

Northern Ireland Affairs Committee

Oral evidence: [Implications of the EU Withdrawal Agreement and the backstop for Northern Ireland](#), HC 1850

Wednesday 23 January 2019

Ordered by the House of Commons to be published on 23 January 2019.

[Watch the meeting](#)

Members present: Dr Andrew Murrison (Chair); Mr Gregory Campbell; Maria Caulfield; Mr Robert Goodwill; John Grogan; Mr Stephen Hepburn; Lady Hermon; Kate Hoey; Nigel Mills; Ian Paisley; Jim Shannon; Bob Stewart.

Questions 1 – 95

Witnesses

[I](#): Isabelle Van Damme, Counsel, Van Bael and Bellis, Martin Howe QC, Chairman, Lawyers for Britain, and Sir Stephen Laws, First Parliamentary Counsel 2006-2012.

Examination of witnesses

Witnesses: Isabelle Van Damme, Martin Howe QC and Sir Stephen Laws.

Q1 Chair: Good morning, everyone. Thank you so much for coming today. It is great to see you. It is very good of you to spare the time to come to talk to our Committee. As you would expect, this Committee is greatly exercised by the current big issue of the day, and I am sure that your contribution will materially enhance our report when we write it. To that end, we have a series of questions we would like to put to you as expert lawyers with an interest in this field.

Before we come to questions, however, I wonder whether I can ask you very briefly to introduce yourselves and to give us a little bit of a pen pitch of your background and how you have come to be here. Shall we start with Sir Stephen?

Sir Stephen Laws: I am Sir Stephen Laws. From 2006 until 2012 I was the First Parliamentary Counsel, after a career drafting legislation, which began in 1976, I think, with the Northern Ireland (Temporary Provisions) Act. I am now, amongst other things, a Research Fellow¹ at Policy Exchange.

Isabelle Van Damme: My name is Isabelle Van Damme. I am counsel at Van Bael & Bellis, which is a Brussels-based law firm focusing on trade law, EU law and public international law. I previously worked as a référendaire for the British Advocate General at the Court of Justice of the European Union.

Martin Howe: My name is Martin Howe, and I am a practising barrister. I do European Union law—principally free movement of goods and services and intellectual property law. At the political level, I am also involved in the Brexit debate, in that I am chairman of Lawyers for Britain. When the Bar Council organised its big formal debate during the referendum campaign, I had the honour to speak for the leave proposition, led by Lord Howard QC, against, for the remainers, Dominic Grieve QC MP and Joanna Cherry QC MP.

Q2 Chair: Thank you very much indeed. If I may ask the first question, it is around the Vienna Convention. Sir Stephen, you are well placed to give this a go because of the paper you have recently written for Policy Exchange. My question is about the extent to which those Members of Parliament who are seeking some way out of the backstop arrangement, if the withdrawal agreement were to be agreed, might rely on the Vienna Convention in order to do that. It seems to me that there is quite a lot of controversy about the utility of that convention, to which the UK is a signatory but the EU is not, in relation to the extraction of parties from obligations of the sort that we may be signing in the near future. I wondered whether you could comment on that.

¹ Correction by witness: Senior Research Fellow



Sir Stephen Laws: Yes, I was one of the authors of that paper, and another was an expert in international law. I contributed largely to the domestic side of it. The idea was that there are these provisions in the Vienna Convention. I do not think there is any chance, either in practical political terms or in legal terms, that they are much use just as things stand. Our idea was that there might be ways to build on them in order to provide reassurance about whether there was a way or some ways out of via the Vienna Convention. It might be sufficient if the United Kingdom were able to declare that it thought that, in certain circumstances, it had the right to exit for a material breach and if after that —this would have to have been agreed in private first—the EU either acquiesced or at least did not object.

How far that would go politically to quell the lack of trust that exists as a result of the absence of an exit mechanism at the moment I do not know, but that was the idea. It is not so much relying on the convention, although that is the foundation for the proposition. The idea is that the United Kingdom could say something that would have, in international law terms, some effect if the other parties to the treaty did not contest it.

Q3 **Chair:** What could constitute a meaningful breach?

Sir Stephen Laws: If it became obvious that the agreement, which declares itself to be temporary, had become something that was not temporary, that might be one. The most obvious one is if the EU could be shown to be in breach of their “best endeavours” obligation to negotiate the next stage.

Q4 **Chair:** That sounds to me, as a layperson, quite a difficult thing, the sort of thing that would take years and years of lawyerly activity to resolve.

Sir Stephen Laws: Yes, but it might be something that would look as if you could do it more quickly if the solution was not the solution limited in the treaty but repudiating the treaty itself. I do not want to sell this as too much. It seems to me that it is a route to be explored.

There is one other area, which is more difficult, that we did not go into so much in our paper where there might be scope for finding something that was a material breach. That would be in relation to any case you could make for saying that the backstop had become something or was being implemented in a way that was incompatible with the Belfast Agreement and that the undertakings given by the Government in relation to Northern Ireland which say that it will be implemented in a way that is consistent with the three-strand and two-strand approaches in the Good Friday Agreement. If that did not happen, particularly if it did not happen because the EU would not let it happen, that too might be some basis for making this argument, but I do not think any argument can be made at all unless there is something that you can rely on to say that the EU had accepted it when the treaty was ratified.

Q5 **Chair:** Mr Howe, you were shaking your head.



HOUSE OF COMMONS

Martin Howe: No, not at Sir Stephen's last remark, which is entirely accurate. I have read his Policy Exchange joint paper with considerable care. There is this idea about a breach of the obligation in Article 184 of the withdrawal agreement to use best endeavours to conclude a long-term agreement. Escaping from the treaty on the grounds of a breach of the obligation to use best endeavours by the European Union is most unlikely to be a viable route, whatever you say at the time of entering into the treaty, because the fundamental problem is that Article 184 contains an obligation directed to two parties to agree with each other. If they fail to agree, with each party pursuing its own bona fide but differing interests, it is extremely difficult for any tribunal, court of law or whatever to pin the blame on one party or the other. That is the fundamental problem with the backstop arrangement.

There is a similar problem with the review clause inside the protocol itself, where you would have to prove not only that the European Union had not liked our proposals but that it had done so in bad faith, and that is an extremely high hurdle. Indeed, realistically, to have the whole future of our country dependent on the—

Q6 **Chair:** You will have read the advice given by the Attorney General.

Martin Howe: Yes.

Chair: You will have read it, not least because it was meant to be confidential but then it was not, so we have all seen it. It seems to me that what you are saying pretty much is in accordance with what Geoffrey Howe—

Martin Howe: You mean Cox.

Chair: Yes, Geoffrey Cox.

Martin Howe: Geoffrey Howe is my uncle.

Q7 **Chair:** Yes, Geoffrey Cox. My apologies. Can I invite you, perhaps, to say where you disagree with Geoffrey Cox?

Martin Howe: In his advice I do not, apart from possibly on one aspect. It is extremely clear advice and it deals directly with this issue of the "good faith" obligations, and you know his conclusions and his advice.

There is one area where I would have reservations. He makes the suggestion that the fundamental problem is that, if there is a deadlock in negotiations, we are then stuck. He concludes that, even if negotiations break down and even if it lasts for a long time, we are still stuck. He then raises an argument—it is an interesting argument—which is that, because Article 50 of the Treaty on European Union is directed to arrangements for withdrawal, if there is a deadlock and the backstop protocol persists indefinitely, there might be an argument that Article 50, as it were, becomes ultra vires, because it turns into a long-term arrangement.



That is an interesting argument. I cannot say it is necessarily wrong. There is a counter-argument, which is that Article 50 is either intra vires or not at the time the treaty is concluded. It is hard to see why, because circumstances evolve in a particular way—something, if it was intra vires at the time it was concluded, could become ultra vires just because of subsequent events.

Q8 **Bob Stewart:** I am totally lost. What does “ultra vires” mean?

Martin Howe: It means “beyond the powers”.

Bob Stewart: I am sorry. I am just infantry.

Martin Howe: I am sorry. Let me explain. It is a well-known concept and, particularly, it is a concept of European Union law that any secondary legal act of the European Union’s institutions must be within the powers conferred by the treaty or by the particular part of the treaty that we are talking about. In this case, we are considering a withdrawal agreement that, on the European Union’s side, would be concluded under the authority of Article 50 of the Treaty on European Union. That has certain limitations on its scope, in that it authorises an agreement on the arrangements for the withdrawal of the member state that is leaving. It does not extend to authorise a long-term, post-leaving treaty, which is why we have this two-stage operation we are going through.

The Attorney General’s argument is that if the backstop arrangement turns into a long-term treaty as a result of deadlock, there could be an argument that it becomes beyond the powers of Article 50.

Isabelle Van Damme: I just want to comment on the issues raised. First, as regards Article 50, I agree that, as a matter of EU law, the European Union can only act when there is a basis in the treaties to act. That is the concept of the legal basis, and it means that it cannot adopt any action that goes beyond the contours of Article 50 if that action is based on Article 50. I should note that the treaty itself—I believe in its fourth paragraph—expressly states that also. The parties agree that there is this limit as regards what the legal basis of Article 50 can do.

In terms of who would decide whether or not Article 50, as a matter of EU law, can offer any basis for a long-term solution, it would be for the Court of Justice of the European Union to decide that question of EU law, because that is a question of EU constitutional law.

On the issue of material breach, the threshold under international law to say that there is a material breach is very high. There is case law to suggest that it must be shown that there is a deliberate and persistent violation of a provision that is essential to the agreement. Taking into account that this mechanism is intended by the parties, as stated in the agreement, to be temporary and that there is continuous emphasis on the need to negotiate in good faith a future agreement that would replace the protocol, the obligation to negotiate could be considered as an essential provision of the treaty.



HOUSE OF COMMONS

But then one would have to establish that there is a deliberate and persistent violation. The obligation here is not to conclude a treaty; it is an obligation to negotiate with the objective of concluding an agreement. The mere fact that, for example, the European Union might disagree with some of the ideas of the United Kingdom over the proposals would not be sufficient to say that there has not been compliance with that obligation to negotiate in good faith, so it is a particular threshold.

I would also note that, in essence, what the United Kingdom would be alleging is that there is a violation of a provision of the treaty. The treaty foresees for the compulsory jurisdiction of the arbitration tribunal regarding any dispute between the parties on the interpretation and application of the treaty, so that would also cover this provision regarding negotiations in the protocol. One could imagine that the European Union would then initiate proceedings based on these jurisdictional clauses in the agreement. At the end, what you may obtain as a remedy as a result of this dispute settlement procedure is a remedial action that may ultimately be taken after a particular process has been completed. That is a remedial action and, typically, that is a suspension of certain provisions of the treaty. It does not foresee the termination of the agreement.

We can discuss whether or not you could, as a party, unilaterally invoke material breach as a ground to terminate the agreement if there is certain tension with the compulsory jurisdiction of this dispute settlement system and the remedies for which the agreement provides.

Q9 Chair: It is probably not fair to ask the lawyers—it is more of a general point, really—but it has been suggested that the Ireland/Northern Ireland protocol has very little to do with ensuring that there is no hard border, which all parties are agreed there must not be, but is more by way of being base camp for the future relationship, which of course was specifically excluded by the European Union from the outset until the withdrawal agreement was concluded. In the terms of the Ireland/Northern Ireland protocol, one can begin to see, perhaps, the shape and form the future arrangement envisaged by the European Union might take.

Were this withdrawal agreement to pass, to what extent would it be legitimate for the EU to use the Ireland/Northern Ireland protocol, and specifically the customs union arrangements that it contains, as the basis on which to build the future arrangement that it wants to see with the United Kingdom? Would it have any legal or procedural force?

Isabelle Van Damme: I just have a first reaction. I believe the sixth recital in the preamble to the protocol might be relevant, because there the parties say, "Having regard to the Union and to the United Kingdom's common objective of a close future relationship, which will establish ambitious customs arrangements that build on the single customs territory provided for in this protocol, in full respect of their respective legal orders". This presumes that the future relationship will be based on



HOUSE OF COMMONS

a single customs territory. It seems to be that the political declaration does not seem to go as far, because it more speaks broadly about a free trade agreement.

I was a bit surprised to see that particular recital in the protocol, because of course that does relate to a possible commitment that would build on this single customs territory created by the protocol. Of course, it is a recital; it is not a binding obligation.

Martin Howe: To follow on from Ms Van Damme's point, in terms of the customs arrangements, the critical part of the political declaration is paragraph 23. In case it is not familiar immediately to everyone on the Committee, I will just read out the paragraph. It is very short. It is section B, tariffs. It says, "The economic partnership should ensure no tariffs, fees, charges or quantitative restrictions across all sectors, with ambitious customs arrangements that, in line with the parties' objectives and principles above, build and improve on the single customs territory provided for in the withdrawal agreement, which obviates the need for checks on rules of origin".

My view is that that paragraph in the political declaration is extremely important. Indeed, I would argue that it is the most important paragraph in the whole political declaration and needs to be looked at with great care. Of course, it is linked to that recital about building on the arrangements in the protocol. Of course, the political declaration is given a special legal status. Although it is not binding as such, it is given a special legal status by Article 184 of the agreement, under which both parties agree to negotiate a treaty based upon it.

The big problem with it, which in fact directly relates to the Irish border problem, is that, as far as I can see, that is not compatible with a conventional free trade agreement like the EU-Canada agreement or other free trade agreements, because all conventional free trade agreements necessarily involve rules of origin checks on goods that pass between the free trade members. The reason for having those checks is that they are the necessary counterpart of the freedom of each free trade party partner to set its own tariffs in dealing with third countries. Unlike a customs union, where everyone has the same external tariffs, if you have a free trade area with different countries having differing external tariffs, you need to stop goods filtering in through the low-tariff country and crossing the border and undermining the tariff policy of the other free trade partners, so that is why you always have them and why, for example, Article 24 of GATT defines a free trade area as being tariff-free on goods originating within the contracting parties, not goods that are flowing around them.

The problem with this is that it may be argued that it actually rules out a conventional free trade agreement. This gets complicated, because in the Chequers White Paper there is a proposal for this hybrid customs arrangement, which the Government may be contemplating, that this



HOUSE OF COMMONS

reads onto, but that itself has numerous issues and problems, not least because, even if it were to be workable, they seem to accept that it cannot be made ready until after the end of the transition period.

Sir Stephen Laws: I do not think I would have anything useful to add to that, except that, as a UK drafter who is used to reading words and expecting to know what they mean, all I can say is that this clearly points the negotiations in a particular direction and gives some indication of where the two parties to it think they will go, but it cannot possibly close all other routes.

- Q10 **Kate Hoey:** Mr Howe, you have said in your memorandum—it really did sound quite serious—that the lock-in nature of the protocol will gravely damage the UK's interest whether or not it actually comes into effect, since the existence of the protocol will compel the UK to submit to adverse terms in the future relationship agreement as the only way of preventing the protocol coming into force or escaping from it. That sounds quite serious to me.

Martin Howe: Yes.

Kate Hoey: But I am not a lawyer.

Martin Howe: You do not have to be a lawyer. In a sense, as a lawyer and as a litigation lawyer, one is always a negotiator—it is part of the job—but many other people negotiate. The problem is this. If you negotiate against a background where, if the negotiations break down, you are free to walk away, then you can hold out at least for your essential interests. If you negotiate against a background where, if you fail to reach an agreement in default, these terms in the protocol automatically come into effect, that necessarily constrains your negotiating power.

It is then very hard to do better in your negotiations than the terms you are locked into on the protocol, because why should the other side give you better terms unless you are able to offer them something else in return that is better for them?

- Q11 **Kate Hoey:** So we are going in with our hands tied behind our backs.

Martin Howe: That is right. It is a very important point. You can argue about how likely or unlikely it is that the protocol will actually come into force. If a long-term relationship is concluded before the end of 2020, it would not come into force. You cannot really argue that, even if it does not come into force, it does not have a very severe constraining effect on the United Kingdom's negotiating position.

- Q12 **Kate Hoey:** Do all three of you agree, then, that the only way to be absolutely certain that the backstop cannot be permanent—although I am not sure how you would deal with that particular point, Mr Howe—would be to have a legal extra page added on to the withdrawal agreement that says, legally, that it can be got out of by the United Kingdom at a certain



HOUSE OF COMMONS

stage by simply saying, “We do not want to be in it anymore because we think we have satisfied the border arrangements”?

Sir Stephen Laws: What I said is that you need something that can be relied on as a legal proposition to bring it to an end. It may be that there are ways of doing it that would be less satisfactory and would not involve actually changing the agreement, but they then have to become politically acceptable, which is probably a bigger problem.

Isabelle Van Damme: A few options have been put forward. One option that has been put forward is that one could have a kind of annex to the agreement or an interpretative declaration whereby maybe the conditions that are laid down in Article 20 are further clarified, because Article 20, which is the review clause, is premised on the idea that the agreement would no longer be necessary. That would be the position of the United Kingdom in this case. One could set out in further detail what that would mean and what the conditions are under which either party could argue that it is no longer necessary, as an entry point for the negotiations that Article 20 foresees.

The other option is, as has been discussed, that you have a temporal limitation of the validity of the protocol. Of course, there is a certain tension here with perhaps the essential objective of the agreement, which is to avoid a hard border. Then the parties accept that, after the expiry of a certain period of time, you might go back to a hard border. Another option is that you have a type of sunset review clause, whereby you would have a temporal limitation on the validity of the agreement, so the agreement would expire after a certain amount of time unless the parties agree to maintain that agreement.

One should keep in mind that there is the option of termination, but the agreement, as it is currently drafted, also offers several means for the United Kingdom to put pressure on the European Union. I have already mentioned one method, which is to initiate dispute settlement proceedings, at the end of which it may be that an arbitration tribunal would then ultimately authorise the United Kingdom to adopt remedial measures.

Q13 **Kate Hoey:** That would take a very long time.

Isabelle Van Damme: That would take quite a long time.

Q14 **Kate Hoey:** The EU might not exist by the time that would be sorted out.

Isabelle Van Damme: I do not want to take a position on that. The core objective of remedial measures is to induce the other party to comply. There is another option in Article 18 of the protocol, which sets out an option of imposing safeguards. It is quite widely formulated. It enables either party to the agreement, in certain conditions, to adopt safeguards, which are, again, remedial measures without having to go to dispute settlement. That could be adopted much more quickly. Then one



HOUSE OF COMMONS

would have to see whether the European Union disagrees and says, "There is a violation of Article 18".

It seems to me that there are certain mechanisms under the agreement that would enable either party to put pressure on the other party to engage in those negotiations with the objective of coming to an agreement that would replace this protocol.

Martin Howe: On that last point on Article 18, the threshold for the adoption of safeguard measures in Article 18 of the protocol is pretty high. It is, "If the application of this protocol leads to serious economic, societal or environmental difficulties liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate measures". I cannot see that that is really a solution to some disagreement over the nature of border arrangements. The purpose of that, it seems to me, is more to do with the so-called level playing field provisions of the protocol, and giving in fact both parties, but particularly the European Union, a basis for taking action. Were we to do something, say, in the field of state aid that they disagreed with, it would entitle them to take action such as putting countervailing duties on products from a company in Britain to which state aid had been given. I would leave that aside.

I cannot see any way in which the lock-in problem can be solved other than by something that amends the treaty at the same legal level as the treaty. It does not matter in a way whether it is a separate document that amends it or whether it is an amendment to the text. As it stands, that is a matter of mechanics rather than substance. The most straightforward way would be a simple time-limited right to leave. That would also affect beneficially the negotiating dynamic that I referred to, because, if we knew we could get out of it after a period of time, that would give us a stronger hand in the preceding negotiations.

There is an alternative, which is to have much more clear and objective criteria for when the protocol would cease to apply. At the moment, in fact the criteria are very broad criteria that are to do with supporting the objectives of the Belfast Agreement. If the European Union objects to revised proposed border arrangements, it seems to me that it would be almost impossible, providing it put forward some sort of coherent political justification linked to the Belfast Agreement, to say it was acting in bad faith in failing to agree to us being able to substitute those arrangements.

You could substitute a much clearer clause, giving much more objective criteria. That would be possible, but it would be very unsatisfactory, because we could end up in an international tribunal for years and years arguing about whether those criteria had been met or not.

Q15 **Kate Hoey:** Sir Stephen, does it surprise you that our negotiators, and particularly our legal people who have been involved in the negotiation, have got us into this position?



Sir Stephen Laws: No, but I do not really know enough about how they got into it. It is important, though, not to look at this always as a legal problem that may have a legal solution. We have discussed various ways in which there might be a legal solution to this, but that does not address the real problem. The problem is not that there is not an exit from the backstop; the problem is that there is a lack of trust on each side that is triggered by the backstop. Finding a solution to the problem of lack of trust is more difficult, perhaps, than finding a solution to the backstop.

On the one hand, people fear that it may be an attempt to lock us in to something. That fear is generated partly by the fact that we have the capacity to leave the European Union at the moment with two years' notice. Why would it be any worse to have the ability to exit whatever arrangement comes next with a similar period or, perhaps as it is meant to be temporary, a shorter period of notice? On the other, there is, at least purportedly, some anxiety about the Good Friday Agreement, to which on the UK side we would say, "We are bound by the Good Friday Agreement. Why should we need to repeat it in further requirements?" Obviously, you have to find a way of implementing it, but in order to ensure that the UK respects the Good Friday Agreement or the Belfast Agreement you do not need anything, because the UK will. If you find a way of exiting, you might need something that would give reassurance to the other side about what happens to the Good Friday Agreement. That might resolve that problem of trust.

The problem of trust on our side might be resolved by providing more reassurance about a way out. That is how it seems to us. How far you go legally to do that is not a legal question.

Kate Hoey: I am sure my colleagues will get on to other options that might be simpler, such as perhaps leaving on WTO terms.

Q16 **Mr Goodwill:** Yes, that takes me nicely on to my question, which is about leaving on WTO terms. There has been a lot of political debate about what would happen if the withdrawal agreement, either in its current or in a modified state, was not agreed. There are some in this place who think that we would automatically go into a no-deal Brexit under WTO rules. Many people have said that this is the way the whole world trades and that this would not be a problem, but then others are saying that this could be really, really difficult.

Looking at the WTO tariffs on beef, for example, which make up 40% of all the Irish Republic's food and drink exports, which is valued at £2.5 billion, of which 50% goes to the UK, there would be a €3 per kg tariff plus 12.8% of the value, which is around about a 65% tariff across the carcass. In the event of a no-deal scenario, would that be a situation that would have to be applied? Would there be some flexibility in terms of that tariff?

Isabelle Van Damme: Just focusing on tariffs, the United Kingdom will now have its own schedule under WTO, which means there is a maximum



HOUSE OF COMMONS

binding as regards the level of tariff it may impose. The fact you have a schedule and those maximum commitments does not mean that you may not impose a lower tariff or a zero tariff. In fact, many WTO members do that for many types of products, despite the fact they have these maximum commitments in the WTO. That is the so-called applied rate. If the United Kingdom wishes to do so, it could reduce the tariff to a level that is much lower than its binding commitment under WTO law.

For trade, we are dealing with trade going in two directions. There are two sides to this border.

- Q17 **Mr Goodwill:** Lamb exports from the United Kingdom are very important. That would potentially have a similar level of tariff for exports to France.

Isabelle Van Damme: Yes, exactly. For trade going from the United Kingdom to the European Union, including to Ireland, Ireland would need to apply the common customs code. The European Union imposes obligations on member states to enforce customs legislation and the common customs code. While the United Kingdom might decide to reduce its tariffs for certain goods, without an agreement there is no guarantee that the European Union would take the same decision. The applied rates that one sees now in the common customs code may continue to be the same if there is no deal.

- Q18 **Mr Goodwill:** So the EU would impose the WTO level of tariffs.

Isabelle Van Damme: No, it would apply the applied rate, the MFN rate. It would apply the non-preferential rate that it applies to imports from all other third countries with which it has not signed, for example, a free trade agreement so there is no preferential tariff. MFN rates would apply.

- Q19 **Mr Goodwill:** In that situation, the UK would have to take a view as to whether it would reciprocate with similar levels of tariff or would set lower or even zero tariffs.

Isabelle Van Damme: Yes, it is a decision for the United Kingdom to take on what kind of market access it will allow for EU products.

- Q20 **Mr Goodwill:** If we had a different level of tariffs in different directions, would that create the potential for smuggling across the Irish border? In effect, there would be a need for controls on goods travelling, because there would be some financial benefits in moving goods such as beef across the border.

Isabelle Van Damme: If I correctly understood your question, the idea would be that the United Kingdom applies across all of its borders the same tariff, but it would be a tariff that is lower than that of the European Union. In that case, as long as the United Kingdom applies its tariff on an MFN basis, as a matter of WTO law, there is not necessarily a problem. Of course, in terms of diversion, goods that would enter the United Kingdom under possibly a lower tariff rate from third countries



HOUSE OF COMMONS

would no longer enjoy the benefit that they are in free circulation to go to, for example, other third countries such as Ireland, in the case of a no-deal Brexit.

- Q21 **Mr Goodwill:** Is there already a mechanism in place whereby those goods coming from third countries could be tracked and dealt with? Would it require some time to put those systems in place? Is that maybe not a legal question? That is a question for customs.

Isabelle Van Damme: In order to determine what kind of tariff you need to apply, whether you need to apply your MFN tariff or a preferential tariff, it is necessary to determine the origin of the product. You need to determine from where this product comes so that customs officials know what tariff rate to apply. That involves preparing documentation regarding origin certificates for products and then, of course, the products need to clear customs. That is also a particular process that takes some time and involves some documentation and clearance, et cetera.

- Q22 **Mr Goodwill:** As far as goods that are travelling, say, from the Republic of Ireland via Holyhead, Dover and then into the EU, would there be a facility in place so that could happen without tariffs being collected and reclaimed and then charged again? Could there be almost like a "free port" arrangement where they could traverse or would all that documentation have to be done at Holyhead and then again in Calais?

Isabelle Van Damme: If the goods are intended to stay within the European Union, if there is really no deal, those goods will then need to clear customs at that border, because that is the moment at which they are entering the European Union. It is different in a case where, for example, the goods might be in transit, so they are going through Ireland to another third country. In principle, the freedom of transit applies there, so no import checks or formalities apply. But countries may also, under the WTO, impose certain requirements where they are checking at the border that these are indeed goods that are in transit. They check that these goods will not enter their domestic market.

So there is a freedom of transit, but that does not preclude a WTO member from imposing certain checks at the border, but the WTO agreement says that there should be no unnecessary delays. However, some extent of checks may be possible, and that is why countries enter into certain agreements regarding transit measures so as to facilitate that process and so it can occur as quickly as possible with as limited a cost as possible.

- Q23 **Mr Goodwill:** I do not know whether Mr Howe wants to comment on that.

Martin Howe: I completely agree with Ms Van Damme. There might be a little bit of an issue of terminology. In a sense, there is no such thing as WTO mandated tariffs. What happens is each WTO member submits a schedule of tariffs, the so-called bound levels. Those are the maximum



HOUSE OF COMMONS

level of tariffs that that member has committed not to charge more than. The European Union has submitted such a schedule.

What is happening at the WTO—I am sorry; I am not quite up to date on where the process has got to—is that the United Kingdom is copying and pasting that schedule, so the United Kingdom after exit will have the same upper levels of bound tariffs as the European Union currently does. Those are only upper levels, so the United Kingdom is free to levy zero tariffs if it feels like it or some intermediate level, as long as it does it to all comers, on a most-favoured-nation basis.

In the particular example of beef, which you raised, where the European Union customs external tariff is very high, there is a policy decision to be taken. If the UK were to maintain that same level of tariff itself and therefore impose the tariff on imports of beef from the European Union and, in particular, the Republic of Ireland, you would expect that it would damage consumers in the UK by forcing up beef prices. If, on the other hand, you scrapped the tariff altogether, then British beef farmers might feel aggrieved. There may be a policy issue there in terms of setting a level of tariffs that keeps the farming community on an even keel but does not upset consumers, but that is a policy choice for this country.

Finally, on this issue of goods in transit, the importance to the Republic of Ireland of its transit trade in terms of both imports and exports, which travels on lorries via Great Britain and across the Channel ports on to the continent, is very high. It is much higher than the cross-border trade. Therefore, in a no-deal scenario, whatever else happens, it will be important to come to arrangements with the Republic of Ireland that smooth the flow of such transit traffic; there is no point in obstructing it. Indeed, it is part and parcel of encouraging the European Union not to unnecessarily obstruct British lorries going through Calais.

Q24 Mr Goodwill: That is why the withdrawal period is there: so the parties can come to these arrangements and get that agreed.

Martin Howe: If we are assuming a no-deal exit, which your question was about, Mr Goodwill, then even in a no-deal exit, that means no Article 50 deal; it does not mean you do not necessarily have mechanistic agreements of a kind that commonly exist between trading partners, like special transit arrangements that smooth the flow of Irish goods to and from Ireland when they travel via roads in Great Britain.

Sir Stephen Laws: This is not really my area of expertise, but I would point out that the cross-border beef trade from the Republic of Ireland is not unimportant to the Republic of Ireland.

Q25 Mr Goodwill: I get the impression that either there can be a situation where there is in effect a truce and neither side imposes these punitive tariffs or there could be some sort of escalation of trade war where, for example, lamb exports to France had a tariff applied and therefore the UK had no alternative but to apply with a similar type of tariff on other



goods.

Martin Howe: It is not an option not to apply tariffs for either party. You could have an interim free trade agreement, for example. You could have a standstill agreement that would qualify as a free trade agreement under Article 24 of GATT and be a permissible exception, therefore, to the most favoured nation principle. Unless you have that sort of deal, even a temporary deal, both parties are required, unless you can think of another way around it, to impose whatever is their chosen level of most favoured nation tariffs on imports from the other. The only way we could not impose any tariffs on imports from the EU would be to abolish tariffs on imports from other countries too.

Q26 **Mr Goodwill:** If the UK were then to apply, say, a deficiency payment scheme for sheep farmers, would that be, then, one of the situations where non-state aid could be challenged by the European Union in that we were distorting the market? That was mentioned earlier.

Martin Howe: If we were in a no-deal scenario, things like deficiency payments to farms would come under the WTO regime. I am sorry; I am not an expert on the WTO agriculture regime at all, but I think that there is an agreed limit on the amount you are allowed to pay in direct payments to farms, but we are well under that. That is my belief. I am sorry; I am not an expert in that. Perhaps you should ask someone who is more of an expert for a definitive answer.

Isabelle Van Damme: It is the case under WTO law that there are clear disciplines regarding subsidies or state aid, as we call it in EU law, and sub-disciplines regarding agriculture. Regarding domestic support, the model is that each member has accepted certain maximum levels of support that they are allowed to give.

As regards MFN, indeed it is the case that, for example, in a no-deal situation, if the United Kingdom applied a zero tariff to imports from the European Union, that is an advantage that is given to the European Union. According to the MFN principle, that advantage must then unconditionally be given to all the other WTO members. It is not that easy to just lower the tariffs as a solution.

One option that is being discussed by several people is the possibility of asking the WTO for a waiver as regards the MFN obligation. That involves a decision taken by WTO members in principle on a consensus basis where, for a limited period of time in exceptional circumstances, they would allow a waiver of the MFN obligation, and that would then be subject, if it is for longer than a year, to annual review. That is a process that is foreseen in the WTO. Of course, it is one thing for the United Kingdom to ask WTO members for such a waiver; it is a different thing for the European Union to request such a waiver. If the United Kingdom requested such a waiver, that would have no effect on trade going from the United Kingdom to the European Union, because the European Union is bound by its MFN obligations.



HOUSE OF COMMONS

Of course, for the European Union, in terms of the possibility of a waiver of that obligation, the Irish border is access to an immense market. There are serious concerns that the integrity of the internal market might be affected if that border is suddenly opened and there are no tariffs and no checks as regards to technical regulations, et cetera. One can understand very much the concerns of the European Union in that regard. That option comes with considerable risk, but it is a possibility.

Q27 **Mr Goodwill:** So there would in some circumstances be incentives for people to smuggle goods across that border.

Isabelle Van Damme: Yes.

Q28 **Mr Goodwill:** It could result in a harder border than we have at the moment in terms of policing for goods.

Isabelle Van Damme: Yes.

Q29 **Chair:** I assume there would be no objection to reducing tariffs to zero on things like olives and olive oil, which are not produced here. Therefore, there would be no threat to domestic producers. In that way, perhaps it would protect against the possibility of tariffs being erected against British lamb, for example. Would that not be the case? Of course, that would enormously disadvantage producers in the southern parts of the European Union since, at the moment, the arrangements are such that they have preferential access to UK markets and other producers—north Africa, for example—are effectively frozen out by the tariff arrangement. That would be a perfectly legitimate thing to do, would it not? There would be no legal impediment, because you would be applying, under MFN rules, the same zero or near-zero tariff to everybody. Would that be a remedy to the threat of punitive tariffs being raised against exports from the UK to Europe?

Isabelle Van Damme: If the MFN principle is respected, in principle that would be possible. If I understand correctly, the process you are describing is typically what happens in negotiations between trading parties. What you are describing is the leverage that in such a situation each party has. That is what parties do in trade negotiations: they use that leverage to obtain commitments. They might also obtain a certain leverage in the context of trading goods and tariffs as part of leverage to obtain something with respect to services. That is really the essence of how many trade agreements are being negotiated: by creating the type of leverage that you have just described.

Q30 **Jim Shannon:** Thank you for coming to give us your advice and thoughts on where we are. The backstop is a key issue for us and me, being an MP for Northern Ireland, as a number of MPs here are. The concerns run deeper than those across the whole of the Chamber in many other parties, who also recognise the fear and concerns about the backstop. The Attorney General has already confirmed the legally binding implications of Northern Ireland's position within the United Kingdom.



HOUSE OF COMMONS

The EU has been keen to tell us that it has been an insurance policy and that everything will be all right, but the fact of the matter is that any insurance policy that I have ever had over the years I could cancel any time I wanted, and I could claim any time I wanted as well. This so-called EU insurance policy is not really worth the paper it is written on. That is my opinion. I am not asking you to say yea or nay to that; I am just putting the point forward.

Sir Stephen, you mentioned—I think you are absolutely right—the fact that trust is at an all-time low. I would not trust them to get me to that door, never mind get me anywhere else. That is just telling you the truth. That is how I feel about them. That is where I am. Many people in my constituency also feel the same. From the very beginning, the Republic of Ireland and the EU have told us that if we do not do this, that and the other, it will lead to a hard border. It is marvellous how the potential or idea of a hard border has suddenly evaporated like water in the Sahara desert. It just goes away like that as if it was never there. I sometimes wonder who the dog is and who the tail is. Is it the EU wagging the Republic of Ireland's tail or is it the other way around? We all now agree—they accept it—that there is absolutely no need for a hard border.

The implications of it, of course, are much farther reaching than what the Attorney General has said. You then go into the negotiations that then take place on trade. I want to get your opinion on this; I am reaching my question, Chair. Macron, the French President, has been very clear that parts of those trade negotiations and deals will then take place within this period of time. If only Europe could work to two years. My goodness, it would be a miracle, so it would. They need 10 years or 20 years to make even the simplest decisions and then screw you for every pound they can get out of you. That is my opinion of Europe, of course.

But the issue very clearly for me is this. If we enter into a trade agreement and try to achieve it within two years, they will use the backstop and the overlap beyond the two years, which then means we lose our control of it. We will hit the issue of fisheries. The Prime Minister has been clear in her opinion in relation to the fisheries, but it is also clear to me that if this withdrawal agreement and the legally binding agreement and the implications of it were to take their conclusion and go beyond the two years, they have the strong arm and the strong angle when it comes to enforcing trade deals, in particular regarding the fisheries. We want to be free of the red tape and bureaucracy of the EU when it comes to fisheries.

Do you feel, collectively and individually, that going beyond the two-year period also makes it more difficult to get trade deals and to come to arrangements, particularly regarding fisheries? It is not only the fisheries; it is agriculture and it is jobs as well. There are many other implications that will go beyond that. I am just keen to get your thoughts on this. Would it not also be better, within this withdrawal agreement, to have a two-year conclusion, a timescale on it? That



HOUSE OF COMMONS

timescale will focus attention and will make sure that both parties negotiate in a way to come to a conclusion.

Chair: There are several questions there.

Sir Stephen Laws: On the issue of trust, it does seem to me that the ball is in the EU's court. This is not a legal observation; it is just an observation from outside. The ball is in the EU's court. The trust is a question about leverage; leverage was mentioned before. Those considering the WTO exit or the Government's proposed way of exiting are considering whether or not, in the further negotiations that are going to take place whatever happens, the UK will have better leverage if it is in the WTO solution than if it is the withdrawal deal solution. The history of these negotiations has been, in some ways understandably, that the EU uses their leverage very effectively. Making sure that in the next stage the UK has the right amount of leverage and can rely on the EU to negotiate on a level playing field seems to be in their court to demonstrate at this point, because we cannot demonstrate it.

Isabelle Van Damme: I would make a few brief remarks. One thing we have to accept is that the UK market and the EU market are deeply integrated economies, and they will probably remain so. That is probably also economically beneficial for both parties after the deal. When we talk about the backstop, we are dealing with specific aspects of trading goods. That is very important, and it is especially important because it is in that context that the issue of a border mostly arises, but the integration between the UK economy and the EU economy is not based only in trade in goods. It is very much services. There are so many issues where the European Union has an interest in obtaining access to the UK market. I mentioned services, but there is also the issue of fisheries. They certainly want access to UK waters.

Jim Shannon: They want to steal our fish.

Isabelle Van Damme: In terms of the assumption that the European Union is not interested in making any agreement or entering into any agreement with the United Kingdom soon, I have a bit of a difficulty with accepting that as a starting point. There are so many matters in which the United Kingdom and the 27 other member states now co-operate to the advantage of their respective economies. The European Union also has a specific interest in those other matters regarding trade, so not only dealing with trade in goods.

It is also about the fact that traders—exporters to the UK and exporters to the European Union—ultimately want to operate within a stable and predictable framework. That is now currently the concern for many traders and exporters. For that reason both parties have an interest in reaching a comprehensive agreement. Whether it is a customs union or a single market trade agreement is a different question.

In terms of assuming—this also goes to the issue of trust and leverage—that the European Union is not interested in a future agreement,



whatever it says, I have difficulties with that as a starting point. There are so many other issues, as the political declaration also outlines, that need to be addressed and that are of interest to both parties.

- Q31 **Jim Shannon:** Isabelle, is it not quite simple? Within the withdrawal agreement, all EU27 countries and the UK Prime Minister at least could put forward a two-year time limit for it to be within this term of Government. If you put a two-year time limit on that, it will focus attention and we will come to that conclusion. If there is no agreement at the end of two years, that is up to the EU. The element of trust keeps coming back. They had better prove their trust to me and to the British people, because they have not done it.

Isabelle Van Damme: One has to recognise, taking into account that we are in a process of disintegration—we have very integrated economies and we will now go to a model that is less integrated by definition—this is a very complex exercise. I can understand the concern about imposing any specific time limit within which those negotiations need to be completed. In trade negotiations in general, the EU's experience has been that it varies depending on the particular trading partner and how ambitious the agreement is.

But what you will see once the real negotiations for the future agreement start is that there will be so many different stakeholders in those negotiations. Both will have to engage in a process of consultation with those stakeholders. It is also of interest to the United Kingdom to know what domestic producers and service providers want. Trade negotiators are more qualified to comment on this, but it is difficult to impose any defined time limit on how long that process might take.

- Q32 **Jim Shannon:** What is your opinion on that, Martin?

Martin Howe: On the two-year period, I agree that it is entirely possible that negotiations with the European Union over a complex agreement could well run over that two-year period. In addition, I have already mentioned that the Government's preferred model involves this sort of dual tariff/customs process never tried anywhere in the world before. They appear to accept that it will be at least late 2021 until that can be made ready. I am personally much more cynical. I do not think it will ever work at all, but even the Government seem to accept that it cannot be got ready within the two-year transition period.

I must say that I am very concerned about this scenario. What this country needs most of all is certainty over the future so businesses can plan. It seems to me that going down the withdrawal agreement route with this backstop protocol guarantees years and years of uncertainty, more negotiations going on and on and on, with a danger the backstop gets triggered because they are not finished by the end of 2020, and continuing uncertainty as to future business.



HOUSE OF COMMONS

In practice, it makes it impossible for the United Kingdom to conclude or even negotiate trade agreements with third parties because they do not know when we will be able to implement them. In theory, in the transition period we have the right to negotiate them to come into force at the end of the transition period, but we will only be able to engage trade partners if we are able to say with certainty, "On 1 January 2021, this deal can be put into effect". I would agree that the process has to be time limited. It cannot be allowed to drift on, particularly with the backstop protocol.

On the subject of fisheries, which you raised, can I add something? There is an important point here. The political declaration says on fisheries, "Within the context of the overall economic partnership the parties should establish a new fisheries agreement on inter alia access to waters and quota shares". There is a commitment in principle to have some sort of mutual access to waters and quota-sharing agreement, although the political declaration does not specify the nature or shape of that.

One very important point about the future relationship agreement is that it would appear from the political declaration that the intention of the Government and the European Union is to negotiate it as a single agreement or linked series of agreement. Personally, I think that is a bad idea, although politically, as a package, it would have to be negotiated together. To link this whole lot together is a very bad idea because of future flexibility. It means that, if we want to renegotiate something to do with security co-operation, we cannot get out of it without bringing down the whole structure, including the free trade agreement. The Swiss found themselves in this bind, wanting to renegotiate free movement of persons but finding that all their bilateral deals had been linked together.

The immediate problem it causes is that it means that the whole series of agreements cannot be agreed on the European Union's side except without each individual member state having a veto, because it would become a mixed competence agreement. That means that every single member state can veto a deal and either push us or keep us in the backstop if its demands are not satisfied. Why this is linked to fishing is of course because President Macron announced just after the summit where the deal was agreed that he would be using this particular lever to promote France's interests as regards access for EU boats to United Kingdom fishing waters. One can imagine that there are other concerns raised by other member states, such as Spain in respect of Gibraltar, where having this lever of the individual member state being able to veto the deal with the UK will prove very problematic for us.

Sir Stephen Laws: I do not disagree with any of that, except to say that, on the question of everything being linked together, there is something in the Tusk/Juncker letter that suggests that—



Martin Howe: This is the provisional application.

Sir Stephen Laws: Yes, you might begin to provisionally apply things as you agreed them, but it gives no certainty about that at all. It probably does not need saying, but I did not answer the two-year question. The two-year time limit has not worked out well for us so far, but it was the only leverage we had.

Q33 **Mr Campbell:** I wanted to bring you to the issue that was raised yesterday by Mr Schinas at the European Commission. He raised the issue of the hard border and the potential for it if a no-deal scenario emerges by 29 March. I have been endeavouring to get a political analysis of what any hard border might look like. In terms of a legal framework, what options would be open? The UK has said that it will not implement a hard border, so what options would there be in terms of a legal framework for the EU to say, "This is what needs to happen now"? If it says, "Now we are in a no-deal scenario and we have given enough warnings that there may be a hard border", what options would be open to the EU?

Martin Howe: The European Union in principle has just as much flexibility as we do. We are both constrained by the WTO MFN framework. We would not, for example, be able to say, "We are not going to charge any tariffs at all on goods if they happen to come over the Irish land border", but that does not mean we would have to enforce those tariffs by means of having men in peaked caps putting poles across the road physically at the border.

Q34 **Mr Campbell:** At the 300 roads, you mean.

Martin Howe: 300 roads, indeed.

Mr Campbell: And the fields and lanes and byways.

Martin Howe: Indeed.

Mr Campbell: This is the point I want to get to.

Martin Howe: Indeed, it is impractical. My understanding is that we would not be doing that. We would just be saying that we enforce tariffs like a VAT return. If you import goods from the Republic, you declare it on your VAT return and you are inspected in the same way, on a risk basis, to make sure you have paid the tariffs. As far as I can see, that would be compatible with the MFN principle, because we would be charging the same tariffs. The mechanics would be different, because every other border of the United Kingdom where goods enter is either a seaport or an airport. It is only the border between Northern Ireland and the Republic.

Q35 **Mr Campbell:** If I could just give you a practical example that Mr Goodwill alluded to in terms of beef and lamb, there are numerous farmlands that straddle the border between Northern Ireland and the Republic. In a no-deal scenario with a so-called hard border, you could



HOUSE OF COMMONS

well have farmers who have UK sheep and EU sheep in the same field. It is very difficult to tell them apart. You could have UK and EU cattle, and they are very difficult to tell apart as well, because they are both in the same field, part of which is in the Republic, in the EU, and the rest of which is in the UK. What legal framework could the EU look at, examine and implement that might resolve that conundrum?

Martin Howe: I am not an expert on agricultural support, but do they not now have to have individual ear tags? Presumably the ear tags will be EU or UK ear tags.

Mr Campbell: They may have both.

Martin Howe: But there is further flexibility permitted under GATT rules, which is that you can have special rules and special exemptions for frontier zones. That is permissible as a derogation from the most favoured nation principle. Very local trade—for example, a milk round where milk is collected and taken to a local dairy—could potentially come under exemptions. You could have a system of exemptions.

What one has to be careful about in dealing with the European Union is that it often asserts that its rules are laws of nature, in terms of its customs code. But its customs code is amendable. It can amend it by QMV to put in special rules about the border in Northern Ireland, if the political will is there to do it.

Q36 **Mr Campbell:** In what timeframe would that have to be done if we were in a no-deal scenario?

Martin Howe: It can pass legislation very quickly when it wants to. That is the answer. The normal process can take years.

Q37 **Mr Campbell:** But it would hardly be able to do it before 29 March.

Martin Howe: I do not know about that.

Q38 **Mr Campbell:** Isabelle Van Damme, what is your view?

Isabelle Van Damme: As I mentioned, there is the option of asking for a waiver for MFN, but I am not sure the European Union is keen on that option. The example you have offered confirms, again, the importance of establishing origin in trade. There are procedures and documentation to be complied with to determine origin. In that particular area, on those types of goods, it is not only about tariffs; it is also about non-tariff barriers. Here I am referring to technical regulations and sanitary measures that the European Union applies and that the United Kingdom has an interest in applying also in case of a no deal.

I am not sure I even want to use the term “frictionless trade”, because you will always have some types of checks and fees that apply. What you currently have is a situation where within the European Union the same measures apply, the same technical regulations and mostly the same sanitary measures. In case of a no deal, one might have in the



beginning some alignment, but in the long term it is quite likely that those regulations will start to diverge. You then need checks to determine whether a product—this is also true for live animals—is in conformity with those regulations and with those requirements.

One of the tools through which this process is facilitated are the so-called mutual recognition agreements, which the United Kingdom is now already concluding. Most of these mutual recognition agreements mostly deal with the process of determining whether a product conforms with a technical regulation.

Q39 Mr Campbell: That would not necessarily have to be done in a border setting.

Isabelle Van Damme: Sometimes, no, it does not have to be at the border. For example, a UK exporter, such as a farmer with an interest in exporting to the European Union, would go to a conformity assessment body and it might determine that a product complies with UK regulations and also with EU regulations. That would mean that the farmer or the exporter would have the advantage of having one certificate that enables him to export to the European Union.

That is one of the main objectives of the conformity assessment procedures that are determined in mutual recognition agreements, but I should note that the European Union already has certain types of those agreements. I understand that the UK is trying to model those agreements, but you have many different types of those agreements. They do not all provide for the situation that you get a single certificate. That is also something to be negotiated with the European Union, and then the parties need to agree on the criteria for these processes.

If you do not have such an agreement, the WTO rules talk a little bit about mutual recognition, but the obligations can be interpreted in different ways. The reason why you have mutual recognition agreements is often that there is no absolute guarantee under WTO law that the other party will recognise your equivalent regulations. As regards technical regulations, for example, the TBT agreement says that each WTO member will give positive consideration to the possibility of mutual recognition of another party's technical regulations in case they are deemed to fulfil the objectives of its own regulations. When it is about the conformity assessment procedures, it provides that one will recognise the results of such procedures by another WTO member, provided that there is an equivalence of assurance that the product complies with the technical regulations.

There are certain obligations in WTO law, but they do not give absolute assurances, and that is why countries try to have these mutual recognition agreements. I should note that what is happening now, of course, is that, if you have a comprehensive trade agreement, mutual recognition is negotiated in the context of those trade agreements. If you look at the agreements the EU has concluded with Japan or Canada,



HOUSE OF COMMONS

there are different forms of arrangements regarding recognition in those treaties that also depend on the type of product concerned. It often depends on groups of products. Pharmaceuticals might be different from electronic equipment, for example.

Sir Stephen Laws: I do not have not much to say on this. I may be taking a simplistic view, but I do not see how non-tariff barriers create much of a problem initially, because, as has been said, there will be alignment. In a no-deal scenario, I would have thought it will be relatively easy, or ought to be relatively easy, to come to an agreement quickly that neither side would make changes to their regulatory regimes that would have an impact on the Irish border.

Mr Campbell: That makes sense.

Q40 **Lady Hermon:** I am just checking on what was reported to have been said—I think it is accurate—by the European Commission yesterday, which is that, if there is no deal, to quote the gentleman who was speaking, it is “obvious” that there will be a hard border. Did he get it absolutely wrong?

Sir Stephen Laws: The detail has been discussed by other members of the panel.

Q41 **Lady Hermon:** Sir Stephen, in your introduction you indicated your extensive career that went right back to the very difficult days of Northern Ireland, so I would really like to hear from you on this particular issue, because you will be sensitive.

Sir Stephen Laws: It does seem to be that in a no-deal scenario there is considerable freedom. There are constraints, but there is considerable freedom for the UK to produce a situation in which there does not need to be any change to the border arrangements on our side.

Q42 **Lady Hermon:** I am sorry to interrupt. When I heard the arguments of the leave campaign in 2016, one of the key mantras was about taking back control of our money, sovereignty and our borders. In the event, heaven forbid, that we have no deal, how are we taking back control of the border crossing in, for example, Crossmaglen in south Armagh?

Sir Stephen Laws: I am not suggesting or advocating any of this. What I am saying is that it seems to me, from a technical point of view, there is considerable freedom for the UK to ensure that the border arrangements on our side remain the same. The pressure then comes on how responsible we are for whatever the Irish Republic has to do because the EU forces them to. That is the question. It is a political question in terms of what we are prepared to accept in that way.

Q43 **Lady Hermon:** Was the EU Commission wrong to say it was obvious that there was going to be a hard border on the island of Ireland if there was no deal?



HOUSE OF COMMONS

Sir Stephen Laws: If that is an expression of a determination to ensure that the Irish Republic erects one, then I suppose it is correct, yes.

Martin Howe: It is very hard to comment on that without reasons. As I have said, we are free not to create a hard border within the WTO framework.

Q44 **Lady Hermon:** So we do not take back control of the border.

Martin Howe: No, that is a different issue. For example, after we leave, the point is we will be free to have laws that depart from European Union laws, including, for example—this is quite an important example—laws on improved scientific breeding methods, which EU law at the moment is very unscientifically restrictive of. If we adopt a more liberal framework, it may well be that we would then have farmers in the United Kingdom, including farmers in Northern Ireland, having the ability to use improved breeds of crops or animals.

At that point, issues would arise because the European Union would say, “We do not want a cow that does not conform with our anti-GMO laws to cross the border into the Republic”. The fact you have differing regulations on both sides of the border does not mean you have to enforce rules against the movement of goods by means that are on the border. You can stop such things entering the commercial chain.

Q45 **Lady Hermon:** You can stop such things. Have you visited the border at the present time on the island of Ireland?

Martin Howe: I have not visited the border, no. My most recent visit was to Belfast.

Q46 **Lady Hermon:** Let us approach this from a different direction, then. The backstop is already in the withdrawal deal; it is in the Brexit deal. The Prime Minister has signed it; the 27 other EU member states have signed it. Are you telling the Committee that the Prime Minister was wrong to sign that deal with a backstop arrangement to protect peace and the Belfast/Good Friday Agreement? Is that what you are suggesting?

Martin Howe: That is obviously a very highly political question. I am primarily here to talk about the law, although I have informed you about my political views about leaving. In a sense, I am in the Committee’s hands on how I answer it. I can give a political answer, but is that appropriate?

Chair: You are here primarily as part of a panel of lawyers, so I think it would be reasonable for you to decline to answer as a politician.

Martin Howe: That is a very broad political question. Was it right to sign it or not? My personal opinion is no, but that is not appropriate as part of my evidence as a lawyer.

Lady Hermon: That is very clear.



Martin Howe: What I can point to is that the consequences of this protocol, in the way it locks us in, as I have described, are very adverse. The other side of the equation, if you analyse it, is to ask the question around whether this mechanism is a necessary mechanism if you want to ensure a continued open border with no infrastructure on the border, to which the answer is that there are other mechanisms other than the alignment of regulations, namely enforcing border controls by mechanisms that operate away from the border.

Q47 **Lady Hermon:** Going back, then, to the reason that you are here, as part of a team of lawyers, let us just look at what the Attorney General said on 3 December at the Dispatch Box in the House. He described the backstop as “as much an instrument of pain to the European Union as it would be to for the United Kingdom”. I am sure you are familiar with that expression.

Martin Howe: I am familiar with that. If it is an instrument of pain, it is a pain that the European Union has suffered for something like 30 years in the case of the EU-Turkey agreement, a very similar customs union arrangement where Turkey is the junior partner and has to follow the EU common external tariff.

Q48 **Lady Hermon:** Forgive me for interrupting and disagreeing with you, but it is not the equivalent of the arrangement with Turkey. This is a completely different scenario where a member state, the UK, will be leaving the EU. A member state will be leaving under Article 50. We only get into the backstop arrangement if we get through the transition period. If we get through the transition period and if there is not an agreement at that stage, that is the only time the backstop becomes operational. But at that stage a member state has to leave the EU, an entire member state—not part of a member state but the entire member state. Surely to goodness the backstop arrangement is at that stage challengeable in court, because the whole of the member state, the UK, must leave, so it is already potentially challengeable. Is that not correct?

Martin Howe: That is a different question, Lady Hermon.

Q49 **Lady Hermon:** Yes. It is an instrument of pain for the EU because they will not want to be in that sort of arrangement at any time.

Martin Howe: In terms of the instrument of pain for the EU, we are considering what happens if the protocol comes into force. If the protocol comes into force, a sector of European Union law will continue to apply within Northern Ireland but not to Great Britain, and it will continue to apply to Northern Ireland very much in the same way as it applies within a member state—in other words, under the enforcement control of the European Commission and under the jurisdiction of the European Court of Justice. The only difference between Northern Ireland and a member state, in effect, will be Northern Ireland will not have any means of voting on those laws, whether via the Northern Ireland Assembly or via the Westminster Parliament.



HOUSE OF COMMONS

As regards Great Britain, the arrangement will involve an external customs union with the European Union, modelled on the Turkey arrangement. The status of Northern Ireland will be that it will be inside the European Union's customs union; Great Britain will be outside the customs union but in union with that. That is an important point, because that implies that there will be customs declarations and checks on goods that travel from Great Britain into Northern Ireland, so there will be customs checks between Great Britain, on the one side, and the European Union and Northern Ireland together. The effect of the customs union provisions will be that there will be zero tariffs on goods that cross that border, but they will still have to follow customs formalities. What Mr Cox suggested is that this will be a painful scenario for the European Union.

I have difficulty in understanding why it is a painful scenario for the European Union. At the moment, in terms of the goods traded between the United Kingdom and the EU, we have a massive deficit in that trade; it is about £95 billion per annum, from the latest figures. It is, therefore, very much in the interest of the European Union to have the United Kingdom in a customs union with them that not only means they have tariff-free access into our market for their goods, but maintains the European Union external tariff wall around the boundaries of the United Kingdom. The high-tariff areas particularly are motor vehicles and agricultural products, so it then protects continental producers against imports from the rest of the world, which potentially could be at lower prices, if we were to control our own tariff policy or if we were to be able to do independent free trade deals, which we would not be able to do. I find it very difficult to understand why this should be a painful situation for the European Union.

Q50 Lady Hermon: Let me put it to you that it will be a painful situation because, in fact, you have just argued that it will be difficult for the UK to enter into trade deals because of the particular arrangements for Northern Ireland, which is part of the United Kingdom. Let me put it to you that, in fact, it will be equally difficult for the European Union to enter into any trade deals because, in doing so, the EU would have to be specific about the territory to which that trade deal would extend. Can I ask Ms Van Damme if she would take the point that it would be equally difficult for the EU to enter into trade deals if we have this particular arrangement in operation in Northern Ireland?

Isabelle Van Damme: Perhaps to some extent, but when talking about it being painful for the EU, I mostly consider it in terms of the fact that the single market is supposed to be indivisible in terms of the four freedoms. That was the starting point of the negotiations for the European Union and the European Union's main interest is in maintaining that integrity. As I understand it, by negotiating this backstop the European Union did make a concession, because it allows free movement of goods with a particular territory that will be part of a third country, so it has accepted some degree of division in these very exceptional



HOUSE OF COMMONS

circumstances. Indeed, that was probably a considerable concession for the European Union to make and it might be concerned that this sets a precedent for the future.

Lady Hermon: Correct, exactly.

Isabelle Van Damme: The EU always tries to maintain the integrity of its internal market and that comes with those four freedoms. Now it has made the concession as regards to Northern Ireland with respect to free movement of goods, and that is rather exceptional.

Q51 **Lady Hermon:** You are confirming that, in fact, this is not something that is attractive to the EU if we were ever to get into the backstop arrangement.

Isabelle Van Damme: It was not an easy concession to make, but it was a trade-off that the EU accepted as part of the solution for avoiding a so-called hard border.

Q52 **Kate Hoey:** How many trade deals is the EU likely to be negotiating in the next 10 years? It takes it so long anyway.

Martin Howe: Lady Hermon suggested that the existence of the backstop arrangements, if they come into force, would be an obstacle to the European Union in concluding trade deals with third countries. I do not believe that is the case. Very similar arrangements with Turkey have not proved an obstacle to the European Union. The problem, from our point of view, is that if the European Union were to do a trade agreement with a new country—let us say India, just to take a random example—and they were to agree, therefore, to put zero tariffs on most or all Indian goods, we would be obliged, under the backstop arrangement, to give the same tariff concession to India, but we would not be entitled to benefit from the reciprocal benefits of the trade agreement. This is a very serious problem that Turkey has encountered, where the European Union has entered into new trade agreements. Turkey has to give the tariff concessions to align with the common external tariff of the European Union for goods into its own market, but it has no guarantee of getting reciprocal concessions from the other country.

Q53 **Lady Hermon:** We are concentrating on the backstop. We only ever get into the backstop if, at the end of the transition period—31 December 2020—we have not completed our new trading arrangements with the EU. We only get into the backstop if we get into the transition period and we only get into the transition period if we have a deal. We have to have a deal by 29 March this year, so how do we solve the impasse? Some people call it a crisis, but how do we solve the impasse at the present time? The arguments about the backstop could be completely academic if we do not have a deal by 29 March. That is set in statute, so how do we break this logjam?

Sir Stephen Laws: There can only be a political solution. As I said before, the political solution is to find something—it seems to me that it is



likely to have to come from the EU—that will give people trust that the withdrawal agreement and the framework for the future relationship can result in a satisfactory outcome for the United Kingdom. In the end, it is going to depend on what is in the agreement for the future relationship. From a UK point of view, that means giving reassurance that we are not surrendering our leverage in the negotiation of what comes next at too great a cost if we enter the withdrawal agreement. That is the question. It has a political answer; I am not a politician and I do not want to give a political answer. I have spent my life aligning my view with the Government; it is a hard habit to break and I would not trust myself to say anything else.

Isabelle Van Damme: As was just said, it is essential to focus on the future relationship and at least to decide whether a customs union might be acceptable, whether it is going to be a trade agreement or a single market. Let us assume that very early on one agrees on negotiating a customs union of some sort. Maybe the backstop, as a transition to that, might be less problematic. Of course, if the objective is not to have a customs union, the backstop does become, for certain people, more problematic.

More clarity on at least the basic architecture of the future trading relationship is essential also to start negotiating on how to replace the backstop, because if the agreement enters into force, one immediately starts negotiating on a possible alternative, to which the protocol refers, for replacing it. In those negotiations on replacing the backstop with a better solution—because this is a protocol that will be in continuous negotiation; that is foreseen in the agreement itself—it does seem essential that the parties to that negotiation have some basic, common understanding of what the model is. Although the agreement seems to refer to some kind of common customs territory, as I understand it, at least in the United Kingdom there is no consensus yet on what the model would be that is acceptable to the United Kingdom. Clarity on that seems to be an essential condition on then starting the negotiations for replacing this particular protocol.

Q54 **Lady Hermon:** I hope it is not the case, but in the event that we do not have a deal by 29 March, how would the Republic of Ireland be expected to protect the integrity of the single market?

Isabelle Van Damme: Ireland continues to support the agreement and hopes that the agreement will enter into force, but it will be difficult for Ireland to unilaterally take particular action as regards specifically the trade aspect, because there are many aspects to this particular border. We are dealing here with aspects that have to do with the European Union's common commercial policy, and that is an exclusive competence of the European Union. One can see maybe the European Union delegating some of those powers, but that would be very difficult, so Ireland will be bound by its obligations under the EU treaties and that will be difficult to reconcile with its interest not to have a hard border.



HOUSE OF COMMONS

Q55 **Ian Paisley:** Thank you, panel, for your evidence; it has been very helpful and very clear. Isabelle, with regards to the WTO issues that you have spoken about already, let us cast our minds forward to 30 March this year, if, unfortunately, there has not been an agreement worked out. On day one of a no-deal scenario, what happens with goods that are travelling across Northern Ireland to the Republic of Ireland? Is anything different?

Isabelle Van Damme: Assuming that there is no waiver of any type of WTO obligations and assuming that the parties on both sides of the border respect their MFN obligations, then, in principle, tariffs would be imposed according to the applied rates of each party.

Q56 **Ian Paisley:** That would happen on 30 March.

Isabelle Van Damme: In principle, yes, because if the United Kingdom is no longer a member of the European Union, it is a third country. While WTO law does not require any WTO member to impose its tariffs, it can apply no tariffs on an MFN basis; on the Irish side, Ireland has obligations as a matter of EU law to apply the common customs code.

Q57 **Ian Paisley:** Would the MFN waiver you mentioned effectively act as a transition period if it came in during that time?

Isabelle Van Damme: It could. A waiver in WTO law has a temporal limitation on it and it would need to be agreed in the WTO what the limitation is.

Q58 **Ian Paisley:** Would that be agreed ex post facto?

Isabelle Van Damme: No.

Q59 **Ian Paisley:** It would have to be agreed in advance of the 30th.

Isabelle Van Damme: Yes. Of course, one would need to see how WTO members respond to this proposal and the timing of when it is raised, but it would be, in principle, a decision that needs to be taken in the WTO on a consensus basis.

Q60 **Ian Paisley:** Would you be urging the Government to be engaging in that conversation now, as an insurance policy?

Isabelle Van Damme: For this to work, you would need to have the United Kingdom and the European Union both asking for a waiver as regards their MFN obligations. I do not know if they are testing the waters in Geneva, but I do not think third countries are currently thinking of this. The initiative lies entirely with the WTO member that is seeking the specific waiver. Even if the United Kingdom were to ask for a waiver, there is no guarantee that the European Union would do the same, unless they come to an agreement. With many of these issues the problem is that to find alternative solutions in case there is no deal and then to find ways to facilitate trade under WTO terms, agreements need to be made. For example, with the mutual recognition agreements, the parties do



HOUSE OF COMMONS

need to come together and that goes to the issue of trust again, which Sir Stephen mentioned.

- Q61 **Ian Paisley:** On that issue then, Sir Stephen, you mentioned the issue of the Juncker and Tusk correspondence that has been going backwards and forwards between Her Majesty's Government and the EU. Do you accept the Attorney General's interpretation of those letters—that they have no legal standing? They do not change this withdrawal agreement.

Sir Stephen Laws: They do not change it, no. They are, as they purport to be, part of the workings towards the treaty that would be taken into account in international law in construing it. On the other hand, there are only very limited respects in which they add to the terms of the proposed agreement itself.

- Q62 **Ian Paisley:** Martin, yesterday Lord Bew gave a presentation in Parliament that the withdrawal agreement, as it is currently constituted, drives a coach and horses through the Belfast Agreement. He said that really the Irish Government had let down their obligations in defending the Belfast Agreement because they were more interested in the backstop arrangements. He added meat to that suggestion by saying that under the withdrawal agreement a new institution is effectively put in place, which takes on part of the responsibilities that the Northern Ireland Assembly should be doing. Therefore, this withdrawal agreement breaches the Belfast Agreement, or the Good Friday Agreement as it is sometimes called. Do you agree with that analysis?

Martin Howe: I am sorry; I did not see that, so I am not aware of what Lord Bew said in his presentation, I am afraid. I cannot comment on the particular points he put forward, but on the broader question of whether the backstop protocol alters the constitutional status of Northern Ireland within the United Kingdom, I would say that it does.

It is being slightly historical, but looking back to the articles of Union of 1800, interestingly, one particular article of Union said that His Majesty's subjects in Ireland shall be entitled to the same privileges under all foreign treaties as His Majesty's subjects in Great Britain. Technically, that is still part of statute law in Northern Ireland.

- Q63 **Lady Hermon:** Forgive me, Mr Howe; I just have to correct that. The Belfast Agreement was implemented by the Northern Ireland Act of 1998, which makes it quite clear that the constitutional status is that it remains part of the United Kingdom unless and until the people of Northern Ireland voting in a broader poll express a wish that that should be changed. The constitutional status of Northern Ireland is set out by the Northern Ireland Act of 1998 and not by the older legislation that you just referred to. To suggest that that still binds is not correct.

Martin Howe: Lady Hermon, it is part of statute law; therefore it can be amended by an Act of Parliament, so Parliament could enact an Act that implements the withdrawal agreement and that would have an effect of



overriding that provision, but, in my view, that still results in the alteration of the constitutional status of Northern Ireland.

Lady Hermon: Forgive me, but the constitutional status was set out in the Northern Ireland Act, which implemented the Belfast Agreement. On page 307 of the withdrawal deal, which has been signed, the Belfast Agreement, the consent principle and the constitutional status of Northern Ireland are guaranteed, in black and white, in the Brexit deal, which has been signed by all EU members and the UK Government. It is deeply unhelpful to suggest that the Brexit deal has undermined the constitutional status of Northern Ireland.

- Q64 **Ian Paisley:** I want to take this point myself; it is one that I have been waiting for all day and I would like to continue to take it. I think it does damage the Belfast Agreement. I am surprised that those people who are cheerleaders for the Belfast Agreement have allowed something else, whatever their political machinations are, to overtake it and subsume it and not to defend their agreement, which is so precious in every other set of circumstances, but in this set of circumstances they can damage the Belfast Agreement because it suits them politically.

Page 327 of the withdrawal agreement—Article 18—contains words about the “economic, societal and environmental difficulties” that might arise, and the European Union can interfere in those matters and direct actions unilaterally. Obviously, if that became law, it would change the Belfast Agreement, because the European Union could act unilaterally on any economic, societal or environmental difficulty that might arise during the period of the backstop. Am I right?

Martin Howe: In terms of the effect of the safeguard measures, as I said earlier, the type of measure this is contemplating would be something like the European Union imposing special duties in the event it felt that actions were being taken by the United Kingdom, whether in Great Britain or Northern Ireland, which cause either serious economic, societal and environmental difficulties or diversion of trade.

- Q65 **Ian Paisley:** It says that if the application of the protocol leads to a serious economic, societal or environmental difficulty liable to persist or to the diversion of trade, the EU—and of course the UK—“may unilaterally take appropriate measures”. Given that the United Kingdom is paying for Northern Ireland through its taxes and all the rest of it, none of that changes, but unilaterally the EU can take action in Northern Ireland. That changes Northern Ireland’s rights and privileges as part of the United Kingdom. I do not know if you have thought about what some of those economic, societal or environmental difficulties might be. For example, if there was a lack of products that came into Northern Ireland as a result of treating GB as a third country, that could cause difficulties. That could cause economic, environmental or social problems. The EU would have the right to act, if it so desired, unilaterally.

Martin Howe: Yes. I do not read this, though, as entitling the European Union to, as it were, take action inside Northern Ireland or impose



HOUSE OF COMMONS

measures inside Northern Ireland. I would have thought it is a stretch to read it that way. In my view, where the constitutional status of Northern Ireland is affected is primarily by making required to be part of Northern Ireland law the large number of measures that are set out in annex 5 of the agreement. The titles of these measures run to about 70 pages and they are European measures. They centre on standards for goods, but they do go wider.

Q66 Ian Paisley: These would be laws that would affect Northern Ireland directly. If the Northern Ireland Assembly was functioning, would it have no role in formulating those laws, other than overseeing them?

Martin Howe: No, it would be the same relationship as we now have as a member state, so where they are regulations they would be directly applicable; they would just be law without any intervening action. Where they are directives, it would be the same, in principle, as now, but within Northern Ireland. The United Kingdom would be obliged to implement them, but there would have to be transposing measures. Whether those transposing measures were taken by Parliament at Westminster or by the Northern Ireland Assembly is an internal constitutional matter for us. In fact, as you are aware, the Assembly does have existing powers, under the European Communities Act 1972, to transpose directives within the scope of its own powers.

Effectively, that system would carry on, but the point is those directives leave very little room for manoeuvre and their enforcement would be supervised by the European Commission—again, very much the same as now, as a member state—and they would be justiciable by the Court of Justice in Luxembourg by direct references from the courts of Northern Ireland.

Q67 Ian Paisley: Northern Ireland would be treated completely differently from the rest of GB on all of these matters.

Martin Howe: Indeed. In Great Britain that regime would not apply.

Q68 Ian Paisley: Would that be permanent or, as you say, locked in?

Martin Howe: “Indefinite” is probably the best word, rather than “permanent”. Indefinite until an agreement was reached to leave the—

Q69 Ian Paisley: That would certainly be seen as a constitutional change in Northern Ireland in terms of its link with the rest of the UK.

Martin Howe: Having a significant segment of your laws that are outside your control and that you have no say over, and when that regime does not apply to the rest of the United Kingdom, strikes me as a constitutional difference.

Q70 Ian Paisley: Going back to my earlier point, under the Belfast Agreement the whole trick in that was to give the people a say in their laws and regulations. That is removed from them, because the Assembly would really have no say in this; they would just have to put it in place.



Martin Howe: The Assembly would have, in effect, the same limited degree of discretion when it comes to directives, on the details of how they are implemented, as the Westminster Parliament now does as an EU member state.

Q71 **Ian Paisley:** There is damage done to the principles of the Belfast Agreement if we pursue the withdrawal agreement as it currently stands.

Martin Howe: I personally would characterise it as a constitutional change. It is not as radical as moving the whole of Northern Ireland completely outside the United Kingdom, but it is still significant.

Q72 **Ian Paisley:** That has been the problem with Northern Ireland. It has been treated as a place apart and it then has acted as a place apart. When it is treated as a place within the United Kingdom, it acts better. Treating it as a place apart causes the problems.

Martin Howe: That is more an observation from you than a question for me to answer.

Q73 **Ian Paisley:** In terms of technological solutions for the border arrangements, there has been some change. Initially, it was said that there were no technological solutions, but it appears now to be a view from the Government that there are and that measures can be taken. Would you be surprised that the Government have not spent any money on trying to attract contractors or looking at programmes that would allow the application of those technological measures?

Martin Howe: I am disappointed by that. In a way, in response to Lady Hermon's question of how one could solve the backstop problem, a large part of the difficulty—not all of the difficulty, because the difficulty arises from the European Union wanting to impose it—in dealing with the backstop issue has been that the British Government have been, effectively, saying that they want to maintain a completely open and uncontrolled border. In fact, they want that not just at the Northern Ireland land border but also at the sea border.

The problem with doing that is that if you say to the European Union, "We want a completely uncontrolled border", the European Union naturally say, "What other measures are there to protect the single market from either goods that do not bear European Union tariffs migrating inwards or goods that do not comply with European Union regulatory laws migrating inwards?" If you rule out any form of control of goods crossing the border, you necessarily go down this road of having, effectively, insoluble conflicts and problems of either having Northern Ireland having a different regime from Great Britain or the whole of the United Kingdom being locked in to following European Union rules and laws while having no vote on them.

The alternative is, indeed, to propose measures that control the flow of goods across the border, but without infrastructure on the border. That is mentioned in the political declaration, but it seems that it is a late



HOUSE OF COMMONS

addition. In fact, it is paragraph 27, which refers to “such facilitative arrangements and technologies will also be considered when developing any alternative arrangements ensuring the absence of a hard border on the island of Ireland on a permanent footing”. It is in there as a possibility.

Q74 Ian Paisley: Do you think, if it is there as a political declaration, it would be remiss of the Government not to start spending money looking for those solutions?

Martin Howe: If they are serious. Of course, the other problem with it, as it is phrased, is that it simply says that they will be “considered”. The European Union has accepted an obligation, if you like, to consider the arrangements in good faith, but of course they can easily say, “We are not happy with them. We do not think they are watertight enough, so we are not going to agree them”. It seems to me that an essential way of getting out of the conundrum of the backstop is for the UK to have a right, as it were, to control the border with a scheme of away from the border controls.

Q75 Ian Paisley: If you can alter the Belfast Agreement in one way, as we have discussed earlier, you can alter it in other ways, by technological solutions on the border that previously were not there. People have always said that any change to the border is a change to the totem that is the Belfast Agreement. Of course, if we can change one aspect of this, as we have already discussed, there would be no problem.

Martin Howe: As far as I am aware, the Belfast Agreement does not expressly deal with the border, so one is talking here about, if you like, a political interpretation of it, which you are more qualified to talk about than I am.

Q76 Chair: Sir Stephen, did you want to come in on that?

Sir Stephen Laws: I did want to say something about the Belfast Agreement, which of course binds both the United Kingdom and the Republic. In the situation where we have no deal and the Republic was being asked to erect a border by the European Union, it would be concerned about whether that affected its obligations and that might affect the attitude of the EU as to whether or not it seeks a waiver.

The Belfast Agreement and the backstop are entwined because, to some extent, the backstop is supposed to repeat the obligations of the Good Friday Agreement. To some extent, it is supposed to implement them. As a drafter of legislation, I do not think repeating obligations is ever a very good idea, because all you ever do is create a hole for people to show some incompatibility with them. There are respects in which something is needed to implement it in the context of our not being in the EU.

I had heard Lord Bew’s—



Q77 **Ian Paisley:** Did the High Court judgment not say that Brexit did not have a negative impact on the implementation of the Belfast Agreement as it currently stands?

Sir Stephen Laws: Sorry, I have lost my train of thought.

Ian Paisley: You said you did hear Paul Bew's comments.

Sir Stephen Laws: I heard a summary of them, yes, and there are arguments—and we have heard some—that there might be some incompatibility between the Belfast Agreement and the withdrawal deal. I am not sure whether I agree with them, but I do not think they are outlandish and they become stronger if the backstop ever becomes permanent. That was one reason why I suggested earlier that maybe, in looking for what could be agreed as a way out of the withdrawal agreement, there was scope for exploring the idea that, if the thing did go on too long, it created a threat to the principles of the Belfast Agreement.

Q78 **Ian Paisley:** Do you think it would?

Sir Stephen Laws: The arguments that it would become stronger the longer it goes on.

Q79 **Ian Paisley:** Are you surprised, then, that those people who have declared their undying love for the Belfast Agreement have not highlighted this point?

Sir Stephen Laws: In this process I am not surprised by anything.

Q80 **Maria Caulfield:** It is likely that the withdrawal agreement will not be supported next week, so the idea of a no-deal scenario is obviously causing concern to some Members of Parliament. Is it not true that there are two options to make WTO terms much softer? There is the option of a temporary free trade agreement, which does not need the ratification of all 27 members; it could be done via the Council or the Commission and would enable, for a short period of time, a smoother transition period until a full free trade agreement is agreed. There is also the option of the WTO waiver, which Ms Van Damme has highlighted, which could mean that, although we are on WTO terms, we do not have to necessarily impose tariffs between us and the EU. If that option was looked at, what is the timescale in terms of getting a waiver from the WTO on that? I am really asking you what your opinions are on those two options. If we are going down the WTO route, as is likely at the moment in law, what is the likelihood of either of those options being used?

Martin Howe: I would rather comment on the legalities rather than necessarily the likelihood.

Q81 **Maria Caulfield:** Legally, are they possible and how quickly could we get those in place?

Martin Howe: The answer is, if one stitched together a temporary free trade agreement—say, renewable in six-month chunks while the talks go



on for something more permanent—in principle, if it were a zero-tariff FTA, that would be compliant with Article 24 of GATT. Therefore, it would be permissible, in derogation from the most favoured nation principle, to carry on charging zero tariffs. As to how quickly that could be done on the European Union side, if it were limited to trade matters and mutual recognition of technical standards, it would be within the powers of the European Union. It would not be a mixed competence agreement requiring each individual member state to be a party to it.

Forgive me; I would have to check quite how rapidly. One thing I am not sure about without checking the treaty is whether there is European Parliament ratification necessary. I think there is, but I would have to check TFEU to answer that.

Q82 **Maria Caulfield:** Okay, so legally it is possible to do. How long could that be for? What is the maximum term that could be? Obviously, it would be a temporary arrangement. Are we talking six months, a year or two years?

Martin Howe: There would be no legal maximum. Confusion has arisen here because people have talked about an interim agreement, which is also mentioned in Article 24. If you have agreed to enter into a customs union or a free trade agreement, you can have an interim agreement leading to it. Those, typically, are for scenarios where you have existing tariffs and you want to progressively reduce them in phases, and because charging partial tariffs is not itself a qualifying free trade agreement, you need to bring it under the umbrella of an interim agreement. Those are limited, save in exceptional circumstances, to 10 years, so if it needs to be an interim agreement, there is a 10-year limit under WTO rules. If it is itself a qualifying free trade agreement, there is no time limit beyond what the parties choose to—

Q83 **Maria Caulfield:** So you could have it ongoing until—

Martin Howe: You could have it running on but terminable on six months' notice or something like that.

Isabelle Van Damme: I will just make a few points. First of all, one has to look at what type of agreement it is. When one refers to interim agreements, that presupposes you have negotiated a trade agreement and then you need time to implement it. It is not a standalone agreement. It is attached to another agreement on which there has been a common understanding and you know what type of future trade relationship you might have. If I understand correctly, in the circumstances that you described there would be no such agreement, which means that an interim agreement would not be an option.

If one wanted to base a temporary free trade agreement on Article 24 of GATT, you can have a free trade agreement, but it should substantially cover all trade. That means that the agreement that we have in mind when looking at the principle of Article 24 is a very comprehensive



HOUSE OF COMMONS

agreement, dealing with not all kinds of trade but more than some, the Appellate Body has said. It is unclear to me how one could negotiate such an agreement by the end of March should there be no such deal.

Q84 Maria Caulfield: But it is a solution in terms of bridging, if there is no withdrawal agreement.

Isabelle Van Damme: Yes, but it would mean that you are concluding a free trade agreement and, of course, you can conclude a free trade agreement on the basis of Article 24. If you then want that free trade agreement to apply for 10 years, 20 years or without it having a clause on its scope of application, that is fine, but a condition is that it should substantially cover all trade.

We have different types of agreements that are not covered by 24 but for which the agreements provide. In the TBT agreement and the SPS agreement, WTO members are encouraged to, for example, conclude mutual recognition agreements. That might be smaller scale than a fully-fledged trade agreement, dealing with the trade in goods, not services, I understand, in the circumstances you have described. That would be possible.

With respect to the procedures that would apply, as was mentioned, the common commercial policy is an exclusive competence of the European Union and the procedures are laid down in Articles 207 and 218 of the treaties. That would involve, in principle, the European Parliament needing to approve the agreement. If it is a strict trade agreement, there is no need for member state approval, although that question is sometimes also political within the European Union.

Q85 Nigel Mills: I am sorry to have missed the start of the session. If you have already answered, you have my apologies. Could you tell me where in the withdrawal agreement it defines the term “hard border”?

Martin Howe: It is an operative clause at the start of the backstop—Article 1.3.

Q86 Nigel Mills: I do not think it defines “hard border” anywhere. Is that not quite unusual in a legal document—that you do not define a pretty substantial term? That is one of the conditions in Article 20 of the backstop, with the assessment of whether the backstop is needed anymore. It is Article 1.3, page 303.

Martin Howe: Article 1.3 is the criteria that the reviews principle applies and it is “arrangements necessary to address the unique circumstances on the island of Ireland, maintain the necessary conditions for continued North-South co-operation, avoid a hard border and protect the 1988 Agreement in all its dimensions”. Indeed, I am not aware of any more precise definition of what is meant by “hard border”.

Q87 Nigel Mills: Is that not quite fundamental? With any legal agreement I have ever been asked to sign, you want to have terms defined so you



HOUSE OF COMMONS

know what they mean and what tests are going to be applied to know whether you have met them or not.

Sir Stephen Laws: As the drafter here, I would say that the practice is to define anything that is not plainly obvious what it means to start with. I certainly would not say that “hard border” is an expression that everybody would understand within its natural meaning.

Q88 **Nigel Mills:** What would you think it meant? I might think a hard border means concrete posts and a 20-foot-high fence and people with machine guns. Other people may have a different interpretation of what a hard border means, might they not?

Sir Stephen Laws: It is an expression that has a very wide penumbra of meaning to it.

Q89 **Nigel Mills:** If we go to the preamble to the protocol, in the recalls there is one that says, “Recalling the commitment of the United Kingdom to protect North-South co-operation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls”. Does that help us with a definition? It now says “including any physical infrastructure”; presumably that does refer to something being built on the line of the border, but what are “related checks and controls”? That is at the top of page 303.

Sir Stephen Laws: Applying the wholly inapplicable principles that you would apply in a piece of UK legislation, I would say that meant related to the infrastructure.

Q90 **Nigel Mills:** That is what you think “related” means there. This agreement would not rule out having a customs inspection in your warehouse in Belfast. That would be a permitted check or control.

Martin Howe: That is a fair reading of it. Sir Stephen has mentioned UK statutory principles of construction. This, of course, is an international treaty. It is an acknowledged part of an international treaty that terms in the operative provisions can and frequently are interpreted by reference to words in the recitals, so indeed it is right, in terms of the words “avoid a hard border” in Article 1.3, you would take into account this recital in casting light on its meaning. For “related checks and controls”, I would have thought the obvious meaning is related to the physical infrastructure on the border, or maybe it means having checks and controls with a van that turns up and places itself on the border.

Q91 **Nigel Mills:** There are some people who seem to think that having any customs checks anywhere represents a hard border, but you would not think that was a natural reading of the words “hard border”.

Martin Howe: Personally, no.

Q92 **Nigel Mills:** Finally, is it not, frankly, bizarre that the tests we have to apply to any future partnership to determine if it meets the requirements for ending the backstop are in Article 1.3, and all those terms in there



have no clear definition in this agreement so we all know what they mean and so we can all judge whether an agreement meets them? This funny Joint Committee that we have to apply to to get confirmation that our future partnership now meets them would have a pretty unfettered view and be able to interpret those words in any sort of just about stretchy definition that they chose. It is a rather strange place to put the future of your country's trading and security position in. You would not advise a client to sign a legal agreement without defining very key operative terms, would you, Mr Howe?

Martin Howe: Indeed. I would advise a client under no circumstances to sign this. As you say, the only way out of the backstop once you are in it is via Article 20, the review clause, and the criteria that are to be applied are the criteria in Article 1.3, because Article 20 refers back to it.

You said it is the Joint Committee that takes the decision. As a matter of mechanics, the Joint Committee has to operate by consensus, so it is the European Union nominee on the Joint Committee that we need to consider, because presumably the UK nominee would be in favour of the release of the United Kingdom and would be proposing the arrangements. That means that the European Union nominee on the Committee can, quite lawfully and consistently with the treaty, say, "I am not happy with these proposed arrangements. Maybe they are completely satisfactory as regards the hard border, but, in my view, it does not protect the 1998 agreement in all its dimensions", in some regard or other.

Q93 **Nigel Mills:** Ms Van Damme, I have a final question. Is the term "hard border" better understood in EU language than it is in the UK, or is this a very general term in the EU? I know they have hard borders elsewhere, so maybe they do have a definition of them.

Isabelle Van Damme: No, it does not have a separate meaning on the European continent, but it does seem to mean different things for different people engaging in this debate. As a matter of law, you have referred to some of the elements that are relevant to interpret that term. It also seems that it is directly linked to external instruments, in the sense that these are the instruments to which reference is made in Article 1 and in the preamble to the agreement, so one would need to look at the objectives of those other agreements, including the 1998 agreement. They seem to inform what the parties mean by a "hard border". That is how I think the term would be interpreted.

One way to look at it also is that the parties might be trying to describe a situation where they are trying to protect the status quo as it is today, in circumstances where the regulatory framework is entirely changing. EU law and free movement facilitated the implementation of these arrangements in the past and now that framework is disappearing, so they are trying to put something in place whereby the status quo, whatever it is today, is somehow maintained by reference to the objectives of these agreements that exist outside this protocol, but which this protocol is trying to achieve.



HOUSE OF COMMONS

Q94 **Nigel Mills:** Mr Howe, you said that the protocol only comes into effect if we have not got an agreement agreed by the end of 2020. Do we have to test an agreement that we agree before 2020 against that provision in the backstop or do we not ever get there, so we can have any sort of agreement we like as long as we never get into this?

Martin Howe: The answer to that is that the European Union would insist on whatever replacement agreement satisfying the criteria in Article 20 of the protocol.

Q95 **Nigel Mills:** The backstop is basically in force from the day we leave, in terms of testing all future agreements.

Chair: Before you came, we pretty well bottomed that out.

Martin Howe: We would have no leverage to depart from those criteria.

Chair: Thank you ever so much. We have kept you for the best part of two and a half hours, which is very unusual, I can assure you, for this Committee. That is testament to the interest in this and also, of course, the expertise that we have in front of us. Thank you very much indeed for being with us today.