Open Letter to Sir Jeffrey Donaldson

15 February 2024

Dear Sir Jeffrey,

As someone who worked collaboratively and closely with you in the campaign against the Irish Sea border, in many different ways, it seems somewhat odd that there is now a re-writing of that campaign, what it stood for and from where its impetus initially came.

I therefore feel compelled to personally write this letter, in order to place a number of matters on the record, and to set out the arguments which, in my view, confound the claims you have made in regards what has been achieved.

There have been a number of outlandish, and plainly false, claims made by you and Gavin Robinson MP in particular. This letter, which is by necessity lengthy and detailed, puts on the record the factual background to the anti-Protocol campaign, and sets out clear challenges- with reference to legal authority and the express words of the legal text of your own deal and non-binding command paper- to that which you are telling the unionist/loyalist community.

This is not a personal attack on you, whom I deeply respect, and indeed, I have already paid tribute to your hard work, genuine dedication and relentless efforts on the issue of the Protocol and Irish Sea border. In the two years prior to your decision to accept the Irish Sea border, unionism/loyalism united firmly behind you. I was proud to stand with you on many platforms, and there can be no doubt you did stand firm for a long time when a lesser person would have caved in long ago. All of that is a matter of factual record, and for which you deserve immense credit.

However, there are issues of credibility arising given the way your deal has been sold (or oversold as I would say), and moreover this is compounded when there is a deliberate refusal to engage with legitimate questions and challenges- arising not only from external sources, but also internally within your own party.

Of course, you may well simply ignore this letter, declare yourself the all-conquering leader of unionism and deride those with whom you stood shoulder to shoulder when the world at large was attacking you and unionism. That is your choice.

This letter focuses on the substance of arguments, I have no interest in personalising matters, other than attributing to you the political arguments which you have made.

If your deal is as strong as you say it is, then perhaps you can respond to this correspondence, dismantle for all to see the criticisms I make and demonstrate how you can stand up all the claims you have made. If the DUP leadership can’t actually

engage on the substance of these issues, or instead personalises matters or simply repeats the same soundbites, surely that tells a tale?

In recent days you have published a political broadcast depicting yourself as being on the pitch and deriding all those "*in the stands*". I would gently remind you that it is the first rule of any professional football club to remember who pays the wages and who are the lifeblood of any team. Those in the starting 11 come and go, but the support base remains a constant.

The star striker who becomes so arrogant and disengaged from reality that they put the ball in their own net, run away celebrating, then flick two fingers up to their own fans and deride any of them who dare to express concern, doesn't usually remain the star striker for very long. This is even more so when many of his own teammates are looking on in horror, head in hands.

I note that all those who have refused to blindly endorse your claims have been dismissed by recourse to varying derogatory terms. This includes that on the day the DUP returned to implement the Irish Sea border and anoint a Sinn Fein First Minister (who maintains there was "no alternative" to IRA terrorism) those who were rewarded with Ministerial posts in exchange for their acceptance of the Irish Sea border, launched scathing attacks not on Sinn Fein or the IRA, but rather on any principled unionist who refused to play along with the charade.

It seems to be suggested now that any progress made is solely the responsibility of the DUP. To hear some of your commentary, one could be forgiven for thinking that it was the DUP from the outset who led the fight against the Protocol and Irish Sea border.

This is a rather odd narrative, because it was you who in January 2021 declared there were "*opportunities"* in the Protocol, and stated that it was "*not a constitutional issue".*

It was only when the DUP slumped to 13% in the polls, that all of a sudden there was a change in tone. Let us not re-write history: it was not me, nor Jim Allister, nor grassroots unionism/loyalism which changed- either then or now- but it is you who came to adopt our arguments, and indeed make them central to not one but two election manifestos and the seven key tests, which- I note from a recent retweet- you now appear to assert "*were not sacred*". I don't recall that asterisk in any manifesto pledge.

We have now come full circle, with you back to your original position, and those of us who ferociously opposed it from the start, remaining true to that unalterable position.

That being a true and verifiable account of recent history, it seems to me rather brazen for those in the DUP who have now accepted, and returned to implement, the Irish Sea border, to seek to deflect from this reality by attacking those who have remained true to their principles.

But of course, whilst unionism/loyalism are expected to collectively pretend that black is white- in some type of Orwellian show of loyalty to 'the party'- even a significant number of principled senior members of your own party refuse to play

along with that which your party Chairman describes as *"the sleight of hand of the century".*

Lord Dodds, DUP Chairman Lord Morrow, Lord McCrea, Lord Browne, Sammy Wilson MP, Ian Paisley MP, Carla Lockhart MP, Paul Girvan MP, Sammy Wilson MP alongside DUP party officer Michelle McElveen, and MLAs such as Diane Dodds MLA, Keith Buchanan MLA, Thomas Buchanan MLA, Joanne Bunting MLA and Jonny Buckley MLA (to name but a few) have all also made clear the Protocol and Irish Sea border remains.

Are all these senior and experienced figures within the DUP also simply just *"naysayers and critics"* who have got it wrong? Are they telling lies?

The positions set out in this letter are supported by independent legal advice by Northern Ireland's former Attorney General John Larkin KC. That opinion has been placed into the public domain. It has been entirely unchallenged by any legal expert.

The DUP have been unable to publish even one single independent legal opinion which supports the claims you and those endorsing the deal have made. Indeed, as I understand it, you informed your Parliamentary party prior to the deal that you had obtained legal advice, from some unnamed individual who had, apparently, been recommend by the Government!

I am sure you will, at some stage, want to set out exactly who this advice was from, to publish its contents and to confirm whether, or not, this advice was paid for by the NIO or another arm of the UK Government?

It is important to turn now to the substance of the disputed matters.

It has been expressly claimed that the "*Irish Sea border has gone*" and "*the green lane has gone"*. These assertions are demonstrably untrue, for the following reasons.

The Irish Sea border, since the Windsor Framework, has manifested itself in two component parts- a green lane, and a red lane. Pausing at this juncture, you will recall that paragraph 10 of the Windsor Framework referred to the green lane as the 'UK Internal Market system'. These are simply interchangeable descriptors of the same structure.

The red lane is a full EU customs border down the Irish Sea. The default position is that goods falling under the ambit of the Protocol which are moving GB-NI, are subject to this full customs border. It operates based on an 'at risk' criteria. Put simply, it is not only goods which are, as a matter of fact, going to the EU, but rather all goods falling within the 'at risk' category which are subject to this full EU customs border.

This, obviously, therefore encompasses many goods and materials which are destined solely for NI. It is noted you have also, repeatedly, claimed there is now zero checks on goods destined for NI. This assertion is also clearly wrong for many reasons, but most obviously and irrefutably because of the fact a significant amount of goods and materials destined to remain in NI, are nevertheless caught by the red lane.

The ’at risk’ criteria is determined by the UK-EU joint-committee, in consequence giving the EU a joint-administrative role in the operation and scope of the Irish Sea border. In recent weeks both yourself and your deputy Gavin Robinson vigorously welcomed a minor amendment to the ‘at risk’ category via a joint committee decision.

This, in itself, is illustrative of the fact that the Irish Sea border remains and is, at least jointly, under EU control. That the DUP welcome the EU permitting minor easements to a border down the middle of our own country, is indicative of acceptance that NI is, at least in part, under EU control.

Additionally, your own claims about the Irish Sea border are self-caveated by inserting into your false claim (addressed more below) that border checks GB-NI, for goods destined for NI, only take place to counter “*smuggling*”. How do you smuggle in your own country?

This very comment demonstrates that moving GB-NI is moving between two different customs territories. As Lord Justice McCloskey in *Allister* stated, “*NI belongs more to the EU market than the UK market”.* Mr Justice Colton in *Rooney and JR181 (3)* remarked that due to EU Regulation 2017/625 “*the UK is no longer to be treated as a unitary state*” and that NI is to be treated as the entry point into, and thus part of, EU territory.

On the very first week of the Assembly returning, the DAERA Minister in response to questions by Jim Allister KC MLA confirmed that EU Regulation 01/2023 continues to apply, and moreover the Government’s own guidance on the trusted trader scheme made clear NI remains a third/foreign country in relation to Great Britain.

In response to an urgent question tabled by Baroness Kate Hoey, the Government confirmed that Articles 5-10 of the Protocol (which create the Irish Sea border) remain in full force. Nothing has changed.

Turning now to the green lane, which- you and Mr Robinson have claimed- has “gone”. The green lane is essentially a trusted trader scheme, its fundamental premise is that to ‘opt-out’ of having to go through the full Irish Sea customs border (which applies by default), you must apply for ‘authorisation’ to go through a more simplified process (the green lane).

This structure is put in place by Articles 7-14 of joint committee decision 01/2023. You will also note Article 15, which gives the EU the unilateral power in specified (but broad) circumstances to terminate the green lane, thus de-facto granting the EU full power over the operation of the Irish Sea border.

There is not one word of these Articles, in so far as they relate to the structure of the green lane, changed. Instead, the command paper simply proceeds on the basis that it will now be called the UK Internal Market scheme- which was already its formal name in the Windsor Framework in any event.

Your assertion, and that of your deputy Leader, can be completely defeated by one simple (rhetorical) question: if there is no ‘green lane’, then what is a trader applying to access to move goods GB-NI, and where has the structure put in place by Articles 7-14 of 01/2023 gone?

As your party Chairman Lord Morrow (supported by many other senior members of the DUP) has said *"the green lane has neither gone, nor been replaced…you cannot replace something with itself*".

In regards your emphatic claim that for goods moving GB-NI there is now *"zero checks and zero customs paperwork*", this, again, is demonstrably false.

As already pointed out, many goods destined for NI are caught by the red lane, so that in itself renders your assertion as to "*zero checks and zero customs*" paperwork for goods destined for NI utterly inaccurate.

However, even in regards the green lane (or its transitioned identity- 'UK Internal Market scheme'), it is a complete falsehood to tell the unionist and loyalist community there are now zero checks and zero customs paperwork.

The 'Safeguarding the Union' command paper, which is a non-legally binding document, is itself clear that reducing green lane checks to 'zero' is merely a future "*intention*" (see paragraph 98), and even this intention is caveated with an exception, namely that checks will still be carried out by UK Authorities (see paragraph 96). This may seem prima facie unobjectionable, but the deceptive nature of the entire 'promise' becomes clear when one understands Article 12 of the Protocol (which has supremacy in domestic law via section 7A EUWA 2018), which gives power to the EU to direct UK authorities. In short form, UK authorities can be directed and controlled by EU officials.

Moreover, Article 9 (2) expressly requires- in seeking 'authorisation' for the green lane- the provision of information "*for customs purposes*". How therefore can you with any credibility therefore say there is "*zero customs paperwork*"?

Therefore, the claim you have repeatedly made in regards having secured zero checks and zero customs paperwork for goods destined for NI is not only wrong in substance because even if the deal was implemented in full, this wouldn't be the case, but more fundamentally you have merely secured a statement of intent without any binding or timebound commitments. The Irish Sea border, its checks and controls, remains in full operation last week, this week, next week and into the future. There has nothing which has changed, and it is wrong to continually mislead people.

It has been further claimed that you have "*restored the economic rights under Article 6 of the Acts of Union"*. This appears to be a convoluted effort to surrender on the Acts of Union, whilst appearing to be doing the opposite. Article 6 of the Acts of Union means what it says. In the words of Lord Justice McCloskey, the intent and effect of Article 6 is "*unmistakable*".

In conjunction with a dishonest and deceitful Government, you have sought to extract from Article 6 some subjective meaning which renders the statutory provision itself obsolete, and instead creates a new interpretation- which is entirely at variance with all the legal judgements, up to an including the UK Supreme Court.

However much the Government, and those supporting this deal, may want to wish away the indisputable legal reality, the fact is that a glossy command paper or

repeating conjuring tricks around Article 6 does not alter one word of the judgments of the High Court, the Court of Appeal and the Supreme Court.

Indeed, if you yourself review your own statements to Parliament and speeches from platforms, they too are at total variance with the new intellectually and legally dishonest position you now promote. There has been no honest explanation for this volte face.

Turning now to the 'Stormont brake'. It is worth pointing out that this mechanism was within the Windsor Framework, which the DUP rightly rejected as inadequate. It remains unclear how this sub-optimal (and in truth, utterly useless) mechanism has now all of a sudden transformed into the all-conquering chainsaw "*cutting the pipeline of EU law*", as you have claimed.

Firstly, the full swathe of EU law contained in Annex 1 and Annex 2 of the Protocol, alongside the separate clause in Article 2 (which via the non-diminution provision have an open-ended application of various EU law provisions), continues to apply unabated. There isn't one word of that, covering well over 300 areas of law, altered.

In regards Article 2 of the Protocol, following a briefing note published by Unionist Voice Policy Studies, Jim Shannon MP read out- word for word- the concerns as to how Article 2 impacts, among other things, the Rwanda Bill. Indeed, this was then further emphasised (correctly) by Sammy Wilson MP, and the same position adopted by Gavin Robinson MP, your deputy Leader.

However, notwithstanding that, you have uncritically and emphatically endorsed a command paper which says that Article 2 has no application at all to immigration issues (see paragraph 46 of the command paper), thus contradicting the position of your own party.

Only this week, Mr Justice Humphreys confirmed Article 2 does, contrary to the false claims of the command paper, apply to such issues. This follows the judgment of Mr Justice Colton in *Angesom.*

The political spin has (just like with the Acts of Union) crashed into legal reality. What are we to do about the judgment of not one, but two, High Court judges? Are they too to be ignored and dismissed as inconvenient "*naysayers…criticising from the stands*"?

It seems to me, at least on this issue, that the referee has checked VAR, ruled your goal out as being clearly offside, but that you and the NIO are just pretending the goal counts anyway and telling your supporters that you keep your own score, which is all that counts, and that reality must be ignored.

Secondly, contrary to your claims, the dynamic alignment with amending EU law continues, this is the default presumption. The only difference being that now Stormont can merely ask, if exacting conditions are met, the Government to notify the EU, and upon notification the EU law is merely paused.

As set out very clearly before the very first sitting of the Windsor Framework scrutiny committee, if this happens the original EU law continues to apply and obviously (as

to be addressed further below) GB could also diverge, because, again contrary to your claims, there is no legal barrier to doing so. NI would be left in a hybrid state of "*trivergence*", according to a senior civil servant.

It is worth all unionists taking the time to watch back this committee and the evidence of the senior civil servant, particularly in response to pointed questions from Jonny Buckley MLA and Joanne Bunting MLA. The whole concept of the Stormont Brake unravelled.

In any event, even if the Government accept the request to initiate the 'brake' mechanism, then this requires the UK and EU to discuss matters on the joint-committee, but if the EU fail to agree, then the matter is finally determined by international arbitration, and the ruling of that body is binding, with the UK having already limited its sovereignty in both international law (via the treaty) and domestic law (via section 7A EUWA 2018) by making clear that should an international arbitration panel rule in favour of the EU, the EU law would automatically apply in NI from the first day of the second month subsequent to the ruling.

The claim as to having secured a "*veto over EU law*" or having "*ended dynamic alignment*" is simply false.

Thirdly, the Stormont Brake only applies to limited areas of EU law listed in Annex 2. It does not apply to Article 2, Annex 1, Annex 8 (VAT and Excise), Annex 9 (Single electricity market) or Annex 10 (state aid subsidy).

In regards Annex 2, it is not even all aspects of that listed in that provision which falls under the Article 13 (3a) mechanism ('the Stormont Brake'). There are at least 42 EU Acts outside its scope.

Moreover, even if within scope, the amending Act must "*significantly differ*" from the EU Act, it must also be demonstrated how it causes "*significant everyday impact likely to persist"*, a rather high hurdle.

As can be seen, the mechanism is in fact extremely limited. There are exacting hurdles to overcome before it can even be deployed.

In short form, the Stormont Brake doesn't do what is being claimed. EU law continues to apply unabated, there is merely now a mechanism to raise a dispute, but the final say doesn't even rest with the purportedly 'sovereign Parliament', but rather with an international arbitral body.

There were also the claims that you had secured a protection against divergence between GB-NI. This, again, is obviously untrue as Sammy Wilson MP and Carla Lockhart MP made clear in their speeches as the Regulations passed Parliament. A Minister of Crown can simply make a statement (or exercise discretion to decide no statement is even needed) saying 'this will create regulatory divergence', and proceed to pass Regulations or a Bill which causes divergence anyway.

This analysis has been confirmed by the NIO itself, including by junior Minister Steve Baker MP who proudly informed his own constituents there was "*nothing*" to prevent GB-NI divergence.

Accordingly, this is yet another false claim which has been presented to the unionist/loyalist community.

You have also claimed you have "*abolished"* the duty to have regard to the *"all-Island economy"*. The first thing to say on this claim, is that the all-Island economy is structurally embedded by the fact NI is in enforced regulatory-alignment with the Republic of Ireland rather than GB, owing to the fact NI is left in the EU single market for goods.

But the claim you have "*abolished*" the relevant (and, as Gavin Robinson accepted in Parliament, utterly useless and meaningless) duty in the Withdrawal Act is again factually false. The command paper makes a non-binding pledge to repeal this provision at some unspecified future date. Therefore, as it stands now and for the foreseeable future, it remains in place. You haven't abolished anything, but rather secured a 'promise' from the most untrustworthy Government in recent memory that they will do something. This, of course, being a Government which is likely to be out of power in less than a year.

The foregoing makes clear that, in my view (which is shared by a significant number of your own party and endorsed by independent and entirely unchallenged legal advice from the former Attorney General), you have presented to the unionist/loyalist community a series of demonstrably false claims.

There is, I believe, an onus on you to either engage with the counter-arguments and demonstrate why what you have claimed actually stands up to detailed scrutiny, or to be honest and withdraw the untrue or misleading claims.

As I said from the outset, we are all unionists and all share, I am sure, a desire to work together in friendship and unity moving forward. But, in order to do that, such unity must be based on an honest assessment of where we really are. It is your function as the leader of unionism to provide such honesty. You may, as is your right, choose not to do so. There is not much can be done about that.

But as Lord McCrea said in the House of Lords, in the coming weeks and months the people will be able to see the truth with their own eyes, and all the spin and flannel in the world won't be able to fudge the truth at that point.

Yours in friendship,

Jamie Bryson