HOUSE OF COMMONS

International Trade Committee

Oral evidence: UK trade negotiations: Agreement with Australia, HC 1002

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Watch the meeting

Members present: Angus Brendan MacNeil (Chair); Mark Garnier; Paul Girvan; Sir Mark Hendrick; Anthony Mangnall; Martin Vickers; Mick Whitley; Mike Wood.

Questions 162-195

Witnesses

I: Professor Lorand Bartels MBE, Chair, Trade and Agriculture Commission.

Examination of witness

Witness: Professor Lorand Bartels.

Q162 **Chair:** Good morning. Thank you for attending the International Trade Committee's oral evidence session in our "UK trade negotiations: Agreement with Australia" inquiry. We have two distinguished panels this morning. The first is distinguished in itself, as we have the chair of the Trade and Agriculture Commission, Lorand Bartels. Although you are known to the Committee, would you introduce yourself—name, rank and serial number—for the record?

Professor Bartels: My name is Lorand Bartels. I am professor of international law at the University of Cambridge, and—relevantly for today's session—I am chair of the Trade and Agriculture Commission.

Q163 **Chair:** I should have congratulated you a long time ago on your position as chair of the Trade and Agriculture Commission. I hope that you find this worth while and useful in the scrutinising of the agreement.

To kick off, you told Radio 4 in November that the Trade and Agriculture Commission is "toothless" but not "meaningless". What did you mean?

Professor Bartels: I think I said "toothless but hopefully not meaningless". I think that is relevant to today's session, and particularly to this Committee and other Committees in Parliament. We are supposed to advise. Primarily, we advise the Secretary of State for International Trade on the matters before us, which I am sure we will get into. Secondarily—this is what I am doing here—we advise Parliament and, more generally, we maybe not advise, but inform the public, so I guess the "hopefully not meaningless" bit is up to you, if I can put it that way.

Q164 **Chair:** Very good. We plan to make time so that we can bring more meaning to your work. This is one of the arguments that we currently have going with the Department for International Trade. How do you feel about the time, scope and resources you had to do this?

Professor Bartels: We were given three months. Actually, it is supposed to be three months between the date of signature of each FTA and the production of the report; we get three months to produce the report. In fact, for the Australia agreement we were given slightly over three months because of the Christmas and new year break; we had an extra two weeks in real days. I think that time was fine.

I should say that it was quite hard work for the Australia agreement, because we needed to work out all our processes from scratch: how we were going to approach our questions and so on; who we were going to speak to; and how we were going to obtain evidence from people. All that needed to be done, so it was quite hard work, but it was a good amount of time. I think the advice shows that we managed to do our job in those three months.

On the whole, the resourcing is fine. We get a small stipend, which not even all members of the commission have drawn. The expenses are probably more important, particularly for people who are travelling; that is obviously critical. All the fundaments are there. We are supported by a secretariat, which is firewalled from the rest of the Government, as far as our work is concerned. The secretariat is very helpful and useful. It organises meetings and so on—finds information that is factual.

I think all that is fine, but one point I would make is that we weren't given any resources to engage any outside consultants or any research. That meant that we were entirely dependent on information that we found, information that came to us through our consultation process or information from the Government. That did work, but it would have been useful to have had a small budget set aside for some of that work to be done for us. Of course, one could say that the secretariat could be doing that, but it is not an expert research body either. A small consultancy budget might have made life a little bit easier. Other than that, I think everything was fine.

Q165 **Chair:** It is interesting to hear that you had three months, and then an extra two weeks, or 15 days, added on. Our quarrel at the moment with the Department—our moment of tension—is that we can't get 15 days once they have responded to your report, and we are trying to take that further within Parliament through various devices.

Finally, how were members of TAC appointed and how independent is it? Obviously, you are going to say, "Very independent", but how independent do you think the commission was, given that it was Government chosen and appointed? Am I right in that?

Professor Bartels: Yes, it was. Actually, I don't know how the others were appointed and I didn't know who they were until I turned up pretty much just before the first day on the job. How I was appointed was that there was an open application process. I sent in an application. I was then contacted and told that my name was under consideration, and then I was further contacted and asked whether I would like to be chair. I said yes at all stages. Then, after all of that, I had a chat with the Secretary of State. After that, I got the nod. I think it also had to go through No. 10. That seemed reasonable to me—particularly reasonable because the letter of appointment that I have is from the Secretary of State. Essentially, as an individual, I report to her, but of course we operate as a collective body. I would imagine that it is the same for all the others.

On independence, most importantly, yes, we were independent of all outside influences, I would say. First of all, we were definitely independent of the Government. In fact, there was certainly no pressure on us to deliver any particular result—none that I perceived. I was in contact with the TAC secretariat—that is our independent secretariat, who are Government employees but, as I said, firewalled for our purposes. I didn't experience any pressure at all. There was obviously interest—I got the sense there was some interest in what we might be doing, but nothing

untoward, which was a good thing. I doubt very much that anybody else was under pressure; I certainly never had that impression.

There is also independence from the other side. We are appointed for our expertise and interest in the subject matter. So, who were we? We had a variety of roles. Some were farmers. In fact, just about everybody seemed to have some farming experience except for me, which I didn't mind, actually. I learned a lot. We had people who were working farmers. One of our members was unable to make or came late to a meeting because it was lambing season.

Chair: I can't imagine that ever happening!

Professor Bartels: They were people who know what is going on. We had cattle farmers as well. We also had lawyers and an economist. Some people were there not as representatives of any organisation, but because through their roles as representatives of different organisations, including the NFU, they had gained expertise in the area.

Through all of this, I can safely say—and everyone on the commission would agree with this—that we operated as a cohesive commission. We bonded well. We all agreed in the end on everything. We argued pretty heatedly over the facts, even on the last day, but it was a matter of trying to work out the facts. There was a bit of last-minute work in some cases, and there were a few questions where we battled a bit. People had different points of view on free trade and farming and this and that, but at the end of the day we were all happy with what we produced. Considering that we had people from such a wide variety of areas, I think that was quite an achievement, and it is also a sign that we operated as a body that was independent.

Chair: On the basis of the old saying, "Success has many fathers, but failure is an orphan," as you are a former adviser to this Committee, we take a measure of success at your appointment as chair.

Q166 **Anthony Mangnall:** Thank you very much for being here. Is the Secretary of State listening to you?

Professor Bartels: I don't know. I hope so. I haven't spoken to her since I was appointed, but as we all know and as the Chair has alluded to, it was not clear for some time when the advice would be released. Clearly, someone in the Secretary of State's office—and no doubt the Secretary of State herself—has had a look at the report, and I think the early release of the advice shows that she probably is listening to us.

Q167 **Anthony Mangnall:** You made the point in response to the Chair's question that you are also here to help inform the public and that you want to see that done through the Committee, which is why you are in front of us. I don't want to put words in your mouth, but let me try. I presume you see the value in this Committee having the time to be able to scrutinise your report as well as the Government's response to it, so that we may inform the House in our report on the whole of the Australia agreement.

Professor Bartels: I know, as I think everybody who has an interest in this matter does, that there has been an exchange of letters between this Committee and the Secretary of State on timings. The decision on how much time this Committee gets is obviously well above my pay grade, and I can't really comment on it. What I can say in general terms is that, obviously, as with anything that I have ever written or contributed to writing, I am happiest when it has the biggest audience. Usually when I write academic work, there is no time limit. It can take many years for people to get around to reading what I have written, so I am flexible on time. Obviously, the more time that anyone has to read something, the better. It is an intelligent Committee, and I hope that the report is clear enough. I can help today to accelerate the process.

Q168 **Anthony Mangnall:** An incredibly diplomatic answer. I really appreciate that. What we are doing now with the Australia trade agreement is setting a precedent for how we behave in this place for all future agreements. I presume that TAC is going to have a role in those future agreements, as you will with New Zealand and Brazil and whatever else comes forward. After all of this is done, will you be recommending any updated process or procedure that you would expect TAC to have?

Professor Bartels: No, I won't. That is because it is not within our jurisdiction or mandate to make recommendations of that kind.

Q169 **Chair:** Would you make a plea for greater resources, as you mentioned earlier?

Professor Bartels: Well, that is necessary for us to do our work. Actually, it is not even necessary, because we did our work without it, but it would be helpful for us to do our work. What happens to our work once it is done goes beyond our mandate to make recommendations on.

Q170 **Anthony Mangnall:** On this point about resource, you mentioned that you didn't have much access to outside resources, but you did it through consultation, the Government providing information and your own research. Was the level of information provided by the Government significant and comprehensive? Was everything you asked for supplied?

Professor Bartels: Yes, it was pretty good. Sometimes the Government moves a bit slowly, and we did have to press a little. At the end of the day, we asked the Government to help, and it comes down to one person, usually, who has the job to figure it out. If the questions we are asking aren't exactly questions that that person has dealt with before, it can take a bit of putting it on the agenda, let's say. The TAC secretariat did a great job of saying, "This is important, and this needs to be done," as opposed to that being a little unclear for any given civil servant. In the end, the Government came to the party and provided us with the evidence.

Most importantly, there was not any reluctance to give us information. There was not any stymieing of our work. If occasionally we had to ask twice or three times for an answer, that really came down to a particular person not really getting the question and having other things to do—tedious work-related stuff like that.

Q171 **Anthony Mangnall:** May I move on from resources, unless anyone else wants to come in on this? In your mandate, you were given the requirement to answer three questions. Do you want to tell us briefly what those three questions and the answers you gave to them were?

Professor Bartels: Very briefly, we were given these questions in two parts. One is our terms of reference, which is drawn from language that is written in statutory form, which sets our overall framework for what we are supposed to be doing. The second document that sets out our mandate is the letter that comes from the Secretary of State, which asks us, within our mandate, to advise her on any given FTA. It was the Australia FTA in this particular case, and we have subsequently had a letter for the New Zealand one.

Putting these two documents together, we constructed our mandate, which is in the advice that I have brought along. The three questions were essentially as follows. One was whether the FTA requires the UK to change its statutory protections in three areas. One area is the health and safety of animals and plants, which is in jargon known as sanitary and phytosanitary, or SPS, measures. The second area is animal welfare, and the third is environmental protection. The question was: does the FTA require the UK to change any of its statutory protections? Our answer to that question was: no, it doesn't. I can elaborate on that and the reasons for saying it.

The second question was: does the FTA underline—that was the word used, and we actually had to ask to see whether "underline" might mean undermine, but it turns out that it was underline, so we interpreted that, so as not to be confusing, as "reinforce", which I think is a more English word for this—or reinforce the UK's statutory protections? Our answer to that was: in part, yes it does. I can elaborate on that in the future.

The third question was: what does the FTA do? We interpreted this question to mean: what about the future—the FTA as a living instrument? What should we look out for as the FTA develops? What does it mean in the future? Our answer to that question was: that is really a question of Government policy. The FTA does not constrain policy space for the UK, so that is really up to the Government. It can, as we said in answer to question 1, continue with its existing protections. We also explained what sorts of protections the Government might be able to adopt in the future.

We also highlighted a couple of issues that we thought were important to note. One was that under the FTA it is possible for the UK and Australia to reach certain agreements. That is quite normal for international treaties—decisions that are made in the context of the treaty. This is common for all treaties. This Committee is, I think, probably quite conversant with those sorts of decisions. We just pointed out that those decisions need to go through the usual parliamentary scrutiny process because they can affect what the FTA means. One of those decisions is to interpret the FTA. You could say, "The FTA means—this word is a little bit unclear so we want it to mean x, y and z," for instance. That decision, to interpret the FTA, is something that should go through normal scrutiny procedures. That was

one of the key points there, but ultimately, we did not see any particular difficulties with the FTA in the future.

We also, in that context, looked at a number of concerns that had been raised with us in the consultation process, which I think is what a lot of people are most interested in hearing about and that is why we took a very serious factual approach to those concerns. They were all about comparing what goes on in Australia in terms of agricultural practices, so what pesticides are used or whether there is the so-called practice of mulesing of sheep, for instance, to cite two well-known examples. Also, how cattle are transported and hot branding—all sorts of agricultural practices, which were of environmental, animal welfare and SPS interest and so on. Then we compared those practices with what goes on in the UK and we found that, in most cases, the concerns were a little bit exaggerated for one reason or another. What we concluded in just about all cases was that even if these practices did take place in Australia in a way that would not be permitted in the UK, they either did not affect products that would be imported at an increased rate under the FTA or they did not come with any particular cost advantage. At any rate, even if, in a worst-case scenario, both of those questions were answered in another way—in other words, that those practices were different in Australia and led to greater increases of products into the UK and they came at a great cost advantage—in almost all cases, except for a couple of cases where this was not true, the UK would be able to regulate in the same way as today and there should not really be a problem in the UK.

So, hopefully, one of the main outputs to come from this advice was that, with a couple of exceptions, which we can speak about, there is nothing much to be scared of in this FTA. It should not change the picture all that much, in terms of standards. Obviously, there is going to be competition coming from Australian products.

Q172 **Anthony Mangnall:** Professor Bartels, you said in an interview with Politico: "Some people are going to be a bit upset about our report". Did you succeed in upsetting them, but did you also succeed in dispelling some of the rumours and misguided fears that were in this free trade agreement? I also want to put on record your emphasis on the point about the scrutiny and procedure of Parliament over free trade agreements, which you made in your previous comment.

Professor Bartels: It does not seem to have upset people as much as I thought it might, which is probably a good thing. Maybe Easter had something to do with that. I do not know. When I said that, what I meant was that there might have been people who were hoping that we would say that the FTA is a disaster for British farming and not only in some generic way, because free trade is bad, but more specifically in terms of what we were supposed to look at, which is, at its extreme: "Australia engages in a whole lot of barbaric practices that were banned because the UK does not do this sort of thing, and it is done to save money and the Australian farmers are sort of raking it in because they are able to do all these things because it is the wild west out there. Therefore, the FTA should not have been signed with a country like that because we are going

to be importing all these products that are made according to those appallingly low standards."

What we found in every case, except for a couple—and I would not call those practices barbaric; they involved pesticides and maybe genetically modified organisms to some degree—was that those concerns were overblown. Australian standards are not that different, in reality. I would like to talk about that a little bit more at some point, because the way it is regulated is different from in the UK but, in reality, what Australia does is not that different from what the UK does, in particular in so far as what we are talking about are products that are going to be imported into the UK. I think a lot of people were worried that that might be the case. So when I say "upset", they might have wanted the FTA to be nixed because we said, "Yes, that is all true." People who wanted that might be upset. But I would hope that the answer that we gave does the opposite and assures people that the FTA is signed with a country that has relatively similar practices in most cases, as far as the products coming into the UK are concerned, and there is not actually all that much to worry about. Different people will probably have different reactions to that answer, but I hope the assurance side of that, rather than the disappointment side, prevails.

Q173 **Chair:** Before I go to Mark Garnier, I want to pick up on three small points that were raised with Anthony. You see the work of the TAC as feeding into the work of parliamentary scrutiny. Is that correct?

Professor Bartels: Yes.

Q174 **Chair:** Was food security considered in your report on the TAC? It is something that has raised its head, probably more so now since the advent of the Ukraine war.

Professor Bartels: No, we did not look at food security. It was not within the scope of our mandate.

Q175 **Chair:** Finally, mulesing is something that makes me wince, to be honest. I speak as somebody who has spent much of the last month, quite often, with my arm far up the back end of a sheep. That gives me no problems at all, but mulesing does make me wince. This is lambing time, in case anyone was wondering. What level of concern was there about mulesing within the committee? It just seems a pretty rough and barbaric thing to do.

Professor Bartels: Look, it is pretty rough and barbaric. I think everybody agrees with that. I think in Australia, they agree with this too, on the whole. One of the interesting things that we found is that most mulesing in Australia is undertaken with pain relief. We found it a little bit difficult to find out exactly how much there was, and we have a couple of footnotes on this in the advice. We found one academic article that had put the figure at 79%. The auction data was a little bit different, and we had to break that down into which merino were being sold. There are different types of merino, and we did not have the time to get stuck into that, but a majority of merinos were being mulesed with pain relief. There is still a minority of merino sheep that are mulesed without pain relief, and

our understanding is that in Australia various strategies are being considered and implemented to eradicate this, particularly through breeding.

I do not know how much you want to get into what this actually involves, but it is done to merino sheep, which do not exist in the UK. It is all to do with the skin, which is very much folded in order to increase yields, but unfortunately that involves folded skin in areas of the sheep where mulesing is carried out, which is painful. It is all to do with flystrike. The people who conduct this do so for animal welfare as well as economic reasons. It is "We have to kill the village in order to save it"-type stuff. It is pretty barbaric and is not a great thing.

Chair: I am wincing too much. They can use pour-ons for this stuff.

Q176 **Mark Garnier:** I am just trying to shake that image of the Chair out of my head. You mentioned the SPS and the precautionary principle a little bit earlier. Can you talk a bit more about the precautionary principle? Your report says it is not entirely clear whether this agreement maintains the UK's right to use the precautionary principle with regard to SPS. Can you expand a bit on that? I am also quite interested in what effect this would have on other trade deals, if any at all, because obviously trade deals lean on each other. Will this have any effect—for example, if the NFU are trying to export product to the EU? Might this affect that type of relationship?

Professor Bartels: The precautionary principle originates in the area of environmental law, and it moved on into international environmental law. It also exists in trade law, but it has a slightly different definition in trade law. It is a little bit more limited in trade law. I will speak about that, because that is the version of the precautionary principle that is relevant to us.

Q177 **Mark Garnier:** This is the WTO version.

Professor Bartels: In the WTO, exactly. In the WTO, the precautionary principle exists in the SPS agreement, which is the agreement on sanitary and phytosanitary standards. I want to explain it by explaining first what it is not. The way that the SPS agreement works is on a science-based approach. If you want to protect animal and plant health and life and human health and life in certain areas that are covered by the SPS agreement, you are obligated as a state and a WTO member to base your measure on science, which means undertaking a risk assessment, basing your measure on a risk assessment and so on. That is all set out in article 5.1 of the SPS agreement.

There are some cases where there just isn't any science, which is where the precautionary principle in its trade law sense comes in—recognising that, in some situations, there might be a risk to human, animal or plant life or health, but there isn't any really good science. Article 5.7 of the SPS agreement allows you, as a WTO member, to adopt measures on a provisional basis, but you are still under an obligation to keep your eye on the science. Sometimes you just haven't developed the techniques:

science evolves, right? However, as soon as there is science in this particular area, you are back in the world of science-based risk assessments and you have to base your measure on the science.

It is not a precautionary principle in the sense that you can just throw scientific evidence out of the window and say, "Well, we want to play it safe." It is very much the opposite. You are allowed to use the precautionary principle only when there isn't science. If there is science that says that, actually, there is nothing much to be worried about, then you are not allowed to adopt your measure. There have been many cases in the WTO in which countries—EU countries, Australia, Japan, the US—lost cases because they had said, "We didn't think there was science," but it turned out that there actually was science, so they lost those cases. It is very much a science-based instrument, with the small exception of when there is not much good science.

This FTA emphasises the science-based approach. It says that SPS measures will be based on science, effectively, in accordance with relevant provisions of the SPS agreement. We have said that it is not entirely clear whether that includes just the science-based part of the SPS agreement that I've been talking about, or whether it also includes that small exception to the science-based agreement—the precautionary principle in article 5.7. It depends a bit on how you read the provision. We don't think it's very well drafted; we think it should be drafted a little more clearly. At the end of the day, it doesn't actually matter because this is not an enforceable chapter in the FTA, so it won't really amount to anything, anyway. We thought that if you really wanted the part of the precautionary principle that is in the SPS agreement to also be incorporated in the FTA, it could have been done more clearly.

Q178 **Mark Garnier:** If it was enforceable, it would be important.

Professor Bartels: If it was enforceable, it would be important? Well, that depends a bit on the relationship between the SPS agreement and the FTA; it depends on where it's enforced. That is itself an unclear question—how much are you allowed to deviate from WTO law in FTAs in that area? But, yes, in principle, you would have to start out from the assumption that that would be important.

Q179 **Mark Garnier:** I know this is slightly irrelevant, but they don't use the precautionary principle in America, if I remember correctly. Are you familiar with that?

Professor Bartels: Somewhat.

Q180 **Mark Garnier:** I remember, when I was a Minister, talking about exactly this issue in terms of how we approached the EU and then how we approached the US trade deal. Clearly, we are doing a lot of trade with the US and the EU. Ultimately, do those relationships lean against each other in a conflicting sort of way, or are they actually completely irrelevant? So that we can have a deal with the Australians that is unique in its own right, and we just transact that, and we can have another with the US that is unique, and similarly with the European Union. Is there

going to be a knock-on effect on any of this stuff?

Professor Bartels: I don't really think so. It depends on segregation of product when it gets to the UK. If you had an Australian product that came into the UK according to rules that would not be acceptable to the EU, and that product was then disguised as a UK product that was made according to EU acceptable standards for export to the EU, then you would have a problem. Essentially, what we are talking about is smuggling. The risk is one of smuggling, and there are—or should be—processes to prevent that sort of smuggling from taking place. Among other things, the EU wouldn't want that product to come into the EU without those sorts of controls because, for tax reasons, in any case, it would be an Australian product. It is a question of whether the product is washed as a UK product, which is illegal in a whole lot of ways. A lot of this talk of the UK not being able to be part of different regulatory systems ignores, or at least overlooks, that. You can't just wash products once they are in the UK. They are still traced in some way.

If they then get re-exported to other countries, there should be systems in place to stop that sort of washing and smuggling from taking place. That is not to say that those systems are always perfect, but it is a common problem.

Mark Garnier: That is really helpful. Thank you.

Q181 **Mick Whitley:** Good morning. Your report says that the agreement may lead to increased imports of Australian products produced to lower standards than those of the UK as regards products produced using pesticides banned in the UK and canola oil from genetically modified oilseed rape. What will that mean for UK producers and production standards?

Professor Bartels: Those were the two areas that I was alluding to earlier, where we thought that, on balance, it was likely that we could identify products that would come into the UK at an increased rate under the FTA because tariffs had been lowered, where practices in Australia are materially different from practices in the UK and where there is a cost advantage to Australian farmers compared with UK famers, because being able to use pesticides that are cheaper and more effective in Australia than those that are allowed in the UK comes at a cost advantage.

First, in the case of both pesticides and GMOs, when we said that we were not talking about any risks to the environment or animals from these products coming in, it was not within our mandate to say so, but it is the same with humans. That is an SPS issue that remains the same. The Government can protect its environment, people, animals, plants and so on from anything that it considers to be dangerous, provided that there is science or the precautions I talked about before; there are rules on that.

We were talking about something different: the use of pesticides and GMOs in Australia in a way that, if it is harmful at all—to some extent, the jury might still be out on that—it is harmful in Australia, to Australian territory, to Australian animals and to Australian plants. That makes it

Australia's business and none of the UK's business, from an international law point of view. One country does not get to tell another country what to do just like that; you need a reason for it. If Australia wants to destroy its animals and that doesn't affect the UK, Australia can destroy its animals. There are minimum international law baselines, but in principle that is the way it works, which is something that not all the people who wrote to us fully appreciate.

In those areas, Australian farmers may be operating with an advantage that UK farmers might not have, and there are some products, such as canola oil, that may come to the UK more cheaply. I think canola oil is imported into the UK anyway, so that probably will not have much of an effect on UK production, but in theory there could be a few cases of products like that where UK farmers would be suffering from competition from products made according to practices that are not permitted in the UK, but are permitted in Australia.

Ultimately, as far as our mandate is concerned, we ended up by saying that in those areas there is nothing the UK can do if you want to stop that sort of thing from happening. Again, I want to emphasise that we are talking about a very small number of products—a couple—that are probably not even produced in the UK, so they are not suffering from competition in any economic sense, but there is nothing the UK can do in those areas in terms of saying, "Well, there is a problem with the standards." If you want to stop products coming in that are made in those ways, then you have got to do it by not liberalising in the first place. So that is the lesson of that.

That particular message didn't come out in our report. What we were saying in our report was that, in terms of standards, you can't complain about Australian standards when the effect of those standards—the different standards in Australia—is solely in Australia and does not affect the UK in any way.

Q182 **Martin Vickers:** The FTA provides for certain "general exceptions" that are copied from WTO law. Could you elaborate on what these are and how important they are for upholding the UK's statutory protections?

Professor Bartels: This is fundamental. In legal terms, and in particular in terms of answering our first question, it is the most fundamental part of our report. The exceptions in the FDA, as you rightly say, are copied over from WTO law—in fact, they are incorporated by reference from WTO law, in particular article XX of GATT, which sets out general exceptions.

There are three main exceptions of relevance, and each one is relevant to one of the areas we were looking at. To take them in order: one exception allows the UK to adopt measures necessary to protect animal and plant life and health. This is article XX(b) of GATT. This exception is then elaborated in WTO law in the SPS agreement, which is what I was talking about before—base your measure on a scientific risk assessment, with the exception for when there is no science, and a bit in the SPS chapter in the FTA as well. That is relevant for statutory protections, which are targeted

at the protection of animal and plant life and health. So long as the UK can show that its measures are necessary for protecting animal or plant life and health according to the available science, that is perfectly fine under the agreement. That was fundamental to us. That is why there can be no fear in the UK that any dangerous products will come into the UK at an increased rate under the FTA, because the FTA permits the UK today, as yesterday under WTO law, to prevent those products coming in. Nothing changes. The legal position has not changed at all.

The second relevant exception is article XX(a) of GATT, incorporated into the FTA. That permits the UK to prohibit imports of products in order to protect public morals. That is UK public morals. It is particularly relevant to the statutory protections that we were looking at in the context of animal welfare. Animal welfare, as has been established in WTO case law, can constitute the public morals of any given country, provided you can show that the legislative apparatus in that country, or public opinion, or some evidence about a particular animal welfare concern rises to the level of public morals. Provided you can show that, in principle, animal welfare concern can be public morals. What is also important about that is that it can stretch to the treatment of animals in other countries as well. There is an extraterritorial dimension to that.

What we took from that is that this FTA, as before under WTO law, permits the UK to adopt the measures necessary to protect its public morals in the context of animal welfare—in other words, to the extent that the UK today, until this FTA is ratified, is able to have animal welfare-based import restrictions, it can continue to do this under the FTA, so nothing changes in the FTA.

The third exception, which is relevant to environmental protection, is article XX(g) of GATT, again incorporated by reference into the FTA, which enables the UK to adopt measures that relate to the conservation of exhaustible natural resources, which includes—the FTA specifies this, but it is in WTO law anyway—living resources. That is usually taken as an environmental exception. Again, this permits the UK to protect its environment. So long as the measure is directed at protecting the UK's environment, it can continue to adopt measures, nothing changes and it is exactly the same as under the WTO.

For these three reasons, because these exceptions have been incorporated into the FTA verbatim from WTO law, our conclusion was that the FTA does not change the UK Government's ability to adopt its existing statutory protections.

Q183 **Martin Vickers:** If there is a dispute about the general exceptions, what options are there for settling that dispute?

Professor Bartels: As far as the FTA is concerned, this is what would happen. Let's say that the UK adopted a new rule; I mean, it could be an existing rule. Let's say the Australians say, "Well, we don't much like the rule that you've got today", and the FTA prevails over existing legislation in just about every case. There is an example of that in the advice. There

are some examples where you might say that the FTA is based on or takes into account an existing rule, but as a general rule of treaty interpretation existing domestic law is a bit irrelevant; you just look at the FTA.

So the Australians could say, "We don't like your law", or, "We don't like a future law, and we think that it violates an obligation in the FTA, because you're not allowing us to export to you. Right? You're not allowing us to export this agricultural product, because you say that you want to protect your environment", or something like that.

Then the UK would have to defend itself under the FTA and it would say, "Well, in fact, yes, it's true—we are violating the obligation to allow the product to come in. But the exception enables us to do this." This is the way that all law works. I am sure you are familiar with this, but I will just say it anyway, namely, that it is a bit like self-defence in murder; yes, you have killed someone, but it does not matter because it is in self-defence and so you get off. I mean, it is just an exception to an obligation.

So, the UK would basically say, "Well, it's fine, yes, normally we would have to allow that in, but we don't have to in this case, because we are doing this to protect our environment—article XX(g), as incorporated", etc., etc. Then, the answer would be, and there are plenty of WTO cases along these lines, "Yes, that's perfectly fine. No obligation violated."

Q184 **Anthony Mangnall:** May I make a clarifying point? That typically means that when we have had discussions in previous years about hormone-injected beef and chlorinated chicken, under our SPS—domestic laws—that would not change, because the obligation would be for people to respect our domestic laws.

Professor Bartels: I want to be quite careful in how I answer that question. We did not say that every UK law is legal; what we said is that the legal position in relation to every UK law has not changed.

Q185 **Chair:** And the effect of that could be what?

Professor Bartels: Well, we wanted to be accurate in our advice and we did not want to be misleading by presenting only part of the picture. So we thought that, for the sake of accuracy, we needed to mention that the EU had lost one of the WTO challenges to its beef hormone ban, in 1998. We also mentioned—not too many people actually do mention this—that there was a later case in 2008 in which the EU actually brought the case, asking a WTO panel to declare—essentially, a declaratory action—that its changes to its beef hormone ban were now legal, and that case ended inconclusively, with the result that the result of the previous case continued in operation.

In other words, the EU's beef hormone ban remains illegal, but the reason for that is a little more complicated. So, it is not to say that the EU would necessarily have lost its case if it had been conducted slightly differently. There was simply no result; it said, "We don't know and therefore we go back to the previous case", because the case was not argued, or even decided, at first instance particularly well. So, it is a bit of a messy one.

Now, we know that the UK's beef hormone ban is a continuation of the EU's beef hormone ban. Given the ambiguity in result of the second case on the EU beef hormone ban and given that the UK beef hormone ban has not been specifically targeted, we cannot say that the beef hormone ban is necessarily legal—I think that is just a fair reading of the current situation—but we also cannot say that it is necessarily illegal. We did not want to say either thing in this advice. What we did want to do was to give people the full picture, which we did; we have set all of this out in the advice. What we did say, which we think is accurate, is that whether or not the ban is legal or illegal, the FTA makes no difference to it.

Q186 **Sir Mark Hendrick:** I just want to explore a little further the UK's position with regard to the general exceptions provisions. Your report says that the agreement's environment and animal welfare chapters contain provisions that actually give the UK a greater "right to regulate" than under WTO rules. Obviously, it also refers to the general exceptions provisions, in certain respects, giving it more leeway to override its trade liberalisation obligations than it would have under WTO law on its own. Could you explain that a bit more and say how significant you think it is?

Professor Bartels: What this FTA does, which is pretty standard for modern FTAs, is that it has a chapter on environmental protection and then, which is quite novel—this is the first FTA to do this—it has a slightly weaker, but similar, chapter on animal welfare protection. That is something that the UK should be congratulated on—pushing forward this area of the law in the context of FTAs.

In terms of the environmental chapter—this is quite standard for environmental chapters in FTAs—there are a variety of obligations, which require Australia and the UK not to lower their environmental protections in certain circumstances. One obligation is that they are not allowed to reduce, or rather, not implement, their existing environmental laws, if that is to gain a trade advantage. So, you cannot say, "We have got these laws in this area, but we are not going to apply them to this sector or to these particular agricultural products" if that is to improve trade. That includes against import competition. This is to stop a race to the bottom in terms of regulatory standards.

In the FTA, you have an enshrining of obligations to prevent a race to the bottom—to prevent saying, "We have got this wonderful trade deal; let's take maximum advantage by erasing our standards, so that we will be able to compete with the other side." That stops Australia from doing this in order to gain an advantage in the UK, but it also stops the UK from doing this. It works in both respects—directly, in the sense that it stops the UK from reducing its environmental protections, which is all built into the TCA with the EU anyway, so the UK is not going to be doing that for a variety of reasons; it also stops Australia from doing this. In that sense, it also reinforces the UK's statutory protections. It is the same with animal welfare, although that is slightly weaker because they are still feeling their way.

Q187 **Sir Mark Hendrick:** I understand the principle and clearly it would not be

an issue with the EU, but as far as the WTO goes, it may be. Could you give me an example? Could you also say how binding you think the environment and animal welfare chapters are?

Professor Bartels: I don't think these obligations cause a problem for WTO law in principle—

Sir Mark Hendrick: I don't mean they would cause a problem. I am saying they are going above and beyond.

Professor Bartels: Yes, definitely.

Sir Mark Hendrick: My point is about an example of how such a case might arise and how binding the obligations are in terms of Australia and the UK abiding by them.

Professor Bartels: Sure. Let's take Australia. Let's say for instance that Australia decided that it wanted to—what's an example of an environmental obligation?

Sir Mark Hendrick: The use of pesticides.

Professor Bartels: Well, the use of pesticides is a tricky one, because that is not necessarily covered by the FTA in quite the same way as the others. The environmental laws are not fully comprehensive in terms of everything. But let's say it was something like pollution of a river.

Let's say that, as a result of pesticide use, there was some degradation of an Australian river. Let's say that the effect—different terms are used in the treaty, which require interpretation, which we have done—and in some cases possibly the intent of a law allowed for greater use of pesticides leading to damage of an Australian river, which is of sufficiently serious levels to be legally relevant. Let's say that all that was to increase Australian exports to the UK. Then the UK would be able to bring a case against Australia based on that obligation and say, if there is an environmental law that would prevent that from happening, which is important, "You have violated your obligation to implement your environmental law." Therefore, Australia would be in violation and the UK would essentially be able to adopt countermeasures.

Q188 **Sir Mark Hendrick:** What if the law existed in this country but didn't exist in Australia?

Professor Bartels: Irrelevant. This is the thing that I think I needed to say. In international law, you cannot just say that your laws are the best laws and you cannot make other countries abide by them. The French are trying to do this at the moment with EU trade agreements. They are called mirror clauses. It is just not the way it works. I mean, you can make it work, but it is not normal. You can force it on other countries, but it is a form of, dare I say, colonialism. It is just not the system. Australia gets to have its laws. We get to have our laws. New Zealand gets to have its laws. It is completely irrelevant what the UK does in these circumstances. The way these obligations are written is to say that your national laws are

what you need to enforce, not that your national laws need to be the same as UK laws.

Q189 **Sir Mark Hendrick:** No, but what if our standards are higher in terms of environmental law; theirs are lower and we are not happy about it?

Professor Bartels: That is exactly what I am saying, it does not matter.

Sir Mark Hendrick: All right, fair enough.

Professor Bartels: That is the point; it doesn't matter. You can negotiate that to begin with, but that is unusual. You can say, "We need a baseline of protection" but those baselines of protection are usually internationally agreed; they are usually multilateral rules. Then what you do is say, "You can't fall beneath baseline provision".

Let me give you another example from the area of labour standards. There is a distinction between international rules or international minimum labour standards, including slavery, where everybody has agreed one way or another that you should not fall beneath those standards. That does not mean that you can say to another country, "If you don't pay your workers our minimum wage, we are not going to accept your products coming in".

Q190 **Sir Mark Hendrick:** I accept the principle and you have given a different example there in another context. Just going back to the pesticides, how do you prove there that Australia has a competitive advantage?

Professor Bartels: There was a case on this involving wider standards. It is actually the same issue, just slightly different facts. It is difficult to do. You need to show that there is at least a competitive effect of the reduction in, or failure to implement, domestic law. You would need to look at the economic result of what Australia is doing, or at least the projected economic result. You would need to work out whether that is likely to give Australian products a competitive advantage over UK products in either of the two markets and that would give you your result. Yes, that is difficult to prove, for sure.

Q191 **Chair:** In the example you have just given about the river, could we argue that is a sort of ceding of sovereignty, or is the UK coming in at that point not through the agreement but just through domestic law? In what circumstance would another country get so het up about Australia damaging or destroying one of its rivers, or do you think this is more of a global, save-the-world look, rather than a trade look?

Professor Bartels: It is fundamental to distinguish between things that countries do within their territory which have an effect on other countries, like climate change, for instance, or even loss of biodiversity. Secondly, there is a category of things that countries can do within their territories, which they have agreed are of concern to others. And you have international law on that—for instance, looking after your endangered species. They are your species, but you have agreed through CITES that other countries have an interest in that.

Q192 **Chair:** Koala bears?

Professor Bartels: Koalas, for instance, what's left of them. And thirdly, things that countries do within their territories that might be damaging to their territories but are not actually of any direct concern to other countries. A lot of that includes pollution, for instance. Pollution is generally a domestic matter, and that is just bad luck. It is up to you. Those three categories need to be distinguished.

Q193 **Chair:** Before I bring in Mick Whitley to mop up at the end, this is a slightly mopping up question, but on the procedure, what sort of improvements would you like to see in the involvement of the TAC in future trade agreements? As you know, we have battles at the moment with the Department over time, looking for a mere 15 days. From your perspective, what would you like to see? You have about 90 seconds.

Professor Bartels: My wish list. Look, I have to say that I am pretty happy with the way things are, so I don't have any big asks. We had to work hard to figure out how to approach this FTA and this does give us a precedent for how to approach future FTAs. They are, of course, all different. We will struggle to do a job like this if we are faced with CPTPP, because figuring out what goes on in Australia is difficult. Figuring out what goes on in 11 countries where we don't even speak the languages, let alone have different legal and administrative cultures, is going to be completely impossible.

Q194 **Sir Mark Hendrick:** What about the EU?

Professor Bartels: There is a lot of experience with the EU, at least in legal terms. That one is easier. In terms of working out what goes on in Malaysia, Brunei, Indonesia, whatever, is going to be virtually impossible. We cannot write a report that is this big, in God knows how many languages, trying to figure out all of that. We are going to have to do a slightly different job on that one. However, on New Zealand—if we deal with other single countries, particularly if they are in a language that some of us can understand, it would be easier. I think the language might become a problem at some point.

Chair: An exclusive here: the Australians say they can understand the New Zealanders, so we can maybe take that one to the bank.

Q195 **Mick Whitley:** Is there anything that we have not already covered that you would like to mention, or write to us about?

Professor Bartels: I think we have covered pretty much everything that is in the advice. I hope that what I have said is useful to your scrutiny process. We tried to write this advice in a way that would address different constituencies, from the Secretary of State to parliamentary Committees, Government negotiators and the general public. I do not know if we succeeded in all respects, but we hope that at least those aspects that people are most interested in are clear enough for them.

My final point would be to say that we did all agree—I think this is fundamental—on this report; it was a collective piece of work. There was no suggestion of separate opinions, or anything like that. We are satisfied

with it, and we think, ultimately, that the FTA does not make life difficult for UK agricultural producers in the way that was very much feared. That was, of course, the reason that we were established. We say that, of course, about the Australia agreement—we have not yet completed our work on any other agreement—and we hope that our work has assured people that that is the case.

Chair: Thank you for that. Thank you very much, Professor Bartels, for being here this morning, and for your frankness. We will take a few minutes' break before we flip over to the next panel. Thank you again.