UNDERMINING THE UNION

AN ANALYSIS OF THE DUP 'DEAL'

IT IS RIGHT TO SAY NO

BY JAMIE BRYSON

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‘UNDERMINING THE UNION’

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Introduction

[1] This paper is produced to respond to the claims being made within, and in support of, the deal published today between elements of the DUP and the Government. I have been a vocal critic of this deal as it developed, and it is incumbent upon me (and those like me) to engage with the text of what has been published today, to meet the arguments being advanced by its supporters and to do so in a detailed and careful manner. This is what this paper seeks to do.

[2] It is important that all those with strongly held views on this matter commit to writing- personally and individually- their arguments, in order that they can be scrutinised and debated. There has been an unnecessary secrecy and haste which has surrounded the campaign by supporters of the deal in the DUP to quickly force it through, in order to limit detailed scrutiny of what it actually does- rather than what, for political convenience, some claim it does.

[3] Sir Jeffrey Donaldson and his allies have had many days of selling ‘their’ deal without others having seen it. Indeed, as can been seen by the comments of DUP MP Paul Girvan today (31 January 2024), many DUP MPs were only allowed to see the deal when it was published. This is despite Sir Jeffrey touring internally and externally ‘selling’ his deal with a power point presentation. In essence those who agreed and supported the deal marked their own homework. They sat as the judge in their own case.

[4] It would be welcome if Sir Jeffrey was willing to enter into a public debate on these issues. This would allow people to hear the arguments and counter-arguments tested, and make their own mind up as to which prevails. However, it appears, certainly from comments today as Sir Jeffrey stood in the splendor of Hillsborough Castle alongside the Secretary of State, that he now sees himself as somehow too good for those he was happy to march alongside and share platforms with in his quest to rise back up from the DUP’s 13% slump in the polls after their first period of acting as Protocol implementers.

[5] In any event, whether Sir Jeffrey has the courage to engage in respectful debate testing the merits of the arguments on all sides, or not, this paper commits the arguments to writing. I would urge all people to properly read and consider ***all arguments***. I would, respectfully, point out that Sir Jeffrey Donaldson told the unionist people in January 2021

that the Protocol was "*not a constitutional issue*" and said it contained "*opportunities*". This should give every unionist pause for thought as to Sir Jeffrey's analysis.

[6] It is also important to note that a significant number of people internally within the DUP oppose Sir Jeffrey's analysis. It is known this includes senior individuals (who spoke in the House of Commons today) such as Sammy Wilson MP, Ian Paisley MP, Carla Lockhart MP, Paul Girvan MP and other very important individuals such as Lord Dodds, Lord McCrea and party Chairman Lord Maurice Morrow. There are also a number MLAs opposed such as Jonny Buckley, Michelle McElveen, Joanne Bunting, Diane Dodds and a number of others.

[7] Such is the fundamental constitutional significance of this issue, I believe those who are opposed within the DUP must speak out and take all steps they can to seek- even at this late hour- halt the progress of this disastrous acceptance of the core architecture of the Protocol. If that is unsuccessful, then the fight must continue every single day.

[8] Sir Jeffrey Donaldson has said he is "moving on" from this issue. There is no prospect of any principled unionist moving on from the battle to restore and preserve both the letter and spirit of NI's place as an integral part of the UK.

[9] Notwithstanding the criticism, and the challenges in this paper to many of the bold and explicit assertions which have been made by Sir Jeffrey Donaldson, it is important to record that there has been progress made. There are undoubtedly some gains in the deal, and it is important to acknowledge that whilst we now diverge fundamentally on the future direction of travel and what this deal achieves, that Sir Jeffrey and his team have worked hard to make progress (with some, albeit limited, success) and the DUP have corporately, until recently, stood up against significant and at times unprecedented pressure.

[10] These are matters of the most fundamental constitutional importance; they engender strong feeling on all sides. The disagreement and dispute over ideas and arguments, both legal and political, is not personal. But this issue is too important for those who feel strongly not to enter the fray.

[11] It is important to be very clear- from the outset- that there is a difference between the 80-page Command Paper, and the legal text (which is three statutory instruments). The Command Paper has no force of law; it doesn't carry any weight and is essentially the DUP and Government's 'sell' for their deal. The whole document therefore is essentially those who negotiated the deal, setting out in a Command Paper how they have marked their own homework. **Put another way, they write a judgment in their own case (an 80-page one).** This glossy document makes many claims, some of which are contradicted by the legal text itself.

[12] As the time available is, to put it mildly, very short, it isn't possible to address all the inconsistencies, misleading statements and quite frankly deceptions riddled throughout the 80-page Command Paper. That analysis is important, and will come, but in the here and now the core focus and priority must be on the all-important legal text, and the claims which have been made by Sir Jeffrey Donaldson and those supporting this deal.

[13] It is true to say there is some (very limited) progress in regards the operation of the Protocol/Framework, or expressed another way, there is some progress in limiting the

visibility and complexity of the Irish Sea border. However, as ought to be obvious, whilst anything that reduces the constitutional damage is welcome, that is quite different than removing the Protocol and Irish Sea border.

[14] There are some areas covered by the deal which directs itself to strengthening ties across the UK. These are certainly welcome, and useful. I refer to, for example, an Inter-Trade Body and East-West council. But none of this has anything to do- at all- with the Protocol/Framework.

[15] It should also be made clear that contrary to the claims published in the media today by Dame Arlene Foster (who initially stated the Protocol provided "opportunities" and adopted the position of implementing it) that the DUP's "seven key tests were not sacred", there are many people who when they voted for the DUP believed the clear, express and unequivocal commitments made. It is notable that these promises and commitments were not, in fact, as presented and instead were merely there for presentational purposes, to be discarded at a politically expedient moment.

[16] The structure of this paper directs itself to (i) the claims made by the DUP as to their deal **(paragraphs[17]-[61])**; (ii) the Constitutional legislation **(paragraphs [62]-[89])**; (iii) the UK Internal Market legislation **(paragraphs [90]-[97]**); (iv) The Marking of Retail goods legislation **(paragraph [98])**; (v) the deal measured against the DUP's seven key tests **(paragraphs [99]-[118])**; (vi) omnibus conclusion **(paragraphs [119]-[128])**.

The DUP claims

[17] The DUP, via the agency of Sir Jeffrey Donaldson, have made a number of claims about what the deal achieves. I find the majority of these claims to be overselling at best, and on some occasions demonstrably dishonest.

[18] It is clear a section of the DUP have set their mind on doing this deal, and the substance of it matters little, all they care about is the presentation of it in order that they can mislead enough people to at least lead to confused silence, or even convince people this deal must do what the DUP claim.

[19] The DUP leader summarised his assertions in a graphic published on social media today (31 January 2024). I will address each of these claims, and some others in turn.

"Zero checks and zero customs paperwork on goods moving GB-NI and staying there"

[20] This claim is demonstrably false. The first point is that Sir Jeffrey appears to proceed on the basis that the green lane (or its renamed version) encompasses all goods moving GB-NI and staying there; but, of course, that is not so. There is a significant amount of trade which because it is caught by the 'at risk' category, which has been narrowed *but not eliminated,* still must use the red lane, despite never going anywhere near the EU.

[21] However, even for goods which do manage to access the green lane, the claim made by Sir Jeffrey is still completely untrue.

[22] The Windsor Framework envisaged a timely reduction of checks in the green lane over time (but never fully eliminated) leading to eventual elimination of *physical* checks and this claim is simply repeated in the deal. I draw crucial importance to paragraph 96:

> *"96. As we transition to the UK internal market system, through our risk management approach we will provide clear legal direction to DAERA and other UK Government authorities to eliminate any physical checks when goods move within the UK internal market system, except those conducted by UK authorities and required as part of a risk-based or intelligence-led approach to tackle managing risk through criminality, abuse of the scheme, smuggling and disease risks. To deliver this new intention, the Government will take direct powers at Westminster to direct NI bodies to protect the UK internal market."* (my underlining).

[23] This exposes the fundamental dishonesty in Sir Jeffrey Donaldson's claims. There is merely a commitment (which simply copy and pastes essentially that which was in the Windsor Framework) in a command paper (which has no legal force) to delivering on an *intention* to end physical checks. It is purely aspirational.

[24] **Sir Jeffrey Donaldson should answer a simple question**: **where is the legislation which ends all checks for green lane trade?**

[25] In equal terms, Sir Jeffrey's claims that his deal would deliver "zero customs paperwork" is again demonstrably false. Whilst there is at least a repetition of the *intention* (without a single word of legal text) to *eventually* arrive at a place where there is no checks, in regards paperwork there isn't even such an aspiration.

[26] The Windsor Framework obligations remain in full force. There is not a word of them changed. The amendment to 01/2023 was an agreed process within the architecture of the Framework, it didn't alter it. That such a process to address operational issues in GB-NI trade requires EU agreement demonstrates NI's colony-like status.

[27] Joint Committee decision 01/2023 puts in place an authorisation process (Articles 6-9) which requires that to even access the so-called green lane, you must apply for authorisation. This demonstrates that all goods moving to GB-NI start from the default position of being subject to the red lane and thus full EU customs checks and paperwork.

[28] However, in order to even obtain this authorisation, you must go through the process in Article 9 of 01/2023. This provides at paragraph 2, inter alia:

> *"The application for the authorisation referred to in paragraph 1 shall contain information on the applicant's business activities, on the goods typically brought into Northern Ireland, as well as a description of the type of records, systems and controls put in place by the applicant to ensure that the goods covered by the authorisation are properly declared for customs purposes and evidence can be provided to support the undertaking in Article 10(b) of this Decision."*

[29] Therefore, in order to obtain authorisation to access the green lane, you must provide information for *customs purposes.* This remains in full force.

[30] **Sir Jeffrey Donaldson should explain how is claim as to "zero customs paperwork" can be reconciled with Article 9 (2) of 01/2023 of which not one single word has been altered.**

[31] The Irish Sea border, including checks and customs paperwork, will operate the same tomorrow, next week and for the foreseeable future the same as they are now. All that has truly been 'achieved' is getting the Government to repeat their commitment in the Windsor Framework to deliver on their *intention* to eliminate all checks. There is no timetable for this, no binding legal commitment. In regards customs paperwork, there is not even a suggestion of changing Article 9 (2) of 01/2023.

[32] **I would respectfully remind Sir Jeffrey Donaldson that he was the same man who (rightly) walked out of the 1998 talks and then fought against the Belfast Agreement due to the failure to secure binding legal text and commitments in regards certain issues which others were happy to leave as mere aspirations and intentions.**

"The Irish Sea border has gone"

[33] This is again demonstrably false. However, don't take my word for it, Sir Jeffrey's own colleague Sammy Wilson MP expressly said in the House of Commons today: "*the facts remains in NI there are still EU manned border posts being built which will create a border in our own country".*

[34] UUP leader Doug Beattie also confirmed "*the Irish Sea border remains*". Like some absurd comedy sketch, it appears only the DUP leader and those around him have actually embarked upon this delusion of seeking to close their eyes to that which is right in front of them.

[35] The Irish Sea border- both the red lane and green lane- central architecture (and infrastructure) remains with unabated force. By default, every single good covered by the Protocol Framework moving GB-NI is subject to a full customs border (red lane). Those who are eligible to do, and who are trading GB-NI and staying there, can apply (providing information for "*customs purposes*") for authorisation to access the green lane which, at present, still contains checks (albeit greatly reduced).

[36] Therefore, it is absolutely obvious that the Irish Sea border remains. There is a hard Irish Sea border (red lane) which applies by default, and a soft Irish Sea border (green lane) which eligible traders can apply to seek authorisation for (with customs information required).

[37] **It would be more accurate for Sir Jeffrey to say 'there is by default an Irish Sea border, but GB-NI traders can apply to be authorised to be excused from complying with its requirements, and if successful such traders can access a soft Irish Sea border (green lane) in which there are checks presently and in the future, but which the government, in aspirational terms, has indicated there intention to end. There is however no legal binding commitment to do so, much less any legislation actually delivering on their intention**'.

Restored our rights under Article 6 of the Acts of Union

[38] The command paper is complete evidence of the dishonesty of this claim. It devotes many pages to explaining away the decisions of not one, not two, but all three of our highest tiers of courts in the UK (NI High Court, NI Court of Appeal, Supreme Court).

[39] In complete contradiction of the judgments at all stages of the *Allister* trilogy of legal cases, the command paper claims that the Acts of Union doesn't really mean what the text says, and that it has been misinterpreted, and therefore the subjugation and suspension identified by the UK Supreme Court is ok, because the Protocol Framework is not actually inconsistent with Article 6 of the Acts of Union, so therefore the effect on Article 6 is not a real effect on Article 6, despite the Supreme Court saying that was the effect on Article 6, because well, the Government command paper says so. Confused? Aren't we all.

[40] The smoke and confusion is then capitalised on by a new argument Sir Jeffrey Donaldson adopts. It was never actually about restoring the legal text of Article 6 of the Acts of Union (despite him saying from countless platforms and in written material it was), but rather it was about extracting from the legal text the principle of the legal text, and guaranteeing that. Readers can be forgiven for being confused and asking how the guarantee set out in the legal text of Article 6, can be extracted from Article 6 and made to be something different.

[41] However, there is no need to take my word for it, rather we can defer instead to one of our most senior judicial figures, Lord Justice McCloskey who said at paragraph [377] of Allister [2022] NIQB 15:

> *[377] I consider the underlying intention to be unmistakable: from 1 January 1801 all subjects of this newly unified single state were to be treated equally in the respects specified. While the more expansive language of the second part of the first clause invites the argument that its scope and operation are not confined to trade or trade-related matters, this issue does not arise for determination in these appeals. I consider that the second clause is to be viewed as one specific outworking of the first part of the first clause.* (my underlining).

[42] It may seem the above is obvious from simply reading Article 6 of the Acts of Union. The Government, in aid of trying to fashion for Sir Jeffrey an escape hatch from his fundamental commitments (and the DUP's first key test), have devoted pages and pages of their command paper, the same arguments which are now being deployed by the DUP, which seeks to turn a very simple provision into a very complex interpretive exercise.

[43] I rest my point by deference to Lord Justice McCloskey. His legal analysis is self-evidently of greater weight than mine. He says the intention and effect of Article 6 of the Acts of Union is "*unmistakable*". This analysis was not disputed by the Supreme Court.

[44] Therefore, this defeats- completely- the assertion of Sir Jeffrey Donaldson (and others in the DUP) and the command paper that you can fulfil, restore or otherwise act compatibly with Article 6 of the Acts of Union by extracting from it some subjective principle which is at variance with the unmistakable intent of Article 6, as set out by Lord Justice McCloskey.

[45] Therefore, we turn to look at what occasions the breach of Article 6 of the Acts of Union. Lord Justice McCloskey concurred with the first instance finding of Colton J. At paragraph Lord Justice McCloskey reproduced (see paragraph [378]) this passage from Colton J, who said at paragraph [61] of his first instance judgment in Allister:

> *"Although the final outworkings of the Protocol in relation to trade between GB and Northern Ireland are unclear and the subject matter of ongoing discussions it cannot be said that the two jurisdictions are on "equal footing" in relation to trade. Compliance with certain EU standards; the bureaucracy and associated costs of complying with customs documentation and checks; the payment of tariffs for goods "at risk" and the unfettered access enjoyed by Northern Ireland businesses to the EU internal market conflict with the "equal footing" described in Article VI."*

[46] It is clear therefore that the breach of Article 6 (with its "unmistakable" intention and core principle) is (i) the continued application of EU law; (ii) documents and checks GB-NI and (iii) the privileged access to the EU single market.

[47] Put simply: EU law continues to apply to NI (Annex 2 applies in full force and Stormont Brake doesn't, and can't, touch a word of it); the Irish Sea border remains, even having to apply for 'authorisation' to trade in your own country is a fetter on trade which applies GB-NI, and not between locations in GB; (iii) and not only does the unequal footing due to privileged access remain, but Sir Jeffrey is now in fact actively championing such access.

[48] The subjugation and suspension of the Acts of Union not only remains; but worse than that it has actually been codified in statute.

Permanent guarantee to protect trade flows between GB-NI

[49] Where is this in the legal text? It is not there. This is a command paper commitment, unsupported and absent from the legal text. This Government is likely to be out of power in a matter of months. They have given a future commitment, which isn't being put in law, and they are soon to be out of power.

Ends NI automatically following EU rules

[50] No, it doesn't. NI, in the specified areas covered by Article 5 and 13 of the Protocol remain subject to the continued application of EU law. This law automatically applies by default, unless the Stormont brake is pulled, and the process is successfully resolved in the UK's favour. The final say (thus surrendering a core aspect of sovereignty over laws applying to NI) rests with international arbitration which, if it rules against the UK, means even EU law which has been subject to a request from 30 MLAs to the UK Government to trigger the brake, and the Government has complied with this requested and triggered it, then nevertheless the EU law will automatically take effect.

Abolishes UK duty to have regard to 'all-Island economy'

[51] No, it doesn't. The command paper (which, I again repeat has no force of law

whatsoever) commits to repealing this provision. But, tellingly, there is no legislation laid, drafted or even set out in a timeline as to when it would happen.

[52] This, again, is placing trust in this Government- soon to be out of power- to keep their word.

[53] Therefore, turning a command paper commitment, with no legal force, into proclaiming the abolishment of a duty which continues in law with unabated force is not simply overselling, it is fundamentally dishonest.

Prohibits future treaties with EU would harm our place in UK internal market

[54] This *has* been achieved and can be honestly said in the manner by which it has been expressed. And it is to Sir Jeffrey's credit. It may even be said that, certainly in regards interactions with the EU, it strengthens the treaty limb of Article 6 of the Acts of Union, into the future. This is an undoubted 'win' for unionism, and importantly it has the force of law.

[55] However, this has no effect on the current Irish Sea border, but rather prohibits a future hardening of it. If the UK Government wanted to remove the current Irish Sea border, it could do so easily using the same legislative drafting method, but instead of prohibiting this in future treaties, to also disapply anything in present treaties/arrangements (using the wording 'international or domestic law') which created such a border. They have not done so.

Creates a new East-West Council and Inter-Trade UK

[56] This, whilst having zero bearing on the Irish Sea border and Protocol/Framework, is in itself a good and worthwhile achievement. Anything which promotes greater linkage across the UK is to be welcomed, and this can rightly also be described as a good achievement by Sir Jeffrey.

Northern Ireland no longer treated as a 'foreign' or third country

[57] The command paper again makes many claims about no longer treating NI as a foreign or third country. However, there is not a sentence of legal text which remedies this.

[58] EU Regulation 2017/625 remains with unabated force, supercharged by the Official Controls (NI) Regulations 2023, which means that- as a matter of law- NI continues to be treated as the entry point into, and thus part of EU territory.

[59] As identified by Lord Dodds recently, this is similar to the claim NI is in the UK customs zone, but in practice it applies the EU customs code. Or, in the manner whereby legislation is now drafted in a manner in which it extends and is in force in NI, but doesn't apply there due to the Protocol.

[60] There is none of this which has changed.

Conclusion on DUP claims

[61] Sir Jeffrey Donaldson has not just oversold this deal, but at times is being fundamentally dishonest by making assertions which are demonstrably false. They cannot

withstand even the most basic scrutiny. There are some gains, for the most part unconnected to the Protocol/Framework and Irish Sea border, and a particular good constitutional prohibition on the ***future*** exercise of the prerogative power in a manner which would create a border between GB-NI. This however obviously does nothing to remove the current Irish Sea border.

Constitutional Legislation

[62] The supposed 'constitutional legislation' is found in the Windsor Framework (Constitutional Status of Northern Ireland) Regulations 2024. The first thing to say is these regulations are made via statutory instrument (secondary legislation) under powers conferred by section 8C of the European Union (Withdrawal) Act 2018 ('the 2018 Act'), rather than a primary Act of Parliament. That, in of itself, ought to be a powerful indicator of their limited significance.

[63] The Regulations essentially have four parts; (i) the insertion of a presentational amendment into section 38 of the 2018 Act; (ii) the insertion of a new section 38A into the 2018 Act which purports to prohibit the UK Government (arguably limiting their treaty making power) from making any ***new*** (additional to the current Irish Sea border) agreement which would create barriers between Great Britain and Northern Ireland; (iii) presentationally amends section 7A the 2018 Act in order to simply say that the Stormont Brake applies (as will be demonstrated, this presentational trick is utterly pointless and quite literally does absolutely nothing) and insert a requirement for a Minister to express an opinion as to whether any laws being made for GB would cause barriers between GB-NI); (v) an amendment to section 6A of the NI Act 1998 which simply alters slightly the outworking of the Article 18 consent mechanism 'review' procedure if a vote doesn't have cross-community consent. It does not alter one word of Article 18, and still disapplies cross community consent.

[64] I will address each in turn.

Section 38 of the 2018 Act

[65] The amendment (Regulation 2) inserting a new provision into section 38 of the 2018 Act which states that the Windsor Framework is "without prejudice" to (a) NI's constitutional status; (b) NI's part of the UK economy; (c) Parliament's powers to make laws for NI; (d) vesting of Executive power in His Majesty; and in a new subsection (5) says it is also without prejudice to the NI Act 1998 and the Union with Ireland Act 1800 and the Acts of Union (Ireland) 1800 ('the Acts of Union').

[66] This is purely presentational. It does and changes absolutely nothing. The crucial point is that this provision is subject to section s7A of the 2018; and so, if any of these listed matters are inconsistent with the Protocol/Framework, then they must give way (be subjugated or suspended). They remain in force; but do not apply in so far as they are inconsistent with the Protocol.

[67] It is also important to note this provision does not confer anything new, at all. There is no new powers; it essentially, for pure presentational purposes, says 'Parliament is

sovereign, and that includes over these things, which we have set out to give you some comfort'. It is utterly worthless.

[68] It is not an operative provision (ie., it doesn't do anything) and "without prejudice" doesn't mean anything, it doesn't have any effect on section 7A.

[69] Dealing with each presentational statement of fact in turn:

- subsection 4 (a)- this adds nothing to what is already in section 1 (1) of the NI Act 1998 (a provision all unionists had agreed amounted to a "deceptive snare");

- (b) NI's part of the UK economy is a political statement;

- (c) Parliament is sovereign, obviously it can make laws for NI. This is set out already in the NI Act 1998 (including in section 23 (1)) but also in the structure of devolution;

- (d) the vesting of the Executive power in His Majesty is in section 23 (1) of the NI Act 1998, this is just saying the same things again for presentation;

- subsection 5 (a) this says the NI Act, including the principle of consent, remains in force, but of course we know this because the Supreme Court has told us already and moreover, the disapplication of cross community consent was caused by section 7A and didn't even require the regulations made at the time to expressly do it.

- (b) this deceptive reference to the Acts of Union is again purely presentational; it does absolutely nothing to undo the subjugation and suspension of Article 6 of the Acts of Union. Rather, as will be addressed in the section looking at the DUP's seven key test, this provision actually puts into statutory language that which was set out by the Supreme Court in *Allister.* Parliament is sovereign, the Acts of Union remain in force but, the bit this shiny new provision leaves out, that they are 'subject to', and thus remain subjugated by section 7A.

[70] Put in the most basic terms, this much heralded provision simply restates legal facts. The provision has no operative value; it does not do anything. It is just for presentation. The reality is someone could spray-paint the same words on a wall and they would have as much effect.

Section 38A of the 2018 Act

[71] The heading of this provision speaks of 'prohibition', and it essentially limits the treaty making power of the Government in the future, which limits the prerogative power by prohibiting the making of any agreement with the EU which creates a new regulatory border between GB and NI.

[72] Firstly, this is forward looking. It deals with the future, not the present or the past. It does not remove the Irish Sea border or currently regulatory border. If that was really the intention, the provision could have said "*notwithstanding section 7A of the EUWA 2018, no provision of domestic law whenever enacted, or international law, has effect in so far as it creates a regulatory border between GB and NI*".

[73] But the Government did not do this, and the simple question is this: if, as Sir Jeffrey Donaldson claims, the Irish Sea border is gone, then why could the Government legislation to prohibit any ***future*** regulatory border, but couldn't legislate to remove or say there was no ***present*** regulatory border?

[74] And so, this provision promises no 'new' regulatory border, but does nothing about the Irish Sea border which remains with unabated force.

[75] However, despite this provision having absolutely no benefit or utility whatsoever in relation to the current Irish Sea border, it is a worthwhile provision and a good achievement in terms of the future. It doesn't, at all, solve the current constitutional problems, but it prevents anymore of this kind.

[76] If such a provision had of been in force at the time of the EU-UK Withdrawal Agreement, the treaty could never have been lawfully agreed.

[77] It is fair to say that as a distinct issue (and I emphasise, it has no bearing at all on the current Irish Sea border) this is a good achievement by the DUP negotiating team, and this should be acknowledged. It is also fair to say that in regards the 'treaty limb' of Article 6 of the Acts of Union, this is a useful reiteration- and arguably strengthening- of that provision.

Amending section 7A of the 2018 Act

[78] This is perhaps where the 'deal' is at its most deceptive. This provision doesn't alter the effect of section 7A at all. The purpose of section 7A is to act as a conduit pipe through which the Protocol/Framework flows into domestic law. Therefore, in order to disarm it, you either disapply it, or, you change that which enters the 'pipe' (i.e., the text of the Protocol/Framework itself). This provision essentially inserts an 'explainer' as to the fact the Stormont brake exists. It is amongst the oddest and most pointless provisions in the statute book.

[79] It is more so as the Supreme Court held in *Allister* that that which is in the Protocol/Framework (such as the Stormont brake) has direct effect in domestic law due to section 7A (2), and therefore there is actually no need to do anything else.

[80] Sir Jeffrey has claimed he has 'broken dynamic alignment'. This is a worrying comment because it would appear to expose a fundamental misunderstanding as to this provision, and to the Framework. The Stormont Brake (which is wholly ineffective) created a mechanism by which to try and effectively seek to challenge and, if you can overcome exacting hurdles, halt ***new EU law*** or amendments to ***existing EU law***. This, in theory, created a means by which to challenge dynamic alignment.

[81] The new provision simply puts an 'explainer' (bizarrely and quite frankly deceptively) into section 7A, presumably to allow the DUP leader to say 'section 7A is amended'. This does nothing that the Framework (which the DUP rejected) didn't do. There is nothing new here in this part.

[82] The provision then inserts a section 13b(e) into the 2018 Act, which requires a Minister of the Crown to make a statement telling the House of Commons if he is of the ***opinion*** that any new law affects trade ***between NI and other parts of the UK***. Note this is

poorly drafted and reads as if it is asymmetric; only applying to NI *to* the UK, not GB to NI. It may however apply both ways and is probably intended at least to do so.

Amendment to NI Act 1998

[83] The final provision created by the Regulations is an amendment to the NI Act 1998 to change timelines for the review mechanism and provide a ***discretion*** (the word 'may' not shall) for a Minister to produce a report on the effect of the Protocol/Framework on NI's constitutional position. Again, it should be emphasised this merely says a Minister 'may' do this, it is permissive rather than any form of obligation. There isn't even an obligation to consider doing it.

[84] If discretion is exercised to produce such a report, it 'must' (mandatory) be 'raised' in the joint committee. This basically means put it on the agenda. It doesn't amount to anything of substance at all.

[85] I would observe that it hardly takes a Minister of the Crown to produce a report to understand the constitutional implications of the Protocol/Framework on NI, and/or unionists objections to it.

Conclusion on constitutional legislation

[86] This legislation does not change the effect of the Protocol/Framework, or the damage it inflicts one iota. It is for the most part purely presentational. It does not restore Article 6 of the Acts of Union, or the disapplied cross community consent provisions of the NI Act 1998. The presentational list, a statutory comfort blanket if you like, inserted in section 38 of the EUWA 2018 remains subject to (and thus Article 6 of the Acts of Union remains subjugated by) section 7A. It essentially takes the Supreme Court judgment in *Allister*, and converts it into a statutory explainer. Therefore, far be it from remedying that which caused unionists the greatest offence, it in fact embeds and codifies it in statute. An assertion of the legal fact Parliament is sovereign has no effect on section 7A, because section 7A is made by Parliament. If Parliament really wanted to demonstrated sovereignty, it could disapply section 7A.

[87] The section 38A provision inserts a worthwhile future prohibition on the exercise of the prerogative power. Whilst this has not effect at all on the Protocol/Framework and current Irish Sea border, it can properly be described as a useful achievement by the DUP negotiating team.

[88] The amendment to section 7A is essentially just putting an explainer into section 7A. It is purely presentational, has no effect, and in truth is a fundamentally dishonest attempt to mislead people and give the DUP a political argument to say that section 7A has been amended, and hope that people don't realise that this does not in fact amount to anything at all.

[89] The amendment to the NI Act simply makes slight timing alterations in regards the review if there is no cross-community consent for the Protocol to continue (but of course even without such cross-community consent, continue it will) and states that a Minister ***may*** produce a report. Of course, so too ***may*** a Minister produce a report on the viability of landing on the moon in a hot air ballon.

The UK Internal Market legislation

[90] These Regulations are known as The Windsor Framework (UK Internal Market and Unfettered Access) Regulations 2024. As with the constitutional regulations, they are made via statutory instrument (secondary legislation) under powers conferred by section 8C of the 2018 Act.

[91] These Regulations make amendments to the UK Internal Market Act 2020 ('the 2020 Act').

[92] A new section 45A is inserted into the 2020 Act. This amendment directs itself to unfettered access for NI goods to the rest of the UK. It is essentially an explainer to unfettered access for NI to the rest of the UK (i.e. NI-GB trade). But the obvious point is that this has never really been an issue; the Irish Sea border is asymmetric, it only faces one way. This doesn't nothing to remove or in anyway alter the Irish Sea border.

[93] In of itself, it is important in securing NI has unfettered access to the UK market, but that this is required illustrates that NI is de-jure in a different regulatory zone (the EU single market for goods) than the rest of the UK. If it were not, and were not subject to EU law, then no such issues would arise. That such provisions are required for trade in our own country is an extraordinary example of how perverse the current arrangements are, and continue to be.

[94] A new section 45B deals with export procedures from NI to GB. Again, this deals with NI to GB, not the Irish Sea border which is GB-NI. By it owns admission, it simply puts in place that which was already envisaged by the Framework. It is therefore not a 'gain', as it does nothing new.

[95] A new section 45C, which really has the ring of a big of a makeweight to be seen to be doing something, is basically an explainer as to provisions of the UK Internal Market Act. It doesn't in itself do anything.

[96] A new section 46A which by its own heading merely makes clear that it provides 'guidance' as to the section 46 which is already there.

[97] There is an amendment to the Qualifying Northern Ireland Goods (EU Exit) Regulations. This again deals primarily with NI goods having access to the UK internal market and makes no difference to GB-NI and thus the Irish Sea border.

The Marking of Retail Goods Regulations 2024

[98] These Regulations deal with the 'Not for EU' marking and apply the requirements on a UK wide basis. It does nothing to alter the Irish Sea border, but its unobjectionable as it in this discrete area of labelling puts the same obligations on GB as NI.

The DUP's seven key tests

[99] These tests were not mere aspirations, but rather delivered in the language of absolute and fundamental commitments. They were repeated time and again, and formed the centre-piece of not one but two DUP manifestos. They are the basis for the DUP's present mandate. I address each in turn.

Fulfil Article 6 of the Acts of Union

[100] This is addressed in detail in paragraphs [38]-[48]. The guarantee provided by Article 6 is found in Article. The command paper devotes many pages, and a full Annex, to trying to help the DUP escape from this case, by seeking to make the Acts of Union mean something other than the clear legal text, and contrary to the meaning established by the Allister cases by all tiers of court from the NI High Court, the Court of Appeal to the UK Supreme Court.

[101] This test is demonstrably not met, and indeed the command paper devotes much ink to explaining why the continued subjugation of Article 6 of the Acts of Union is ok.

[102] Indeed, far be it from restoring Article 6 of the Acts of Union, the DUP have effect codified its subjugation and essentially converted the *Allister* judgment into a statutory provision inserted into section 38 of the 2018 Act that, bizarrely, is more like an 'explainer' that Parliament is sovereign (obviously); that the Acts of Union are still in force (obviously); but this provision is subject to section 7A and thus the Protocol/Framework, and thus they are subjugated and in suspension.

Avoid any diversion of trade

[103] NI remains in the EU single market for goods, the UK is not. There will naturally be diversion of trading patterns, with NI- at least in a significant part of our economy- aligned with the Republic of Ireland rather than the UK. This amounts to an economic United Ireland in these areas of the economy.

[104] The DUP now argue that this is only one part of our economy, and that most of our economy is aligned to the UK. Arguing that economic alignment with the Republic of Ireland is fine, so long as its only a little bit, appears a very slippery slope. The issue, it seems, is just one of an unspecified degree rather than substance. It seems incomprehensible that any unionist would accept such constitutional hybridity in any area, regardless of the degree.

[105] There is nothing which 'avoids' this.

Not constitute a border in the Irish Sea

[106] Sir Jeffrey cannot even convince a significant number of the most senior members of the DUP that this test is met, never mind anyone else.

[107] It is obviously not met, and this is set out in detail at paragraphs [33] – [37].

Give the people of NI a say on law that governs them

[108] EU law continues to apply. There has not been a single word of Annex 2 removed. I regards future EU law, the Stormont brake allows an objection to be raised to new or amended EU law, but the final say as to whether it applies rests not with the people of NI, our elected representatives, the UK Government or Parliament, but rather with an international arbitration body which can decree the law applies, and it does.

[109] We remained governed by laws we did not make and cannot change.

[110] This test is failed.

Result in no checks on goods going from GB-NI and remaining there

[111] This is addressed at paragraphs [20] – [32] above. The new arrangements do not *result* in no checks (contrary to Sir Jeffrey Donaldson's claims), but rather there is a non-binding commitment to deliver on an *intention* to arrive at the point of there being no checks. There is no timeline, no legally binding commitments just an aspiration.

[112] This test is failed, emphatically.

Ensure no regulatory barriers develop between NI and the rest of the UK

[113] This was already achieved in 2020 via the UK Internal Market Act. However, there has been more progress in this area. This test has been met, and the regulations on the UK Internal Market do make some slight improvements.

Preserve the letter and spirit of NI's constitutional guarantee in the Belfast Agreement by ensuring consent from a majority of its citizens for any diminution of its status as part of the UK

[114] Writing on Unionist Voice, and in an accompanying video, Sir Jeffrey accepted this required amendment of section 1 of the NI Act 1998, which all unionists accepted was a "deceptive snare" (as per Allister case) and was much less than was promised in the Belfast Agreement.

[115] The constitutional legislation (which does essentially nothing and is purely presentational) far be it from remedies what Sir Jeffrey himself accepted was the defective nature of section 1 of the NI Act 1998 in terms of it not reflecting the nature of the promise in the Belfast Agreement (i.e., it did not guard any change short of the final formal handover of sovereignty- put simply, you can change everything but the last thing), but in fact supercharges section 1 in its defective form.

[116] This test is failed.

Conclusion on DUP's seven key tests

[117] It can not be credibly asserted the DUP's seven key tests are met. The DUP appear to have simply abandoned talking about them rather than press on with such an obviously dishonest and unsustainable assertion.

[118] There is one of the seven key tests met. The other six, to varying degrees, are failed. The three core tests- Acts of Union; removing the Irish Sea border and constitutional guarantee are failed emphatically.

Omnibus conclusion

[119] This paper, putting on the record and setting out my own personal arguments on this matter. I shall publish it, and open it up to scrutiny and challenge. It has been produced inside a number of hours on the same day the command paper and accompanying legal texts have been produced. As there is urgency of time, due to DUP efforts to complete this process in the next 48-72 hours, it has sought to focus on key issues.

[120] There is much more to be said about the command paper in particular, and many arguments can be further expanded and may, in coming days, need to be defended and developed in the face of any counter arguments.

[121] Those who feel strongly about these issues, particularly those of us who have been in the public domain on these issues, have an obligation to set out our personal position clearly. It is not enough to provide bullet points or shiny graphics with broad assertions, the arguments should be set out in detail and opened up to scrutiny.

[122] Finally, it may well be the case that the DUP do return to Stormont, to adopt the role of Protocol implementers (as is required- see *Rooney and JR181 (3) v Poots*). There may be many people who has travelled the long road of this campaign to are battle weary and are willing to now simply accept what is there, and let it go.

[123] That is each person's choice. Some of those persons who are central to advancing and supporting this deal are my friends, some are very close friends. All are unionists, committed unionists, including Sir Jeffrey Donaldson with whom I have clashed repeatedly recently, and- as this paper demonstrates- I will continue to battle with on this issue.

[124] That is because I feel strongly and genuinely that Sir Jeffrey has taken the wrong road; he, I am sure, feels the same about me. But I acknowledge without hesitation that my disagreement does not lead me to conclude, or assert, that Sir Jeffrey or others are any less unionist. I think it important we disagree well, and in the heat of recent battle, perhaps many of us- feeling so passionate and strongly on these issues- in our intra unionist public discourse haven't disagreed particularly well. In the coming battles, and there will be many as the fight against the Protocol and those who accept and implement it goes on, perhaps we will all disagree better within the unionist family.

[125] For me, the fight will continue. I fundamentally believe that this deal undermines and embeds the fracturing of the Union. It doesn't do what it says, and it is at variance with all the commitments we collectively made and objectives we set. For others, they will see this deal is a good outcome, or maybe- perhaps- as simply the least worst option. They are entitled to that view, but it is a view with which I will never agree and I will continue to argue is fundamentally wrong.

[126] The Belfast Agreement power sharing arrangements creates a one-way process to

the incrementally dismantling of the Union. This has been overlayed and supercharged by the Protocol/Framework, which remains firmly in place in all key respects. There will be many who will equally see things differently. In many years from now, we will all have the benefit of hindsight and perhaps I will be proven right, or perhaps I will be shown to have been completely wrong.

[127] In 1998 Sir Jeffrey Donaldson walked out on David Trimble and led the battle against him over aspects of the Belfast Agreement. Ironically, given many of the aspirations and intentions which are being presented as binding commitments in this deal, Sir Jeffrey primarily took this approach because he felt such aspirational intentions were not enough, that they didn't amount to anything substantive. He, therefore, more than anyone should understand the nature of genuine political conviction which drives a person to diverge, and to do so fundamentally, even from those considered friends, allies and/or persons for whom respected endures.

[128] I believe this is one of the saddest days for unionism since the formation of Northern Ireland. That so many have been sucked into a mode of celebration is a matter of profound bemusement. Those who said no, could always have said yes if circumstances change. But those who have said yes, can never again they so. We all have to live with our choices.

Jamie Bryson

31 January 2024