House of Commons

European Scrutiny Committee

Oral evidence: Regulating after Brexit, HC 125

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Watch the meeting

Members present: Sir William Cash (Chair); Richard Drax; Margaret Ferrier; Adam Holloway; Mr David Jones; Craig Mackinlay; Gavin Robinson; Greg Smith.

Questions 78 - 93

Witnesses

I: Professor Lorand Bartels MBE, Professor of International Law, University of Cambridge, and Counsel, Freshfields; Sam Lowe, Partner, Flint Global; and Shanker Singham, CEO, Competere Ltd.

Examination of witnesses

Witnesses: Professor Lorand Bartels MBE, Sam Lowe and Shanker Singham.

Q78 **Chair:** Good afternoon, gentlemen, and thank you very much for appearing to give evidence this afternoon. I know Mr Singham is joining us from Tokyo and it is about 11.30 pm Tokyo time, so he has had quite a long day. Your time is very much appreciated, Shanker, as is yours, Professor Bartels and Mr Lowe. Thank you for coming. We have a very high-calibre panel today, we are glad to say, and we have been looking forward to hearing from you.

We are interested in better understanding the post-Brexit regulatory environment against which the Government are now legislating and pursuing important policy reforms. The picture, as we see it, is complicated, and it is vitally important that it is understood that, if the most is to be made of the UK's new regulatory freedoms outside of the EU, we must try to find a way of understanding what this really means.

In our first background session, we covered the withdrawal agreement, the Northern Ireland protocol, retained EU law and common frameworks. Today's session has a similar purpose. We are seeking to better understand the constraints that our various UK, EU and international obligations place upon us in the United Kingdom. These may be linked to controlling divergence under the trade and co-operation agreement or being mindful of the push towards competition that new UK free trade agreements like those with Australia and New Zealand are likely to engender. One overlooked issue, as we see it, is international regulatory co-operation, which we also touched on.

Taken together, this information is extremely important when considering Brexit-related reforms, which our inquiry will turn to in the new year. This is a kind of scene-setter. In this regard, we are especially interested in farming and agriculture, the technology and data sector, and financial services.

Before we start, would you mind briefly introducing yourselves? Mr Singham, as you are appearing remotely, perhaps we could start with you.

Shanker Singham: Thanks very much, Chairman. I am Shanker Singham. I am the CEO of Competere, which is an international trade law and policy consultancy. I have served as an adviser to the UK Trade Secretary and also as a cleared adviser to the US Trade Representative in the past.

Professor Bartels: I am Lorand Bartels. I am Professor of International Law at the University of Cambridge. I am also counsel at the law firm Freshfields. I am also chair of the UK's Trade and Agriculture Commission. Shanker omitted to mention, but he won't mind me saying so, that he is also on the Trade and Agriculture Commission.

Sam Lowe: I am Sam Lowe. I am a partner at Flint Global, which is a business advisory firm, where I lead its trade and market access practice. Once upon a time, I was a member of the UK Strategic Trade Advisory Group.

Q79 **Chair:** Thank you. I will put the first question. How would you describe the EU-UK trade and co-operation agreement—a pretty broad question—and how similar to and how different is it from other free trade agreements?

Shanker Singham: The UK-EU TCA is, in broad terms, similar to other trade agreements that have been negotiated around the world. There are areas where it is thinner, shall we say, than some other agreements that have been negotiated, particularly in some aspects of services, for example, and in mutual recognition. There are also areas where it is deeper than other deals; in areas like competition and level playing field obligations, in particular, it is quite deep. It does have a good regulatory practice chapter, which is relevant to this Committee's discussion today.

It is probably safe to say that it is a bit of a mixed bag. I think the UK was mindful not to seek too much from the EU as part of their negotiating posture, which was understood at the time. But I would also make the point that trade agreements do evolve over time, and this trade agreement, like pretty much all trade agreements, has a set of committees under each of the chapter headings that is intended to deepen the agreement over time. These trade agreements do evolve—they are not set in stone—but the broad architecture of the UK-EU TCA is very much along the lines of modern free trade agreements.

Professor Bartels: I agree with everything that Shanker said. I might add just for the sake of completeness, although I do not think we are going to be spending any time on this, that the TCA is a bit of a mixed bag in another sense, which is that there are lots of different elements in it apart from trade. For instance, there are parts on social security, transport, energy and fisheries, which members of the Committee may remember as being very hotly negotiated at the time. But if we are just focusing on the trade dimensions—I assume that we are—yes, I agree. It looks to me very much like a standard free trade agreement in all essential parts. Of course, as Shanker said, there are some parts where it is a little bit deeper and others where it is a bit shallower.

From a conceptual point of view, I might just elaborate on one of those areas. As Shanker said, the agreement does not really do equivalence. That is something that other agreements also do not do but they talk about it more. CETA, for instance—the EU-Canada agreement—is often held up as being one of the great FTAs that talks about equivalence. That agreement often says, "Look at the annexes to see where all the equivalence decisions are," and there are literally blank pages there. I think there was an equivalence decision this year, which is about half a decade after this thing started to be negotiated.

A lot of equivalence in FTAs is more an aspiration. In that sense, there is not all that much in this agreement, and that is pretty normal. That means, as we will come on to, that the role of EU law in the agreement is, I would probably say, non-existent.

Sam Lowe: I would like first to re-emphasise Lorand's point about the fact that the TCA covers more than trade. You asked whether the agreement is similar to other free trade agreements. Most other free trade agreements do not have such in-depth provisions on energy, air transport, road transport, social security co-ordination, fisheries, law enforcement and judicial co-operation. All these different areas sit beneath the same governance framework and at times are linked to each other, sometimes in the context of dispute settlement.

The other point I would make in setting out why one element of it is slightly unusual, although not unheard of, is that the trade agreement does provide duty and quota-free trade across the board, which at the time was unusual for both the UK and the European Union. Since we negotiated this agreement, we have come close to that with Australia and probably will get there with New Zealand once all the different phase-ins come, but it is actually quite unusual to have duty and quota-free trade between developed economies. There is usually some lingering protection in respect of agriculture.

Q80 **Chair:** Does it work? Does the concept that you have described work in practice? We have an agreement but the question is, what is the outcome?

Sam Lowe: The duty and quota-free trade is conditional on the goods that exporters are exporting complying with the rules of origin provisions of the agreement. They have to be able to demonstrate, subject to certain terms and conditions, that the goods were locally produced in either the UK or the EU or in both. It is certainly not the case that all products traded between the UK and the EU qualify for duty and quota-free preferences, but so long as they meet the criteria, they certainly have the opportunity to.

Q81 **Chair:** Is there any disagreement on those points?

Professor Bartels: No. On duty-free and quota-free, we are basically talking about customs duties, and there aren't any. That does not mean that there are no other trade barriers or form-filling that needs to be done—rules of origin forms, other sorts of product-type forms and so on. There is obviously friction and cost in that sense, but to the basic question—do you have to pay tax to export in either direction?—the answer is no.

Sam Lowe: Although—and we will get on to this in the course of the discussion—there are some areas where trade defence measures are still in place. For example, steel exports are still subject to tariff rate quotas when entering the EU and also the other way round.

Chair: Shanker, do you have anything to add to any of that?

Shanker Singham: No, I think that is broadly right. Tariff-free/quota-free is obviously significant, and it does have an impact. I know we are going to get on to the Australia and New Zealand agreements and some of the other trade agreements that the UK has, but we have to bear in mind when we talk about those agreements that this agreement does provide for tariff-free/quota-free from day one without transition periods. If you are talking about competition in agriculture, for example, from other countries with whom we are negotiating trade deals, you have to remember that European exporters do have that beneficial arrangement with the UK.

Q82 **Adam Holloway:** You have already touched on it, but could you tell us a bit more about the UK's obligations in the TCA?

Professor Bartels: It is a thick document, full of obligations, so it is a bit hard to summarise them, but I guess if we are talking about the trade aspects, as with all free trade agreements, I would boil it down to a few core types of obligations that then fill hundreds and hundreds of pages.

One is, as we were just saying, that neither side is allowed to impose customs duties on products coming from the other side, nor are they allowed to restrict exports or impose export duties. At that very simple level, there is free trade. Beyond that, there are rules, as you see in all free trade agreements, that prevent behind-the-border discriminatory measures. Essentially, all trade agreements, from the WTO down to FTAs, are about, in the first instance, customs duty reduction—in this case, complete elimination—and, secondly, non-discrimination rules. That is in terms of goods.

In terms of services, which we have not spoken about yet, the agreement is, let's say, similar to other FTAs that deal with services. It is much more limited than with goods, but the overall idea is that in certain areas where this has been negotiated, each side undertakes not to restrict trade in services, not to discriminate against the other's service suppliers, and so on. Of course, all of this is subject to public policy exceptions, national security exceptions and so on. I do need to emphasise that it is nowhere near as broad with services as it is with goods. There are many, many restrictions. Much is not free between the two sides.

That is, I think, the essence of it. There are other obligations that we may come on to, which are essentially limitations on these freedoms. I think that conceptually speaking, that is the way to think of them. By that I mean that certain activities that can make products too cheap, so that they can then unfairly benefit from the free trade obligations, are limited.

Q83 **Adam Holloway:** What sort of products would they be?

Professor Bartels: Anything, really; it can be absolutely anything. The way that these provisions are drafted is essentially to look at the types of activities that can make the production of products too cheap and try to stop that happening. There is a distinction, conceptually, between trade that is fair, which is when you produce products according to commonly accepted standards, and trade that is seen as unfair. That unfair trade is where, in all free trade agreements—and, for that matter, in the WTO as well—there are rules to stop countries unfairly subsidising, either through money or through not regulating properly, the production of products.

Q84 **Adam Holloway:** I am being dim; I cannot visualise what that activity might be. Can you give an example of a product produced in that way?

Professor Bartels: For example, if you pay money to a factory to make a cheap product, it is too cheap and the EU does not like it, it is allowed to react.

Sam Lowe: Can I give a similar example? Take the industrial emissions directive that we have rolled over post exiting the European Union. Were we to change that in a way that it put less of an obligation on factories, the EU might say, "You are unfairly granting that factory a competitive advantage by subjecting them to less burdensome rules."

Shanker Singham: I think the way to look at this is that the UK's freedom of action, if you will, is limited by a number of things. First, it is limited by its membership of the WTO, which means that it cannot do anything that violates the WTO agreement—or it can, but then it will be subject to trade sanctions and remedies. The TCA operates in a similar way, in the sense that if the UK does violate some of these provisions, as Professor Bartels said, the EU can react. What does "react" mean? It means potentially activating the trade sanctions elements.

Broadly, the areas where the UK is limited in its actions in that regard would be things such as subsidy control. Both Professor Bartels and Mr Lowe talked about some of those restrictions. Both sides, the UK and the EU, have subsidy control measures. The EU has a state aid regime and the UK has a subsidy control regime. What essentially the agreement says is that if you violate the basic norms of those regimes, you may be in violation of the agreement.

We also have level playing field obligations, which I know we are going to come to. Those mean that you cannot lower your labour and environmental standards, broadly speaking with a view to improving your trade or investment advantage. In other words, you cannot lower your labour standards in order to attract a factory or attract trade. The agreement also has good regulatory practice provisions and regulatory co-operation provisions.

As with all trade agreements, if the UK were to violate those rules, it would be subject to trade sanctions. That is the way the international trading system works. It does not say to a country, "You can't do these things"; it merely says, "If you do these things that damage your trading partners, then you have to pay for it."

Q85 **Craig Mackinlay:** This question is probably to you, Professor Bartels. Something very relevant at the moment across all European countries, ours included, is the various levels of energy support mechanisms. There is going to be a huge variety in different countries. I do not know quite what Germany is doing, or Spain, but everybody is implementing some type of energy support scheme. Energy is a huge cost input to steel manufacture, for instance—it is for lots of energy intensive businesses. We have gone up our own track with a fixed price for the next six months for businesses. Would things like that fall outside the TCA and would we, perhaps, have something to say about a particularly generous one in the Czech Republic, for instance?

Professor Bartels: No, it would not fall outside the TCA in principle.

Craig Mackinlay: But the reality is that nobody is doing anything about it.

Professor Bartels: Trade in energy is trade in a product or a service, depending—

Craig Mackinlay: I am more thinking about the energy price that a business has to pay to manufacture whatever product it is making.

Professor Bartels: Yes, that sort of input can easily be a subsidy in principle, but what often happens is that countries subsidise—they subsidise a lot, but it does not necessarily mean that there is going to be a dispute, particularly when countries are all doing the same sort of thing. It is a not throwing stones when you are in a glass house type arrangement. You see that in a lot of areas, particularly when it comes to green energy subsidies. Because all Governments are doing this, nobody really wants to take on another country and test the rules to see how far they go.

Sam Lowe: The TCA does actually include provisions accommodating this. While it was being negotiated, particularly towards its conclusion, we had to take into account the outside environment of covid, where there was also quite a lot of Government spending. There are specific provisions that do accommodate what I would frame as emergency spending. If you have a natural disaster or the like, you can get around these measures, although of course that does not mean that you could never challenge particularly generous schemes or the like; you would have to have a discussion about what was appropriate in the context of an emergency. But for the most part, the example that you gave, given the fact that everybody is doing it, is not something I would be particularly concerned about at the moment.

Professor Bartels: There is another dimension: a lot of this is covered by the WTO anyway, which, incidentally, does not have those exceptions, which are basically taken from the EU state aid regime. You can see an example of how relevant the WTO regime is to EU-UK trade in that just a few months ago, the EU began dispute settlement proceedings against the UK for a local content requirement in a green energy subsidy scheme in the UK, and the UK basically folded and changed its scheme. One needs to look at the full picture. It is not like the TCA exists in a vacuum. The WTO rules are still there, and in some cases they are stronger. In the subsidy area, in some respects they are actually stronger.

Q86 **Gavin Robinson:** Good afternoon, gentlemen. Forgive me that I cannot remain for the entirety of the evidence session and, depending on the length of your answers, perhaps not even for those either.

Mr Singham, do you believe that the TCA is a help or a hindrance in the UK's desire to move away from EU laws?

Shanker Singham: If you look at the different potential models *[Inaudible.]* and their impact on the UK's ability to regulate, obviously there are lots of different models. There is remaining part of the single market, which would take away your ability to regulate autonomously. There are agreements with the EEA and obviously there are different countries—Switzerland, Norway and so on—that have these different models with the EU. What I would say is that the TCA is the way of interoperating the UK and EU regulatory systems that has the least impact on the UK's regulatory autonomy of all those systems. It only affects the UK's regulatory autonomy in the level playing field, labour, environment and some subsidy control areas. Just to add to the previous comments on subsidy control, both subsidy control regimes have provisions with regard to services in the public interest, or services in the general economic interest, as the EU describes them, so there are exceptions to those things.

I think the UK does have, pretty much, quite a high degree of regulatory flexibility with regard to this, even in the labour and environment areas, where the agreement essentially says, "You won't lower your labour or environmental standards with a view to improving your trade or investment position or introducing trade or investment distortions." It is still the case that that does not mean—and this may be an area where the UK and the EU have a slightly different vision of what the agreement actually means—that you cannot change labour and environment provisions, provided you are not lowering the overall standards.

Those are areas where I do not think the UK Government have any desire to lower labour and environment standards, and certainly many of our trading partners, particularly developed country trading partners, provide in their own negotiating objectives that they require countries they are negotiating with not to lower labour and environmental standards. For example, if we ever get to the point of negotiating a trade deal with the US, those are its negotiating objectives; among its negotiating objectives, there is a provision that partners cannot lower their environmental or labour standards.

We are not intending to do that and many of our trading partners would not want us to do that anyway, but you can change things. You can accomplish those outcomes in different ways. That certainly is possible under the trade agreement. Now, the EU may take the position that that provision requires a sort of harmonisation of laws or that your labour and environmental laws are fixed and cannot be changed. I would argue that that is not the case, provided, obviously, that you are not lowering the overall standards.

There is one area where it is quite specific, which is with regard to tax and the BEPS—base erosion and profit shifting—rules that we have all agreed under the OECD. It does provide that we will not change those commitments that we made in the OECD. There is a range of commitments to international standards and international agreements throughout the whole of the TCA where we are affirming that we are not going to change those.

Finally, it also provides—and this is not unusual in trade agreements—that where we are going to regulate in certain areas, we will consult with the trading partner, in this case the EU. It provides that we will talk to them about what we are planning so that no side is surprised by anything we may do. Of course, we can do whatever we want to do, but there is a requirement for consultation in that process.

Q87 **Gavin Robinson:** Thank you. That was very comprehensive. I know that some of my colleagues are going to come on to level playing field later in the session.

Gentlemen, does anything arise from that that you disagree with, or are there any additional policy areas for which you believe the TCA would prove problematic when seeking to diverge?

Sam Lowe: One of the points to draw out is that it does not stop you doing anything. It does clearly articulate the trade-off. Were you to do certain things, it could lead to some of the benefits of the trade and co-operation agreement falling away. My personal view is that that is preferable to living in a different environment, such as in the data space, where we are reliant on an EU adequacy agreement that can be removed unilaterally without any real process and is much more subject, in my view, to political whims and political disagreement and being used as leverage. I prefer the framework to living outside.

In terms of specific areas, I think we should also identify on the environmental side and the level playing field commitments that it does draw out specific areas of interest—for example, industrial emissions, air emissions, air quality, nature and biodiversity, conservation, and waste management. It does focus in on some specific areas that matter.

One area that I think we do need to be aware of is carbon pricing. It does not commit us to retain the same approach to carbon pricing as the EU but it does commit us to have an approach that achieves a similar outcome. I am bringing this up in the context that a colleague of some of yours raised the possibility of stripping away the legacy European emissions trading system in the UK as an example of a Brexit benefit. That is actually an area where I think the EU would potentially raise concern, and depending on what replaced it, it could bring in some of the retaliation that we have referenced and I am sure we will get on to.

Gavin Robinson: Professor Bartels, are you content with that?

Professor Bartels: I think what my colleagues have said covers the essential points.

Gavin Robinson: Thank you very much.

Q88 **Richard Drax:** Gentlemen, good afternoon to you all. Are there any areas not covered by the TCA, or not covered extensively, where it will be easier for the UK to diverge from the EU? Mr Singham, perhaps you could kick off.

Shanker Singham: As I have said, and as Mr Lowe talked about previously, the model is very different from either a commitment to be part of the single market or to agree an agreement with the EEA. It does allow the UK to diverge from EU regulation. There are these specific areas—labour, environment, tax and, to some extent, subsidy control—where the scope of that divergence is limited in outcome. Provided the UK does not lower its outcome standards in labour and environment, it is able to move.

One thing that, if we were to do it, would trigger some sort of trade sanctions from the EU would be if we, for example, dramatically lowered our labour protections in order to attract a factory, investment or trade. The idea of the level playing field provisions, which are the major ones in this area—this applies to the EU as well; we often look at this in terms of only the UK, but the EU is required not to do these things as well—is to ensure that there is not a distortion of trade between the UK and the EU.

The parties will probably disagree about precisely the scope of what that means. The EU may take the position that there is a distortion if there is any difference in regulation. That is a view that they may take. I would submit that I do not think a distortion is necessarily made out in all cases where there is a difference. It could be made out if you are clearly lowering standards, but if you are trying to achieve the same outcomes through different means and you can show that there is no lowering of standards, then I do not think there is such a trade or investment distortion. But it is very possible that both sides will have different views on that, and it is very possible that there may be some sabre-rattling from either side, potentially, about some of those changes.

But just to repeat, any change like that would have to trigger a reaction from the other side. Somebody would have to bring a case and the result of the case would be trade sanctions. There would be no ruling that says, "You, the UK, have to change what you're doing." There would simply be trade sanctions based on a violation of the agreement, and then once you brought your regime into compliance, the trade sanctions would go away. But somebody has to bring a case. As we have seen—there was some discussion about this previously on things such as energy and covid and so forth—nobody is bringing cases on these things, whereas under the WTO agreement on subsidies and countervailing measures, people are bringing, or threatening, cases with regard to, for example, the US's provisions on subsidising some of their environmental and green energy technologies as part of their Inflation Reduction Act.

So people have to bring cases, and I do not think that is necessarily going to be the case if the difference between the UK regulation and where we are now is really a difference in the way you are achieving a particular outcome. A lot of our regulatory reform is about making processes faster and making costs lower through efficiency. Provided that you are not changing the ultimate goal of regulation—for example, the ultimate goal of health and safety regulations—then I think you have quite a lot of flexibility even under the level playing field provisions.

Q89 **Richard Drax:** Professor Bartels, are there any areas not covered by the TCA where it would be easier for the UK to diverge from the EU?

Professor Bartels: We can only really answer that at the level of general principle because it covers the field; it covers all trade in goods and it covers some trade in services, so there is not all that much left over if one is talking about trade and the inputs that go into the production of products or services, which is the level playing field/subsidies-type issue. I suppose there are newer areas where it is partly in, partly out, like data. If we were being fully accurate then I guess, in trying to find an answer to the question, we would look at those areas in services where the agreement does not really do very much. But I cannot give an answer on which those services are, because, as you know, there is a massive annexe to the agreement that has all sorts of carve-outs and it is very hard to dig into and work out exactly what is covered and what is not covered.

I would say that as a general rule, from that point of view, it looks very much like an ordinary trade agreement. It is not fundamentally different from a lot of other free trade agreements.

Q90 **Richard Drax:** Not many areas, I think is the conclusion. Is that what you are saying—that there are not many areas at all?

Professor Bartels: It really depends on how you define the areas. Is it an economic area, is it an area of regulation, or what? It is a bit of a difficult question to answer.

Sam Lowe: From a regulatory perspective I think the UK has a lot of freedom in respect of setting its own regulations for trade in services. We are even seeing with the early discussions on where the UK might seek divergence if we are talking about reform of solvency regimes and the like that, because the trade and co-operation agreement offers so little depth in terms of that relationship and it is not accompanied by an equivalence arrangement for financial services, the UK sort of can do as it wants in that area with very little consequence, in my view.

I want to clarify what the focus is when it comes to these level playing field provisions. It is on regulations that impact upon competitiveness, for the most part. What we are not generally talking about—you do have to talk in generalities because you can always find exceptions—is product standards. To sell a product into the European Union, you have to meet the European Union's product standards. That is unarguable, so they do not necessarily need to have level playing field requirements enforcing EU product standards in the UK. We are trying to set up a different regime and are not doing very well; we keep pushing back deadlines and the like.

We can have different product standards in the UK, but anyone trading with the EU will still have to meet the EU requirements. The level playing field provisions do not really focus on that. From an EU perspective, they are already protected, because it is binary. They tend to focus on things such as the industrial emissions directive that I mentioned—things that affect the competitiveness of firms that engage in trade—rather than the design of the products themselves, where they have existing ways of guarding themselves, if you want to frame it that way.

Q91 **Chair:** You began to touch on a very interesting question about the nature of competition in this context, but also the question whether the EU and the UK have the same idea of what a level playing field is. I do not know whether you are familiar with the work of Professor Vaubel of Mannheim University. He has written about regulatory collusion and produced a very interesting series of pamphlets. Fundamentally, the EU and the UK could quite easily, and almost certainly do already, have a different concept of a level playing field. In the EU they have created a regulatory arrangement based on a legal framework, where it is decided by majority vote. If you were to look, for example, at who wins the votes in the Council of Ministers, you may find, and we do find, that France and Germany tend to get the lion's share of the decision making. That is something that Professor Vaubel has been looking at.

The other side of the equation is that we have a concept of a level playing field that is much more about fairness and competitiveness and not purely regulatory. It is almost a mirror image of the different approaches that we have to the rule of law and the creation of laws between our respective organs of lawmaking, the Council of Ministers on the one hand and our parliamentary system on the other.

What I am concerned about is whether there is such a thing under the TCA as a level playing field that holds up not merely as a matter of theoretical application but in practice. Does it create difficulties if they are coming at it from different premises? In other words, it is a question of apples and pears. Do you notice any difference between the attitudes of the EU historically in relation to a level playing field and the ideas of the

United Kingdom, which are much more attuned to those of other parts of the world, particularly Australia, New Zealand and the United States? Could you give us a sense of where you think the balance is on that issue?

Professor Bartels: It is a little bit hard to know what the UK's approach is in terms of how much it might diverge from the EU because, as you well know, Chair, the UK has been subject to the same rules on level playing field within the EU as other EU member states for a good 40-something years.

Chair: It is 50.

Professor Bartels: One would have to reach back quite far to find something in the DNA of the UK's regulatory approach to say with any confidence that it does diverge from the EU's approach.

When it comes to the provisions on level playing field in the agreement, it is probably worth noting that they were drafted by the Americans. They are American provisions, word for word, which the EU adopted, beginning in the mid-2000s—I think it was 2004 or 2005 when they started to use this terminology. For instance, the main provision on level playing field, on non-regression, states: "A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period". That benchmark is a little bit different from the norm, but the concept about not lowering labour or environmental standards in order to gain a trade or investment advantage is drafted by the Americans, and it has been litigated by the Americans as well. I am not sure that one can look at these provisions as having been introduced into the TCA by the EU. The concept is not an EU concept in origin at all.

Shanker Singham: I want to underscore one of the things that Professor Bartels said there. You ask a very high-level question about this, Chair. There has been a vigorous discussion in international trade policy circles about market distortions for quite a long time, and most of this relates not to the UK and the EU but, really, to China. That is the background for this discussion, and that is why the US's negotiating objectives are no lowering of labour and environmental standards. That is why there is a renewed and heightened focus globally on what in the agreement is called level playing field, but the reference in the agreement is to trade and investment distortions. The idea is that, all other things being equal, the two trading partners should not use their regulatory system or lower the costs of their firms in ways that are anti-competitive and damage trade and investment between the two partners. That has been quite a pre-existing position globally.

One thing I will say is that if you interpret the level playing field provisions of the TCA—this goes to your question—in a way that is focused on whether this is actually a trade or investment distortion, then these provisions are at the forefront of that discussion that is going on in the world. We are likely to see more provisions like this in trade agreements around the world, among lots of partners. On the other hand, if you interpret them in a way that suggests that any difference in approach—this is the difference between an outcome and how you get to the outcome—is automatically a distortion, in other words if you assume a distortion from any difference and your goal is really regulatory harmonisation, then that is significantly different from the way the rest of world thinks about these things. That is going to be a tension between the UK and the EU in terms of how these provisions are precisely interpreted.

That goes to a much more general and higher-level issue about the importance and value that certain countries ascribe to regulatory competition. Is regulatory competition the way that you discover a consumer-welfare-enhancing market equilibrium from your regulatory system, or is it harmonisation? There are obviously costs for business associated with regulation that is just different between parties, but there are also costs to consumer welfare and economic efficiency of anti-competitive regulations. You have these two things in tension. That is not just an issue between the UK and the EU; that is a global issue, and it is an issue that is being fought over in virtually all global fora, but particularly with respect to China distortions and the operation of, for example, China's state-owned enterprises.

Chair: Before I turn to David Jones, I am afraid that I must offer a warning. We notice that we are getting to a point where there could be multiple votes. Each vote takes around 10 minutes, and I am getting concerned about where we are going to be. Let's test the water with a question from David Jones. When we have got that out of the way, we will have a better idea, but the Minister is on her feet in the Chamber at the moment.

Q92 **Mr Jones:** We have discussed this quite a lot already, but in practical terms, how strong an incentive do you believe the level playing field and balancing mechanisms in the trade and co-operation agreement are to ensure that both sides maintain broadly similar labour and environmental standards? Do you think that small reforms or deviations would be tolerated? I am particularly keen to know whether you think that the Government should be mindful of these provisions of the trade and co-operation agreement when pursuing their Brexit freedoms opportunities programme, which Mr Jacob Rees-Mogg was spearheading. Professor Bartels, would you like to start?

Professor Bartels: There are basically two types of level playing field obligation that are important. One is the one that I mentioned before, which is non-regression: UK standards cannot be derogated from with an impact on trade and investment. There is no real suggestion that that is going to happen, I think.

The other is dynamic divergence going forward. There, to answer your question, it is pretty loose, actually. Of course, one would have to look at any given proposal to see whether it pushes beyond what is there, but I might just read out the words themselves, because I think that is the best answer I can give. It is article 411 and it says: "If material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in" the previous paragraph, which are labour and social, environmental or climate protection, along with subsidy control—and so on.

We are talking about two rubbery concepts. One is material impacts on trade and investment. I think that is already an answer, which is that slight effects do not fall under this terminology. Secondly, it needs to be the result of significant divergences between the parties. That is pretty flexible. It is obviously not meaningless—one could imagine certain limitations arising from these words on certain policies if there is huge divergence—but in principle, I don't think it looks like much to be worried about in the ordinary course of lawmaking.

Q93 **Mr Jones:** So, to get back to the final question that I asked, about the extent to which it would inhibit the Government in pursuing their Brexit opportunities, I guess the answer must be, "If there is not significant divergence."

Professor Bartels: Well, that is what comes out of the text, yes. It is also important to remember that, for all the differences in regulatory approach and, to some extent, objectives, we are dealing with first-world entities that pursue broadly the same goals. The UK and the EU are allies in many respects. One has to understand these provisions in that context as well. We are not talking about, for instance, China versus the UK. We are not at that level.

Chair: I would quite like to get through this, because we are going to get a vote soon. Could I get an answer from Mr Lowe first and then, finally, Shanker Singham? Then David has a further point to make.

Sam Lowe: I will try to be brief. I agree with that; however, to your question whether the UK Government should have this in mind when pursuing this reform agenda, yes they should. The reason I say that is that the real preference of both the UK and the European Union is that they want to have this trade agreement. We negotiated it through quite rough circumstances and concluded this was in our interest. We should acknowledge that the ultimate consequence of extreme divergence and being unable to resolve our difficulties is that the trade and co-operation agreement, in most aspects, if not all, could ultimately fall away. I am not saying we are anywhere near that point, but we should have that in our minds.

I would also mention, going back to the Chair's earlier point, that when it comes to tweaks to the regime, there will be differences in understanding on both sides, the UK's and the EU's—Mr Singham has referenced this as well—as to what constitutes regression. I will give one example and then bring it to a close.

Look at, say, the use of neonicotinoids in the context of farming. Were the UK to relax that regime, would that constitute regression from the point of exit? The UK might argue that it did not, because you have a different approach and it is all fine. The EU might argue otherwise. In this context, how do you decide who is right? It goes to arbitration. That is ultimately where that would get decided were that dispute to escalate to a specific point. I am not saying that we are going to have a dispute on that; I am just using it as an example.

Mr Jones: I am expecting a bell to ring at any moment, but Mr Singham?

Shanker Singham: Sam is right that, to some extent, some of these things may be subject to arbitration. In that particular example, it would be relevant that there are EU member states that allow the use of that particular product.

I would say that it is really a question about how we do regulatory reform going forward. The reality is that, with a lot of regulatory reform, the devil is in the detail; it is very much in the very specific aspects of particular regulatory regimes. It is unlikely, in my view, that the outcomes and the regulatory objectives of the two parties are really going to diverge that much because, as was pointed out, we probably broadly have very similar ultimate objectives. We may achieve those objectives in different ways, and that is where I think there is going to be some tension between the EU and the UK for reasons that you mentioned, Chair, in terms of approach to law in general. But to the extent that that occurs, I think that will have to be resolved in litigation going forward.

Chair: Right, we have a vote now.

Richard Drax: Multiple votes, apparently, so we could be quite a while.

Chair: Apparently they are multiple. I am very concerned about this, for obvious reasons. Apart from anything else, for Mr Singham in Japan it must be well after 12 midnight, and he will need to get some sleep. I will make a decision when we have got through this vote, because sometimes they say there are multiple votes and it turns out that they are not quite so bad. After the first vote, we will come back here and then we will evaluate the position. We may even have to come back again rather than keep you hanging around waiting for us to do 10 votes or something like that. We will do this vote now and then we will come back and inform you what the next steps are, and we will try to accommodate you. Thank you.

Sitting suspended for a Division in the House.

On resuming—

Chair: We have come back from the first vote and we know that there are going to be up to four votes in all, immediately. That will take up to about 45 or 50 minutes. In the interests of those watching as well as the witnesses—in particular Shanker, who is in Tokyo, where it is now well after 12 midnight—waiting another hour to resume would not be a good idea, so I am going to adjourn the proceedings. We can come back, perhaps on a Zoom call, having given proper notification to people that we are resuming this extremely interesting discussion, for which we are all extremely grateful. Thank you, Professor Bartels, Mr Lowe and Shanker Singham. I now adjourn the proceedings. We will come back as soon as we can reasonably do so to pick up from where we are now. Thank you all very much indeed.