

European Scrutiny Committee

Oral evidence: [EU Withdrawal](#), HC 763

Tuesday 6 March 2018

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Members present: Sir William Cash (Chair); Geraint Davies; Richard Drax; Mr Marcus Fysh; Kate Green; Kate Hoey; Kelvin Hopkins; Darren Jones; Mr David Jones; Stephen Kinnock; Michael Tomlinson; Dr Philippa Whitford.

Questions 240-301

Witness

[I](#): Rt Hon David Davies, Secretary of State for Exiting the European Union.

Examination of witness

Witness: Mr David Davis.

Q240 **Chair:** Secretary of State, welcome. As I know we have limited time, I am going to go straight to the first question about the progress of negotiations. Other than the Northern Ireland border issue, on which we will ask some specific questions shortly, what are the main points of contention with the legal text that the Commission published last Wednesday? What do you think the prospects are of getting change and securing our negotiating aims with regard to these matters?

Mr Davis: First, I think the prospects of getting to an outcome by 23 March are good. The expectation is there. Ireland is obviously the biggest and most obvious issue. Within the most material element of the withdrawal agreement, the implementation period, the issues that will still be in play primarily would be the Joint Committee, the arbitration or decision-making mechanism, and there is still a question on the issue of citizens' rights within the implementation period. I think those are probably the biggest immediate ones. There are about 11 areas of difference. I can't list them all from memory, but I could send you a list if you want.

Q241 **Chair:** Okay. That would be very helpful. If there are supplementary questions that we would like to put in writing, would you be agreeable to us sending those and then you can deal with them accordingly?

Mr Davis: Indeed I will.

Chair: That would be very helpful, because we have a lot of questions and we haven't got time to deal with all of them.

Mr Davis: And I am booked on a flight to Malta.

Q242 **Chair:** You will certainly get to Malta, but let's get on.

With respect to dispute resolution and the European Court of Justice, the Prime Minister made her position clear, as far as we can see, in the speech on Friday, following the Chequers meeting and so on. You have said that the Government are looking for a Canada-plus-plus-plus model for an EU-UK future trade agreement. Would that mean that a CJEU-plus-plus model for the corresponding dispute resolution mechanism would be what is required? Is it the case that the more a future trade agreement is based on EU law and concepts, the more likely it will be that the European Court will be involved in the dispute resolution mechanism—which, by the way, she mentioned five times?

Mr Davis: "The independent arbitration mechanism" was probably the phrase she used. You are speaking to the draftsman of that.

Let me deal with that backwards. One of the issues that plagues us—that is the wrong word—that is a constant in the European Union's negotiations



HOUSE OF COMMONS

is that when they make reference to principles of EU law and rest on EU law, the European Court takes to itself the monopoly of decision on matters of EU law. So you can find, and indeed she mentioned it in her speech, that if you are not careful with the drafting, the Court then intervenes. The most obvious example of the Court intervening in an international treaty was the treaty on data and the Schrems case, which you will be aware of, in which it basically struck down the safe harbour agreement. There is an issue there, but we are aware of it and we keep it out.

To go back to the beginning of your question on CETA-plus-plus-plus, the context of the phrase is that I was being asked by Andrew Marr on television, "So what you want is CETA-plus?", because I was talking about the mechanisms. I said, "Plus-plus-plus." He said, "CETA-plus?". I said, "No, plus-plus-plus," the idea being that it is not very much like CETA but it uses some of the mechanisms from CETA. The point about CETA, the Korean treaty and most free trade agreements is that they have independent arbitration mechanisms, which typically consist of appointees from either side and an independent appointee. It arbitrates over whatever the treaty tells it to arbitrate over.

We would not foresee making that European law. What we are talking about is trying to get mutual recognition arrangements on equivalence of standards. I made a point in a speech last week, which I hope you saw, Chairman, about our aim to have very high standards. The point is that we would intend the arbitration mechanism to rule on whether the action one side or the other—not just us, but the European Union—had taken was some sort of unfair competition, using regulation in an unfair competitive manner. We would not expect in any case that to be a CJEU arbitration mechanism.

Chair: Fine. I will ask Geraint Davies to ask the next question, followed by Darren Jones and then Stephen Kinnock.

Q243 Geraint Davies: Secretary of State, on that particular point you will be aware that the investor-state dispute settlements or investor court systems that have been used have tended to focus on investor power, the interests of investors and future profits, and have not thought very much about the impacts on the environment and wider public law. Don't you therefore think that it would be quite a narrow system to have this sort of tribunal system limited to investment and competition, which would not really replace the European Court of Justice at all?

Mr Davis: It is not seeking to replace the European Court of Justice in that sense; it is seeking to do a specific function. That might relate to the explicit alleged anti-competitive action, or it might relate to something else, depending what is in the treaty. I have no doubt that, at some point, there will be pressure from the European Union for elements of the treaty that will not be directly related to production, maybe labour law—in the Canadian treaty there is a reference to the International Labour Organisation—or indeed emission standards. That is entirely possible; let



HOUSE OF COMMONS

us see what the negotiation shows up. At the moment I don't want to speculate on what might come up, because it is for them to make the bid.

Q244 **Geraint Davies:** May I ask another question on the first section, on the meaningful vote? If Parliament, in its meaningful vote, votes down the deal, will we go back to negotiations or will we stay in the EU, or will there be a—

Mr Davis: With respect, Mr Chairman, that has been dealt with at length at the Dispatch Box, and it has been made very plain what the meaningful vote means. I don't want to re-track over that.

Q245 **Geraint Davies:** But will the meaningful vote be three months—

Mr Davis: No, no, no. I recommend you go back both to my comments—

Geraint Davies: We are at liberty to ask the question.

Mr Davis: And to the comments of your colleague on the Committee, when he was a Minister, on this matter. They are all in *Hansard*.

Geraint Davies: Will the meaningful vote be within three months of exit day?

Chair: Geraint, I'm sorry, I think we need to move on.

Geraint Davies: I think we have a right to ask these questions.

Chair: You are asking questions. You have asked them and got an answer.

Q246 **Geraint Davies:** No, no, there is no answer, with respect. Will there be an opportunity to suspend article 50 in the event that there is not time to have a meaningful vote because negotiations—

Mr Davis: I do not view the meaningful vote as overruling the referendum, if that is what you mean.

Q247 **Geraint Davies:** So if there is a meaningful vote and we vote against the deal, what will happen?

Mr Davis: We will leave under all circumstances.

Chair: Geraint, quite seriously, we could spend all afternoon on this, and I have other members of the Committee who want to ask questions. I am now going to move on to Darren Jones.

Darren Jones: Hello, Secretary of State.

Mr Davis: Afternoon, Mr Jones.

Q248 **Darren Jones:** Airbus is a major employer in north Bristol, the area I represent, and employs about 15,000 people across the country; through its £5 billion of spending in the UK supply chain, it accounts for over 100,000 employees. It said yesterday that it needs imminent clarity on our post-Brexit customs arrangements before it has to start stockpiling goods and considering its place in the UK. When will you be able to



HOUSE OF COMMONS

provide clarity in order to save 100,000 British jobs?

Mr Davis: The first thing to say is that I saw the head of Airbus in Munich less than a month ago and talked to him about this issue. The clarity that we have given already, bearing in mind that we are at the beginning of a negotiation—you cannot give the outcome of a negotiation until the end—is that we will not be in the customs union, but we will seek a free trade agreement, which will hopefully be tariff free and involve mutual recognition. That then means that we will be able to seek a customs agreement that is as close to frictionless as possible. I think you are a lawyer by training. I recommend you look at the World Trade Organisation guidelines on minimising customs disruption. From their point of view—moving wings from north Wales and moving other components backwards and forwards—I do not foresee them having a major problem there. That's what I talked through with their chief executive.

Q249 **Darren Jones:** With respect, they wouldn't have said that they had a problem if they didn't—

Mr Davis: All I can tell you, Mr Jones, is what they said to me.

Q250 **Darren Jones:** If I could finish my point, I appreciate that you may not be able to say publicly what is happening in negotiations, but this would be devastating for the British economy and for the south-west region.

Mr Davis: If what happens?

Darren Jones: If Airbus reconsider their position in the UK. If you could provide the clarity that they need to protect those jobs, even in private conversations with Airbus, I would be very grateful.

Mr Davis: As I said, I had a conversation with their chief executive less than a month ago—

Q251 **Darren Jones:** They are still not happy, so I would suggest you have further conversations.

Mr Davis: You should talk to him.

Chair: That is very kind. Stephen Kinnock.

Mr Davis: Afternoon, Mr Kinnock.

Q252 **Stephen Kinnock:** Hello, Secretary of State. I want to go on to the issue of EU agencies. The Prime Minister said in her speech on Friday that she wants the UK to continue to benefit from membership of the EU agencies. How is that possible if we will not be under the jurisdiction of the European Court of Justice?

Mr Davis: What she said was that we will explore the possibility. I think the three she mentioned were the European Aviation Safety Agency, the European Chemicals Agency and the European Medicines Agency. There are others—more difficult ones—in the context of justice and home affairs. Let me deal with the economic ones first.



HOUSE OF COMMONS

The European Aviation Safety Agency is an interesting one, because we have a precedent of an association agreement. The Swiss have an association agreement with that agency, as I think she mentioned in the speech. What that allows to happen is that aircraft certification in Switzerland can be done by the Swiss authority, and therefore is arbitrated under Swiss law and under Swiss courts, which has almost the opposite effect to what you described. It actually surprised me when we first looked at it. So it may well be that this actually has the effect of having the ECJ ruling within the European organisation, perfectly properly, but allowing us to have parallel arrangements that take us back to our own courts. That was the thought process.

The word she used, I think you will find if you look, is that we will “explore” this. We haven’t committed, but we will explore this as a way of providing—to take up Mr Jones’s point—a degree of confidence and security for the organisations concerned.

Q253 Stephen Kinnock: In terms of exploring the issue, is there really going to be time to get clarity on that before we have the meaningful vote in October? Presumably, all of this will be in the political declaration on the future relationship and be part of the overall withdrawal agreement. Do you really think all of this very complex stuff can be done in time?

Mr Davis: Yes, I do. There are two elements to this. Putting to one side the agencies for a second, the main agreement will be relatively simple because it is universal, in terms of being tariff free. The issue therefore will be, in a sense, freestanding for a number of areas. Aviation is one of them. Data may be another. There are a whole series of parallels, which we will negotiate in parallel. Our intention is to negotiate these things in parallel, and we intend to conclude the substantive negotiation—not the ratification, because that will take longer—at much the same time as concluding the withdrawal agreement, so later this year. As you say, October is the target, so thereabouts anyway.

Q254 Stephen Kinnock: One of the big challenges is that some of the agencies, such as the European Medicines Agency, have no provision whatsoever for third-country participation, so you would have to rewrite the founding statutes. I think there are 50 EU agencies and about 25 of them have no provision whatsoever for third-country participation. Are we going to have time to rewrite those statutes or get agreement before October?

Mr Davis: For the material ones, yes, because we will look to the parallel arrangements in things such as EASA. We may or may not be able to do it. That is why we are exploring it. I think the likelihood is very high that we would. Take the European Medicines Agency: I think we do about 40% of the approvals under the European Medicines Agency.

Dr Whitford: About a third.

Mr Davis: Thirty or forty per cent.—something of that order. So we are well-equipped technically. You are quite right, the issue will be the legal one. To be honest, the central issue will be whether the Union itself wants



HOUSE OF COMMONS

to negotiate these matters. Karel De Gucht, an erstwhile trade commissioner from the Union, not a great fan of Brexit, said that if the political will is there, this is technically achievable. It is a question of whether the will is there. The will is there with us. The question is whether it is with the other side. We will know shortly, after 23 March.

Q255 Dr Whitford: I want to ask about citizens' rights, but before I move into that, is asking the European Union to change the set-up of something such as the European Medicines Agency not us cherry-picking at the highest level?

Mr Davis: I don't think so. This cherry-picking—I have teased them back with it on one or two occasions as well—has become almost a reflex response. Every single free trade arrangement in the world, pretty much, is bespoke. It is built and tailored to the interests of the individual country or countries involved. One of the reasons why the European Union has not had a great deal of success, given its size, with international free trade arrangements, is because it has tried to cherry-pick—to use that term—or tried to make it fit the interests of 28 different countries. It has been very complex and hard to do, but it is a reflection of the fact that everything is bespoke. I think even Mr Barnier accepted that bespoke is the word for this.

In most cases, if not all cases, the benefits flow both ways. The benefits to approvals of medicines brought to the table by British companies are worldwide—they are certainly Europe-wide. If we were suddenly out of the EMA completely, you would have a 40% hole there—or 30%, whatever the number is you said; it is quite a sizeable hole anyway. Again, it comes down to whether the will is there. My whole approach to this—you can take a very macho approach to negotiations, I think the better approach is to look at what is beneficial to both sides, whether it is Mr Jones's constituents, whom he is quite properly raising with me, or the equivalent constituents in Toulouse, where I have also been to talk to them. That is the thrust of this.

Q256 Dr Whitford: On citizens' rights, obviously the phase 1 proposal talks about the ECJ being involved for up to eight years after transition. Does that mean that there would be application of the charter of fundamental rights through that?

Mr Davis: No, I don't believe so. This is about interpretation. Bear in mind also, when you talk about the ECJ being involved, that we are saying that the British courts have the right, effectively, to ask for advice. Whether they take the advice is up to them, but where there is no precedent, they will seek advice. The reason for that is that we are seeking to make the rights given in Britain to European citizens equivalent to the rights given in Europe to British citizens, so that is the reasoning for it. You are quite right, the referral back has a sunset clause of eight years.

Dr Whitford: Obviously, no Parliament can bind a future Parliament. We are already haemorrhaging EU nationals—19% of EU doctors are in the process of leaving, etc. So a lot of what we need to do is give them surety.



HOUSE OF COMMONS

How do we give EU nationals the surety against the idea that whatever is decided now can simply be repealed after 2022, depending on what Government we have?

Mr Davis: First, it will be part of a treaty. The withdrawal agreement will be in itself a treaty. Historically, British Governments have not repudiated treaties in a cavalier manner. Secondly, the way we are putting this particular right into the treaty will mean that it is not possible to, as it were, accidentally repeal it; it has to be an explicit action of Parliament. I find it almost impossible to believe that a British Parliament would treat 3 million people in such a cavalier manner, given that they have effectively been made a promise by an extant British Government. And of course, bear in mind that this is a deal that covers British citizens on the continent as well, so they would actually be jeopardising the deal that relates to them as well. I think it utterly impossible.

There have been some unfortunate actions post Brexit on the part of a nasty minority of people. The British Government has always made it very plain that it values the contributions of European citizens and that it wants to ensure that their rights continue. I have said this at the Dispatch Box a number of times: the whole premise that we have taken with this is that it is a moral duty on us and, we think, on the Europeans—the European community—to ensure that these people do not have their reasonable expectations just whipped away because the British people decided to leave. That's the logic of it.

Q257 **Dr Whitford:** I'm sure you will be aware that a significant proportion of long-term EU nationals who have applied for permanent residency after decades here have been refused. Part of whatever comes up has to give them surety and a right of appeal. The treaty doesn't do that. They need to know where they go to court if they feel they are being—

Mr Davis: There is going to be an independent agency, as it were, that will represent their interests. I don't want to call it an ombudsman, because that is not what we called it, but something like that. Interestingly, this morning, Mr Guy Verhofstadt, the lead for the European Parliament on Brexit, visited me in Downing Street, and between seeing me before Cabinet and seeing me after Cabinet, he was briefed by the Home Office team on what is being done to make this whole process much more administratively clearcut, much more dependable and much simpler. One of the things he agreed with them—you're the first to know, I guess—was that they would visit the European Parliament and take the people who are most concerned about this through the process, and also that we could listen to what they have to say on it. So there's a lot of work going into this.

I am the first to admit that there were some unfortunate accidents—a hundred letters being sent out and this sort of thing. That really shouldn't have happened, and we are going to do absolutely everything possible to make sure it does not happen again. We have actually got Mr Verhofstadt engaged with the British Government on exactly that.



HOUSE OF COMMONS

Q258 Chair: Thank you very much for that. We are going to move on to the role of the European Court in respect of the implementation period itself. There is a curious thing about the draft text that they published the other day, which is that it is ambiguous in giving the Court jurisdiction over the withdrawal agreement—you quite rightly describe that as a treaty, but of course it's not going to be an EU treaty; it's going to be an international agreement. At the same time, it gives a joint committee the power to make binding decisions, so there is an inherent ambiguity. I don't know whether your lawyers have picked up on that. I can only tell you that that is the advice that we have had, and I must say I concur with it.

On that footing, the Commission clearly intend the Court of Justice to have exclusive—I use the word “exclusive”—jurisdiction to interpret the withdrawal agreement and treaty. That is a non-EU treaty—an international agreement. This creates quite a curious situation, because after all, the European Court does not actually have exclusive jurisdiction over international agreements—but park that one. This quite clearly is inconsistent with what the Prime Minister says and what I think you have been saying, which is the desire for us to insist on an alternative mechanism to deal with possible disputes over new EU law coming into effect during the implementation period, or to bring forward any arbitration mechanism in any future relations agreement.

In a nutshell, I am inviting you to answer the question about exclusive jurisdiction. That seems to me to be a very important question. I would just like to know, and I think the Committee and the country would like to know: are the Government going to allow the European Court to have any exclusive jurisdiction over us?

Mr Davis: Let us separate it out. On the operation of the treaty, as the Prime Minister has said, you do not allow the court of one side of a treaty to arbitrate over the whole treaty. There has to be an independent arbitration mechanism. That is separate, of course, from the fact that the Court will have rights, as it were, during the course of the implementation period in the UK over single market matters and the like. But that is not the operation of the treaty.

Q259 Chair: So you are telling me that there will be exclusive European Court jurisdiction over the United Kingdom in respect of the implementation period over single market matters?

Mr Davis: Over single market matters.

Q260 Chair: Exclusive jurisdiction?

Mr Davis: I will take legal advice on that, frankly, because I am not quite sure what you are aiming at with “exclusive jurisdiction”.

Q261 Chair: I think you may find it helpful to start with this ambiguity, which I do not need to go back over, because there is an inconsistency in the Commission's own document.

Mr Davis: The determination of the treaty has got to be independent. That's the point.



HOUSE OF COMMONS

Chair: That's the point. In other words, when I say exclusive jurisdiction, I mean that it would have sole jurisdiction and that it would not in that case be consistent with our proposal, which is for an independent mechanism. I think I have covered that far enough for the time being.

Mr Fysh: Secretary of State, good afternoon.

Mr Davis: Good afternoon.

Q262 **Mr Fysh:** Could you guarantee that a withdrawal agreement, if there is political agreement for it at the end of March, would be ratified and adopted?

Mr Davis: A withdrawal agreement would be ratified and adopted?

Q263 **Mr Fysh:** Could you guarantee that a political agreement at the end of March on a withdrawal agreement would be ratified?

Mr Davis: It is dependent on the overall withdrawal agreement, which is in turn dependent on our understanding of where we are going to go with the future economic partnership and the other future arrangements. It is dependent on those things. Highly likely? Guarantee? I don't think I can guarantee. We can be certain, if we have a withdrawal agreement, the implementation period will be in place.

Q264 **Mr Fysh:** Yes, but is it not the case that, from a legal perspective, until it is ratified and adopted it is not legally operative? Am I right in thinking that?

Mr Davis: Yes.

Q265 **Mr Fysh:** So would it be prudent, on that basis, to not prepare for the potential of a no-deal scenario before it has been ratified and adopted? Would it be prudent to stand down the preparations for that eventuality?

Mr Davis: No. That is not what we intend. You had the Chancellor here yesterday; he will have given you a view on that too, which I think will be the same.

Q266 **Mr Fysh:** My understanding and memory is that that is not what he said—that he thought that the Government would, after that withdrawal agreement has been agreed, stand down the preparations for no deal. Is that not Government policy?

Mr Davis: The stance of the Treasury is, quite properly, that we will do all the no-deal contingency planning that is necessary at any point in time, but nothing that is not necessary. It is not possible to stand it down until we have got to the point of agreement, which will be later in the year. We have to carry on with that. It is always possible—highly improbable, let me be plain, but always possible—that the deal will come apart at the end, for some wholly unpredictable reason. You have to be ready. A responsible Government have to be ready for that outcome as a matter of good practice. That's all.

Q267 **Kate Hoey:** On the implementation period, Secretary of State, can we have absolute clarity, please, on fishing? We are leaving the Common



HOUSE OF COMMONS

Fisheries Policy in March 2019, so during the implementation period, there is nothing to implement in terms of fishing. Fishing will be free from being used. I think there is concern, because the Prime Minister was slightly ambiguous on this, that fishing will be used as some kind of—

Mr Davis: I am not surprised she was slightly ambiguous, because it is an implementation period for which we are still negotiating, and we have not even engaged on the fishing element of it yet.

Q268 **Kate Hoey:** No, but the fishing communities are concerned that fishing will be used as a kind of bargaining tool, because it is obviously a crucial aspect of taking back control of our fishing waters. What I am trying to get at is: during the implementation period, negotiations about fishing stocks will be going on, but we will be out of that in the sense that it is our water, and we will deal separately with what we want to co-operate with and decide. Is that right?

Mr Davis: Yes, and there is a year-by-year negotiation on stocks, fishing, division, allocation of the stocks and so on. We will have to come up with a mechanism by which we deal with that. We will have control of our own waters at that point, but nevertheless we will still have to negotiate with them, partly because we will want market access and partly because you have got people with investments in ships, trawlers and lord knows what else—

Q269 **Kate Hoey:** But it will be separate from the rest of the legal—

Mr Davis: We are not going to be trading away fishing rights for other things, that is for sure.

Q270 **Richard Drax:** Can I just pick up on fishing? I asked the Prime Minister yesterday whether the United Kingdom would be in control of our waters when we have left the EU. She reassured us that we will be—maybe you can do the same—and that EU boats that wish to come here will be under our agreement and, of course, pay for the privilege. In addition, in most cases the fish will be landed in the UK. I believe that is another issue that will generate lots of jobs in the United Kingdom. Can you confirm that all that is the case?

Mr Davis: On the landing, I am not sure; I think on everything else you said, yes. On landing—I am blindsided on that. It is under our control. There is not going to be a sudden stop of foreign fishermen fishing in our waters in March next year. We will deal with how we bring that under British governance and British allocation during the next six months, but it will be under our control, and the Prime Minister's comments to you were exactly correct.

Q271 **Dr Whitford:** Secretary of State, could you explain the legal basis for that? If our transition deal is a standstill, with everything the same as now for 18 months to two years, what is the mechanism for fishing to be separate?

Mr Davis: Fishing is something of a special case, because there is a year-by-year revision of allocation, quota, catch and all the rest of it, so we will



HOUSE OF COMMONS

have to have a special mechanism for that. Bear in mind, we are still in the middle of a negotiation, and this is part of that which has not yet been heavily engaged on. It will be.

Chair: Just for the record, the ambiguity I referred to in the draft text arises under article 126 and articles 157 to 159. I will leave it at that. I will ask David Jones to ask the next question.

Mr Davis: Afternoon, Mr Jones.

Mr David Jones: Hello, Secretary of State.

Mr Davis: It is very strange to see you from this angle.

Q272 **Mr David Jones:** The Prime Minister was very robust last week in the context of the EU's proposals over the Northern Ireland border by declaring that no British Prime Minister—no United Kingdom Prime Minister—would ever accept anything that imperilled the constitutional integrity of the United Kingdom.

Mr Davis: Or indeed the single market of the United Kingdom.

Q273 **Mr David Jones:** Yes. In that context, I wonder if I could ask you a few constitutional questions. First, should retained EU law be given precedence over pre-exit UK primary law, given that Parliament is sovereign?

Mr Davis: That is something that arises not so much from Northern Ireland as from the current withdrawal Bill, now going through the Lords. What that seeks to do—you will remember this better than most, Mr Jones—is replicate the current circumstance, which gives precedence to EU law over existing law. What the Bill seeks to do—indeed, from memory I think the Chairman raised this matter on day two or day three of the Committee stage—is replicate that. That will apply for any law passed before departure in March '19 but not any law passed thereafter. Any law passed thereafter will, like most laws, take precedence over what precedes it.

Q274 **Mr David Jones:** So, in respect of pre-exit law, retained EU law will have precedence.

Mr Davis: Yes, that is the current circumstance. We have given an undertaking, or at least Steve Baker gave an undertaking—the memory is coming back to me now—to, I think, the Chairman on this, to keep it under consideration and come back to him after the Lords stage. But, yes, in principle what you have said is right.

Q275 **Mr David Jones:** Given that EU citizens' rights are going to be entrenched, how will those rights be protected against implied repeal by subsequent legislation?

Mr Davis: The withdrawal and implementation Bill will be drafted that way. I am told by the draftsmen that it can be done. It cannot be overtaken by implied repeal. It can be—were Parliament so to choose—overruled explicitly, but not by implied repeal.



HOUSE OF COMMONS

Q276 **Mr David Jones:** So that Bill will make provision for that.

Mr Davis: Yes. The WAIB will do that.

Q277 **Mr David Jones:** How is it proposed that the implementation period be provided for in domestic UK law?

Mr Davis: Again, that will be in the WAIB.

Q278 **Mr David Jones:** Finally—this is an issue that many Committee members are concerned with—is it right that United Kingdom courts should have a power to disapply primary legislation of the UK Parliament, which is provided for in the current withdrawal Bill?

Mr Davis: The only circumstance under which I can see that happening in future is if they are effectively using a piece of EU law against preceding UK law. In what context are you thinking otherwise than that?

Q279 **Mr David Jones:** The Bill gives explicit power to British courts to disapply enactments, which is a wholly novel concept in UK law and is frankly a matter of concern to the Chairman and other members of this Committee.

Mr Davis: Remind me, Chairman, was it that, or was it the precedence of EU law, that Steve Baker wrote to you or spoke to you about?

Q280 **Chair:** No, it was with regard to this very question and I was going to ask a supplementary to that. I cannot see any circumstances. It is really the first time ever in British domestic history—constitutional history—under domestic law, outside our being members of the EU itself, during the period of the '72 Act. When that Act is repealed, the very notion that the Supreme Court would have the right to strike down Acts of Parliament seems inconceivable. As a matter of fact, we have had correspondence with the Prime Minister over this. It is all on our website. We have replied to her reply. This is a fundamental constitutional question. I am surprised at the moment that this has not been given more attention, because I was given an assurance, as you say, on the Floor of the House, by the Minister, so that we could deal with this during the passage in the House of Lords. Can you give me an answer to this question about the striking down of Acts of Parliament by the Supreme Court?

Mr Davis: As I said, I cannot see any circumstance other than the use of a prior EU law that would lead to it, but I will certainly ensure that you get your written answer to your comment.

Mr David Jones: If I may say, that is not apparent from the text of the Bill. Furthermore, judges themselves are concerned about this and seek guidance.

Mr Davis: In which case, we had better conclude it before it gets through the Lords, hadn't we?

Q281 **Chair:** There are several Acts and provisions—enactments—that have in the past been struck down by the courts, but most famously the Factortame case struck down the Merchant Shipping Act 1988. I seem to



HOUSE OF COMMONS

recall raising that at the time and saying, "I don't think you will get away with this if you attempt to bring this Act into operation." The only reason why it was justified was because it fell within the clear parameters of the European Communities Act itself. Once that Act has been repealed and once those treaties have gone, the question of the disapplication—the striking down—of primary legislation by the courts, as David Jones has quite rightly pointed out, is a matter of concern to the courts, and they may not want to raise this too much, because of the problem of their being drawn into the political arena, as Lord Neuberger has suggested. So if we could just get an answer from you, albeit in writing—

Mr Davis: If it is like Factortame, it could even relate back to the principle of the treaty, rather than the treaty itself, which is the point you made at the time.

Chair: Indeed. I am grateful for that. We will move on now to Northern Ireland.

Q282 **Kate Hoey:** The Government quite rightly—in my view, anyway—rejected the European Commission's legal translation of paragraph 49 of the joint report on the fall-back option, and obviously I suppose we would all love to get option A. However, on option B, where the EU seems to think that the British Government have not given enough detail on the technical ways that we could have frictionless trade, is there any more work going on with that, or do you feel that we have given enough technical information, if the will was there?

Mr Davis: There are two things to say on technical information. There were two papers published over the summer of last year. One was about the general question of customs handling. If you remember, two ideas were put up. One was called the hybrid arrangement, which effectively involved keeping a common external tariff barrier and then rebating it—quite a complex arrangement. The other one was the so-called maximum facilitation one. Those two items were put into the customs paper in the summer.

There was also a Northern Ireland paper, which talked about, in particular, using autonomous economic operators—trusted traders—and using exemptions for the very large number of microbusinesses, such as the craftsmen, the small farm or whatever.

Those were all in play. Now, to come back to A, B and C, when we had this discussion with Mr Barnier about four weeks ago, I said to him, perhaps slightly frivolously, "I'm old-fashioned enough to have my alphabet go A, B, C, not C, B, A," and A is dependent upon the free trade arrangement, in essence. It is dependent upon our being able to get a free trade arrangement, a mutual recognition arrangement on standards and a customs agreement. Under those circumstances, we solve most of the problems.

B then comes into play, in terms of solving the problems that are left, whatever they may be—such as the single electricity market, or phytosanitary standards—which might be the sort of thing that the

Northern Ireland Executive might do in Northern Ireland itself to facilitate agri-food business and so on. That was the way we saw it.

Now, in terms of the mechanisms used, those two papers in the summer provide the skeleton of it, but we can't really move on to the next bit—A and B—until we get on to the future relationship. Now, you will remember—all members of the Committee will remember—that the Commission was insistent at the beginning of this process on sequencing and not dealing with the future relationship until we got the withdrawal treaty to a certain level: the so-called sufficient progress rule. So we haven't been able to talk to them—

Q283 **Kate Hoey:** Perhaps we shouldn't have agreed to that in the first place.

Mr Davis: I'll let that one pass; you can tell how comfortable I was with it. We haven't been able to talk to them about the future relationship. The point is that until we get on to the future relationship, A and B are harder to solve.

Q284 **Kate Hoey:** So it is the cart before the horse, really.

Mr Davis: It is the cart before the horse, but we've done quite a lot of building of cart—put it that way.

Q285 **Kate Hoey:** But will the Government, if things stay as they are, block the inclusion of the Irish protocol in the whole withdrawal agreement?

Mr Davis: The Prime Minister has said in terms: "No United Kingdom Prime Minister could sign up to something which"—as that does—"breaches the economic and constitutional integrity of the United Kingdom." It would not just annoy the DUP; quite a lot of people in this Parliament consider themselves to be Unionists.

It does not even meet the very next paragraph in the joint report in December. Paragraph 49 is what they have drafted; paragraph 50 makes it plain that we need to maintain easy east-west trade, as it were, not just for Northern Ireland but for the Irish Republic too, for whom it is massively important. So it doesn't even meet the full joint report arrangements.

Q286 **Kate Hoey:** Finally on that, do you think people like Michel Barnier have read the report from their own parliamentary constitutional committee? It is called "Smart Border 2.0" and it came out, but it got very, very little publicity. I raised it with the Prime Minister yesterday and I have just heard that apparently it has been taken off the European Union website today. That was a very good report about how technology could work, and this was the European Union's own parliamentary constitutional committee.

Mr Davis: Yes, I know the report you are talking about. We don't agree with all of it; let me be perfectly plain. I do not want you to get the impression that we think that that report is the answer; we do not, because there are elements in it that we do not agree with. However, it demonstrates that a technical solution to the remaining problems, once



HOUSE OF COMMONS

you have dealt with tariffs and the mutual recognition of standards, is possible. That is what we intend to do.

Chair: I just want to mention that we only have a quarter of an hour to go. I will go to Michael Tomlinson, Kate Green, Richard Drax and Stephen Kinnock in that order. We really have got to be quite—

Mr Davis: I'm afraid the plane to Malta will not wait.

Chair: Is it faith, hope and charity—or one of them?

Q287 **Michael Tomlinson:** Secretary of State, on "Smart Border 2.0", clearly that report has been considered. You said that it demonstrates that there are technological solutions out there, but it is not the Government's position to say, "That is the solution." Have I interpreted your answer correctly?

Mr Davis: That is correct.

Q288 **Michael Tomlinson:** Going back to option B, the Prime Minister yesterday set out a customs partnership, or a highly streamlined customs arrangement. Is the highly streamlined one the "max fac"—the maximum facilitation—that you were referring to?

Mr Davis: Yes, that is max fac.

Q289 **Michael Tomlinson:** We heard from the Chancellor yesterday that more work had been commissioned on that. On what sort of timescale will we see further detailed working on that?

Mr Davis: From memory, the Department, at my intervention, initiated some of that work before Christmas, so it is under way already. The customs partnership, as it is termed, is something for which there are no real precedents—none that I am aware of anyway. You would certainly have to look elsewhere in the world than Europe to find them, so that will probably take some time.

On the maximum facilitation, some of the work already, of course, has been done within HMRC. Indeed, if I remember correctly—I have forgotten which Select Committee he was talking to—Jon Thompson, the chief executive and permanent secretary of HMRC, said that they were convinced that they would not need border posts, which implies already that the work there is fairly advanced. I do not want to take too long, because I know you have other questions, but to be plain it involves things such as autonomous economic operators, electronic pre-notification, and a whole series of things using techniques that are established elsewhere in the world that work very effectively.

Q290 **Michael Tomlinson:** Finally, you described the hybrid solution as complex, and I agree; it does sound on the face of it to be complicated. Do you therefore have a preference about the solution?

Mr Davis: It is too soon to tell. What is the point of paying consultants to do this work and to make the decision in advance? I am absolutely certain that maximum facilitation can work from what I have seen elsewhere. You



HOUSE OF COMMONS

talk about agri-foods. I used to sell agri-foods across the Canadian-US border, which is a more difficult border in comparison with here. They each have virtues and drawbacks, and we need to look at a balanced view of both of them.

Chair: Could I ask for brief questions?

Q291 **Kate Green:** I just want to ask one question, dependent on your answer, Secretary of State. I just want to be absolutely clear that I am understanding correctly. You say that there is nothing like the customs partnership that you are aware of at the moment.

Mr Davis: Not that I am aware of.

Q292 **Kate Green:** Am I hearing correctly, therefore, that we have not identified anywhere in the world where it is possible to maintain an open border without a common external tariff?

Mr Davis: That's not quite the same question, if I may say so. Let me give an example. I know that if the Taoiseach were sitting here he would jump on me for saying this, because he does not like the Canadian border analogy, but large parts of the Canadian border—not the bits that have choke points, such as Detroit and Buffalo; some of you went to Buffalo—are very open. You remember how cautious the United States Government was after 9/11, quite properly. Even after 9/11, it was pretty straightforward.

The point here is that you already have a border in existence. Let's not kid ourselves: there is a different tax and excise regime in the south than in the north, so taxes and excise duties are collected for people who cross the border using other methods, such as electronic notification, declaration mechanisms, and so on. We have a border there, which is open. What we are aiming to do is to prevent any other handicaps.

What other handicaps could there be? There could be the handicap of a tariff. Well, we are looking for a tariff-free arrangement. There could be the handicap of mutual standards. Well, we are looking for mutual recognition of standards. We have got a common travel area, so in that respect it is the most porous border in the world, because we are treating citizens either side identically. You don't need to be able to say that one of these models demonstrates what you want, in answer to your question. I hope that helps. Sorry it was so long.

Chair: Richard Drax, then Stephen Kinnock and Marcus Fysh. I ask for short questions, because we have got only 10 more minutes.

Q293 **Richard Drax:** Secretary of State, I think what you are saying to the Committee is that there is a pragmatic solution.

Mr Davis: Yes.

Q294 **Richard Drax:** And that this particular circumstance is probably unique in the world. If the will is there, as you stated, there is no reason why this can't be achieved.



HOUSE OF COMMONS

I must put on the record the fact that I am absolutely appalled by how certain people—not least former Prime Ministers—seem to be saying that, were a hard border to return, which none of us want, that would in some way excuse the return of the men of violence. That is my interpretation. I find that absolutely abhorrent. I am interested in your views about whether, in the negotiations that are taking place, some are using that element as a weapon to keep us from leaving the EU.

Mr Davis: Let me answer your first point first. Yes, there is a pragmatic solution here. It is a mixture of treaty solutions, practical political solutions, traditional issues—the common travel area has been around since 1922 or 1923, I think—

Michael Tomlinson: Yes.

Mr Davis: You are my historian. I remember you once telling me about an 1802 Act.

In my view, it is plainly resolvable in that way. I am not going to get into commenting on other people's words on this. I agree with you that, no matter what happens in this treaty, none of it will provide any sort of excuse for the men of violence to return. You and I are both just old enough to remember it, and we never want to see it again. We will not see it again, and we will not create any excuses for them.

Chair: Stephen Kinnock—a short one please.

Q295 **Stephen Kinnock:** Very short. Two days before the referendum, the Prime Minister acknowledged, in terms, that leaving the single market and the customs union would inevitably lead to checks on the Irish border. What do you think has happened since then to change her mind?

Mr Davis: I don't remember the speech, so I don't know what she said in detail. I never comment on speeches that I have not actually heard or read. The simple truth is that there is a border there now. It is a tax and excise border, and it works perfectly well with no border posts anywhere. If you go there, the only way you can tell you are on the border is that the markings on the road change colour.

Stephen Kinnock: I've been there. It is unmarked.

Mr Davis: You parked there, did you say?

Stephen Kinnock: No, I didn't park. It was with the Brexit Committee.

Mr Davis: It is, to all intents and purposes, invisible, and we intend to maintain the same standard. That doesn't mean that there doesn't have to be tax collection or whatever away from the border.

Q296 **Mr Fysh:** The Secretary of State for trade said that one of the objectives of this process is that we should establish a fully independent trade policy. That is what he said in his speech the other day. Can you elaborate on how the binding commitments that the Prime Minister talked about are consistent with that? Am I right in thinking that they would be



HOUSE OF COMMONS

consistent with that by being with regard to the trade in markets that we might have with the EU in the future, rather than binding commitments on our domestic markets?

Mr Davis: I made a speech a week ago in Vienna aiming at the European Union's concern about the regulatory race to the bottom. That is particularly a concern of the French, but not just the French. They have this notion of Anglo-Saxon economic society that we are all red in tooth and claw, and that we deregulate at every turn. Of course, that is wholly untrue, and I gave a series of indications of that. There is our health and safety: the industrial death rate in the UK is lower than any other country in Europe—in the case of many of them, by a large margin. Our operation of banking regulation is tighter than anybody else in Europe. We are the only country in Europe that requires the separation of retail and investment banking. Our emission standards are better than most of Europe—not all, but most of Europe. I could go on. I gave about a dozen examples, but I won't bore you to death. So that is the point we are making. We can't be cheaper than China. We can't have more resources than Brazil. Our gain is in quality, intellectual content, sales of services and so on. That is the point.

What is more, we see a global strategy that is aimed at creating global standards. The car safety standards used in the EU are based on United Nations Economic Commission for Europe standards. Emissions standards are based on many other international treaties—Paris and others—and so on. That is the way we are going. I do not see that as constraining the treaty.

However, to come back to your point explicitly, the point that the Prime Minister made was that nothing will constrain a future Parliament. Let us imagine we take a ridiculous decision and we decide to set about undercutting some particular industry in Europe. It will know, by looking at the treaty that we strike, that there will be a price for that. The price may be a restriction on access to the European market for that product, or a tariff, or something like that. It will make its decision in that knowledge. In the same way that Parliament makes decisions in the knowledge of downsides and upsides to every decision it takes—it is not going to be hindered or handicapped, but there may be a price to it—if we make that decision and say, "Okay, for international trade purposes, we need to do this. There may be a consequence in Europe, but that is what we need to do," in that way, we protect Europe but also protect the right of Parliament to make decisions.

Chair: And to protect your time and your plane to Malta, I am now going to move the subject on to regulatory divergence. I would ask you to look quickly at the cross-examination of the Chancellor of the Exchequer yesterday, where we dealt with some of the questions you have just raised in relation to MiFID II and the potential financial transaction tax—but not now.

Q297 **Kelvin Hopkins:** The Prime Minister has said that it will be necessary to have binding commitments in some areas of regulation to keep in step



HOUSE OF COMMONS

with the EU. You have implied that we would not use deregulation as a competitive advantage. In other areas, specifically workers' rights and environmental protections, she talked about a strong commitment. Would the Government be open to making binding commitments in those areas, because "binding" sounds rather stronger than "strong"?

Mr Davis: As I think I said earlier in answer to another question, most trade agreements have other elements in them that are not strictly trade. The best known one, and I guess the most advanced trade agreement to date, is the Canadian one. It has undertakings about meeting certain ILO standards on labour law. I think the prospective Japanese trade treaty has got something similar. I would be unsurprised if we got a request for that from the European Union. We will look at that and make a balanced judgment on quite how strong the commitment is, but if it is an undertaking to meet ILO standards, it is binding.

Q298 Kelvin Hopkins: We have been below ILO standards in many areas for a long time, and we want to rise up again. Nevertheless, our workers' rights still derive mostly from British legislation, not from European legislation and, as you say, they are still relatively strong compared with other areas. A binding commitment to make sure that we pin workers' rights and environmental protections at an appropriate level and they are not allowed to deteriorate—

Mr Davis: Bear in mind, Mr Hopkins, that I was I think the first Cabinet Minister to say, post-referendum, that we are not seeking to reduce the protections of British workers—anything but, just the reverse.

Chair: I have one last question from Geraint Davies, because I know we have to let you go.

Mr Davis: Croatia yesterday, here today, Malta tomorrow—what glamour. This is the glamorous bit.

Chair: I hope you will have a very enjoyable time there.

Q299 Geraint Davies: You have mentioned standards, but have you ruled out offering more migration to countries that we do future trade deals with as a cost of market access?

Mr Davis: That is not—and I would not offer it in public if it were—part of the strategy. What you find is that when you have trade deals that cover things like services—there is a fairly limited amount of free trade in services at the moment—you often have related free movement arrangements or migration arrangements. Mode 4—there are various modes of migration. It is entirely possible that would happen. I do not know whether the Europeans will be willing, but we will want to negotiate significant mutual professional qualification recognition. If we can do that, I imagine that there will be some arrangements allowing people with those professional qualifications to move between countries, but that is a few months down the negotiating path.

Q300 Geraint Davies: I mean third countries—



HOUSE OF COMMONS

Mr Davis: Youn mean third countries? That already happens.

Q301 **Chair:** Can I just ask one last point? Could you please get across to Mr Barnier that article 50 changed the European Union and does not mean that they can dictate to us the terms on which they want it to be run? Would they bear that in mind when they reply tomorrow, apparently, because frankly there is an impression that they are trying to hector us on the complete misconception of the treaties themselves? Article 50 gives us the right to leave. That is a fact. We can have our sovereign Parliament back and we can have our own way of running things within a reasonable parameter.

Mr Davis: I know that was not a question, Chairman, but let me just say this. I understand what you are saying. At the beginning of this process I said to the House in one the debates that they would be astonished at how polite I was going to be in the next two years—those who know me, anyway. I take the view that public aggression in negotiations generally does not work very well. It creates an attitude on the other side, and I avoid it. What anybody else does is up to them. *[Interruption.]* Mr Kinnock, are you going to give me some different advice?

Stephen Kinnock: I just wondered if you had told the Foreign Secretary that.

Mr Davis: Ah, now, now, now. I gave advice to your father on one occasion, but that is another matter.

Chair: Anyway, thank you very much for coming. We have found it very helpful.

Mr Davis: Thank you. I have a couple of letters to organise for you, so I will do.

Chair: Thank you very much.