

1. We have reviewed the two new documents laid before the House last night, namely the Instrument relating to the Withdrawal Agreement and the Joint Statement supplementing the Political Declaration, together with the Prime Minister's press statement. These address the conditions in which the backstop is intended to operate.
2. It is of cardinal importance to recall the intention of the backstop, namely to preserve the integrity of the EU's customs union and single market by enabling goods that do not comply with EU law to enter the customs territory of the EU across a 'soft' border between Northern Ireland and the Republic of Ireland and thus be 'in free circulation' within the EU.
3. We note that on 13 November 2018 the Attorney General issued a note of advice, to the effect that the backstop "would endure indefinitely until a superseding agreement takes its place in whole or in part".
4. The Instrument and Joint Statement do not allow for a unilateral termination or suspension of the backstop by the UK. They envisage, in accordance with the Withdrawal Agreement (Article 178(5) and the Protocol on Northern Ireland), a possible right to suspend the backstop, but only if three conditions have been met, namely:
 - a. there has been a prior ruling by an arbitral panel, constituted under the terms of the Withdrawal Agreement, that the EU was acting "with the objective of applying the Protocol indefinitely",
 - b. there has been a persistent failure of the EU to comply with such a ruling; and
 - c. the suspensory measures taken by the UK are proportionate.
5. Even then, the available remedy of suspension would be temporary, and would continue to be policed by the arbitral panel.
6. Given our experience sitting on international arbitral panels, we consider that it would be exceptionally difficult to establish, to the satisfaction of such a panel, that the EU was acting in bad faith or with "with the objective of applying the Protocol indefinitely" as opposed to the legitimate objective of protecting the customs union. Where conduct admits of two interpretations as to motive, one legitimate and the other not, a tribunal will normally prefer the legitimate motive.
7. As regards the Joint Statement, it confirms the commitment in Article 184 of the Withdrawal Agreement by the EU and UK to use best endeavours, in good faith, to negotiate expeditiously new agreements on the future relationship. We do not consider that, as a matter of international law, the Joint Statement adds any material obligation going beyond commitments of best endeavours and good faith.
8. We note the statement by the Prime Minister that the UK "will make a Unilateral Declaration that if the backstop comes into use ... it is the position of the United Kingdom that there would be nothing to prevent the UK instigating measures that would ultimately dis-apply the backstop". As a matter of international law, a Unilateral Declaration of the kind apparently envisaged cannot change the content or effect of international legal obligations entered into in the Withdrawal Agreement and the Protocol on Northern Ireland.
9. In short, the soundness of the advice given by the Attorney General on 13 November 2018 (which we accept as correct) is not, in our opinion, affected by the Instrument and the Joint Statement, and cannot be affected by a Unilateral Declaration. It remains the case that the backstop would continue to "endure indefinitely until a superseding agreement takes its place in whole or in part". The backstop is no more or less temporary today than it was when the Attorney General offered his advice. No right of unilateral suspension or termination has been created.

12 March 2019

Professor Philippe Sands QC

Professor Sir David Edward QC