As such, the North-South Ministerial Council and the North-South bodies set up under the 1998 Agreement have a specific power to introduce proposals on the 'application and implementation' of the Protocol.[53] Similarly, the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, have explicit 'feed-in' powers recognised in the Protocol where it concerns the application of Article 2.[54] This is an article these bodies were largely responsible for the inclusion of, through their use of rhizomic scales, as the explicit protection of human rights both through dynamic alignment and as static rights was not an automatic inclusion in the trade deal, though in the Northern Ireland context, as these bodies insisted, they were essential.[55] While formal decision-making powers on issues relating to the Protocol thus always remained with the UK-EU Joint Committee,[56] most of the input that the Joint Committee received on the topic of the Protocol stemmed from specialist actors at the regional and local level, who through their political rescaling reshaped the standard legalised nested scale.

The centrality of the Standing Committee is emphasised at other points of the Protocol as originally agreed; for example, the EU's ability to 'supervise' UK implementation of the Protocol's provisions concerning the Irish Sea border on a practical level is to be agreed at the Joint Committee – but Article 12(3) of the Protocol makes it clear that they can only agree this 'on proposal' from the Standing Committee. Structurally, the local, in other words, is intended to dictate what the national and supranational agree to.[57]

The Specialised Committee and the Joint Committee are not the only bodies established under the Withdrawal Agreement and the Framework where issues affecting Northern Ireland arise. Article 15 of the then-Protocol also established a body called the 'Joint Consultative Working Group' (JCWG), which sits below the other two committees; it consequently has no decision-making power but has been charged with one of the most crucial elements of ensuring that the Brexit settlement with respect to Northern Ireland works in practice. The Protocol as designed involves significant dynamic

[51]See eg the report of the 10th Standing Committee meeting: https://commission.europa.eu/system/files/2022-03/2022-02-08_eu_uk_final_agreed_inisc_post-meeting_statement_en.pdf.

[52]Hayward, above n 47, p 52.

[53]Art 14(b).

[54]Art 14(c).

[55]O'Donoghue, above n 34, p 89 at p 93.

[56]Art 14(e); Art 165 WA.

[57]C Murray and C Rice 'Into the unknown: implementing the Protocol on Ireland/Northern Ireland' (2020) 15 Journal of Cross Border Studies in Ireland 17.

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alignment with EU law for the sake of making the Irish Sea border work: most EU law pertaining to the free movement of goods (and six directives on non-discrimination)[58] consequently apply, *dynamically*, to Northern Ireland.[59] Under the Framework, as we will see below, less of this compliance will be necessary to demonstrate *in practice,* but as a matter of law, it still in effect will be the applicable law across Northern Ireland on issues like product regulation.

When EU law that applies to Northern Ireland changes, the Protocol makes it look as if the UK simply has an obligation to ensure that those changes are incorporated into UK law as applicable to Northern Ireland[60] – and on account of the Withdrawal Agreement's retention of the principle of primacy of EU law,[61] should any conflict arise between these dynamically applicable EU rules and domestic law in Northern Ireland, the EU law should continue to set aside incompatible domestic law. However, in practice, this auto-application of updating EU law in Northern Ireland will not come out of thin air. Instead, the JCWG will be informed 'in a timely manner' of any planned changes to EU law, alongside any other information that the EU considers 'relevant' in order for the UK to fulfil its Protocol obligations.[62] This process eschews traditional nested scales and instead embraces, in some ways, the networked rhizomic nature of how the Brexit negotiations unfolded.

Even in the original version of the Protocol, then, the fact that the Protocol's EU law content is dynamic produced specific structures to jump the scale and new forms of temporal scales to reflect the specific *local* consequences of *supranational* policymaking. The JCWG has been described as a potential 'discussion forum' where issues can be debated freely before being fed into the Specialised Committee and the Joint Committee for the purpose of decision-making.[63] The JCWG, much like the other bodies, is *de jure* composed of EU and UK representatives[64] – and the UK has committed once more to including NI Executive representatives as part of its delegation to the JCWG[65] – but in practice, by its own rules of procedure, makes explicit scope for 'experts or other persons who are not members of delegations' to attend meetings of the JCWG to 'provide information on a particular subject'.[66] While the minutes and agenda of these meetings are not public, an annual report from the Joint Committee in 2021 made it clear that the Specialised Committee as well as the JCWG engaged actively with 'stakeholders' – who can only be those *local* to Northern Ireland, and often will not represent the state.[67]

The institutional structures of the Protocol consequently prima facie look intergovernmental at the national/supranational level, but in practice, only the *formal* decision-making powers lie at that level; the work actually done in relation to the Protocol on the ground was always done in close collaboration with local stakeholders, once more reflecting that traditional conceptions of multilevel governance do not capture the operation of the Northern Ireland settlement in full.

[58]O'Donoghue, above n 34, p. 97.

[59]E Frantziou and S Craig 'Understanding the implications of Article 2 of the Northern Ireland Protocol in the context of EU case law developments' (2022) 73 Northern Ireland Legal Quarterly 65 at 68.

[60]Art 13(2) and 13(3) NIP make clear that unlike the remainder of the Withdrawal Agreement, both EU legislation referenced in the Protocol and case law pertaining to the EU law in the Protocol will update as the EU law and case law itself does.

[61]In Art 4 WA.

[62]Art 15(3) NIP.

[63]K Hayward and D Phinnemore 'Obscure committee could give North input into EU decision making post Brexit' *Irish Times* 30 April 2020, https://www.irishtimes.com/opinion/obscure-committee-could-give-north-input-into-eu-decision-making-post-brexit-1.4241281.

[64]Art 15(1) NIP.

[65]Letter from Rt Hon Michael Gove to Colin McGrath, MLA, chair of the Committee for the Executive Office, Northern Ireland Assembly, 6 January 2021, MC2020/17995, as reported in Hayward, above n 47, p 53.

[66]Council Decision 202/1599 on the EU's position on the Joint Consultative Working Group [2020] OJ L365/3, Annex 1, Art 3(2).

[67]Withdrawal Agreement Joint Committee, Annual Report 2021 (24 March 2023), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1148570/withdrawal-agreement-annual-report-2021.pdf.

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(ii) The democratic consent mechanism[68]

The above account of local involvement should not suggest, however, that the dynamic nature of the Protocol was uncontroversial, either in Northern Ireland *or* in the UK. It formed the nexus of much of the UK's post-ratification complaints about the Withdrawal Agreement, with the legitimate concern that outside of the EU, this 'dynamic' EU law on the movement of goods would apply to Northern Ireland without it having any real *input* into that legislation.[69] The JCWG and the other Committees, after all, were there for information exchange, and would allow Northern Ireland stakeholders to flag potential concerns – but nothing in the Protocol itself enabled anyone from either Northern Ireland or the UK to protest the application of updating EU law in Northern Ireland *generally*. The UK, in effect, accepted this as part of the Brexit settlement's 'costs' on behalf of Northern Ireland – with the national taking clear priority over the local. Then, in a near-perfect example of rhetorical rescaling, the UK changed its tune and started protesting the deal that the EU had presented it with (and that it had signed). Ireland could have chosen to extend its MEP franchise to Northern Ireland and those identifying as Irish citizens, giving some input into EU lawmaking at Parliamentary level for those in Northern Ireland, but, thus far, has chosen not to. If it did, it would offer another alternative example of networked law-making that is de-territorialised.

The only concessions the EU had proven willing to make at the time of drafting the original Protocol in response to UK and Northern Ireland concerns about dynamic alignment to parts of the EU rulebook can be found in two provisions that describe, in effect, emergency exits from the Protocol. The first of these, the so-called Article 16 'safeguarding measures', is of less interest from a scaler perspective; what it permits is for the UK to disapply aspects of the Protocol if they are causing lasting economic or social difficulties in Northern Ireland.[70] While signs of such difficulties would obviously appear to those in Northern Ireland first, the actual functioning of such safeguard measures is entirely intergovernmental, in that all discussion of their application takes place in the Joint Committee.

More interesting is Article 18, which establishes a so-called 'democratic consent' mechanism for those in Northern Ireland. Here, again, we see parts of an international agreement not only acknowledging *other* international agreements – here, specifically, the 1998 Agreement – but also acknowledging *devolved government* and the role it should play in determining if it wishes to be part of a process agreed outside its own competences. This is unusual, both as a matter of trade law and given how the Protocol came into being: international relations are not a devolved matter, and so there was no formal ability for anyone in Northern Ireland to protest the UK's agreeing that the Protocol would apply to Northern Ireland.[71] However, given the *existence* of the Protocol, the UK and the EU agreed that the Northern Ireland Assembly should get a periodic option to vote to *leave* the Protocol. The Article 18 process takes place every four years if only a simple majority of the Assembly agrees that it should continue to operate; but where the support hits the threshold of 'cross-community' support, this 'democratic consent' would be deemed to have been given for eight years.

In other words, despite the fact that the UK could and did force the Protocol into existence against some considerable, though by no means complete, opposition in Northern Ireland, it also compelled the EU to agree that it cannot do so *indefinitely* – and so entirely local decision-making will determine the future of what is now the Framework not just once, but *every four or eight years* during its application. There is an intriguing temporal scale here: an ever present stable/unstable future, which is a

[68]For critical analysis, see B O'Leary 'Consent: lies, perfidy, the Protocol, and the imaginary Unionist veto' in Fabbrini, above n 47.

[69]See eg HM Government *Northern Ireland Protocol: The Way Forward* (July 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008451/CCS207_CCS0721914902-005_Northern_Ireland_Protocol_Web_Accessible__1_.pdf.

[70]See R Howse 'Safeguards: "this is not an exit" – Article 16 in the Ireland/Northern Ireland Protocol' in Fabbrini, above n 47.

[71]For an overview of what generally occurs with regard to federal or devolved regions in international economic law see O Omiunu 'The evolving role of sub-national actors in international trade interactions: a comparative analysis of Belgium and Canada' (2017) 6 Global Journal of Comparative Law 105.

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level of uncertainty rarely embraced in legal frameworks, but one that is also present in the 1998 Agreement, which leaves the future constitutional status of Northern Ireland as a future stabilising/destabilising event. Brexit thus produced Northern Ireland's second instance of the local having the power to scupper painstakingly wrought settlements at the domestic and international level – and there is no configuration of multilevel governance, legal or political, that would have predicted this as an outcome of Brexit negotiations.

(c) The Windsor Framework

The Protocol's shape may have been final as a matter of law by 2020, but as a matter of politics, it did not ever feel truly stable or finalised. As early as summer 2021, UK Government policy had become that the Protocol was unsustainable and had to be renegotiated completely, with Lord Frost (as UK negotiator with the EU at the time) making clear that he actually wished to see an end to all EU law that still applied in Northern Ireland.[72] It is easy to conclude that the primary driver for the UK desire to fully rewrite the Protocol was Unionist fury at its existence and operation, as Unionist political protest became substantial from summer 2021 onwards – culminating in the ongoing DUP refusal to nominate a deputy Prime Minister and so preventing the formation of Northern Ireland Executive, and ultimately for the Assembly to sit, until its issues with the Protocol were resolved.[73] The DUP used rhetorical and constitutional scale to its advantage here, addressing two different actors' interests – parliamentary sovereignty in London, and the Act of Union in Northern Ireland – in one set of protests. But at least as regards London, we saw how easily Unionist concerns were set aside by a Westminster government with a majority in signing the Protocol, and so the reality is more complex than Westminster simply responding to the DUP's rhetorical rescaling. It is just as likely that a 'clean Brexit' remained an overriding UK government goal, and attributing motivation to the will of (one of) the Northern Ireland communities is a matter of political convenience rather than conviction – a different form of rhetorical scale.

After threatening to, as a matter of domestic law (and, importantly, in violation of international law), unilaterally disapply the Protocol's border provisions via its introduction of the Northern Ireland Protocol Bill,[74] the UK government's change in leadership (to Prime Minister Rishi Sunak) in late 2022 resulted in progress in negotiating with the EU for the first time since 2020. Sunak pivoted the UK demands away from fundamentally rewriting the entire Protocol, stepping back from limiting or removing the role of EU law and EU institutions in overseeing its operation, and instead achieved practical improvements above and beyond those tabled by the EU in October 2021.[75] The final negotiated package, which renamed the entire Protocol as the 'Windsor Framework', was agreed on 24 March 2023 at the Joint Committee – after the Commission and UK government agreed 'in principle' on 27 February 2023 on the revisions to be made.

[72]HM Government, above n 68; House of Lords European Affairs Committee, 'Uncorrected oral evidence: The UK-EU relationship' (26 October 2021), question 7, https://committees.parliament.uk/oralevidence/2904/pdf/.

[73]'NI election 2022: DUP blocks new NI government in Protocol protest' *BBC News* 9 May 2022, https://www.bbc.co.uk/news/uk-northern-ireland-61373504; for a broader discussion of Unionist opposition to the Protocol, see L-C Whitten 'Northern Ireland: a constitutional exception and why it matters' (The Constitution Society, 21 September 2021), https://consoc.org.uk/northern-ireland-a-constitutional-exception-and-why-it-matters/.

[74]See eg Stephen Farry, deputy leader of the Alliance Party, stating that 'the legislation could only ever be enacted at a huge price for Northern Ireland and the entire UK' (13 June 2022), https://www.allianceparty.org/protocol_bill_very_bad_for_northern_ireland_and_entire_uk?locale=en; and Karine Jean-Pierre, White House Press Secretary, indicating on behalf of the Biden administration that 'efforts to undo the Northern Ireland protocol' would not create a conducive policy environment, *C-Span* 7 September 2022, https://www.c-span.org/video/?522688-1/white-house-briefs-monkeypox-response.

[75]European Commission 'The October 2021 Package' (October 2021), https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement/protocol-ireland-and-northern-ireland_en#october-2021-package.

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To an extent, both the post-2020 dissatisfaction with the Protocol and the eventual conclusion of the Windsor Framework reflect the traditional 'nested scales' of international relations theory: the conflict between the UK and the EU was *set* in Northern Ireland, but in practice took place exclusively between the highest level of political actors, with Northern Ireland stakeholders only being consulted as convenient by the UK and the EU when proposing new ways forward in their negotiations. However, the actual content of the Windsor Framework once more centralises the local in a way that we would not normally expect to see in multilevel governance: the UK's most tasking demands, agreed by the EU, give power not *to the UK* (on the assumption of some representation from Northern Ireland), but rather explicitly to Northern Ireland, as *distinct* from the UK. We will now explore how those demands manifested in the Framework.

(i) The general application of EU law

To the disappointment of those wishing to see the UK 'rip up' the Protocol, the basic qualities of it remain in the Windsor Framework: the EU rules on movement of goods continue to apply to Northern Ireland, and ECJ oversight of how the UK applies those rules in Northern Ireland also remains. Article 2 as regards to human rights, including the six directives requiring dynamic alignment, remains wholly intact, including the requirements that Northern Ireland's human rights bodies oversee legal changes introduced by the Northern Ireland Assembly for compliance.[76] As such, much of the original rescaling seen in the Protocol remains intact. Furthermore, in the Framework's lasting agreement on 'rights', we see an interplay of temporalities and geographic overlapping spaces that eschews a 'nested' scale through its networked, temporal outcome: the Framework continues to maintain EU rights on the day of Brexit operational in Northern Ireland that are connected to the 1998 Agreement, but also ensures the dynamic adoption of six EU directives that evolve over time. The requirement under the 1998 Agreement that Ireland and Northern Ireland have equivalence of rights adds another layer to the relevant laws applicable to Northern Ireland – and while this commitment sits outside the Framework, it is nonetheless a factor in how Northern Ireland's laws develop after Brexit, given Ireland's remaining membership of the EU.[77]

The practical operation of the Single Market rules on goods in Northern Ireland, however, is changed significantly by the Framework. Joint Committee decisions on *how* the rules are to apply are reconsidered in the Framework, and the UK and the EU have mutually agreed unilateral measures on the application of the EU law to goods moving into Northern Ireland that, in practical terms, significantly reduce the 'burden' posed by EU law on those doing business in Northern Ireland.[78] The end result is known as the 'red and green lane' system, whereby significantly fewer checks will take place on products that are staying in Northern Ireland (eg 'green lane' goods) – while the full panoply of Single Market rules will continue to be applied to all goods that are at risk of travelling onward to Ireland (eg 'red lane' goods). The decisions on what types of goods to place in the 'green lane' were heavily influenced by Northern Ireland stakeholder concerns about the volume of checks applicable, or the rules applied, to issues like pet movement, medicine, customs, and VAT – but were ultimately determined and implemented at the (supra)national level by the UK government and the EU Commission.[79] This superficially looks like the traditional 'nested' scales at work – but a full explanation of *where* the EU made concessions on the application of EU law is impossible without considering the rhizomic networks of input that are these Northern Ireland stakeholders.

[76]CRG Murray and N Robb 'From the Protocol to the Windsor Framework' (2023) 74(AD1) Northern Ireland Legal Quarterly 1.

[77]K McNeilly and A O'Donoghue 'Mapping the tapestry: national and international human rights frameworks in Northern Ireland and Ireland' (2023) 34(2) Irish Studies in International Affairs 1 at 16.

[78]For a detailed analysis, see Murray and Robb, above n 75.

[79]Ibid, at 3.

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(ii) Dynamic alignment

In terms of implementation, a very different picture emerges when we consider changes to the Protocol that were agreed in terms of Northern Ireland's input into the EU law that *dynamically* applies to Northern Ireland. As discussed above, under the original Protocol, all EU law that applied to Northern Ireland would do so on a dynamic basis – and the effects of 'updating' EU law would at best be discussed by the JCWG and fed into the Specialised Committee and eventually the Joint Committee. However, none of the above bodies had specific powers to either provide input on the development of these EU rules within the EU institutions, nor did they have an express ability to reject the application of 'updated' EU law to Northern Ireland. The Protocol provided for 'safeguarding measures' – but even those were intended to be temporary and to attract repercussions.

The Framework responds to the democratic deficit[80] inherent in having dynamic EU law apply in a constituency that has no ability to influence that EU law in two ways. The first of these is known as the 'Stormont Brake'; the other has no short-hand name but addresses the level of input that Northern Ireland representatives get into the EU legislative process.

The Stormont Brake is a novelty, in that it gives Northern Ireland the conditional power to *override* the general operation of the dynamic alignment inherent to the Framework – resulting in a veto on the application of a specific EU law to Northern Ireland, exercised by the UK, but, if accepted by the UK government, triggered by Northern Ireland, in a clear example of a form of scale jumping. The new Article 13(3a) of the Framework sets out what conditions apply to the operation of the Stormont Brake:

- It only applies to the measures in Annex 2 of the Framework, concerning the free movement of goods;
- It cannot be used to 'block' EU measures that do not 'significantly' change from those already applicable under the Framework, and the updated EU law must have a 'significant impact' on life in Northern Ireland;
- The Brake must be triggered within two months of the publication of a specific EU act in the EU's Official Journal;
- It can only be triggered by the Northern Ireland Assembly, when 30 of the 90 Stormont MLAs from at least two cross-community parties agree that they wish to apply the Brake and can meet the above conditions.[81]

If all of those conditions are demonstrably met, the Northern Ireland Executive can task the UK Government to 'veto' application of the EU law in question to Northern Ireland. Though the final decision to do so lies with the UK Government, the Secretary for State for Northern Ireland has stressed that where the request is filed in line with the rules set out in the Framework, the UK can only ignore a (domestic) legal obligation to notify use of the brake to the EU where 'exceptional circumstances' apply – and they are unlikely to.[82] Notifying use of the brake then results in a six-week exchange between the UK and the EU in the Joint Committee, and will result either in an agreed way forward, or the EU (via the Commission) taking remedial action if the Brake has been misapplied, subject to arbitration.

There are many questions about how effective a veto the Stormont Brake is, but, for our purposes, it is primarily interesting because it creates a structure whereby in principle, devolved government can *instruct* national government to *block* the operation of an international agreement signed at the national and supranational level and influence supra-national law-making and implementation. The unusual nature of such an agreement explains why there are many hurdles inherent to the Stormont Brake, but it is nonetheless another concession made by 'high level' negotiators in response to local political problems, and thus a further demonstration of how traditional nested theories of governance cannot explain the Northern Ireland settlement in full.

[80]A Deb 'Parliamentary sovereignty and the protocol pincer' (2023) 43 Legal Studies 47 at 63–64.

[81]Note that the Framework as agreed by the UK and the EU does not stress that this is to be a cross-community vote, but the UK implementation of the Framework does: see Murray and Robb, above n 75, at 17–18.

[82]Chris Heaton-Harris (*Hansard* HC Deb, vol 730, col 344).

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The same can be said for the updates to the Protocol's structures that follow from the Framework. In addition to the Joint Committee, the Specialised Committee and the JCWG, the Framework introduces new bodies to facilitate the operation of the Protocol that are 'inclusive of the Northern Ireland institutions as well as business and civil society'.[83] These new bodies, such as the Special Body on Goods (a sub-committee of the Specialised Committee), enable direct negotiation by local interests with not only the UK officials who would represent their interests in the Joint Committee, but also the EU officials who might not understand the particular concerns they face on the ground, and who can feed back directly to those developing EU law proposals. These rhizomic networks of business and civil society, who already proved very effective in original Article 50 TEU negotiations, have now become part of the formal legal governance scale. Greater consultation and feed-in to EU legislative development is likely to actually limit the *need* for the Stormont Brake, and so the Framework's bolstered consultative mechanisms work hand-in-hand with the Brake to ensuring that the EU and the UK do not agree measures that in practice will cause significant difficulties in Northern Ireland.[84]

(d) Summary

For now, Brexit – with respect to Northern Ireland – seems 'settled': the actual Parliamentary vote on the Windsor Framework sailed through on 22 March 2023, with only 29 MPs voting against the improvements negotiated by Sunak, demonstrating that the appetite for the outsized role that Northern Ireland has played in UK-wide politics has waned significantly since 2020. Sunak's rhetorical flourishes about Northern Ireland being the most exciting economic zone in the world attempted to reframe and reduce the concerns about parliamentary sovereignty inherent to the Protocol's lasting inclusion of EU law and institutions, instead focusing Parliamentary (and Northern Ireland) attention on the global nature of Northern Ireland's economic future.[85] When the DUP was a numerical force that the Conservatives had to reckon with in Parliament, its priorities determined the shape of the Brexit settlement – but it has failed to recreate that level of influence by refusing to take up its seats in Stormont. In signing off on the Windsor Framework, the UK eventually agreed to a deal that continues to highlight the unique status of Northern Ireland in interesting ways, but ultimately reflects a settlement that the UK and the EU could live with. 'Nested scales' account for substantial parts of the Protocol as well as its replacement Framework but, across time, the role played by Northern Ireland in both the negotiations and the operation of these agreements remains inexplicable by traditional theories in international relations. For better explanations, as suggested throughout this paper by means of examples, 'politics of scale' must be explored and applied to Northern Ireland and Brexit.

3. Lessons from a scalar analysis of Brexit and Northern Ireland

Clarke describes the Brexit campaign as very much a scaler proposition on the part of the UK: '"Take back control" condensed unexpectedly popular conceptions of space (restoring the Great to Great Britain); scale (rejecting the supranational – European – level while projecting a flat and friendly globe); and sovereignty (understood as national decision making).'[86] While some of these elements were and are applicable in Northern Ireland, its own place within those scales is somewhat different,

[83]Ibid, at 16.

[84]Ibid, at 12. See also the UK's domestic implementing measures regarding the Framework (The Windsor Framework (Democratic Scrutiny) Regulations 2023, currently in draft), which will add a Schedule 6B to the Northern Ireland Act 1998, to create the Windsor Framework Democratic Scrutiny Committee in the Northern Ireland Assembly – a body tasked with monitoring and scrutinising Commission proposals of relevance to the Framework as they proceed through the EU's legislative process.

[85]J Webber et al 'Rishi Sunak threatens to push through Brexit deal on Northern Ireland without DUP' *Financial Times* 28 February 2023, https://www.ft.com/content/3d2b4e24-5c92-4a28-b2fa-c4bfe143e814.

[86]J Clarke 'Re-imagining space, scale and sovereignty: the United Kingdom and "Brexit"' in Nonini and Susser, above n 10, p 138.

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especially as it pertains to England. This partially explains the differing outcomes between Northern Ireland in comparison to England or even the other devolved nations. These factors sit alongside the differing legal and political scales that already placed Northern Ireland apart; the fact that an international treaty, the 1998 Agreement between Ireland and the UK, forms part of its domestic constitution is also a critical element.[87] But beyond this point, the actions of those at the local level – politicians, human rights bodies, civil society and business, using rhizomic and rhetorical scales – enabled a jumping and rescaling process to take place. This rescaling and scale jumping was enabled only in part because of Northern Ireland's specific history; more generally interesting, it was also possible because those at the local level recognised both the necessity of and the utility of other forms of scale that pre-existed and could be created once the imaginary of the nested scale was abandoned.

While the description of Leave as a break in the 'politics as usual' narrative is a compelling one, this is only true when viewed from the core.[88] At the periphery of both the UK and the EU, where Northern Ireland finds itself, 'politics as usual', even after the 1998 Agreement, is often filled with crisis, protest, convulsion and change. (Indeed, as already discussed, Ireland is often a factor within UK constitutional politics). Northern Ireland is rooted in contingency, which in its present form includes its future position as a polity. This means that its civil and business societies are already well networked, not only within Northern Ireland, but also across the UK, in Ireland as a whole, and even further than that – to the EU and US. Sassen argues that at the same time as new types of global scaling of politics and institutions are constituting within the national (and the devolved), new forms of governance scales are produced.[89] Northern Ireland is, to paraphrase Sassen, particular and specific, and demonstrates how the 'politics of scale' can produce contestation and disruption alongside hegemonic practices. But its specifics do not mean that its example is not of value elsewhere.

Politics, and specifically Brexit in Northern Ireland, is non-cosmopolitan and cosmopolitan all at once.[90] A clear attachment to localised issues, often in the form of laws, including the Act of Union and the 1998 Agreement, has sat alongside EU membership for the past 25 years. While globalisation gained pace in the 1990s, the UK was (re)devolving power to its constituent nations.[91] Devolution and its accompanying legal structures, which in the case of Northern Ireland included international, regional, national and sub-national law (albeit not in a fixed scale but rather a tangle of cross linkages and inter-dependencies), resembled in part its own past compromises of the original partition of Ireland and other post-World War I exemplars, as Murray points out, while at the same time producing a whole new tapestry of inter-connected scales, continuously in tension with each other.[92] Brexit disrupted this already confounding pattern.

Broader critical debates on scale, particularly with regard to trade law (including the WTO and the EU), point to the use of these mechanisms to pull decision-making away from local decision makers when such decisions do not suit the interests of capital or corporations. While there are points to this argument, particularly within the rhetorical scaling of Lexit positions (left-leaning arguments in favour of Brexit), the core message and arguably outcome of Brexit was an attempt at the re-assertion of power through political, legal and rhetorical scaling within Westminster entrenched in arguments of (sometimes Parliamentary) sovereignty and an argument in favour of restructuring the UK into two 'new' entities: internally, Singapore on Thames, as a haven for capital and corporations and, externally, Global Britain, which does not step away from international trade law but rather immerses itself

[87]Such hybrid constitutional orders are not uncommon in transitional arrangements globally: C Bell *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford: Oxford University Press, 2008) p 144.

[88]Clarke, above n 85, p 140.

[89]S Sassen *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006) p 2; N Papanastasiou *The Politics of Scale in Policy: Scalecraft and Education Governance* (Bristol: Policy Press, 2019).

[90]Sassen, ibid, p 3.

[91]Northern Ireland was devolved from 1921 until the return of direct rule as result of the Troubles in 1972.

[92]C Murray 'Imposing Brexit onto Northern Ireland's post-conflict governance order' (*Verfassungsblog*, 5 April 2023) https://verfassungsblog.de/imposing-brexit-onto-northern-irelands-post-conflict-governance-order/; McNeilly and O'Donoghue, above n 76.

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in the 'spaghetti bowl' of international agreements, including those subject to the same critiques of undemocratic, sovereignty-busting forms that formed part of the Vote Leave campaign.[93] These priorities, however, rarely considered the UK territorial constitution and its implications.[94]

Northern Ireland was a stumbling block in this rhetorical narrative exercise. Northern Ireland does not necessarily upend the critical accounts of 'politics of scale' but rather demonstrates how disruptive a relatively local polity can be when it is has mastered the leveraging of multiple scales, both hierarchical and networked. It is this mastery that is of greatest use elsewhere. Brexit produced new scales, and Northern Ireland and the Framework sit at the core of many of them. The Protocol/Framework remains a site of political and legal debate and struggle, and in its substantive content, the site of a multiplicity of scales, networked, rhetorical, overlapping, hierarchical and temporal. The Framework for now seems a more stable 'solution' to Northern Ireland and Brexit, primarily because the Westminster appetite for Brexit has significantly diminished at the same time as the DUP's ability to leverage power in Westminster has lapsed; but – importantly – also because this new solution as constructed makes significantly more space for local structures, temporal concerns, and geographic specificities than the first attempt at a settlement did. The Framework is, in reality, more rescaled than the Protocol, as opposed to less so.

Sassen argues that the old hierarchies have not disappeared, and so the nation state and other hierarchies remain, yet 'novel scales emerge alongside the old ones and … the former can often trump the latter'.[95] The critiques of the swallowing of the Irish, Welsh and Scottish devolved authority back to voracious Westminster is based on the premise that the Westminster system is the correct scale for UK-wide decision-making.[96] It is only here where 'good' governance is possible, despite the distance between the core and periphery and the nature of a multi-nation state. The UK-based old hierarchies remain, especially when viewed from the core, but there is no novelty in Northern Ireland producing new ones.

Brexit reveals the multitudes of contingent scales. In the UK, at times this harks back to the Act of Union as the 'perfect' or correct scale, despite it being a scale which was never stable and was sundered when Ireland became independent in 1922. For others, that scale is England itself, or at its utmost, Great Britain unfettered from the complications produced by Northern Ireland for the perfect Brexit. The 'metaconstitutional' order of Northern Ireland represents an anathema to the perfect scale of taking back control.[97] Law holds these scales together, but beyond the law, symbolism, history and cultural evolutions undercut any of these scales as immutable. The centring of the Act of Union was not present in the Brexit campaign beyond Unionist debates, and as negotiations have run on and culminated in the Windsor Framework, the idea of the proper or natural scale is now very much centred on Westminster.[98] This has played out in law where, since Brexit, Westminster has repeatedly attempted to wrest legal authority from the devolved nations back to London.

The proper and natural scale imagined by London is not simply one that does not include the EU but also one where the peripheral devolved nations are far less troublesome to the core's political imaginings. We see this same tension arising again with regard to the European Convention on Human Rights, which prior to and since Brexit has been a lightning rod for 'taking back control' rhetoric. But much like Brexit, Northern Ireland and the 1998 Protocol cause distinct problems for Conservative

[93]S Sassen 'Introduction: deciphering the global' in S Sassen (ed) *Deciphering the Global: Its Scales, Spaces and Subjects* (Abingdon: Routledge, 2013) p 4, Q Slobodian *Crack-up Capitalism* (London: Penguin, 2023) p 61.

[94]C McCorkindale and A McHarg 'Unity and diversity in the United Kingdom's territorial constitution' in M Elliott et al (eds) *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (London: Bloomsbury, 2018) ch 14.

[95]Sassen, above n 92, p 6.

[96]D Wincott et al 'The Anglo-British imaginary and the rebuilding of the territorial constitution after Brexit – unitary state or union state?' (2022) 10 Territory, Politics, Governance 696.

[97]N Walker 'Flexibility within a metaconstitutional frame: reflections on the future of legal authority in Europe' in G de Búrca and J Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford: Hart Publishing, 2000) p 9 at p 20.

[98]Clarke, above n 85, p 143.

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attempts at rescaling.[99] In Brexit, ceding ground to the EU, over the objections of Unionism, was the price the core was willing to pay, and also a price that those in Northern Ireland who wished to avoid a hard border on the island were willing to pay. The Windsor Framework's ultimate feasibility will take years to fully work itself out, but nonetheless, its scale-based solution – while complicated, networked and across multiple temporalities – demonstrates the possibilities that can be imagined when we move away from nested governance.

Here, the ultimate beneficiary of that imagining is Northern Ireland – but there is no reason why Northern Ireland's use of scaler techniques cannot be emulated, in context-specific ways, by other polities contesting the nested, hierarchical order in which they operate. Northern Ireland, as the local, used scale not to 'take back control' but rather to unsettle what 'control' means and who should have it. Much of the outcome of Brexit was unimaginable to many lawyers and politicians, trapped in the traditional nested hierarchical imaginary – but this was not the case at the local level in Northern Ireland. As perhaps the most significant outcome from the Brexit negotiations surrounding Northern Ireland, the local remains part of the decision-making and its voice remains heard across all governance levels because it was capable of imagining an outcome beyond 'nested' scales. Independence movements might in similar ways be able to insert themselves into legal and political processes that take place in hierarchies that they are usually excluded from, by working to create rhizomic networks and observing temporal scales so as to enable scale-jumping and re-scaling; and similarly, smaller member states of international organisations could use scaler techniques to play 'outsized' roles in the networks in which they operate. Scaler theory, in other words, is not merely an explanatory tool for already-finished phenomena that do not fit the dominant legal narrative of how the world organises itself politically and legally; it is also a potential *toolkit* for actors, who can learn from the particular scaler dynamics that Northern Ireland utilised here and consider how those might be used by them in their specific contexts.

Conclusion

While Brexit and Northern Ireland lies at the core of this paper, we argue it also demonstrates that within law, scale is everywhere. It always has been. The certainty with which we discuss territorial and temporal jurisdictions shows the extent of its presence, but also the necessity of discussing its implications. This is especially so where scale makes us perceive that something *must* be the way it is, that only certain solutions are possible, or – when political and societal elements come to the fore – that there is a *natural scale* at which any law happens. Looking at law through scale allows us to see how the various political power struggles, from a whole multitude of actors, play out within legal orders, and how rescaling resets our terms of interaction with those legal orders.

Northern Ireland proved itself adept at jumping its scale. It managed to do so partly because of its history and existing network of rhizomic collaborations and partly because the politics of Brexit, particularly before the vote, had left the rhetorical scale wide open for it to shape. The possibilities of jumping scale were embraced by the full variety of actors in Northern Ireland – perhaps not always successfully, but sufficiently so to significantly influence the Brexit negotiations' outcome. Seeking and persisting until meetings were scheduled with key actors, whether it was by local community groups or the statutory human rights bodies, was essential in shaping the Framework. These actors did not acknowledge their place in the traditional 'nested' scale; they felt entitled to have meetings with the EU Chief Negotiator, and that it was his obligation to them to do so. They also successfully mobilised state actors like Ireland or the US to ensure that Northern Ireland was at the top of the Brexit negotiating agenda, and not – as London had hoped – something to be settled at the end. The DUP used its role as kingmaker in London, however brief it was, to ensure its core concerns became part of the rhetorical debate at Westminster – and to this day, the effects of its rhetorical

[99]CRG Murray et al 'The implications of the Good Friday Agreement for UK human rights reform' (2017) 11–12 Irish Yearbook of International Law 71.

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rescaling can be seen in Westminster policy meant to garner DUP support for the Windsor Framework, such as the recent offer to 'rebrand' the Irish Sea Border to the 'UK Internal Market Lane'.[100] Northern Ireland, across all its actors, maintained that it must continually have a voice over laws that will affect it.

Sassen argued in 2006 that an epochal transformation was underway, and it is within the national that the most complex meanings of the global are being constituted. Northern Ireland is a clear example of the micro-processes underway.[101] Northern Ireland proffers a challenge to the pregiven hierarchal scales of law and politics. It suggests that understanding contemporary transnational legal developments requires understanding law beyond nested, clean hierarchies or centralised authority, and rather embracing the messiness of rhizomic alternatives and legal imaginaries from the periphery. The nested scale is still there but its existence can only partially explain how the Windsor Framework came to be or how it operates. The contestation between scales bypassed those centralised authorities and continues to resist the nation-state's attempt to reclaim power. Those of us analysing legal orders should take the lessons that Northern Ireland provides us with, and dig deeper into other situations that on the surface seem to fit with traditional 'nested' understandings – and those operating at the lower rungs of those legal orders should likewise look to Northern Ireland to explore techniques by which they, too, might be able to move beyond their 'nests'.

[100]J Crips and J Barnes 'UK offers DUP patriotic rebrand of Irish Sea border' *Telegraph* 19 January 2024, https://www.telegraph.co.uk/politics/2024/01/19/uk-dup-irish-sea-border-rebrand-northern-ireland-brexit/.

[101]Sassen, above n 88, p 1.

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