HOUSE OF COMMONS

International Trade Committee

Oral evidence: UK Trade Remedies Policy, HC 701

Wednesday 14 October 2020

Ordered by the House of Commons to be published on 14 October 2020.

Watch the meeting

Members present: Angus Brendan MacNeil (Chair); Mark Garnier; Sir Mark Hendrick; Mark Menzies; Lloyd Russell-Moyle; Martin Vickers; Mick Whitley; Craig Williams.

Questions 1 - 32

Witnesses

I: Dr Lorand Bartels, Senior Counsel, Linklaters LLP, and Reader in International Law, University of Cambridge; and James Kane, Associate, Institute for Government.

Examination of Witnesses

Witnesses: Dr Lorand Bartels and James Kane.

Q1 **Chair:** Welcome to the International Trade Committee's first evidence session on UK trade remedies policy. We have two panels today. The first panel consists of some well-known faces to us, Dr Lorand Bartels and James Kane. In the second panel we have Laura Cohen—again, well known—from British Ceramics Confederation, Richard Warren from UK Steel, and Rosa Crawford from the TUC.

Without further ado, I will ask the first panel to introduce themselves. I can see that both Lorand Bartels and James Kane are waiting. Lorand Bartels, name, rank and serial number and how you want to introduce yourself, sir. It is good to see you.

Dr Bartels: Yes. It is nice to be before the Committee again. My name is Lorand Bartels and I am senior counsel in the trade practice group at Linklaters, the law firm in London. I am also a reader in international law at the University of Cambridge.

Chair: Thank you very much, and James?

James Kane: Thank you, Mr Chairman. My name is James Kane. I am an associate at the Institute for Government, which is an independent think tank aiming to improve the effectiveness of government.

Q2 **Chair:** Good to see you also, James, and thank you both for coming this afternoon. Lorand Bartels, do you think the Government are on track to establish a robust legal framework for the UK's trade remedies policy,

which will, of course, be needed on 1 January 2021, in just a little over two months' time?

Dr Bartels: Yes, I think so. The Government have set out the administrative guts of the Trade Remedies Authority in the Trade Bill, which is due to be passed before the end of the transitional period. In terms of the substance of trade remedies, the Government have already passed primary legislation that sets out a fair amount of information, but also detailed regulations that instruct the Trade Remedies Authority on how to work.

Beyond that, there is also a fair bit of guidance that has emerged from the Trade Remedies Authority, so I think the overall picture is relatively clear.

Q3 **Chair:** A far healthier situation than it was coming up to the run-up in March 2019?

Dr Bartels: Definitely, yes.

Q4 **Craig Williams:** James, could you summarise the Government's trade remedies strategy?

James Kane: It is quite a broad question. In essence, the Government chose, under the previous Administration, to split the UK's trade remedies framework between two pieces of primary legislation: the Trade Bill, which of course has still not gone through but looks set to soon and which formally establishes the Trade Remedies Authority in law, and the customs Act—formally the Taxation (Cross-border Trade) Act—which gives it most of its powers relating to the conduct of trade remedy investigations.

The essential structure of the trade remedies process will be that the Trade Remedies Authority conducts an investigation according to the rules set out in the Taxation (Cross-border Trade) Act, the regulations made under that Act and the guidance issued by the Secretary of State. They will then decide that either the criteria for the imposition of a trade remedy, an anti-dumping duty, a safeguard or an anti-subsidy duty are met or not met.

If they decide that the criteria are met, including the final stage of the economic interest test, they will make a recommendation to the Secretary of State for Trade, who will decide whether or not to accept that recommendation on the basis of the public interest. If they accept it, they publish a public notice imposing an additional duty. If they choose to reject it, they must explain their reasons to Parliament in doing so.

Beyond that rather technical legal framework, it is probably a bit too early to say what the Government's strategy for trade remedies is, since we do not know yet how this legal framework will be applied. The devil is always in the detail, and that is probably true of trade remedies more than anything else. A lot of the provisions, both in the statute and in the regulations—although, as Dr Bartels was saying, we have a lot more detail to work with than we did in March 2019—still have to be

implemented, and they could be implemented with quite different consequences in individual cases.

Q5 **Craig Williams:** Could I push you, given that you have a lot more detail to absorb now, on what we are building and how it replicates or differs from the EU system we have had to date?

James Kane: I would say that, in some ways, they are quite similar. In fact, the differences that are probably the most politically sensitive in the UK system arise in no small part from changes that the EU has recently made to its trade defence system. To take one example, the lesser duty rule is a principle used in trade remedies. That proposes that where there is a difference between the margin of dumping, the extent of the dumping or subsidisation that has occurred, and the extent of the injury that has affected the UK industry, the lesser of those two margins is to be used to calculate the duty.

Until a couple of years ago, the EU universally in all cases used the lesser duty rule. In its most recent reform of its trade defence legislation, it has now provided that it will not apply the lesser duty rule in anti-subsidy cases and it reserves the right not to apply it in anti-dumping cases. The UK is, in effect, sticking with the previous EU system of always applying the lesser duty rule.

To summarise, they look quite similar. In particular, looking at some similarities, unlike the US system they have not gone for a bifurcated model of trade remedies investigation where there are different bodies responsible for assessing whether there has been dumping or subsidisation and whether there has been injury. Those have been integrated within the same body, as they are in the EU. Although some differences have recently emerged, those are in no small part resulting from changes to the EU system.

Craig Williams: Interesting. I don't know whether the other witness wants to come in and add anything. I will pass back to you, Chair.

Chair: Thank you very much. I will move on, because we are going in that direction anyway, to Mark Menzies.

Q6 **Mark Menzies:** Dr Bartels, how adequate do you believe the powers of the Trade Remedies Authority to be?

Dr Bartels: First of all, the Trade Remedies Authority is implementing rights that are given to the UK in its capacity as a WTO member to apply trade remedies as, in some sense, technically a safeguard but more generally to protect itself from unfair trade practices and unforeseen developments. WTO law constrains and sets guidelines for how a domestic agency can exercise that right, the right of the UK in this context.

How to run an agency is not so much a question for me but for the Institute for Government, I would say, but as far as I can see the powers look entirely adequate. In broad terms, the Trade Remedies Authority

looks like what you would expect a trade remedies authority of a WTO member to look like.

Q7 **Mark Menzies:** Good. The Manufacturing Trade Remedies Alliance has said that the UK has, "created a system that potentially makes it harder to adopt measures than any other global trade remedy regime." What are your thoughts on that?

Dr Bartels: That is an interesting one. First of all, I would agree with James that we need to wait to see how the rules that we can read in the primary legislation, in the secondary legislation and in the guidance are actually applied in practice. You can read these rules and you can form the opinion that you have just given me, which is that this is the toughest regime in the world, or you could read the rules and, in up to five or 10 years, realise that the rules are actually interpreted with a degree of flexibility in favour of domestic industry looking for protection.

Let me go through a few examples where one can say that there might be a greater toughening. One is the economic interest test. The economic interest test is equivalent in some ways to what the EU has, which is a Union interest test. Essentially, what you do there is you look at the economic impact of the current situation with dumping and subsidised imports and at the economic situation if you were to impose a trade remedy to guard against those impacts. When you look at the economic situation, you look at all sorts of factors beyond injury to the industry that has asked for the protective measure. You look at the effect on consumers. You look, in the case of the UK, at the effect on competition. You look at the effect on upstream suppliers. You look at the distribution industry. You look at the retail industry.

That all sounds like the affected industry that has asked for the remedies disappears somewhat, and you can see why the manufacturing alliance is a little worried about this because, from its point of view, obviously it would be happier if it was the only consideration: industry to manufacturers, end of story. This is all optional. WTO law does not require you to take into account the economic situation more broadly.

But, to go back to the first point, we do not know what this is going to mean in reality. First of all, there is a presumption that the economic interest test will be met. What that means in practice is hard to say. If we just look over at the EU, it is actually very rare that the Union interest test, which is in many respects similar, has led to any changes in anti-dumping practice. There is a lot of lip service that one sees when these sorts of tests are applied, so we just do not really know.

When it comes to lesser duty, yes, I would say it is tougher. As James was saying, the UK is, let's say, old school in not having any exceptions from the lesser duty rule. The EU has exceptions for subsidisation now. It is not so much discretionary, I would say. It has a specific exception in anti-dumping cases for distorted prices of energy and other raw materials. This has been applied recently in the case of distorted prices for Russian gas, for instance, linked to a non-lesser duty application.

Other countries vary. The US has no lesser duty rule, the Australians do, so saying it is the toughest in the world is a bit strong, but it is certainly on the tougher side when it comes to lesser duty.

Then, of course, there is the political public interest test. I can again see why the manufacturers would be a bit worried about this because the way this works is you run through the whole process. You have established dumping or subsidisation. You have established injury. You have even survived the economic interest test, and as I say we do not know how hard that is going to be to do. Then, at the end of the day, the Secretary of State has a look and says, "You know what, I just don't think I am going to accept this."

What will that mean in reality? In one sense you can say, "Well, that is just making more public what is normally done privately." There is always a political dimension in the EU. The EU member states have a say, usually via the anti-dumping committee. In other countries this is all done behind the scenes, so to have this out there might be greater for transparency. It might dissuade the use of hidden public interest tests finding their way through the system. Again, the basic point is that it could be, but we just do not know yet.

Mark Menzies: That is great. Thank you very much. That is very thorough.

Q8 **Lloyd Russell-Moyle:** The transition is now coming up very soon, at the end of this year, and the Trade Remedies Investigations Directorate is currently reviewing existing EU defence measures that have been imported into the UK with a view to maintaining the measures for the UK after we have left. Is that compliance, first of all, compatible with WTO law, if we have not gone through the whole process ourselves, just trying to piggyback on someone else's process? That is the question I want to put to both of you.

Then a subsequent question is whether the methodology that has been published is robust enough. Do you have any comments about that methodology that the TRID has published in terms of compliance with WTO law to ensure there is a break-in period in January? I do not mind who goes first.

Dr Bartels: James, do you want to kick off on that one?

James Kane: I would never presume to express a view on WTO law with Dr Bartels in the room.

Dr Bartels: Okay, that didn't work. Look, I am a bit reluctant to give a thumbnail legal opinion on this. All I can say is that there are two views. I know that China takes the view that this is not legal because, among other things, the industry that you are now looking to protect is no longer the EU industry. It is the UK industry, which is smaller and, therefore, you should be basing your trade remedy on the new industry. The UK takes the position that, if you look at it, it has already gone through a system where it filtered out trade remedies that did not relate to the UK

and what is left is simply being continued in the manner of a normal expiry or sunset review.

We will probably see arguments on both sides at some point, so I do not want to express a view on whether what the Government are doing is legal, but let's say that there are arguments to the contrary.

Q9 **Lloyd Russell-Moyle:** I understand that. There are always two arguments and China is always going to argue the other side, aren't they? Does the methodology that has been published give us enough of a backstop to be able to make a decent argument that that methodology is robust and is focused on the UK industry specifically? Is that a good basis at least to make those arguments?

Dr Bartels: It is obviously better than having no methodology but, again, this is the sort of thing on which I cannot really express an opinion. I would just rather not say, and not because I am ducking the question. I just do not really know. It is sustainable, let's say. It's sustainable, but beyond that I cannot really say.

Q10 **Lloyd Russell-Moyle:** It is a sustainable position to have. We do not know where it will end up necessarily. James, do you have any views on that? Do you think we will get through the necessary reviews in time? We only have a few months left. What are the consequences if we don't?

James Kane: My understanding is that the transition reviews do not actually need to be completed before the end of the transition period. They need to be completed before the corresponding EU remedy would expire, so there isn't actually a 31 December deadline for the completion of the transition reviews. They can go on some way into the future.

The only thing I would perhaps add to what was just said on the methodology and the process that have been chosen—and not from a legal point of view but purely from a practical one—is that I am not sure what other alternative the UK Government had other than the removal of all the trade remedies. Given the progress in setting up the Trade Remedies Authority, I cannot see how they would have been able to complete full-scale analyses of all the measures concerned within the time available. In a sense, the Government's hand was perhaps forced. I imagine, as they complete the transition reviews, they will seek to remedy that issue, but for the time being I cannot quite see what else they could have done.

Lloyd Russell-Moyle: That is much appreciated. Thank you.

Q11 **Chair:** Dr Bartels, how realistic a chance is there that the Chinese might take some action against the UK at the WTO—just from your comments there—or do you think it is too much for them to bother with?

Dr Bartels: No. It is, of course, realistic. That does not mean they will win. Let's say that what the Chinese are saying is not outlandish, but it is also not a slam dunk. It would not surprise me at all if we saw some sort of challenge. They have already expressed dissatisfaction. Whether that translates into a challenge we do not know.

Chair: Sir Mark Hendrick, you are muted at the moment. My lip reading skills aren't what they should be.

Q12 **Sir Mark Hendrick:** You have been doing that job for long enough. They should be.

The TRA will be required to assess whether it is in the economic interest of the UK to impose a trade remedy. Do the regulations, as you see it, provide a transparent methodology for making that assessment?

James Kane: I would have to say no, probably because I am not sure one could be put into writing. The regulations provide a list of factors that the authority is required to consider when it is deciding whether or not the economic interest test has been met. Those factors seem reasonable to me. They are all the things that you would expect to see.

It is important to remember that the most comprehensive list of factors is not going to give you a simple step by step process that takes you from flat economic data and tells you whether a particular measure is or is not in the interest of the UK. There is always going to be a question of judgment. There are quite a lot of economists out there who would say that trade remedies are never in the economic interest of any country, or at least only in a vanishingly small number of cases.

The regulations do not provide a simple test. There is always going to be an element of judgment there and, to some extent, even of political judgment. Some of the factors that the TRA has to consider are things like impacts on particular geographical areas or particular groups in the UK. Those are important for assessing economic interest, but the question of whether or not it is more important to have a country that is, as a whole, richer or a country where wealth is more evenly distributed between regions is a political question. It is a value question; it is a judgment question. Therefore, I think hoping for a simple step-by-step test to be written down in the regulations was always going to be a vain hope.

Q13 **Sir Mark Hendrick:** Are you saying that, by the nature of the decision to be made, total transparency is not possible because it is too complex?

James Kane: Transparency in the factors to be considered is possible, and the factors to be considered are there in the regulations. As to how the decision is made, no, I do not think total transparency is possible because people have different views about some of the questions that the TRA is required to consider. That is, after all, why the Committee's predecessor said in its last report on the Trade Remedies Authority that the economic interest test was not perhaps an appropriate one for an apolitical technocratic body to be carrying out.

Dr Bartels: I think James puts it very well. I do not have much to add. The factors clearly involve political judgment. Imagine that you are imposing, or are deciding whether to impose, an anti-dumping duty on the import of bicycles. What is being required of an economic interest test is looking not only at Brompton and the rest of the domestic bicycle industry. You are looking at consumers. You might be looking at green

policy. You might be looking at the types of people who work in affected industries and the shops.

As James rightly mentioned, it is worth noting that one of the factors to look at is the effect of the policy choice that is being considered on groups of people that are vulnerable, which have protected characteristics under the Equality Act. That is not the same as working out whether there has been injury to an industry, whether there has been dumping, whether there has been subsidisation. It is an entirely different question, so I fully endorse what James says.

Q14 **Sir Mark Hendrick:** Following on from that, does the inclusion of an economic test mean that it will become more difficult for the UK industries to secure trade defence remedies compared to EU counterparts, for example?

Dr Bartels: It goes back to what I was saying at the beginning. We don't know because we do not know how these factors are going to be weighed and what the results are going to be. We know a steer is given to the TRA, which is that the presumption is that the economic interest test is met. If we take that and also look at EU practice, where the Union interest test has only very rarely led to a limited variation of duties being imposed, the likelihood is that this is not going to be a reason for trade remedies in the UK being tougher than elsewhere. That is probably quite unlikely.

James Kane: I agree completely. It will depend on how the question is judged. I suppose, if you look at the EU trade remedies regulation, you could see a slight push towards trade remedies, given that the regulation requires the Commission to give special consideration to the need to redress dumping. Then, as Lorand just said, you have a corresponding push towards the imposition of remedies in the UK regulations, given that there is a presumption that the economic interest test is met. On paper, they probably look about the same. In practice, it will depend who is judging the interests.

Dr Bartels: Something that is a little unusual but worth noting is that one of the factors to be considered is competition. One of the criticisms of the list of factors is that the Trade Remedies Authority should be concerned with injury and protecting against injury, and should not be looking at broader competition-related issues. That is something that is worth noting but, of course, the economists would say that, ultimately, trade remedies are a proxy for competition rules dealing with imports, so it is easily justifiable on those grounds.

Q15 **Sir Mark Hendrick:** Finally, how might the TRA ensure that the full range of relevant stakeholder views and interests are taken into account when advising the Secretary of State?

Dr Bartels: The way it works is that there is a notice that says there is going to be an inquiry, an investigation, and then there is a registration period. That is the critical time for making sure that your voice is heard. One of the interesting things about the regulations is that they do not

specify—and neither does the guidance, interestingly enough—how long this registration period is. We know from the limited practice that we have seen so far, including a safeguards investigation that was launched only two weeks ago, that the approach of the TRA is to give a registration period of 14 days. That corresponds to the EU's practice as well.

What has to happen in those 14 days? Well, if you are a consumer group or a retailer, or whoever it happens to be, you need to register your interest within that period. That is probably going to be quite straightforward for competitor industries and maybe for the large supermarkets, retailers, distributors and so on who are following all of this, but it is the sort of small window that could easily be missed by smaller operators who are not entirely following what is going on.

That is something that might deserve some consideration, although it is not unusual to have a two-week period for registration of interests. As I said, it is the case in the EU. The fact it is not written down anywhere in legislation or regulations is something we might see popping up in some form.

The other question is: what sorts of people and interests get represented, and how? There is a distinction between interested parties, which is effectively industries, and contributors, which is where others—consumers, unions and so on—come in, and they do not have quite as many rights. Again, it is not unusual, just something to note, that the way the system is set up, let's say, counteracts a little bit the fear that trade remedies will not be applied as often as across the Channel.

Q16 **Sir Mark Hendrick:** Are interests invited to register, or is the onus on the interests themselves to keep abreast of what is going on and then register their interest accordingly?

Dr Bartels: It is a bit of a mix.

Q17 **Sir Mark Hendrick:** James, how do you see it?

James Kane: The only thing I would add that is perhaps of interest is that, in the latest modernisation of its trade defence instruments, the EU chose to create something called an SME help desk, which is essentially a contact point in the Commission that small businesses that feel they are being adversely affected by dumping or by subsidy can go to to effectively get advice on how the system works. We have not yet seen how that works out in practice, and it also does not necessarily contribute to involving a broad range of interests in the system because it is effectively targeted at businesses that want trade remedies to apply.

It would be interesting for the Trade Remedies Authority to consider whether there might be some use in the UK, which is an environment that is perhaps not particularly familiar with the application of trade remedies, to set up a contact point that could perhaps go beyond businesses that want trade remedies to apply and, also, provide some advice to consumer groups, trade unions and so on that may not be acquainted with the system and help them to participate in it.

Q18 **Mick Whitley:** Good afternoon, colleagues. James, how can the independence of the TRA be ensured, given the need to balance both an economic test and a public interest test?

James Kane: The first thing I would say, I suppose, is that the public interest test is not in the hands of the TRA. That is something where there is an explicit recognition that it is a political choice. In fact, the things that people have highlighted when they have been looking at the public interest test have been questions of foreign policy, defence, security, maintaining good international relations and that sort of thing, so that is not something the TRA has to worry about.

As Lorand and I were saying a moment ago, the economic interest test is going to be a tremendous challenge for a body like the TRA to carry out without becoming politicised because it is a very political question. The officials in the TRA are going to have to be very, very careful to, in effect, show their working and perform this task, which in some ways is quite impossible, as best they can.

Looking at the wider structure of the TRA, how can you assure independence from the Department? Well, the governance structure of the TRA is quite strongly influenced by the core Department in comparison with some other bodies. The chair of the Trade Remedies Authority is appointed solely by the Secretary of State. Unlike quite a lot of similar public bodies, there are no pre-appointment scrutiny hearings for the chair. There is certainly no requirement for any parliamentary Committee to consent as there is, for instance, for the Budget Responsibility Committee over the Office for Budget Responsibility. There is a very strong influence of the Secretary of State on the selection of the chair and the members of the board, which could potentially have implications for its independence. It is set up as a statutorily independent body, as a non-departmental public body, but there are lots of such bodies in government whose independence is, to say the least, questionable.

For instance, the TRA will have exactly the same legal status as the Environment Agency. The Environment Agency is very, very closely integrated with DEFRA. Its chief executive sits on the DEFRA group board. There are very frequent conversations between the chief executive of the Environment Agency and the Secretary of State at DEFRA. If that is the model that ends up working with the Trade Remedies Authority, then its independence will be quite seriously limited.

Q19 **Mick Whitley:** Following on from that, who within the TRA would ultimately be responsible for deciding whether to recommend the imposition of a trade remedy? Are the respective roles of the executive and non-executive TRA members clear?

James Kane: I would have to say no. Since the TRA does not yet exist and the members of its board have not yet been appointed—in fact, I think they are holding interviews for them this week—it has not yet formulated any rules of procedure. If you want to know how, for instance,

the Competition and Markets Authority makes its decisions, or the Office for Budget Responsibility, you can go to its website and you will find its rules of procedure, including rules of procedure for different committees. Because the Trade Remedies Authority does not yet exist, we cannot see that, so we do not know yet how it will work internally once it is set up.

Q20 **Mick Whitley:** Finally, what measures have comparable bodies taken to support their independence from Government?

James Kane: Close relationships with Parliament has been one. For the most independent public bodies out there, you would probably look at the National Audit Office perhaps. That is extremely independent of Government. The Comptroller and Auditor General has a very high degree of independence from any Minister. The structure that has been used for that supports it, so the NAO is a non-ministerial Department rather than a non-departmental public body. It gets its funding direct from Parliament through a separate vote and its chair is jointly appointed by the Prime Minister and by the chair of the Public Accounts Committee.

If you want a really, really independent body, that is the kind of structure you need to look for. For other bodies that have the same legal form as the Trade Remedies Authority, as a non-departmental public body, the degree of independence they exercise varies considerably.

Q21 **Martin Vickers:** My question is initially to Dr Bartels. How might the TRA and the DIT work together in carrying out their respective roles?

Dr Bartels: The DIT is ultimately responsible for policy decisions and TRA is responsible for exercising the powers it has been given. In a way, your question dovetails with the previous question, which is independence, because now we are talking about how independent you want the TRA to be. As we were saying before, it is difficult for a purely technocratic body to be deciding on issues that have a strong political element.

On the other hand, to be a bit more prosaic about the situation, the TRA can make use of information that is sourced not just from the Department for International Trade but also from other Departments—in particular, HMRC—and making sure that information streams flow smoothly is going to be critical. A concrete example: it is not uncommon for trade remedies authorities to need to amend the trade remedies that already exist because the existing measures are being circumvented by exporters. How would you know that is happening? Usually, the customs authority, or HMRC in our case, will come up with the data to show that something is a bit fishy and, therefore, it should have a direct line to the Trade Remedies Authority alerting it that something might need tweaking or, for instance, just the very prosaic communication that is needed when it comes to applying customs duties of a trade remedy sort. Do you come up with a new customs code? How do you figure that all out? This is red tape-type stuff. I am sure they will be able to figure this out.

Q22 **Martin Vickers:** Following on from that, does the existing legislation need changing so that the respective roles of the TRA and the Secretary of State are made clearer? From what you have been saying in reply to

both this and the previous question, let's say it is not as clear as it should be.

Dr Bartels: The legislation and the regulations are pretty clear when it comes to distinguishing between the Secretary of State's role, which is effectively to say no to trade remedies, and the Trade Remedies Authority, which is to work out whether there should be remedies in the first place. The difficulty isn't so much clarity on that point. It is that, with the economic interest test, there are a variety of factors that the Trade Remedies Authority will need to take into account and will need to find a good methodology for testing.

We could expect that it will just always tick the box and say, "Yes, economic interest test is met," but if these tests are taken properly, seriously, if we really need to work out what the effect of a trade remedy or not a trade remedy is on a particular group of disadvantaged people in a particular geographical region, that will make it more difficult to come up with a good answer. That can, of course, feed into the Secretary of State's determination of whether or not, even though the economic interest test might be passed, for public interest reasons the trade remedy should not be adopted anyway.

Looking at this in structural terms, I have to say it does not look wrong. It does not look bad. The difficulty is that we are dealing with very difficult issues of how to manage a market. That is always going to be a difficult balance between technocratic, economic, econometric, accounting and auditing type questions on the one hand and hardcore policy on the other. At the moment the balance I think—we will see how it works. We really need to see how this works. At the moment, it does not seem immediately obvious that it is badly designed.

Martin Vickers: Mr Kane, do you wish to comment on that at all?

James Kane: Not particularly. I agree once again that the economic interest test is a tremendously difficult task for any unelected person to carry out. I think the occasion has passed now, but I tend to agree with the Committee's recommendation in its last report on the TRA that that would be much better off being carried out by an elected person.

Q23 **Chair:** Dr Bartels, just listening to a lot of what has gone on there, is there a clear and adequate appeals process in place for challenging trade remedy decisions? I am guessing that it is probably all new.

Dr Bartels: Untested. Yes, it is pretty clear. There is a special regulation that has been adopted to deal with appeals. Essentially, the way it works is that, in the first instance, the Trade Remedies Authority can be asked to reconsider a decision. If that reconsideration involves a question of law, it can refer the legal question to the Upper Tribunal, which is part of the judiciary and will make a determination on a question of law. Then it can reconsider its decision.

The second bite of the apple for an aggrieved party would be via judicial review—this is set out in the same regulation—where the decision of the

Trade Remedies Authority is then referred to the Upper Tribunal and it is treated as any normal administrative decision under normal judicial review principles.

Q24 **Chair:** An aggrieved party might have to deal with an economic interest test and a public interest test. How do those two interplay with each other, and can the public interest test, which might be political, trump the economic interest test from the TRA?

Dr Bartels: It definitely could. That is the function of it. If the economic interest is determined to be that the trade remedy should not be imposed, you do not even get to the public interest test because there is no recommendation by the TRA to protect the industry that has asked for the protection. The public interest test, by its nature, is designed to trump the economic interest. Yes, of course, we are now getting into questions of policy.

Q25 **Chair:** If you are in the ceramic industry, for instance, and you think you have just done it with the economic interest test, the next thing is you could find the public interest test washing away all your work and all your efforts?

Dr Bartels: Yes, you could, definitely, but how likely is this to happen? When the Secretary of State does this, it is not behind closed doors, and the drafters of the regulatory system should be commended for this. The Secretary of State has political discretion and, from everything we have been saying, a lot of this is a question of policy that in a democratic process is appropriately laid at the door of an elected Government, not necessarily a technocratic organisation.

When the Secretary of State makes the decision not to apply recommended trade remedies, the Secretary of State needs to lay a statement explaining the reasons for this before the House of Commons, which is obviously transparent and leads to debate and publicity and so on. Yes, if one looks at it from the point of view of an industry that just wants instant protection, okay, maybe you do not want all these hoops to jump through but, if you look at this from the point of view of the country as a whole, I think the system looks reasonably accountable.

Q26 **Mark Garnier:** Dr Bartels, can I talk to you about the technicalities of setting up an organisation like the TRA? An awful lot of quite complex and sophisticated skills are needed in something like this, and of course we have not been doing any of this stuff for a long time, having devolved all these powers to the European Union. Do you think we are going to have quite a lot of challenges when it comes to recruiting staff and getting it up and running, and do you think there might be any other challenges that we have to face?

Dr Bartels: I have to confess that I do not know quite what the staffing situation is at the TRA in Reading, so I am going to leave that one to James, if he doesn't mind.

What I can say is something about comparable trade remedies authorities in other countries and the sorts of skills that are required. It is a broad mix of skills. You need forensic IT specialists who are able to dig into the records of a company to work out what the prices are. You need business statistics analysts. You need auditing skills, accountants, investigators. You need people prepared to go to other countries, in an ideal world, to conduct the investigations. You need the occasional lawyer to make sure that the right standards are being applied and so on.

I cannot answer your question, I am afraid, with reference to our Trade Remedies Authority because I am not sure how far they have got with staffing and so on, but these are the sorts of skills that are needed.

Q27 **Mark Garnier:** James, they are quite specialist, nuanced and technical skills. Do you think we have them available, and do you think we will be ready by 1 January with TRA?

James Kane: I think there is going to be a challenge. First, looking at pure numbers, I had a look at the written evidence that the Department submitted to this inquiry a couple of weeks ago. It says that they currently have 96 staff members out of 143 posts, which seems rather low. In fact, it seems rather lower than what the then Secretary of State, Dr Fox, said last February when he said that over 80% of the staff of the TRA had already been appointed.

The number of staff seems quite low in the first place, so they will need to fill those as quickly as possible. Some of them will need to be trained. Looking at the job adverts that were put out for these members of staff, they did not specifically require skills relating to international trade or certainly experience of working on trade remedies, so they will need quite extensive programmes of training. I have not seen anything on those training programmes since January last year when the Department said that just over a third of those in post had completed their training. Again, that seems rather low but that was about 18 months ago, so with any luck they will have made some progress since then.

One serious challenge will be pay. Looking at the job adverts again, the investigators that the Trade Remedies Authority or the shadow authority have hired were hired at a civil service higher executive officer level salary of around £32,000. The two joint chief investigators were hired at senior civil service pay band 1 (the equivalent of a civil service deputy director): salary somewhere between £70,000 and £100,000.

Lorand can perhaps provide better advice on the pay rates that obtain in the law firms that will be preparing the dossiers that these investigators will be examining, but I gather they are rather higher. It strikes me you have two problems there. First, you will find it quite difficult to attract people from those kinds of backgrounds if they are, in effect, taking a substantial pay cut and also having to move to Reading if they are currently based elsewhere.

Secondly, you will see serious problems with churn. One of the issues the Institute identified in its paper on trade about three and a half years ago now, in early 2017, was that Departments that developed specialised skills that are of use to the private sector tend to experience major problems with churn. For instance, in HMRC people are trained in a complex or technical area of accounting or law, or something like that, and then they go off to the private companies that deal with those issues and you have a gamekeeper turned poacher situation. It strikes me that the Trade Remedies Authority will be intensely vulnerable to that, given the salary levels they are paying in comparison with those that are paid by the private sector people they will be interacting with.

Q28 **Mark Garnier:** I do not know whether to say you are being brutally honest or depressingly frank. It is one or the other, but it is a very important point. If we look at the financial services regulator, it is well known that people moving up their careers will park themselves with the PRA or the FCA, increase their value significantly, and go off for four, five or six times their salary to work for Goldman Sachs or whoever it happens to be. You think that type of thing will happen.

Given that we are talking about only 143 members of staff and quite a lot of churn, how you do succession planning for an organisation like that? As you set up a new organisation, you still have to bring people through who are going to be the leaders of the future, but if they are not going to last very long, particularly if they are being paid only £32,000 a year, it seems there are an awful lot of inbuilt problems within this new organisation just in terms of incentivising staff.

James Kane: That is going to be a major problem, and it is difficult to know what the future leadership of the Trade Remedies Authority will look like. Certainly, the leadership that has been appointed so far looks very much in the classic civil service generalist vein. The current interim chief executive was, I think, appointed from two professional associations of chiropractors. He was previously the chief executive of the British Chiropractic Association. I have no doubts he is a very competent administrator and will run an organisation of this size very effectively, but if you want an organisation whose leadership has some expertise in this field, I think that is going to be problematic.

Q29 **Mark Garnier:** If I promise I do not hold you to it, what is your hunch? Do you think we will be ready on 1 January?

James Kane: I think the TRA will be ready to accept applications for trade remedies from companies affected and they will process them in compliance with the statute, the regulations and the guidance. Provided you are not holding me to this, I would worry they will have the wool pulled over their eyes quite easily because you will have firms preparing things for them to look at who have an enormous amount of experience of dealing with the EU trade remedies regime and with other trade remedies regimes around the world. They will be preparing the files for them, and I am not entirely convinced that the people the Trade Remedies Authority has in place will be in a position to clear all that up.

Mark Garnier: It sounds like we have a lot of work ahead of us on this Committee to make sure they are up to scratch. James, thank you very much indeed for your thoughts.

Q30 **Chair:** I have a final question to wrap up the session. We know there are a lot of unknowns, but how will the UK's remedies regime interact with the Northern Ireland protocol of the EU withdrawal agreement? What will be the situation as regards trade remedies in Northern Ireland?

James Kane: I will give my view, and then Lorand can give his much more expert legal view. Article 5.4 of the Northern Ireland protocol specifies that the EU legislation listed in Annex 2 to the protocol will apply in Northern Ireland. If you look at paragraph 4 of Annex 2, you will find trade defence instruments and a listing of the relevant EU legislation dealing with anti-dumping duties and anti-subsidy measures.

The way that looks to me as a non-expert reader is that the EU trade remedies regime will continue to apply in Northern Ireland for as long as the protocol does. How that will interact with the UK trade remedies regime is quite an interesting question because some of the factors the TRA will have to consider when it is conducting its investigations deal, for instance, with the UK market.

You may have the quite odd situation where the Trade Remedies Authority in the UK will be considering the market share of a particular group of companies, for instance, to determine whether they meet the threshold percentage of companies that have to complain about dumping for an investigation to be initiated. Some of those companies might be based in Northern Ireland so will not ultimately be affected by the trade remedies that are imposed by the UK as a result of the investigation. I am not sure how that would work in practice, but it strikes me that you may well see oddities of that nature.

Q31 **Chair:** How easy will it be for companies in Northern Ireland? Will they be able to bandy under the umbrella of the EU, or will they be encouraged to bandy under the umbrella of the UK? They have a foot in two camps and there may be a situation, and it may be hard to conceive of, where it is only them who are affected and it would be quite hard for them alone to bring forward some remedies, or very costly at least.

James Kane: Again, I could not claim any special knowledge of how this will work in practice, but it does seem to me that you could end up with a situation where a Northern Irish business will not be able to complain to the Commission about dumping that affects it in particular because it is not a Union industry. I do not think the extension of the EU anti-dumping regulation to Northern Ireland by virtue of the protocol would cause Northern Irish businesses to count as Union businesses. They would be able to complain to the Trade Remedies Authority, but the Trade Remedies Authority would not be able to recommend an anti-dumping duty that protects them because the customs duties that apply in Northern Ireland would be those applied by the EU. I would very much like to get Lorand's views on this.

Chair: Yes, we have teed it up nicely, Dr Bartels. Give us your view.

Dr Bartels: On that final point, it has actually turned up in an EU proposal to the Joint Committee for amending an aspect of Annex 2 as it applies to trade remedies to make it clear that Northern Irish businesses would not have the right to complain. That has not been accepted by the Government as a potential amendment to the Northern Ireland protocol to the withdrawal agreement.

That shows this is a particularly fiddly area. Unfortunately—and I am sorry, I wish I could—I cannot give a clear answer on how this is going to work. Let me set out what the issues are in a broad sense. The difficulty is that Northern Ireland sits a little uncomfortably in two regimes. It is, by virtue of Article 6* of the protocol, within the UK's customs territory, and if you look at the regime for ordinary customs duties that is how it works. It is only products that are at risk of ending up in the EU that are subject to an EU customs duty regime.

Then for other matters, regulatory matters primarily, Northern Ireland sits within the EU regime. The customs union is UK and then other regulatory matters, like the single market, is EU. Where do trade remedies sit there? As James explained, it is not entirely clear at the moment how that is going to work. That has implications for the UK's trade remedies, which it has said apply to Northern Ireland. I think this is an issue that needs to be negotiated.

A final point is that it is not just up to the EU and the UK, because the WTO sits on top of all this. We have not mentioned it all that much, but trade remedies regimes are implementations of rights, as I said before, that are granted to WTO members, and these are very conditional rights. One of the conditions is that you can only protect industry that is your industry, so those rules also have a bearing on this question and it may be that it is in the WTO that we find an answer, or at least the threat of finding an answer in the WTO might knock some heads together and result in a happy resolution within the Joint Committee.

Q32 **Chair:** Without changing the political geography of the current UK and accepting things as they are, what do you think is the most elegant solution to the conundrum that is Northern Ireland's status as regards trade remedies?

Dr Bartels: It is difficult to say. Normally, what happens with trade remedies tends to follow what happens with ordinary customs duties.

Chair: That is a good yardstick to go with. Thank you, Dr Bartels and James Kane. It is nice to see you both again. There is a lot to chew on, not least where we have left it with Northern Ireland. Thank you both for your time this afternoon. Hopefully, we will see you guys again in the not-too-distant future.

---

* Subsequently the witness would like to clarify that he was referring to Article 4 rather than Article 6.

HOUSE OF COMMONS