

Exiting the European Union Committee

Oral evidence: The progress of the UK's
negotiations on EU withdrawal: role of Parliament,
HC 1962

Tuesday 12 March 2019

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Members present: Hilary Benn (Chair); Mr Peter Bone; Stephen Crabb; Mr Jonathan Djanogly; Richard Graham; Peter Grant; Wera Hobhouse; Andrea Jenkyns; Stephen Kinnock; Jeremy Lefroy; Mr Pat McFadden; Seema Malhotra; Mr Jacob Rees-Mogg; Emma Reynolds; Stephen Timms; Mr John Whittingdale; Hywel Williams.

Questions 3771 - 3850

Witness

I: Rt Hon Stephen Barclay MP, Secretary of State for Exiting the European Union.

Examination of witness

Witness: Stephen Barclay.

Q3771 **Chair:** Secretary of State, welcome to this meeting of the Committee. We understand the circumstances that led to your cancellation yesterday. This session—maybe mercifully from your point of view—will be relatively brief compared with normal ones because we are all keen to be in the Chamber to hear from the Attorney General when he makes his statement at 12.30, and I understand that some colleagues may need to leave because of other meetings that are taking place.

In those circumstances, we would very much like to have you back soon because, regardless of how the vote goes tonight, we will either have things to discuss to do with extensions or to do with the withdrawal implementation Bill. If you could give a commitment to the Committee, as we have not seen you for three months, to come back before Easter, it would be extremely helpful if you could confirm that now. We will find a mutually convenient date and then we can concentrate on the matters of the moment this morning, if that is all right with you.

Stephen Barclay: Sure. First, Chair, thank you for your and the Committee's understanding yesterday of the circumstances. I am happy to give that commitment. As you and I discussed last week, in all my ministerial roles I put a premium on engaging with parliamentarians. Colleagues around the House will reinforce that. I have met five different parties so far in the House of Lords; I have had, I think, 15 bilaterals with Members of the House of Lords; I have met their Cross-Bench committee, their European Union Committee. This is my second appearance here, and I have been in the post three months. I very much want to engage with the Committee, and I hope that demonstrates that.

Q3772 **Chair:** Your commitment to come again before Easter is much appreciated. Time is very much of the essence and there is a lot of ground to cover, so short questions, with short answers from you, would help.

To kick off, for clarification, is there now an end date to the backstop? Yes or no?

Stephen Barclay: There is not a set date.

Q3773 **Chair:** There isn't a set date.

Stephen Barclay: There is an ability to terminate where the EU acts in bad faith.

Q3774 **Chair:** We will come to that in a moment, but there is not an end date. Can the UK unilaterally pull out of the backstop?

Stephen Barclay: Yes; we have legally binding changes that enable us. In essence, the central concern—I am sure we will get on to it, Chair, in



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due course—that had come from the many debates we have had in the Chamber was this idea about the backstop, notwithstanding the many safeguards that there are before one gets into the backstop and notwithstanding the debates we have had in the House as to how the backstop is undesirable for both sides, and breaks the four freedoms and is something the EU does not want. President Macron has spoken about his concerns with the backstop. Notwithstanding all the debates we have had, there was a concern I think in the House—

Q3775 **Chair:** I understand the concern. The question is: how can we pull out of the backstop?

Stephen Barclay: Can we be trapped? That is what I was coming on to: can we be trapped in the backstop? The point is that, to be trapped in the backstop, the EU would be acting in bad faith, and where the EU acts in bad faith, and the consequence, the outcome, is that the backstop becomes permanent, it would be subject to arbitration through the withdrawal agreement.

Q3776 **Chair:** Are you telling the Committee that the UK could pull out permanently?

Stephen Barclay: You would suspend initially.

Chair: Ah.

Stephen Barclay: Then, if that suspension was not remedied, the outcome would be that we would be able to terminate subsequent to that, yes.

Q3777 **Chair:** Where is that in the text of the withdrawal agreement? You will confirm for the Committee that not a single word of the legally binding withdrawal agreement has been changed as a result of the discussions in the last two or three weeks; the words are exactly the same. Is that correct?

Stephen Barclay: The text of the withdrawal agreement is the same, but what has changed—you will have seen the package of documents put down last night—is that there is now a joint instrument that has legal force. If I could draw the Committee's attention to paragraph 12, it says that "it would be inconsistent with their obligations under Article 5 of the Withdrawal Agreement and Article 2(1) of the Protocol for either party to act with the objective of applying the Protocol indefinitely."

The concern that we sought to address with the EU was that there was a very real issue, and I think it went beyond parties, as to whether the backstop would be used as a vehicle to trap the UK and, through doing so, in essence, distort the negotiations themselves—in essence, that the EU was acting in bad faith in order to have negotiating advantage. That is the ill that the joint instrument seeks to address, and a significant change has been secured. It is something that the Attorney General recognises in his legal advice, which I think has been published and shared.



Q3778 **Chair:** And which we have just got. I shall come on to it, but I am trying to understand what actually has changed, because in the paragraph you have just referred to it says: "Should the Union or the United Kingdom consider the other party was acting in this way after the Protocol became applicable, it could make use of the dispute settlement mechanism." The dispute settlement mechanism is in the withdrawal agreement, and it says that any suspension, which is what David Lidington referred to in the House last night, "shall be temporary." Could you explain to the Committee where a suspension that "shall be temporary" can become a unilateral right to withdrawal for the United Kingdom, because I do not see that the withdrawal agreement makes any provision for that whatsoever?

Stephen Barclay: If I can take you to the Attorney General's legal advice—

Chair: I have it in front of me.

Stephen Barclay: He speaks to that very issue at paragraph 17, where he says that he considers that "the legally binding provision of the Joint Instrument and the content of the Unilateral Declaration reduce the risk that the United Kingdom could be indefinitely and involuntarily detained within the Protocol's provisions *at least in so far as that*" is brought about by bad faith.

The point I am making is that the issue that came through in many of the debates we had in Parliament was this issue of the EU, which I do not, for the record, believe is the intention, because it is in both sides' interest to get on to the future economic partnership. I think the EU will approach this in good faith. It is not correct to suggest otherwise, but it was clear that a number of parliamentarians had concern as to whether bad faith would be a vehicle for trapping the UK and distorting the talks more. That is an issue, as I say, that is given legal force.

Could I also, Chair, draw your attention to something that speaks very much to the debate around bad faith? Paragraphs 7 to 11 of the joint instrument set out a process for the alternative arrangements. A number of members of the Committee will know well that the Brady amendment specifically focused on the risk of going into the backstop. There are two aspects: do we go into the backstop and then do we get trapped in it?

Again, one of the things we focused on in the negotiations, in response to the concerns parliamentarians had around the alternative arrangements, was how we use the alternative arrangements to ensure that we do not go into the backstop. The joint instrument gives a clear date and a clear timeframe, which is a legal commitment on both sides, to have alternative arrangements in place.

Importantly—we may get on to this in due course—one of the reasons we could not do that immediately was that it required derogations from the EU, and the point of the text is that, in looking at the arrangements that



sit alongside the technology, the EU cannot unreasonably look at arrangements to enable that technology to function. That is a major safeguard, meaning that we are far less likely to go into the backstop. We have the triggers—the Swire amendment; whether one votes to go in—but the alternative arrangements set out, as I say, at paragraphs 7 to 11 are extremely helpful again in addressing, particularly, if I may say, for those colleagues with more Brexit concern, whether you would actually trigger the backstop in the first place.

Q3779 Chair: The Attorney General in the legal advice just published—

Mr Djanogly: Can I just ask something on that, Chair? Would you mind?

Chair: Can I finish the point? The Attorney General said that what has been negotiated reduces the risk that the UK could be indefinitely and involuntarily detained within the backstop in so far as it has been brought about by the bad faith or want of best endeavours of the EU. Can you confirm that it does not eliminate the risk that the UK could be indefinitely and involuntarily detained in the backstop? Is that correct?

Stephen Barclay: If I could take you to paragraph 12, it says that, if the UK could demonstrate that the EU was acting “with the objective of applying the Protocol indefinitely,” that would be a breach of good faith. That is about a pattern of unjustified delay. Those obligations are then subject to arbitration under the dispute recognition. That is the basis, as I said a moment ago, on which one could suspend. What is important is the interplay between different components of this, and I appreciate that the Committee have only just had an opportunity to look at it.

Q3780 Chair: I understand that point, Secretary of State, although the sentence you have just referred to says the UK “would be entitled to take measures to disapply the provisions of the Protocol,” but actually the withdrawal agreement provides for temporary suspension. It does not provide for disapplication.

Let me come back to the question that you have not answered. The Attorney General says it reduces the risk of indefinite detention, in effect, in the backstop, but it does not eliminate it. Can you confirm for the Committee that it does not eliminate the risk?

Stephen Barclay: The Attorney General will answer in more detail, but my reading of that is that the distinction is that one has to prove bad faith; so to say that it eliminates it ignores the fact that one also has to prove bad faith. That is why a moment ago I was referring to the interplay, because what is set out in the documentation, through the timetable, some of which was in the letters from President Tusk and President Juncker, is the commitment to start more quickly, not waiting for ratification, and that we can start as soon as the withdrawal agreement goes through. Having the alternative arrangements timeframe and a clear programme means that, if that is not met, it becomes much easier to display that bad faith has occurred because, self-evidently, there is a commitment on both sides to have alternative arrangements by



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that date, so it gives a much clearer timeframe. Let us remember that this is both a legal and a political assessment that the House is making—

Chair: I understand that entirely, but Secretary of State—

Stephen Barclay: One also has to make a political assessment as to where the balance of risks is.

Q3781 **Chair:** But bad faith is not the same as an intractable difference, is it?

Stephen Barclay: Bad faith has its own definition in law, and it is a question of proving that. The Attorney General's advice is that, basically, if there was a pattern of unjustified delay—for example, if the UK and the joint workstream on alternative arrangements came forward with sensible proportionate arrangements linked to technology that is provable—the EU could not simply say, "We're not going to have any flexibility in our approach and we're not going to implement those." There needs to be a look at what the political reality would be as well as what the legal requirements set out.

Q3782 **Chair:** Would proposals from the UK in those circumstances have to be backed by the arbitration panel?

Stephen Barclay: This teases out one of the areas that gets misreported in the press in terms of the interplay between EU law and—

Q3783 **Chair:** Would it have to go to the arbitration panel?

Stephen Barclay: If we triggered or made the accusation of bad faith, it would go to arbitration under the joint committee, but that would look to the ECJ to interpret EU law; it is an international body and it is at an international level that it would adjudicate.

Q3784 **Chair:** The arbitration panel would have to decide in the first instance that the EU was acting in bad faith. That is No. 1. Is that correct?

Stephen Barclay: Yes.

Q3785 **Chair:** No. 2: if there were any questions of interpretation of EU law, they would not be decided by the arbitration panel; they would go to the Court of Justice.

Stephen Barclay: But that is a standard, Chair, I mean international—

Q3786 **Chair:** You just have to say yes; that's all.

Stephen Barclay: Indeed, yes.

Q3787 **Chair:** Yes, that is correct. And any ruling—

Stephen Barclay: But if you—

Q3788 **Chair:** Hang on. Any ruling from the Court of Justice would be binding on the arbitration panel, the EU and the UK. Is that correct?

Stephen Barclay: The arbitration—



Q3789 **Chair:** It is a simple question—yes or no. Will it be binding?

Stephen Barclay: You are asking it in a leading way, so, with respect, let me answer it, because I am answering it. The way international arbitration works is that they make judgments of fact, not of law. That is how international arbitration works, and the Attorney General is a leading exponent of that so he will elaborate in more detail. That is why sovereign states with their own legal frameworks enter international arbitration.

The arbitrator will assess the facts. Have sensible alternative arrangements been brought forward? Is the technology workable as a matter of fact? That is not a judgment of law. If he or she needs an interpretation of law, yes, that is a competency of the ECJ, but that is not, in terms of what the joint instrument sets out, where the focus of the arbitrator will be, because it will be whether, particularly on the alternative arrangements, this is technology that exists, and we know from the work that has already been done that it is technology that exists.

What then needs to be looked at, on the facts, is whether either side has acted unreasonably in not bringing forward their proposal. It is a factual question the arbitrator will make, not a legal interpretation. It is quite an important difference.

Q3790 **Chair:** If the UK loses its case before the arbitration panel—in other words, the arbitrator says, “I am afraid we do not think these are suitable alternative arrangements”—the UK will not be able either to have a temporary suspension or to seek unilaterally to withdraw from the backstop. Is that correct?

Stephen Barclay: In so far as both sides are still working—

Q3791 **Chair:** It is a very simple question. Is it—

Stephen Barclay: —to a future economic partnership, yes.

Q3792 **Chair:** Is it correct that if we, the UK, lose in front of the arbitrator, the UK would then not be able to suspend the operation of the protocol? Is that correct?

Stephen Barclay: Yes, because we would need to demonstrate—

Q3793 **Chair:** That is correct—fine.

Stephen Barclay: I will clarify it.

Q3794 **Chair:** The final point I want to put to you—

Stephen Barclay: Would you like me to answer the question, Chair?

Q3795 **Chair:** You said it was correct. I just asked you whether it was correct, and you said yes. If it is correct, that is all I was trying to establish. If we lose at the panel, we cannot suspend and unilaterally withdraw.



Stephen Barclay: But not if there has been prima facie bad faith. The point is that it is not that the arbitrator is sitting there in judgment as to whether the legal interpretation is X or Y. That is not the question they are answering. It is a standard test that sovereign states enter into and the standard under which international arbitration is conducted: on an objective test of the facts, has there been bad faith, for example, on alternative arrangements?

This is where the wiring comes in terms of the commitments on timescale, the firm date that is now in the text by which there are alternative arrangements, and that in having that date you therefore do not go into the backstop in the first place. If you then go beyond that, the text makes timing of the essence. It doubles, in essence, the premium of time, and that is set out in the documentation, which again would give the arbitrator further weighting to that issue of fact. It is not a question on which the arbitrator sits there as a judgment of law. It is saying: "Have sensible arrangements been brought forward?", or, "Have the parties acted in bad faith?"

I come back to the central debate that came up time and again in the Chamber, which was the concern of many parliamentarians around the tension between what is in the withdrawal agreement, which is temporary, and the concern the House had that it would be indefinite. That really goes to the first question about whether one needs to change the text of the withdrawal agreement. The point is that the withdrawal agreement already has language that it is temporary. Many colleagues were concerned about the tension between the temporary nature within the withdrawal agreement and what is referred to as "unless and until" and whether that would therefore have an indefinite nature, and how those tensions play through. That is what we have sought to address in the joint instrument.

Chair: That is very helpful.

Q3796 **Mr Whittingdale:** Can I pursue this theme slightly? The Attorney General's final paragraph, essentially, says that unless you can show breach of faith, rather than simply intractable differences, nothing has changed, and the UK has no intentionally lawful means of exiting the protocol arrangements save by agreement. When it comes to whether or not the difference is due to actual breach of faith or is simply intractable differences, that is not really a question of fact. It is a question of opinion as to what is in the mind of the people undertaking the negotiations. What confidence can we have that breach of faith stands any chance of being upheld, and the EU do not simply turn round and say, "No, we are trying to find a solution; we just don't believe that what you are suggesting works"? That becomes an intractable difference.

Stephen Barclay: What you quite rightly draw out is a distinction between whether there has been bad faith or whether both sides are still negotiating in good faith but have not got to the outcome.



Q3797 Mr Whittingdale: No. Intractable differences mean that you have stopped negotiating. It means there are intractable differences. That does not necessarily mean bad faith.

Stephen Barclay: You can have a situation where both sides are still negotiating in good faith, and the way out of that is through the arrangements. That is what it says. The central question that came through the debates we had in the Chamber was the sense that the EU was going to act not in good faith to reach an agreement with the United Kingdom; the charge that many colleagues in the House had was the opposite, that the EU was going to act in bad faith and that the backstop was a vehicle to distort the negotiations and trap the UK. If you trap the UK, you are de facto acting in bad faith; you are trying to distort the talks for negotiating advantage. That is the concern.

Q3798 Mr Whittingdale: But you have to prove bad faith. The EU is not going to say, "Actually, we're never going to agree to anything you come forward with." That would be bad faith, but if the EU says, "We would love to find a solution; we simply do not agree with you about the viability of the one you are proposing," that is an intractable difference and it means we cannot leave.

Stephen Barclay: That is why I referred to paragraph 9 of the Attorney General's advice, where he addresses the fact that, if de facto the relationship has become permanent, by its nature it is not temporary.

It is worth taking a step back. Both sides have given a commitment to put a future economic partnership in place by the end of 2020. The question then is: at what point does that no longer become temporary as you go past that? As I say, the aim is not to go into the backstop. That is what the workstream, which I did with a number of colleagues in the House on the alternative arrangements, was about, and we have made significant progress with a clear timeframe and a commitment from the EU on that. The question, though, is beyond what both sides have agreed. At what point would it become de facto permanent? At that point, to what extent does that mean bad faith is occurring? If both sides are negotiating in good faith, then, of course, that negotiation will continue.

Q3799 Mr Whittingdale: I do not want to pursue it, but all I would say to you, Secretary of State, is that the conclusion of the Attorney General's conclusions, which is the last paragraph of his letter, reads very much as if nothing actually has changed. Obviously, I am not a lawyer—I await advice from my colleagues who are lawyers—but that final paragraph is pretty terminal.

Stephen Barclay: It is a long time since I was a lawyer, and I defer to the Attorney General, who is a far better lawyer, but I do not accept that, because, as I say, one has to look at this as a package, not in isolation. I accept the point that, if both sides are negotiating in good faith, that is what the final paragraph is referring to and therefore there will need to be an arrangement. The central political concern that was raised during



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the first meaningful vote was that the risk was that the EU would not enter into negotiations in good faith. The concern was that they would use it as a trap. The point is that there has been a strengthening and the Attorney General's advice recognises it. With respect, we cannot cherry-pick and say, "Well, he says there is a reduction of risk and therefore that is binding, but two or three paragraphs earlier, where he says there is a change to the legal risk, we are going to skirt over that." It is important that one takes the whole.

Also, if I may say so, it is worth referencing back to his earlier advice of 13 November where he said that, ultimately, these are questions of the balance of risk and politically it would be in the interests of both sides. That did not persuade the House and that is why we have sought to address the particular concern that the House had about the issue of bad faith. It does not go as far as you would like, Mr Whittingdale—I accept that—but it does allow for the issue of bad faith and the UK being trapped. That is the issue that politically kept coming up in the Chamber.

Q3800 Mr Djanogly: I want to look at what John Whittingdale has just said. John asked about the context of the agreement overall, and bad faith does apply to the agreement overall. The Secretary of State kept referring to alternative arrangements, presumably because that is an issue of significant concern to certain Members of Parliament. The need to work towards the alternative arrangements section, I think I am right in saying, is not in the binding section. Therefore, specifically on alternative arrangements, the question that arises is what level of inaction in working towards getting those alternative arrangements would constitute bad faith? I do not think the Secretary of State has nailed that answer.

Stephen Barclay: If I may, I will try to help on that. The joint instrument is legally binding text and it sets out the arrangements in terms of alternative arrangements, so it does put that on to a legal footing. That is something, therefore, that any arbitration panel would need to look at, so there is legal force to the timescale commitment on alternative arrangements. That is in the joint instrument.

Q3801 Mr Djanogly: I was talking more specifically about the need to work towards getting those alternative arrangements. At what point would bad faith apply?

Stephen Barclay: Can you say that again?

Q3802 Mr Djanogly: At what point would bad faith be arguable in the context of not working towards the alternative arrangements?

Stephen Barclay: That is addressed in the AG's advice. He says that where there is a pattern of unjustified delay, that would be the issue, and paragraphs 7 to 11 of the joint instrument set out a process whereby, in essence, momentum needs to be put into the alternative arrangements. This is legal text; paragraphs 7 to 11 of the joint instrument are legal text. It makes time very much of the essence, so, basically, what you



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have there is something that has legal force that the arbitrator would need to consider.

It sets out that alternative arrangements that supersede the protocol in whole or in part are not required to replicate its provisions in any respect. One of the discussions we have had is to what extent the alternative arrangements would be constrained because of the derogations required for the single market and the protection of the single market. This is saying that there must be flexibility on both sides to look at how that technology is applied, but this, in the joint instrument, has legal force.

Q3803 Richard Graham: On the specific point, Secretary of State, Jean-Claude Piris, the former Director-General of the EU's legal service, has said very clearly that it is important that the EU did not object to the UK's unilateral declaration: "In case of EU dragging its feet and not acting in good faith, the UK might ultimately suspend some of its obligations but not on the rights of citizens." He then reinforced the point by saying: "With this the UK has a legal remedy not to be trapped in a Customs Union with the EU." The key question is: do you agree with him and is that correct?

Stephen Barclay: I do. I think what Piris has said over the last 24 hours, or since last night, is interesting in two regards. He is one of the authorities on EU law from the EU side. First, he has said that a unilateral declaration does have force if it is not objected to on the other side. That is our understanding, so, while it is a UK assertion of our interpretation, it goes beyond that. That is an accepted position in international law, and I think the comments from Jean-Claude Piris reinforce that. The unilateral declaration sits alongside the joint instrument and makes clear the UK's understandings of the temporary nature of the protocol, so there is legal benefit to that. The other point is—

Q3804 Richard Graham: Isn't that the ultimate security? Isn't that the answer to the question that several colleagues have been asking you? Could we get out if we wanted to? Yes. We would use the unilateral declaration.

Stephen Barclay: It is because—the joys of Twitter and people expressing their views on Twitter. He has tweeted that the UK has a legal remedy not to be trapped in the customs union with the EU. Part of the reason why the Prime Minister has had to negotiate so hard, part of the reason why the negotiations were going on as late as they were last night, is that, from the EU side, these are material commitments that they have made.

I think sometimes that is the frustration, and we saw this, although it is a separate debate, when Lord Guthrie and Richard Dearlove said the political declaration contradicted our national security. They are two of our most respected public servants and I hold them in very high regard, but there was a central contradiction in what they said between critics of the political declaration saying, "It is not worth the paper and it has no legal weight," and then the same critics saying, "But the political



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declaration is so binding that it constrains our national security." That is part of the contradiction that we get in this debate.

Chair: Thank you. That is very helpful.

Q3805 **Mr Rees-Mogg:** I want to follow on from that, on the unilateral declaration, to see exactly how unilateral it is. The end of it says, "disapplication of obligations under the Protocol, in accordance with Part Six, Title III of the Withdrawal Agreement." Part 6, Title III, is paragraphs 167 to 181 inclusive of the withdrawal agreement. That is the dispute settlement procedure, so it is only a unilateral ability subject to the approval of the arbitration committee. Is that correct?

Stephen Barclay: It is subject to the dispute settlement procedure, but you only quoted half of it. It also says "or Article 20."

Q3806 **Mr Rees-Mogg:** But article 20 is the joint committee.

Stephen Barclay: Yes.

Q3807 **Mr Rees-Mogg:** How does the joint committee give us a unilateral exit?

Stephen Barclay: Because the joint committee—this goes to the challenge from the Chair at the start of the session—is making an assessment on whether good or bad faith has occurred. That is the linkage to article 5. What you will see there in the paragraph is "in whole or in part due to a breach of Article 5 of the Withdrawal Agreement." The question for the panel would be whether there had been a breach of good faith—for example, in not being willing to address the joint commitments on alternative arrangements. If so, there would be an exit as a consequence.

Q3808 **Mr Rees-Mogg:** But the joint committee is not a unilateral exit because the joint committee is joint between us and the European Union. It would need the permission of the European Union to leave unilaterally. Therefore, it is not unilateral.

Stephen Barclay: It is a joint body, but it sits independently; yes.

Q3809 **Mr Rees-Mogg:** This has been advertised as a unilateral ability, but it is not unilateral. It goes straight back to the withdrawal agreement. Whether it is under article 20, which requires the agreement of the joint committee, which is the agreement of the EU, which is back to square one, which is that we cannot leave without the EU agreeing—

Stephen Barclay: No, it is not.

Q3810 **Mr Rees-Mogg:** How is it not?

Stephen Barclay: Again, part of the political debate has been that the UK will be trapped in a backstop and it has no right of ending this, terminating this, disapplying it, whatever the phrase is. I will take you to the specific line to be clear, which is "could ultimately lead to disapplication of the obligations." The point is that there is scope to



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disapply. You are quite right that the mechanism for doing that would be through the dispute resolution mechanism in the withdrawal agreement, whether that is part 6, title III, or through article 20. The point is that there is scope to disapply the obligations of the protocol, and that is what the United Kingdom—

Q3811 Mr Rees-Mogg: I am sorry, but there has always been scope to disapply the obligations of the protocol if, under article 20, the objectives had been met. This is advertised as a unilateral. I am focusing on the word “unilateral.” It is not something the UK can do on its own. Under article 20, it needs the approval of the joint committee, which is a joint committee between the UK and the EU. We cannot leave it without the permission of the EU under article 20. Is that correct?

Stephen Barclay: There are two things being confused here.

Q3812 Mr Rees-Mogg: Let us just focus on that, and then we will come to title III of section 6.

Stephen Barclay: What is unilateral is what we are asserting as our interpretation. It goes back to Richard’s point. The fact that that is not disputed by the EU becomes common ground that goes before the arbitrator. This is not saying there is a unilateral exit in that regard—the regard you are referring to—but that there is an ability to trigger, and our interpretation is what the unilateral declaration is referring to.

Q3813 Mr Rees-Mogg: That is very helpful. Thank you, Secretary of State. What you are saying is that we have made a declaration that under the treaty we can ask to leave the backstop. That has been blindingly obvious to anybody since the withdrawal agreement was produced. Of course we can ask to leave, but the ability to ask is not the same as the ability to leave, is it?

Stephen Barclay: What this is setting out is the UK’s position, which is that it would be entitled to take measures to disapply the provisions of the protocol in accordance with the withdrawal agreement. That is what it is setting out.

Q3814 Mr Rees-Mogg: But the only measure it can take under the unilateral declaration is to ask permission of the EU to leave, because it is either on the joint committee or it is the arbitration panel. Crucially, with the arbitration panel—because we are covering articles 167 to 181—there is article 174: the arbitration panel is subject to interpretations of EU law as laid down by the European Court of Justice. We, in the unilateral declaration, are accepting that the only way to get out is with the approval of an arbitration panel that is subject to EU law in matters of—

Stephen Barclay: No, with respect, what you said is that the only way to get out is with the approval of the EU. That is not correct. What we are asserting here, in essence, is the trigger that we would apply in order to start. I agree with you that the process for doing so is through the



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mechanism set out in the withdrawal agreement, but it is about what the trigger is.

I come back to where much of the debate has been, particularly on the meaningful vote. It was around the UK being trapped in a backstop where the EU was acting in bad faith, and not just the fact that that would have an indefinite nature but that it would have a distorting impact on the negotiations themselves. The UK would almost be required to concede aspects in the negotiation because, in essence, it had no right of access. What the unilateral declaration is asserting is how we would trigger that mechanism.

Q3815 **Mr Rees-Mogg:** But it does not mean that mechanism would work. That is absolutely no change from what was there before.

Stephen Barclay: No, I do not accept that because it is about—

Q3816 **Mr Rees-Mogg:** The unilateral declaration does not add anything because it simply says that we could ask to leave the backstop. We have always been able to ask to leave the backstop. That is not, in any sense, an improvement or a development.

Stephen Barclay: I do not accept that interpretation. We will have a longer session with the AG on his statement. I said earlier that this is a question of both legal interpretation and political interpretation. The starting point is that neither side wants to go into the backstop. There are safeguards to prevent it. What have been negotiated are legal commitments through the alternative arrangements, responding to the concerns of Brexiteers in the House around avoiding the need to trigger that. What the unilateral declaration does is to give further weight to the circumstances through which we could trigger. I am sure the Attorney General will set out further comments on that.

What is slightly lost in all of this is that there is a huge amount in the deal that we are not getting into because we are into quite a narrow point of legal interpretation between two of us who no longer practise law.

Mr Rees-Mogg: I have never practised law. The Chairman wants to move on, but thank you very much.

Chair: Colleagues, we have 20 minutes left and six people want to come in. We can all do the math.

Q3817 **Mr Bone:** My question is very straightforward. Secretary of State, can the United Kingdom on its own, at any time, pull out of the Irish backstop?

Stephen Barclay: Yes, by triggering a mechanism if the EU has acted in bad faith and that becomes permanent. There are exit routes through.

Q3818 **Mr Bone:** Let me stop you, to speed things up. Clearly that is a no, because it refers to going through other avenues. What I was asking was this. If the Irish backstop was in place, could the United Kingdom



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Government say at any time, for any reason, that they were going to pull out?

Stephen Barclay: As with most disputes between sovereign states—again this is a staple of international arbitration; this is how international arbitration works—the arbitrator will make a judgment on the facts.

Q3819 **Mr Bone:** So that is a no.

Stephen Barclay: What you are assuming—

Q3820 **Mr Bone:** I am just asking a very straightforward question. Can the United Kingdom Government say, if the Irish backstop is in place, “That’s it, folks; we’re coming out”?

Stephen Barclay: If what you are pitching—

Q3821 **Mr Bone:** In any circumstances.

Stephen Barclay: If you will let me answer. What your pitch seems to be suggesting is that the United Kingdom Government should enter into an international agreement, make commitments to do so and then just be able to walk away from it, irrespective of the facts before the arbitrator.

Q3822 **Mr Bone:** Indeed; we have already signed up to a treaty though. When we went into the EU, article 50 allowed us to pull out after two years with no say from the EU whether we did so or not, so that is exactly what I am saying. What you are suggesting I sign up to and vote for tonight, Secretary of State, is the opposite: not the right to pull out of the Irish backstop.

Stephen Barclay: No. The point I was trying to land, Mr Bone, is about the concern that was raised in the House about that idea, notwithstanding all the safeguards that prevent going into the backstop, and notwithstanding the fact that both sides are committed to where much of Parliament’s focus, I hope, will be, which is on the future economic partnership; 48% of our trade is with the European Union. In practice, we need a positive relationship. We have 3 million EU citizens. As a former Health Minister, I know they are invaluable to our NHS.

There is a much bigger prize in terms of having a positive relationship with our largest and most important trading partner. Frankly, we should be focusing our attention on how we build those strong relationships while also having what we deliver through the Brexit vote: an international trading policy, control over immigration and our fisheries policy and all of the other issues that are the real prize for those of us who campaigned for leave. That is certainly what I was campaigning for.

Q3823 **Wera Hobhouse:** Thank you for coming. It is all about bad faith, how that can be demonstrated and what constitutes it. You have already explained that it is about negotiating at pace. We have already heard that ultimately it is something that might be just an opinion.



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You said earlier that bad faith is a legal term. Could you perhaps show us a precedent where bad faith was successfully demonstrated in the history of that legal term?

Stephen Barclay: What I was seeking to allude to was the fact that bad faith would be an assessment. I do not believe that is the EU's approach. I do not think they are approaching these talks in a spirit of bad faith. I think they want to avoid getting into the backstop. They want to get on to having a trading relationship. When you speak, as I am sure you have, with many senior figures in Europe, they are getting frustrated with the whole Brexit process anyway. They want to get on to a much more positive engagement and get this done.

The point I was alluding to was that this is just a staple of international arbitration. You have an assessment on the facts, and on the facts you would look at whether one party or the other had acted in bad faith.

Q3824 **Wera Hobhouse:** But ultimately we would not need any laws if we all just acted in good faith with each other. The whole point of legal disputes is that there is ultimately the assumption that there is not good faith. I am asking you if there a precedent in international law where bad faith, as a legal term, existed and was challenged—that somebody acted in bad faith and there was a successful challenge.

Stephen Barclay: I refer to the Attorney General as the Government's law officer. He is probably better placed than me as to which international legal precedents to cite.

Q3825 **Wera Hobhouse:** You do not actually know how the Government would demonstrate bad faith.

Stephen Barclay: How the Government would demonstrate it is very much addressed in the documentation—whether the process set out in the joint instrument had been followed and whether, in terms of alternative arrangements, sensible proposals had been brought forward. Those would be the assessments that an arbitrator would make in looking at whether either side had acted in good or bad faith. It is not an unusual test.

Q3826 **Peter Grant:** I want to go back to why the backstop is. Is it fair to say that, as soon as the UK decided to leave the customs union and the single market, that created a possible problem as to how to do that but still honour our obligations under the Belfast agreement?

Stephen Barclay: Sorry, would you say that again?

Q3827 **Peter Grant:** As soon as the UK Government decided to leave the customs union and the single market, at that point they created a potential difficulty as to how they could do that but still comply with the terms of the Belfast agreement. That is where the whole backstop issue came from.



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Stephen Barclay: I understand the point you are making. I think there is a distinction between the commitments that were made on both sides. Often, the December 2017 joint report commitments are portrayed as solely a UK responsibility to avoid the hard border. Actually, it was a joint commitment on both sides to avoid the hard border.

There is a distinction between what steps are put in place to avoid a hard border and how one protects the single market. It is unfair to say that is quite often what drives much of the EU concern—notwithstanding that certainly when I speak with people like Michel Barnier he is absolutely sincere in his personal commitment to the peace process in Northern Ireland, and that comes through very strongly when you speak to him. Underlying the EU approach is very much how they protect the single market and not just the issues of how one avoids a hard border. There is a distinction between what measures you need to put in place to avoid a hard border and what measures would need to be put in place to ensure that the single market was protected in the way that the EU often approaches it.

Q3828 **Peter Grant:** But the fact remains, doesn't it, that, if Irish history had been different and if we had not needed a peace process, we would not have the problems now with the Irish backstop?

Stephen Barclay: First, there is a geographical reality in the fact that the Northern Ireland-Ireland border is the only land border. There is also a historic reality. When, for example, we did the work on the alternative arrangements, there is existing technology that works perfectly well on other borders, but which has sensitivities in Northern Ireland. If you have, for example, tracking devices, there are parts of the community who, quite understandably, would have concerns around tracking devices linking to information to the state. There are historic sensitivities. You can look at the alternative arrangements purely from a technology perspective, but there are community issues that flow from that as well. It is a more nuanced issue.

Q3829 **Peter Grant:** Would that also mean that, when people talk about wanting the UK to have the right at any time unilaterally to walk away from the backstop, it is still the Government's position that you will not even consider that if, by doing it, you risk undermining or prejudicing the Northern Ireland peace process?

Stephen Barclay: I think what you raise, Mr Grant, is a very important point. Notwithstanding everything else, the Government have a very firm commitment to avoid a hard border. The Prime Minister set out in a speech when she went to Northern Ireland a few weeks ago her absolute personal commitment to avoid a hard border. Irrespective of the wider debate, that is a unilateral commitment that the British Government have given. It is something that both the UK Government and the Irish Government are very committed to.

Q3830 **Mr McFadden:** What would happen under the agreement, as updated by



last night's documents, if we reach the end of the transition period and both sides have negotiated in good faith but no agreement has been reached on arrangements to replace the backstop?

Stephen Barclay: It is a very fair point. In the first instance, there would be a decision by the House on whether to extend the transition period. As you know, Mr McFadden, there is scope to extend it by a year or two years. That would be the first response.

Q3831 **Mr McFadden:** I am assuming that we have already done that. I said that we had reached the end of the transition period.

Stephen Barclay: I thought you might come back with that. The point is that you are then into a longer period. That is why the commitment that was agreed last night around the timetable for the alternative arrangements is so important, and there is a commitment on the EU side not to unreasonably withhold what may be required in order to facilitate those arrangements. For example, at paragraph 7, there is reference to "facilitative arrangements and technologies." You would look at that in terms of things like the customs code and whether there could be flexibility there.

The point is that both sides have agreed to accelerate the talks. Both sides have agreed to start immediately after the withdrawal agreement rather than waiting for ratification. A clear timeframe has been put in, to put in momentum. Commitments on times have been given on alternative arrangements.

Within your question, there is an absolutely fair point, which is: notwithstanding the above, what would happen? In that instance, we would continue in the backstop because there was good will on both sides, but we are talking—

Q3832 **Mr McFadden:** So the short answer to my question is that if we reach the end of the transition period, assuming it has been extended as you say it might be, and we do not have an agreement, the backstop kicks in. Is that right?

Stephen Barclay: In that instance, the backstop would kick in because that is the insurance. Perhaps the best way I can explain it is: do you see the backstop as life insurance, that it is all-weather and indefinite; or do you see it more like term insurance, which is where the temporary nature comes in?

There comes a point over a period of time when it becomes de facto permanent. The point is that that is when the UK would have, in essence, a right to trigger. To some extent, that is where the politics interplays with the legal interpretation, because there needs to be a judgment, if I may say so, of common sense. There will be a point at which the passage of time shows that it is not temporary.

Q3833 **Mr McFadden:** The Government are placing a great deal of weight on



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the potential for unilateral suspension. Two conditions have to apply for the unilateral suspension element to kick in. The first is proven bad faith on the part of one party, namely the EU, and the defiance of a ruling from the arbitration panel proving that bad faith. Those are the two conditions, aren't they?

Stephen Barclay: Yes.

Q3834 **Mr McFadden:** The EU is represented on the arbitration panel, so in those circumstances the EU would have to agree that it had acted in bad faith for this to kick in.

Stephen Barclay: I think what you are alluding to is what is set out in paragraph 14 of the joint instrument. First, the EU does not have a majority on that. Secondly, what it says is that it would be suspended under that right "unless and until." A bit like the political declarations, there is an inherent contradiction sometimes when part of the criticism people make about the withdrawal agreement is the provision of "unless and until" and its indefinite nature. The point here, which is partly why the language was chosen, is that the suspension would apply "unless and until the offending party has taken the necessary measures."

To bring it back to the alternative arrangements, for example, you have technology that works. It requires some derogations or some flexibility on the EU part. If, after a passage of time, the EU was found not to be acting in good faith because there was a way through, the protocol would be suspended and it would be for the EU then to make those arrangements. The bit we are losing sight of is that both sides want to do a deal. Both sides want a future economic partnership. The onus would then be on the European side to make whatever adjustments were required to put that future economic partnership in place. The primary way that the backstop comes to an end is through a new economic partnership. That is the best way we come out of it.

Almost all of the debate so far today has been predicated, first, on the EU acting in bad faith. I do not think that is the case. I would be quite surprised, given a lot of the speeches and comments about the EU, if a majority of the members of the Committee genuinely thought that the EU was approaching these negotiations in a spirit of bad faith. Yet almost all of our debate is predicated on, "What would we do if the EU acted in bad faith?" I think one should look more realistically at the fact that both sides want to come to a future economic partnership, and it is the future economic partnership that ends the backstop.

Q3835 **Seema Malhotra:** Secretary of State, we have a lot more paperwork today. We have a reprinted withdrawal agreement with the date of March now on it, but in reality it seems that nothing has changed and we are just a few weeks away from leaving the European Union. Everybody now seems to think that the vote tonight is doomed. You will have been following the reactions to what has just happened even prior to your coming here today.



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I want to ask a practical point about our preparedness for leaving the European Union. I have two very brief questions. First, we have six remaining Brexit Bills that are yet to complete their passage through Parliament, and that does not include the withdrawal agreement Bill. How much time do we actually have? Is it realistic that we are going to be able to pass that legislation before 29 March, or do you think we are going to need to seek an extension to article 50?

Stephen Barclay: If I may say so, there are a number of questions within that. You started by saying that we will not pass it tonight and therefore one can look at no-deal issues. Is that the primary issue, or is it that if we pass it tonight there is not enough time for the WAB?

Q3836 **Seema Malhotra:** There are two things. I do not think we are going to pass the Bill tonight.

Stephen Barclay: We can address the no-deal issues or the time-to-ratify issue. There are two different issues.

Q3837 **Seema Malhotra:** Let us start with the time to ratify. Is there time to ratify if it is passed tonight?

Stephen Barclay: There is no question, and a number of colleagues have alluded to this, but that the timetable is tight. On the other hand—

Q3838 **Seema Malhotra:** So what do we do? Genuinely, what are we going to do? Say it got passed tonight. How would we get the legislation through?

Stephen Barclay: First, these issues, particularly around the withdrawal agreement, have been long debated so it is not that the House has not had an opportunity to scrutinise—

Q3839 **Seema Malhotra:** Do you genuinely think that there is time to get it through, or might we need some sort of short extension to article 50 anyway?

Stephen Barclay: We will have to see. The question within the question is, does one need a technical extension in order to pass the WAB—

Q3840 **Seema Malhotra:** You are the Secretary of State for ExEU. You must have thought about this.

Stephen Barclay: I am. I am just—

Q3841 **Seema Malhotra:** In the event that the deal passes tonight—

Stephen Barclay: I know exactly the point you are making. If the deal passes tonight, will we seek to ratify it by 29 March? Yes. It will partly depend on the House, the usual channels and the way the business managers discuss that. The issues in the withdrawal agreement have been long debated and also there is scope—

Q3842 **Seema Malhotra:** There are six Brexit Bills.



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Stephen Barclay: If I may finish—it is a perfectly fair question and I am trying to give a candid answer—the WAB is a significant piece of legislation and the amount—

Seema Malhotra: Secretary of State—

Stephen Barclay: Would you like me to answer?

Q3843 **Seema Malhotra:** There are six Brexit Bills. There is a lot of work to do. There are about 10 sitting days left after Thursday. How are you going to schedule this, or are we looking at an extension of article 50 in order to—

Stephen Barclay: I am trying to answer the question. The issues in the withdrawal agreement Bill have been much debated in the House. In fact, I do not think that many people would feel that the House has not debated the issues around Brexit and the withdrawal agreement Bill.

Q3844 **Seema Malhotra:** Could I make it slightly easier for you, because I know we are running out of time? Are you confident that we will not need an extension to article 50, in the event that the deal passes tonight?

Stephen Barclay: With respect, you have come in on me five or six times. What I am trying to say is that there may be the need for a technical extension if that is the soundbite you are seeking, so there may—

Q3845 **Seema Malhotra:** Thank you for that. Could I ask you a final question? It relates back to the question the Chair was raising at the beginning. How long does a technical extension need to be? We also know that there is potentially the pressure of European elections following the letter from—

Stephen Barclay: Again, you are opening up quite a significant topic. We can have a discussion around the Government's policy—

Q3846 **Seema Malhotra:** Let me ask you this last question then—

Stephen Barclay: Would you like me to answer one of the questions?

Q3847 **Seema Malhotra:** Have you had any discussions at all about the potential need for European elections in the event of an extension of article 50?

Stephen Barclay: I think the idea of having European elections three years after the country voted to leave will be hugely damaging to our democracy—

Q3848 **Seema Malhotra:** But that is not the answer to the question.

Stephen Barclay: Would you like me to answer?

Q3849 **Seema Malhotra:** Have you had any discussions about the potential of it?

Stephen Barclay: Discussions with whom?



Q3850 **Seema Malhotra:** Within Government.

Stephen Barclay: Well, we have had a discussion to say how much we all agree that the idea of having European elections would be completely damaging to democracy and that our focus is on securing the vote this evening.

Seema Malhotra: I will leave it there.

Stephen Barclay: There is absolutely no appetite whatsoever to entertain the idea of having European parliamentary elections. I do not get the sense that within the Front Bench of your own party there is huge appetite for that either, frankly. What is very clear from speaking with European leaders is that there is a degree of Brexit fatigue. They have negotiated hard. They recognise that the Prime Minister has negotiated hard. We have a deal on the table, and they are very keen for us to get on with it. There is no appetite on their part.

The point around debates as to whether one has a technical extension, or how long the extension is, is that it is not within the control of this House. It is not a unilateral decision. That will be a decision taken by the EU 27. I think the House need to be quite careful when they look at the vote tonight. They have an opportunity. The business community are crying out for certainty. In the lobbying they do to me, they say they want the certainty of this deal; they want the deal to go through this evening; and they want us to get on to the positive of a future relationship with European countries we trade with and share values with, and whose citizens we want to protect, as we want them to protect our citizens. There is a huge appetite among European leaders to move forward. The last thing they want is for this to drag on and then to have questions around European parliamentary elections.

Chair: Secretary of State, there is one place where we never suffer from Brexit fatigue, and that is in the Exiting the EU Select Committee. We are very grateful to you for coming today, with all of the pressures. We are particularly grateful for your commitment to come back before Easter, when we will have slightly more time. I am sorry it was a bit truncated, of necessity, but thank you for your answers today. They have been very helpful.