HOUSE OF LORDS

Select Committee on the European Union

Uncorrected oral evidence: Future UK-EU relations: governance

Tuesday 2 February 2021

4 pm

Watch the meeting

Members present: The Earl of Kinnoull (The Chair); Baroness Brown of Cambridge; Baroness Couttie; Baroness Donaghy; Lord Faulkner of Worcester; Lord Goldsmith; Baroness Hamwee; Lord Kerr of Kinlochard; Lord Lamont of Lerwick; Lord Oates; Baroness Primarolo; Lord Ricketts; Lord Sharkey; Lord Teverson; Lord Thomas of Cwmgiedd; Baroness Verma; Lord Wood of Anfield.

Evidence Session No. 1 Virtual Proceeding Questions 1 - 16

Witnesses

I: Professor Catherine Barnard, Professor of European Union and Labour Law, University of Cambridge; Marie Demetriou QC, Brick Court Chambers; Dr Holger Hestermeyer, Professor of Law, King's College London; Professor Simon Usherwood, Professor of Politics, University of Surrey.

Examination of witnesses

Professor Catherine Barnard, Marie Demetriou, Dr Holger Hestermeyer and Professor Simon Usherwood.

Q1 **The Chair:** Welcome, everyone, to the virtual House of Lords and the European Union Committee, for a virtual evidence session. Thank you to our four witnesses who join us today, who will briefly introduce themselves when they first speak. A transcript will be taken and we will send the transcript to the witnesses shortly. We would be grateful if you could notify us of any corrections that need to be made.

The format for these virtual committee evidence sessions is very slightly different to the normal format. I will call each member of the committee in turn and they will have up to five minutes to ask their questions of the panel of witnesses. After that, I will call the next member. Not quite every member has been allocated a question in normal time. We hope the witnesses will be available for a short amount of extra time afterwards, when the two members of the committee who do not have a question in normal time will have an opportunity to ask questions and any other member of the committee who wanted to ask supplementary questions would have an opportunity as well. I will come on to that later in the session, as we approach the end.

I would be grateful if answers and questions could be kept pretty short and crisp, as we have a lot to get through and this is an important evidence session. I will remind you, as witnesses, to introduce yourself very briefly the first time you speak; we know who you are, but those who are watching will then know as well.

Marie Demetriou, what is your assessment of the very considerable architecture that has been established under the trade and co-operation agreement? What do you perceive as its strengths and weaknesses? How does it compare with structures supporting the EU's other relationships with comparable third countries?

Marie Demetriou: May I thank the committee for inviting me to give evidence? I am a QC, a barrister, practising at Brick Court Chambers in European law, among other areas of law. On the one hand, the institutional architecture of the trade and co-operation agreement is similar to that set up by other comparable international trade agreements and other agreements between the EU and third countries. There are a number of similarities.

There are two main components of the institutional structure. There is a supervisory partnership council, which is there to try to prevent disputes arising in the first place. There are a number of sub-committees under that council. Then there is a procedure for the settlement of disputes in the event that they arise. The procedure varies a little bit, depending on the part of the agreement that is at stake in any particular case. Broadly, it provides for a period of consultation and, if that does not work, an arbitration.

There are some novel features. An important point to appreciate is that, whereas the EU's relationships with other third countries typically aim to try to achieve greater alliance between those third countries and the EU, sometimes because the third countries are ultimately aiming to join the EU, this is very different. Here, of course, the UK has just left the EU so it is already precisely aligned, in regulatory terms, with the EU. The purpose of this agreement is to do the opposite: to permit trade to flow as freely as possible while allowing regulatory unalignment or disalignment—I am not sure what the right word is. That different context means that it is going to operate slightly differently.

There are indeed some novel features. One of the key novel features relates to the level playing field provisions. On the one hand, the level playing field provisions permit the UK and the EU to diverge in terms of regulatory standards. There are a number of provisions that emphasise the concept of sovereignty and the fact that the UK can diverge. If the regulatory burdens are reduced in one jurisdiction, so if the UK reduces some of the regulatory burdens on its businesses, that means businesses in the UK have a competitive advantage over those in the EU. Normally, to equal out those competitive advantages and disadvantages, one raises tariffs or quotas, but this is a tariff-free and quota-free agreement. There has to be some mechanism for keeping an eye on those regulatory differences.

The mechanism here is an unusual one. It provides for rebalancing measures to be taken. That is a novel feature that is different to the association agreements the EU has entered into with third states that are applying to join the EU. That is one of the novelties of this agreement. It might be a great strength and it might be a weakness. It depends on how those provisions are applied in practice by the two sides. By that, I mean if they take a sensible approach to them or if they are constantly being invoked, in which case they may prove a stumbling block to the smooth operation of this agreement.

The Chair: The withdrawal agreement and the TCA together have produced 32 different committees, which are going to be running the relationship. I wondered whether you thought that really was a stable thing, whether you had seen it elsewhere with other countries, and whether you felt it was providing the right sort of framework for developing the UK-EU relationship going forward.

Marie Demetriou: It does seem like an awful lot of committees. One has to bear in mind that the agreement is supposed to be a starting point for the development of furthering the future relationship between the EU and the UK. Indeed, one can see from the opening provisions of the agreement that it is supposed to be a starting point. The first provision says, "This agreement establishes the basis for a broad relationship between the parties". Then at several points the agreement refers to the parties being able to agree supplementing agreements.

The intention is to bring those supplementing agreements under the umbrella of this trade and co-operation agreement. The reason why the infrastructure seems to be so complicated is because it is to set up once and for all an infrastructure that can then be applied to other supplementing agreements as they are brought in. That is the aim. If we end up with lots more supplementing agreements and a very ambitious future relationship, with lots of co-ordination, that infrastructure will be necessary.

Q2 **Baroness Couttie:** Good afternoon. Marie, I would like to start by asking you about your view of the absence of an explicit provision for regular meetings at summit level. What are the prospects for regular UK-EU dialogue at the highest level on issues of common interest?

Marie Demetriou: It is rather noticeable that, although the agreement provides and envisages supplemental agreements and further co-operation, there is not actually a mechanism in this agreement for that to take place. That is something that will have to be ironed out. Had there been something set in the agreement, that would have been helpful. It would have provided some impetus for these supplementary agreements and further co-operation to be agreed. On the other hand, one can see that that is clearly envisaged that the parties will carry on talking to try to further their co-operation. The absence of explicit provision will not be a bar to that. It just might have been helpful if it were there.

Baroness Couttie: We have touched upon this, but the TCA establishes a partnership council, 19 specialist committees and four working groups. There are also various other committees established under the withdrawal agreement. I think there are 32 committees in total. Do you think this is a proportionate governance arrangement? What challenges do you think it creates for both sides?

Marie Demetriou: It is proportionate in that this agreement sets up complicated, complex governance arrangements. Whether they are proportionate depends on whether further agreements are concluded. The intention, which seems to be sensible, was to set up an infrastructure that is capable of being used for deeper co-operation, should that take place. Any supplementary agreements would be brought within the umbrella of this infrastructure. On that basis, it probably is sensible.

Professor Catherine Barnard: I am professor of EU law at the University of Cambridge and deputy director of the UK in a Changing Europe programme. I am very grateful to Marie for setting things out so clearly, specifically in respect of your point about the proportionality or otherwise of the committees. Clearly, quite a lot of things still need to be worked through. It is a triumph that the agreement was concluded, but it was concluded in a rush, so these committees will be doing a lot of the heavy lifting.

The problem is the lack of transparency around all these committees. We have seen how the joint committee worked. That is the equivalent of the partnership council for the Northern Ireland protocol. It is almost

impossible to find out what was on the agenda and what the minutes were of these meetings. Yes, the decisions have been published now, but any attempt at having some sort of input into the partnership council by the Northern Ireland Assembly or any other interested party is very difficult when it is not clear what is being discussed. One of the major issues for this House and the devolved Administrations is how they are going to scrutinise what is going on in these committees and monitor the follow-up from these committees.

Dr Holger Hestermeyer: I am a professor of international and EU law at King's College London. I would like to compare it to the EU-Chile agreement or, for that matter, the UK-Chile continuity trade agreement. When you look at it, you see that the committee structure is similar. I would not regard it as set in stone, because the partnership council has the ability to create new sub-committees or abolish old ones. As such, we do not really know how complex it will end up being in reality. We have to see that it is a really complex trade arrangement. When you have a rules-of-origin problem, it is probably a good idea to have a specialised body on rules of origin that deals with it, rather than have Ministers deal with it, who do not have the technical expertise in that regard.

If you look at the Chile agreement again, the political dialogue mechanism is missing. That is one source of worry. The overlap between the withdrawal agreement and the TCA is another source of worry for me.

Professor Simon Usherwood: I am professor of politics at the University of Surrey. Part of the reason for this difference comes back to that point Marie made, which is that this is an agreement that manages divergence rather than convergence. It does not sit within a broader convergent relationship. That absence particularly of summit-level meetings reflects a question of what those summit meetings would deal with. The architecture of this agreement provides for dispute settlement. Absent a clear programme of future additions, at this stage there is not an immediate need for those summit-level meetings. That is something that you might well see come through. At this point, this represents a starting point for the relationship. We should also recognise that there will be a lot of flexibility and development as we go along and populate the committees and structures over time.

The Chair: That is very helpful all round.

Q3 **Lord Kerr of Kinlochard:** I have a general question for Catherine Barnard, and then I will follow it up with a specific one. Here we are, outside the room, we need to find new ways of influencing what goes on inside the room, to the extent that we can. How can we best do that? Who in London should have ministerial responsibility for it? What resources will we need and how can we best deploy them?

Professor Catherine Barnard: As for who in London should have ministerial responsibility, it clearly has to be a senior member of the Cabinet, whether it is Michael Gove, as was the case in the joint committee, or someone else. The key issue is that they need to be

properly resourced. There is an inherent tension here between what is pragmatic and necessary and where the politics lie. The pragmatism is that we are going to need to know a lot about what is going on in Brussels, because it will affect Northern Ireland directly, in respect of goods, and the United Kingdom indirectly, in respect of those areas where we manufacture and sell into the EU. We need to know what is going on in respect of draft proposals. That requires a lot of resource and access that we should have. Therefore, this would suggest an augmentation of our resource in Brussels, not a diminution.

On the other hand, the politics is, "Nothing to see here. We have left the European Union. We should not be devoting resource to Brussels. We should be devoting resource to global Britain and therefore we should not be putting all our effort into Brussels". The reality is that the European Union is still our largest trading partner and will be for many years to come, because geography matters in trade.

Lord Kerr of Kinlochard: Who should have ministerial responsibility?

Professor Catherine Barnard: This is an interesting question in respect of where the whole management of this process sits within government, whether it should be managed out of No. 10 or out of the Cabinet Office. You would think that, given there is a significant co-ordination role, it should probably be managed out of the Cabinet Office and therefore presumably the Chancellor of the Duchy of Lancaster, Michael Gove.

Lord Kerr of Kinlochard: My specific question concerns what seems to be an effort to downgrade the EU representative in London and treat him the way we treat London-based international organisations that are at the back of the diplomatic list and have discussions with the Foreign Office about their premises, rent and parking permits. Is it a good idea to treat the EU's representative in London on a par with the staff of the International Coffee Organization?

Professor Catherine Barnard: It is deeply unfortunate that this is one of the first decisions that has been taken by the UK in respect of our future relationship. I say that, because the EU will be our major trading partner for years to come. There are a lot of matters that need sorting out. There are also a lot of matters over which we would like to have a say, even though we do not have a seat at the table. All this points to the fact that we should be co-operating with Brussels and putting significant resource in there, as I said. We should also be welcoming the EU's representative in the UK with open arms, giving him or her the same deference that we would to any other ambassador.

This is a fabricated and unnecessary dispute. It is an unnecessary provocation over something that is deeply sensitive. I am reminded that this feels a bit like two parents who have divorced but who still have to get on somehow, because they have the kids' interests to bear in mind; you are seeing that they are carrying on their spats over the divorce through the subsequent relationship. We see that on the UK's side over

the ambassador-or-not level of the appointment. You see it on the EU's side over the cavalier approach to Article 16 that we saw last Friday night over the vaccine export restrictions.

Lord Kerr of Kinlochard: I agree. If the effect is—and it seems to be starting—that our man in Brussels has reduced access to the Council and the Commission, our ability to influence what is going on in the Council and the Commission is bound to be further reduced. Is that right?

Professor Catherine Barnard: I agree with that entirely. Norwegian colleagues say that their limited access is deeply frustrating. They have to use all the tools at their disposal, whether it is drinking coffee or good wine with any either EU official or member state official who is available, just to try to find out what is going on.

That brings us to the related issue: how does the UK exercise some sort of influence? I know the politics are that we should not be devoting our time to this, but, if you accept my analysis that there is an awful lot that needs to be sorted out and a lot of loose ends as a result of the TCA, we need access. We need access at high, medium and low levels. That requires a significant office in Brussels. It is all very well saying, "We can talk to the capitals", but, frankly, a lot of the capitals are very small. They rely on Brussels to do an awful lot of the work for them, because they just do not have the resource to be able to have a developed view on energy or fisheries, for example, particularly if they do not have a fishing fleet. All roads still point to Brussels. It still seems to me that there is going to be significant Eurostar activity between London and Brussels. It should be done on a co-operative basis, as indeed it says in the opening paragraphs of the TCA.

Q4 **Lord Lamont of Lerwick:** Good afternoon, Professor Barnard. We have met a few times before. You have touched on my question. While accepting what you say, that we need to know what is going on in Brussels, is there any general prescription you could make for what the balance should be between approaching and having a dialogue with Europe as an institution and having a dialogue with individual nation states, particularly the larger ones, France and Germany?

Professor Catherine Barnard: You are absolutely right that we should focus on the larger member states, but not just the obvious candidates, France and Germany. It is still worth putting significant resource into semi-like-minded states, such as the Netherlands, Sweden and possibly Denmark. Of course, the state we need to put most resource into is Ireland. If the Northern Ireland protocol is going to function in any way smoothly, it requires significant co-operation with Ireland. Dublin, of course, has a seat at the table.

We need to know what legislation in the field of goods and energy is being proposed in and coming out of Brussels because it will be directly effective in Northern Ireland. It is not just existing legislation that will apply in Northern Ireland but any updates on that legislation or any legislation in the field of operation. One way of having some influence

over that would be through Dublin. As we saw last week, Dublin has considerable influence over the European Commission in respect of getting the Commission to understand the sensitivities around the north-south border.

Lord Lamont of Lerwick: Dublin is the key, really, is it not, because it is also an avenue to the White House? Is there anything we can learn from the way other non-EU countries have managed their relationship with the EU?

Professor Catherine Barnard: It is Brussels first and foremost. I am sure you are aware of the book called *The Brussels Effect*, which makes clear just how extensive the influence of EU legislation is on a global stage. That is why the US and large US companies devote so much time and effort to lobbying in Brussels, in order to try to get their voice heard. As I said, it is not just the high-level interaction. It is also lower-level interaction with officials to find out what is in the pipeline.

Q5 **Lord Oates:** My question is directed particularly to Dr Hestermeyer, and it is in two parts, the first of which is rather broad. What unfinished business will remain for the UK and the EU following ratification of the TCA? Secondly, the EU has entered the TCA under Article 217 of the TFEU; in other words, it is an association agreement as far as the EU is concerned. Can you tell us what the implications of this are likely to be?

Dr Holger Hestermeyer: I will take the second question first. The first thing we have to see is that, for the EU, this is a decision that is largely based on what title of competence we can use. Article 217 is relatively broad in what it allows the EU to do. Of course, given the time constraints, there was a general feeling on both sides that this agreement should be an EU-only agreement, in which the member states do not become state parties and we do not have to go through the ratification hell that mixed agreements imply.

What does that competence mean in practice? Article 217 does not allow the EU to adopt measures that exceed its limits of power. That has been stated in case C-81/13, which actually involved the UK against the Council. It mirrors the internal competences and allows the EU to use that in an agreement with a closely associated party. That is why we see the social co-ordination mechanism in there. That is roughly a copy of the EU regulation in that regard.

We should not be worried about the use of the term "association agreement", which is, to some extent, political anathema in the UK. That is unfair. There are several types of association agreements, not just the ones that prepare a country for accession, which is a category we certainly do not fall into. There are also trade association agreements. The one with Chile that I already mentioned is an association agreement. We also call it an association agreement. There are trade association agreements, there are development association agreements, and this will be a new type of association agreement, the withdrawal association agreement.

On unfinished business, this probably goes beyond the question but we are close neighbours with an enormous trade relationship. Even if the TCA were the perfect agreement, drafted in all thoughtfulness, there would always be unfinished business. Given that there were time constraints, there is unfinished business ranging from legal scrubbing to, for example, provisions on social security co-ordination where member states can choose whether they want to make use of an exemption. That is annex SSC-8. That annex has not been populated yet, because the member states still have to decide which ones want to use it.

There are the more interesting ones for the UK Parliament, for example SERVIN.5.13. That is on mutual recognition of professional qualifications, where the partnership council will have a role in drafting agreements. There is also a memorandum of understanding that is being negotiated on financial services. There are a whole number of these provisions. There is space for further development, for example through supplementing agreements, as provided for in COMPROV.2.

Lord Oates: That is very helpful. You mentioned annex SSC-8 on exemptions. Could you tell me a bit more about that?

Dr Holger Hestermeyer: That relates to detached workers. That is actually in a protocol annex to the treaty. That is Article SSC.11. It states that, by way of derogation and as a transitional measure, member states can make use of certain facilities. There are options mentioned in that provision, but the member states have to notify that before the final entry into force. That will then constitute that annex. If you have printed the agreement out, you will notice that at the moment it consists of pages and pages of empty paper. That will be filled up eventually.

Lord Oates: What do you think will be the hardest bit of the unfinished business to deal with?

Dr Holger Hestermeyer: Quite frankly, it is what I mentioned first, the ongoing relationship, which is a permanently unfinished relationship. We need to get back to a pragmatic relationship between close partners. In the end, the UK and the EU are closely related on almost any international issue. As it goes with neighbours, they are more similar than anyone else but tend to fight more often than anyone else as well. Issues like Northern Ireland, which are incredibly problematic and difficult to resolve, will require ongoing co-operation, even though there is no built-in agenda. There is also a built-in agenda for fish, for example. In 2026, negotiations will start. The energy part will actually be subject to renegotiation in 2026 as well. We have to get back to a pragmatic relationship that allows us to resolve all these issues.

Q6 **Lord Wood of Anfield:** I would like to ask Dr Hestermeyer some more questions on the nature of the future relationship. As you say, it is a different kind of association agreement. As Catherine said earlier, it is also an agreement managing divergence, not just future convergence. I would like to ask about the legal and political status of future

agreements. Is it purely a formality that future UK-EU agreements will be designated supplementing agreements to the TCA, incorporated within the structure, like an association agreement? Do you think new agreements might fall outside of the umbrella of the TCA in the future?

Dr Holger Hestermeyer: Public international law would allow you to do both. Even if a previous agreement would categorically state, "You can never sign an agreement that does not fall into this relationship", a future agreement could depart from previous agreements. That is just a facility that international law provides. The default position would be the one provided for here in the agreement. We also have to distinguish between various types of agreements. There are the self-standing agreements that become attached to COMPROV.2 and there is the built-in agenda, which is subject to different procedures, such as mutual recognition on professional qualifications. That will become an annex to this agreement as soon as the partnership council agrees, according to SERVIN.5.13.

Lord Wood of Anfield: To clarify, in the full range of possible future agreements, from security to fish to professional services, legally there is no problem with them all being within the umbrella, whatever the issue at stake. Is that right?

Dr Holger Hestermeyer: Yes, to a large extent, but I have a preference for governmental mechanisms where we have institutionalised co-operation. It simplifies the contact between the two partners. I would regard it as an advantage that it falls under the governance mechanisms. The disadvantage is the extent to which we would not want certain provisions of that to apply. We would want to depart from dispute settlement or something like that. That would have to be agreed in the future.

Lord Wood of Anfield: As you said, it is a very different kind of association agreement. I am interested in what we can learn from other EU association agreements that might inform the structure of how UK-EU relations might develop. In particular, as I understand it, Article 217 suggests that there has to be some kind of permanent institutional committee arrangement between the UK and the EU. Is that going to be the joint committee writ large, getting bigger as more files are added to the TCA, or is it something else, or do we not know yet?

Dr Holger Hestermeyer: That is the institutional structure we have at the moment. Again, I would recommend looking at the UK-Chile agreement. That also copies the institutional structure of what is also an association agreement. I feel there is particular sensitivity surrounding the EU agreement but we, as the UK, have already done that in another agreement and have already copied the institutional structure as well. We should not worry too much, because, for a lot of these institutions, there are going to be meetings of UK and EU officials on certain topics. That seems helpful, because we have problems to resolve in the relationship. It is good to have a dedicated position there. I do not think the fact that it is an association agreement means it has to develop further.

There is one slight caveat, but we will get to that later on today. Scrutiny becomes relevant, because a living agreement that has a built-in agenda means that there will be parts that develop. Parliament might want to keep an eye on how it develops and what develops and not just let it pass, saying, "We now have this agreement".

Q7 **Lord Faulkner of Worcester:** This is primarily for Marie, but I would be very happy to hear from your colleagues if they have views on this as well. It is trying to tease out whether the words in the first Article of the agreement, "close and peaceful relations based on co-operation, respectful of the parties' autonomy and sovereignty", actually mean anything at all. Is this just window dressing and a succession of clichés? Is it something we should take seriously? If so, how could we make a reality of that?

Marie Demetriou: It is a very good question. Those are not simply words in a preamble; they are in the first Article of the agreement. The starting point is that the parties intended them to have some practical significance, rather than being just window dressing.

The second stage of the inquiry is how you give these words practical significance. In the EU treaties, you have similar broad themes, which have sometimes then been seized on by the European court and given practical significance in case law. If and when disputes arise and are determined by the arbitration panel, which has to interpret the agreement, when the panel is interpreting particular provisions of the agreement, it ought to do so in accordance with these principles, which are stated at the outset.

What might that mean in practice? To take an example from the level playing field area and the question of the rebalancing remedies or mechanisms, the rebalancing process arises if there is significant divergence in regulatory rules leading to a material impact on trade. Those words, "significant divergence" and "material impact", need to be given meaning by adjudicators, by the arbitral tribunal. It is a spectrum. What is meant by "significant"? What is meant by "material"? There is a spectrum of meanings. That is exactly where these sorts of guiding principles can, in principle, come in. An arbitral tribunal, tasked with interpreting concepts and words such as that, might say that "significant" needs to be significant in the context where the parties are understood to have agreed that they are going to diverge. That is an example of a practical context in which this can arise.

One interesting provision in the agreement is INST.29(3), which says that decisions and rulings of the arbitration tribunal cannot add to or diminish the rights and obligations of the parties under this agreement or any supplementing agreement. I do not know what the provenance of that provision was, but you can imagine that it may have been the UK Government that insisted on that because they have not liked the way the CJEU has interpreted the treaty and created law, which is, after all, what courts generally do. There is this provision that purports to place restrictions on what the arbitration tribunal can do.

There are two things going in opposite directions. There are these interpretive obligations or interpretive principles that the arbitration tribunal should have regard to when determining disputes and interpreting the agreement. Then there is this sort of brake on its ability to interpret, because it has to stop short of doing anything that might be said to be adding to the rights or obligations. That is an interesting tension in the agreement.

Lord Faulkner of Worcester: What about the good-faith provision in Article COMPROV.3, particularly the separate reference in the following Article to general good-faith requirements of international law and the Vienna convention? Is that significant as well?

Marie Demetriou: There are two good-faith obligations. There is COMPROV.3 and COMPROV.13. COMPROV.3 is that the principle of the duty of good faith applies in the performance of the agreement. COMPROV.13 is that it applies in the interpretation of the agreement. These mirror the obligations in the Vienna convention. It might be said that they do not really add anything new, because that is an obligation that is there in international law anyway.

You do not see expressly the duty of the good-faith obligation in the Canadian-EU agreement, for example. I am speculating, but I wonder if that was inserted following the United Kingdom Internal Market Bill and the threat of the UK to breach. I do not know; that is speculation. The obligations are there in international law in any event. By putting them in, the parties are highlighting that it is very important that they stick to the spirit as well as the letter of the agreement and that they operate in an honest way.

Lord Faulkner of Worcester: The parties have signed up to it without any reservations.

Marie Demetriou: Yes, exactly.

Lord Faulkner of Worcester: That was a very helpful answer.

Q8 **Lord Thomas of Cwmgiedd:** My questions are about arbitration and dispute resolution. Dr Hestermeyer, the UK's Government's explicit aim was to escape completely from the jurisdiction of the Court of Justice. Have they achieved that?

Dr Holger Hestermeyer: It is always a little scary to answer anything on dispute settlement to Lord Thomas. Yes, largely it has been achieved. There are several caveats, however. The first caveat is that the withdrawal agreement remains in force and the function of the Court of Justice under the withdrawal agreement remains there. The second caveat is union programmes. If you look, for example, at UNPRO.4.4, it is clear that the Court of Justice retains functions where the UK joins Union programmes, but that is very limited and also voluntary, so that was regarded as largely unproblematic. The Government were well aware of what they were doing.

Otherwise, there is *The Brussels Effect*, the Anu Bradford book that was already mentioned. The decisions of the Court of Justice will be relevant factually, but the jurisdiction of the Court of Justice is gone. That was achieved.

There was the fear that was originally there about the Achmea decision of the Court of Justice, where an international body decides bindingly on EU law for the EU. That led to the parties being unable to include new provisions in the agreement, for fear that this would lead either to the Court of Justice having a role or to the agreement not being palatable for the EU because it could not sign it under the case law of the Court of Justice. From what I have seen in the agreement so far, that problem was also avoided.

Lord Thomas of Cwmgiedd: The Government said that there are many precedents for the dispute resolution and arbitration provisions that are in the TCA. Do you agree? Are there ways in which it differs from the prevailing model?

Dr Holger Hestermeyer: Yes, the general dispute resolution mechanism is clearly modelled on dispute resolution mechanisms stemming from world trade law. This, for example, also relates to the provision on not adding and diminishing the rights. That is literally from Article 3.2 of the dispute settlement understanding of the WTO. The dispute settlement understanding of the WTO has always served as a model for the general dispute resolution processes in trade agreements, although trade agreements usually do not provide for an appellant body. These days, even the WTO has a problem with that.

That is the general mechanism. There are some things that are a little bit exceptional. For example, there is Article 3.12 of the level playing field, which provides a special procedure for subsidies. There is the rebalancing mechanism, which is utterly novel and remarkable. For the EU, there is something that is comparatively novel, although it has precedent in other trade agreements. That relates to dispute settlement for level playing field obligations, so for labour rights and environmental rights, that for the EU usually were not subject to sanctions, although that has long been criticised in the EU. The US has always had dispute settlement with a possibility of enforcement afterwards. The EU said, "Negotiation is the better route". Here, there is dispute settlement with attachment of the sanctioning mechanism afterwards. That is different for the EU, but it has precedent under international law.

Lord Thomas of Cwmgiedd: Are there any obvious shortcomings in the process that has been set out in the TCA for dispute resolution?

Dr Holger Hestermeyer: I would not say there are obvious shortcomings. There are things that at times I question. For example, subsidies is really interesting, because it suddenly has a lot of procedures. There is the 3.12 procedure, but also WTO proceedings for subsidies remain applicable, and there is the level playing field procedure.

There are a number of procedures that might create problems. There are some insecurities in the rebalancing mechanism. There is a reference to not invoking WTO law. There has long been a problem relating to that. It is unclear what this means. Does that mean the possibility of rebalancing beyond MFN obligations? To what extent would the WTO allow opting out of WTO dispute settlement? The case law of the WTO around agriculture creates problems here. There is a general problem relating to normal dispute settlement in trade agreements, which is that it always delays and it is only state-state. The real actors in the economy have a problem with acceding dispute settlement, but that is a normal problem that is prevalent in trade law.

Professor Catherine Barnard: I would like to make a couple of supplementary observations. In general, in free trade agreements, the dispute resolution mechanisms are not often invoked. Even under the WTO dispute settlement understanding, 600 or so complaints have been initiated since 1995. It is worth comparing that to the 2,000 or so cases that the Court of Justice hears each year.

When these mechanisms are invoked, a lot of things get resolved at the consultation phase. They do not go all the way to what is called the compliance phase, where you are looking at the excitement of retaliation and cross-retaliation. I think there are only about 15 or so cases at the WTO that have gone all the way to retaliation. They are the ones we know about, but they are relatively few.

You asked about lacunae. I would like to re-emphasise the point that Professor Hestermeyer made about the fact that this is a state-to-state dispute mechanism. It is absolutely standard in free trade agreements and under the WTO, but this is a significant mind shift for those who have been born and bred under EU law, who are used to notions of direct effect, supremacy and the ability to refer cases to the European Court of Justice. All that has been turned off, with the exception of the citizens' rights provisions under the withdrawal agreement. Of course, Northern Ireland, in respect of the areas covered by the Northern Ireland protocol, is still subject to the principles of direct effect and supremacy.

The Chair: We move to another of our members with outstanding credentials in dispute resolution.

Q9 **Baroness Donaghy:** Holger, you already mentioned briefly, in answer to the previous question, about the level playing field. Marie, in answer to the very first question, also referred to the unique nature of that deal. Could you expand on how the process for dispute resolution would differ in the case of disputes over the level playing field? In particular, how will the rebalancing mechanism operate?

Dr Holger Hestermeyer: It is a pleasure to answer your questions. Not all of the obligations in the level playing field are subject to the dispute settlement mechanism. For obvious reasons, internal taxation in the EU, for example, is not harmonised and it is really difficult for the EU to accordingly impose obligations on the outside that on the inside are of, at

times, dubious value. So there are limits in the taxation field. Otherwise, there is a dispute settlement mechanism for things such as non-regression which differs from the normal one. The main difference is that it is a panel of experts. It is separate arbitrators.

Here I would like to bring up one issue that is noteworthy. The non-regression obligations are attached to a trade test. So non-regression as such is not problematic; it is only if there is a trade effect. Here, there are two cases that should be mentioned. One is a case that the US started against Guatemala in the context of the Dominican Republic trade agreement—so in the middle Americas. There, the panel put a rather high hurdle on what "trade effect" means, which makes the provision very difficult to enforce. A second case from this year, between the EU and South Korea, seemed to criticise that hurdle as too high, but actually the case was not about a non-regression obligation that came attached with such a condition.

More interestingly, the rebalancing mechanism relates to possible future divergence in some field—labour, social, environment, climate, subsidy control—where that has a material impact on trade and investment, so again an impact test on trade and investment. And it must be a significant divergence. We do not know what any of that will mean in future interpretation. A party can then take rebalancing measures. What would they be in practice? They could be, for example, the imposition of tariffs. There is a need to notify, a consultation obligation and a possibility for arbitration.

That mechanism is untested. On the one hand, it is an ingenious way to resolve the problem of what happens if the two parties do not trust each other in terms of regulation. In particular, the EU thought the UK would drift away from the regulation system, but nevertheless it wants to dismantle tariff barriers entirely, which is unprecedented in EU trade agreements. On the other hand, the mechanism also risks unbalancing the whole treaty. If you read through the provision, it can result in a review if used too often and the capacity to terminate the trade part of the agreement. So what we need here is political savvy in the application.

I want to go back to something Catherine said. Trade dispute settlement is not very often used. Political discussions happen way more often. States are reluctant to use state-to-state dispute settlement. One would hope that, in those political discussions, serious problems can be avoided and that the mechanism will be invoked sparingly, carefully and only when really necessary—and then both sides accept its invocation and it does not destabilise the agreement.

Baroness Donaghy: Part 3, on law enforcement and criminal co-operation, has its own bespoke political dispute resolution mechanism covering matters including handling of sensitive data, extradition, criminal procedural rights and evidence gathering. Is a political dispute resolution mechanism between states adequate in this context?

Dr Holger Hestermeyer: I wanted to point you to COMPROV.16 on private rights, pointing out the private right exception. There is one for Part 3 that is relevant to note. Otherwise, it is always difficult for this political agreement. A political dispute resolution mechanism is necessary, given the mistrust of the parties. If there is too much state-to-state dispute settlement, it will destabilise the agreement, and I hope that the politicians will be wise. Actually, no matter how unfortunate the Article 16 Northern Ireland protocol episode was, and the fact that there were press statements that it was invoked and that the Commission apparently did not see the problem for a moment, we also have to bear in mind that the political level then reacted—and I hope that that wisdom will prevail. So the political mechanism might not be ideal in that part, but it is nevertheless necessary.

Professor Catherine Barnard: To add to the point on rebalancing, the rebalancing mechanism is short and brutal. If you look at the general dispute resolution mechanism, it can last up to about 160 days. On the other hand, if you look at the rebalancing mechanism, it is possible, for example if the EU thinks that the UK has diverged in a significant way that has a material impact on trade and investment, that the EU can engage in rebalancing—tariffs—straightaway. Then the UK would have the opportunity to take a case to the arbitration tribunal, which has only 30 days to look into this closely.

Why does it matter? Because, I imagine, the EU would apply its own interpretation of a significant divergence that has a material impact on trade. I imagine it will have already thought about that because it had experience of it when it has looked at anti-dumping or state aids. The risk is that the arbitration tribunal does not have a chance to properly engage in this issue, the EU dictates the terms and, before you know it, you have retaliation being applied. The procedure is very short, quick and dirty under rebalancing; it is much more measured under the general mechanism.

There is one other point to note, if you move away from rebalancing and just look at the non-regression provisions. In respect of non-regression, it appears to say that the general dispute resolution mechanism does not apply. In fact, when you look at it more closely, you see that, as Holger said, it starts with consultations and then an expert panel. Then if you dig deep, you see it then paves the way for getting back into retaliation: in other words, it engages the mainstream dispute resolution mechanism, including the hardcore stuff on retaliation. So if those retaliation provisions are used, they are pretty brutal. Where the EU is strategic in its use of retaliation—of course it knows that retaliation has to be proportionate—you can well imagine it thinking about imposing tariffs on, for example, Scottish salmon, because it knows that not only is that a sensitive product but it raises devolution issues. So you can see that already that would generate really serious political consequences as well.

Q10 **Baroness Primarolo:** We are going to pick up the themes that Catherine was just talking about in the context of arbitration procedures. Marie, I

think you are going to answer. I have two questions. The first is a general one. The arbitration procedures in the withdrawal agreement reflect those found in the earlier EU agreements with, for example, Ukraine, but this model was not adopted for the TCA. Are there any practical differences that this will make in the arbitration procedures?

Marie Demetriou: The main difference is one that Holger was discussing before. Under the EU-Ukraine association agreement and under the withdrawal agreement, there was a role for the CJEU, the European court. That was something that the EU was pressing for in negotiations in respect of this trade agreement, but the UK was successful in that regard. It did not want any role for the CJEU. There are other points of detail, but that is the key difference between the two different arbitration procedures.

Baroness Primarolo: The Commission, in its notice to stakeholders on 18 January on the application of EU state aid rules, envisages that Article 10 of the protocol will reach deep into UK subsidy measures by virtue of their "effect on trade". We have discussed this slightly. In particular, that will be between Northern Ireland and the single market. How would such an interpretation of the protocol interact with the disputes resolution procedure in respect of state aids as they are contained in the TCA? You raised it earlier when you talked about INST.29(3). It would link to (4) as well, would it not?

Marie Demetriou: This particular issue is going to be really knotty. There is plenty of scope for differences in views. We have this trade and co-operation agreement, which has some very detailed rules on subsidies. It provides for the UK to implement its own domestic subsidy regime. Although the substantive requirements for subsidies are expressed slightly differently from the EU state aid rules, essentially they are quite similar. It is a regime that is to be implemented domestically and to be adjudicated on by the English courts. Implementing measures are envisaged and so far they have not been adopted, but they will be adopted. That is a domestic subsidy regime that is required by this agreement. There is no space for CJEU involvement, although there is the opportunity for the EU to intervene in judicial proceedings, and obviously vice versa.

So we have that on the one hand. On the other hand, we have Article 10 of the Northern Ireland protocol. That provides that the EU state aid rules will apply to domestic subsidies in so far as they affect trade between Northern Ireland and the EU. So we have a situation where, where you have a domestic subsidy that affects trade between Northern Ireland and the EU, you have two regimes that are applicable. The one under the Northern Ireland protocol is the EU state aid regime, so that requires notification to the European Commission and, ultimately, dispute resolution by the European court.

That is going to lead to some knotty issues arising, particularly because at the moment there seems to be a difference in view between the EU and the UK as to what is meant by "effect on trade" between Northern

Ireland and the EU. The Commission has published, just a few days ago, a communication in which it says that, effectively, it is a very low threshold. It is the same threshold as you have in Article 107(1), which covers the main EU state aid rules in the treaty. Showing an effect on trade between two states under 107(1) is a very low threshold indeed. At the end of the year, on 31 December, BEIS published its own guidance, which takes a different view. It says, "No, no, effect on trade really means manufacturers established in Northern Ireland". So it takes a more restricted view of what is meant, and this is bound to give rise to litigation.

For example, what happens if you have a manufacturer that is not based in Northern Ireland—that is based in England, let us say—but is producing goods that are sold in Northern Ireland and find their way over the border to the Republic? The Commission no doubt would say that that is an effect on trade and that, even though the manufacturer is based in England, any subsidy to that manufacturer is subject to the EU state aid rules and the jurisdiction of the CJEU. The UK Government seem not to be taking that view. So it is a very good question, with respect, but it is a tricky question. All that can be said is that there is a divergence of view on the face of it, and that this is an area that is bound to give rise to litigation.

Baroness Primarolo: Could I be clear that, as you touched on, if it was an enterprise in GB and it traded with Northern Ireland, Article 10 could be engaged? It would fall within that and therefore take a different route. You talked about it finding its way into the Republic of Ireland, but it seems that Article 10 is engaged simply because of the connection between, for want of a better word, GB and Northern Ireland. It could be a company wholly in GB but sending goods to Northern Ireland. So the bar is much lower under this disputes procedure than, for instance, the EU's power over other EU states behaving in this way. It is "significant distortions of competition" that applies to member states, but it is this vague area of "material impact on trade or investment" that is engaged in this Article.

Marie Demetriou: Well, that is slightly different. You are right to say that you could have a company based in GB, which is sending goods over to Northern Ireland, that engages the interstate trade threshold. It is trade between Northern Ireland and the EU, so you would have to show that those goods are crossing the border into the Republic, or at least that they are having some impact on trade in the Republic. Maybe they are posing a competitive threat or something along those lines. The EU's position would be that that was sufficient, and then you would have EU state aid rules applying.

Those state aid rules are very similar, substantively, to the new domestic subsidy regime that has to be set up. The key difference is that they are subject to the jurisdiction of the European Commission and the Court of Justice, which of course is something the British Government have wanted to avoid. The upshot of the Northern Ireland protocol is that it

cannot avoid it entirely. On the EU's interpretation of what is meant by interstate trade, large tracts of subsidies might end up being subject to the European jurisdiction in circumstances where that was not desired by the Government.

Baroness Primarolo: It is really complicated.

Q11 **Lord Sharkey:** My question is about accountability and transparency, and is for Simon in the first instance. It has three parts. How would you like to see Parliament approaching scrutiny of the UK-EU partnership in the months and years ahead? Are there lessons we can learn from how other Parliaments have approached the scrutiny of such relationships?

Professor Simon Usherwood: There is a challenge, which is a historic challenge, that the process since 2016 has been a rather difficult one for Parliament. The Government have not been leaving much space for scrutiny, particularly of the two treaties we have had negotiated. The highly accelerated process of passing those into domestic legislation has not left any space. The challenge here is that the relationship is going to be very wide-reaching. While the Government seem to want to say that this should be the concern of all parts of Parliament and all committees, the risk is that it becomes no one person's responsibility and falls between the cracks.

Particularly, as we have seen in some of the evidence that my colleagues have given, there will be issues that will cut across the responsibilities of particular committees and departments. In that context, it is really important that Parliament maintains a central body or set of bodies that have clear, wide-ranging responsibility for that scrutiny, precisely to make sure that there is an effective coverage and an allowing for sharing of expertise.

One thing that is clear is that this will require specialist knowledge that may not be individual committees' primary responsibility. Having a pool of expertise that can provide that scrutiny will be important as we go along, partly because there will be the implementation aspects of this agreement, which will go through for many years. As Holger has said, we have several parts of the negotiations that are pre-programmed and will continue to be developed. We will also have new areas that are likely to be added on.

In the longer-term perspective of a change of Government, you could well imagine that a different Government might want to add substantial new areas on to this architecture, in which case having parliamentary scrutiny remains important. That is something you have seen in other countries. Having a central committee, whether that is one for each Chamber or a joint committee, as you see in some other countries, has been really important in providing that focus, as well as connecting up with the parliamentary co-operation that is envisaged in this treaty. So joining the dots and connecting the scrutiny, along with the provision of a dense relationship of contact making, will be essential.

Lord Sharkey: Can we turn to the issue of transparency? What steps would you like to see the Government take to promote transparency in the implementation and development of the partnership? What should they do?

Professor Simon Usherwood: Partly it is about making sure that records, agendas and minutes of the various committees that are created are made available. In managing those issues, there is a value in transparency. As we have seen, one of the issues in these first weeks of operation of the agreement has been that many stakeholders have not had clear sight of what is intended and what is involved in the process. That imposes substantial costs. So if we can bring businesses and other social groups along in that process, and keep everyone informed, it is likely to provide more opportunities for early defusing of issues.

Beyond that, it is also about having some transparency about the strategic intent. This is something that still has been absent to date. The Government's medium-term plan for their relationship with the EU is something that needs some kind of structure and debate. The EU is not going to disappear, so how one arrives at a modus vivendi with it is something that is of general interest. Providing a framework, a policy document of some kind, would be a useful first step in helping everyone to have a sense of where this might be heading and what the priorities might be. There is a lot that can still be done, but it is connected with a broader project of consultation and trying to bring people back in after what, for some reasons, has been an understandable desire to keep a very close circle. But we are past that point now and we need to broaden that out if we are to reach something that looks stable and sustainable.

Lord Sharkey: A related issue is the tracking of unfinished business and the likely divergences of UK and EU legislation over time, which is obviously a major task. How should we approach it? Is it a job for Parliament or for government—or even for academics?

Professor Simon Usherwood: Academics love work, so I am sure we would be happy to do that for you. In more sensible terms, it is a job for all sides. Again, the question of who has responsibility in government for this relationship will be a key part of that. I would agree that the Cabinet Office is the logical place to site that, given the very wide scope of the issues and the cross-cutting nature of those issues. But it needs to be a collaborative approach.

One of the things that has been quite striking about this process, right through to the present, is that it has been a progressive process of discovery of issues and challenges. Even with the intense volume of discussion that we have had, there have been things that have arisen and knock-on consequences that have not really been appreciated as we have gone along. In that sense, having a system of tracking and evaluating the impacts is something that needs to have a broad base.

Largely, it is for government to take the lead on that, but in collaboration with Parliament, academics and businesses. Again, this comes back to the question about the management of the relationship more generally. You need a dense network, and that should not all be coming from one place. The more points of contact you have, the more sight you have of issues, the more people you can be in touch with to deal with things as they come up and the more capacity there is to smooth out the bumps before they become major problems and we get into all the challenges we have already discussed.

Q12 **Lord Teverson:** I want to move on to the parliamentary partnership assembly. One of the things I learned from Europe is that I got pretty cynical about organisations that it set up and had that did not do anything and could not decide anything. The Committee of the Regions and EcoSoc were examples. At least they got consulted, but they were not really taken a lot of notice of. So I am really interested in the parliamentary assembly. What role should it have? How can it be effective in any way? What other role models might there be? Will it just become one of those bog-standard European parliamentary delegations, which I was once a member of, that did not really achieve anything? I hope you will prove me wrong, because it is really important that we have a parliamentary dimension to it. So how do we solve that? Catherine?

Professor Catherine Barnard: I hear what you say. Of course, the risk is, with both the PPA and the civil society forum, that they become talking shops and do not actually deliver. It is quite common for these trade agreements to have something of this nature. They are not usually called assemblies. Assemblies are more for multilateral bodies. The European Parliament has 40-odd assemblies of this sort that it participates in. You see something similar in the Canadian CETA, but it is called a joint committee, which may or may not serve a similar function.

There are two points. One is about the rebuilding of trust. We know that trust has been undermined somewhat, certainly over the United Kingdom Internal Market Bill, which we know both formally and informally has done some significant damage to trust on the EU side, and now of course the rather unwitting almost triggering of Article 16 has undermined trust going the other way. So having these meetings is a good start.

Secondly and crucially, this assembly would have some role in triggering alerts to what is coming through and down the system, so that parliamentarians who participate on the PPA can at least then be informed of what is being planned and then bring it back to Westminster to try to feed into discussions.

Picking up on some of the issues that Lord Sharkey raised in his previous question, the scrutiny exercise that needs to be undertaken now is absolutely vast. It is not just scrutinising at high level the implementation of the TCA; it is also scrutinising legislation coming out of the EU that will affect Northern Ireland directly but also will affect UK manufacturers. It is also about scrutinising domestic UK legislation, which has nothing to do

directly with EU law but in fact may ultimately trigger the rebalancing mechanism. So there is a massive approach towards scrutiny that Westminster and the devolved Administrations must set up in order to be able to engage in this process.

Finally, it is striking that the language of the PPA in the TCA talks about the European Parliament and "the" Parliament of the United Kingdom. It seems rather unusual language because, of course, if you were looking at this from Scotland, Wales or Northern Ireland, you would say, "What about us?" So it would be really rather important to have some sort or representation from the devolveds, in order to show that it is a United Kingdom.

Lord Teverson: Simon, very quickly, should this parliamentary assembly be able to have evidence sessions and demand that Commission members or Ministers from the UK give information in front of it? Should it have those powers?

Professor Simon Usherwood: That is very much going to be a function of how it develops. I am not sure that that is the priority issue. The key point is that it is another point of contact. Given the scale of the work and the broader context of low trust, it is more about having another line of communication. That is really where the main value will lie. Again, that might change over time.

Q13 **Baroness Brown of Cambridge:** I am going to direct my question at Professor Barnard again; we are making you work very hard in this session. It has three parts, but I will ask them all together. What is your assessment of the institutional provisions for civil society dialogue and consultation in terms of the domestic advisory groups and the civil society forum? Secondly, why do the domestic advisory groups have remit across the whole of the agreement, whereas the civil society forum is limited to Part 2 on trade? Finally, are there examples of best practice for such consultative bodies in other international agreements? What are the key principles that underpin their operation?

Professor Catherine Barnard: If you look at CETA, the Canadian agreement with the EU, you see that it also has a role for a civil society forum. If you just look at the agenda, which is published on the EU website, you see that it seems to meet annually. If you click on its agenda, you see that it talks through the relevant parts of CETA that directly relate to it. For example, it talks about issues that might have arisen under the labour provisions or the environmental provisions of CETA.

One interesting point to note is that it also meets on the margins of the relevant committee. For example, there is a Committee on Trade and Sustainable Development. The civil society forum meets on the margins of that, in an attempt, presumably, to have some influence over what one of the main committees under CETA is doing.

If you are asking the broader question about how these bodies, such as civil society forums, work and how they avoid becoming what Lord Teverson described as some sort of talking shop that does not deliver a great deal, you can see that there is merit in uniting a civil society forum with the relevant committee to try to have some influence on what that committee is discussing. That would at least provide another way to secure some sort of democratic accountability.

Baroness Brown of Cambridge: Is there any evidence that it has any influence or impact?

Professor Catherine Barnard: To be fair, CETA is new and it has met annually three years in a row. I am afraid I cannot give you insight into whether it has made any difference.

Q14 **Baroness Hamwee:** I saw that Holger wanted to come in on that, but since I am going to be asking a similarly cynical question, he might be able to come in at the end of this. The basis for co-operation, we are told very late on in the agreement, is the rule about upholding the shared values and principles of democracy, the rule of law and respect for human rights. I am not seeking to argue with that, but one thinks, "So what?" I do not want to get into the essential elements, because I know that Lord Ricketts is going to ask about those, but, for those that are not essential, where does that take us? What does it amount to in practice? Is it an occasion for drinking coffee and good wine?

Professor Simon Usherwood: Partly it is about providing another mechanism for control. Part of this is the context of the discussions about the rule of law within the EU, where those cross-cutting issues have been high on the political agenda. There is partly a signalling back to member states about the importance of these issues. In practical terms, within this agreement it is not immediately a critical issue, but it is about providing additional reassurance. Again, this comes back to the general issue around the levels of trust and the environment in which this negotiation took place. It allows the EU to feel that it has another lever to pull, along with all the other levers that are there. But I am not sure that it is the most practically consequential at this point.

Baroness Hamwee: A lever for the EU to pull. What about the UK's levers?

Professor Simon Usherwood: They are also available to the UK. But the UK's view is that it wanted to enter into this negotiation to produce an agreement that it wanted to abide by. As to whether these issues are ones that are likely to be high on the agenda on either side, it struck me more as a provision that was coming from the EU than one that was coming from the UK.

Q15 **Lord Ricketts:** I want to look at the essential elements of the partnership as defined in COMPROV.12, which take their full significance when you read them alongside INST.35, about termination or suspension of the agreement. On the essential elements first, they are a set of

important issues: democracy, rule of law, human rights, fight against climate change and countering proliferation of weapons of mass destruction. But they seem to leave out some other issues that you might consider essential elements; data protection is one. It is also odd that there are no arrangements for structured co-operation at all with the EU on foreign policy generally. Professor Usherwood, what do you make of the list of essential elements in COMPROV.12? Are they the right ones? Catherine Barnard might have a view as well.

Professor Simon Usherwood: The thing that pulls them together is that they speak to fundamental norms of international behaviour. It is not to say that the other things are not important, but in terms of providing grounds for using the suspension and termination provisions in INST.35, they reach a particular threshold and they raise very fundamental issues. That is what pulls them together.

Again, the nature of this treaty is that it is very uneven in its coverage. There are some big areas that are not really touched on very much at all. Whether that in time provides additional reasons for adding to that list is debatable, but at the moment those elements—notably the first ones that you mentioned: democracy, the rule of law and human rights—cover a very wide range of areas, depending on how you choose to interpret them. Again, it will be in any operation of that that you will start to see the questions of whether that is an acceptable delimitation of it.

Lord Ricketts: Professor Barnard, when you are commenting on that, could you also comment on INST.35 and the provisions for termination or suspension of the agreement in whole or in part, which can be triggered if the essential elements are not fulfilled? Is that a serious provision? Is it symbolic? It is a nuclear option, I suppose. How does it strike you?

Professor Catherine Barnard: You are absolutely right that it is a nuclear option, because to accuse a western liberal democracy of not respecting human rights or the rule of law is pretty devastating.

I would just like to make the following observations. On a positive note, the fact that the fight against climate change is included in the essential elements is very good news. I think it is a first in any free trade agreement—although it is always dangerous to say that anything is a first, because you discover somebody knows quite a lot more about it than you do. But that already sends out a strong message, so that is on the positive side.

Of course, all sorts of folk would argue that it is a shame that they have not mentioned other things. You mentioned data, but we could also say labour rights and so forth. So inevitably the list is partial.

The bigger problem is what happens if the UK thinks that not the EU itself but one or two of its member states are not respecting the rule of law or democracy. How does that roll out in respect of the second part of your question, which is about the procedure that is triggered by INST.35? As you rightly point out, it is again a quick procedure. It is a nuclear option,

albeit that you have to have a serious and substantial failure. If it is serious and substantial, that may take a period of time, although it could be something dramatic that has happened. It may well be that the power to terminate the whole agreement, which either side can operate with a year's notice, may be more effective than going through this entire process. So, if the UK is very worried about rule of law issues in some member states of the EU, it may decide that it is better to terminate the whole agreement rather than use this nuclear option.

Professor Simon Usherwood: Very briefly, just to complete Catherine's thought, the only advantage is that suspension provides the opportunity for stopping suspension. It depends on the characterisation of the problem. If you think there is a rule of law problem, do you think that is a structural, long-term, semi-permanent one, or is it something that can be sorted out relatively quickly? That might make a big impact on your choice as to whether you want to suspend or terminate?

Q16 **The Chair:** There are no people who want to ask questions in extra time. That is a testament. However, I would like to ask one. It is really a sweeper question. We have been asking a series of very detailed questions about the institutional and governance arrangements that are now the TCA. We have asked a lot of stuff. I wonder whether there was anything that we should have asked you or if there is any gap that you would like to draw our attention to which we can go away and have a look at.

Professor Catherine Barnard: Your questions have been excellent. What we have not covered at all and what is so rarely covered in any of these discussions is what is happening in the field of services: how services will be managed and how in particular the mobility of people will be managed going forward. There is an important provision in the services part which says that there is a possibility of a review of some of the rules, particularly over short-term business visitors. Any future discussions should focus a lot on services, which account for so much of our economy.

The Chair: Of course, we have a sister committee, the EU Services Sub-Committee, the chair of which is Baroness Donaghy. I know that it is grappling with exactly those very serious issues. That is a very good point.

Professor Simon Usherwood: The one observation I will make, just from reading, is about the multiplicity of termination options that are available within the agreement, both complete and for sections of the text. Given that that is going to be part of the operation of this agreement, if we are thinking about dispute settlements, it might be that one party decides that it is simpler just to close down part of the agreement entirely rather than have endless disputes or issues. So, if we are thinking about this question of implementation, the segmentation that is possible will be something that is potentially quite a key part of both sides' calculations about making this work. We have talked about the range of that, but it is worth keeping that in mind.

The Chair: That is a very helpful thought. Thank you.

Dr Holger Hestermeyer: I have three very quick observations. One is on what is missing. A lot of thought will have to be put into the perspective of individuals and how we can make a trade agreement work for individuals.

The second is a note of cynicism, because that appealed to me very much in the debate. There is a historical layer to the development of free trade agreements that explains quite a lot of them, for example the essential elements clause. At one point it is put into a free trade agreement and then, for example, the European Parliament insists on it being in every agreement, no matter how little it is of concern, or there is an issue that is completely irrelevant to the larger public for a long time and suddenly everyone is interested in it, like ISDS.

My final point is about treaty scrutiny, because of my history with this committee. The new committee will have a lot to grapple with and this agreement is symbolic of that. There will be an MoU on financial services. What happens to treaty scrutiny of MoUs and CRaG? The decisions of the partnership council are binding under INST.4. What happens to treaty scrutiny of that? A parallel issue exists in the EU-Switzerland agreement. I am always in favour of scrutiny. I err on the side of more scrutiny rather than less, also for accountability purposes.

The Chair: The newest committee in the House of Lords is the new International Agreements Committee, the chair of which, Lord Goldsmith, is also on the call. I am sure he agrees, as I do, that that is a very wise point.

Marie Demetriou: Various parts of this agreement have to be implemented in national law. Some of it has been. For example, the future relationship Act gives legal effect to the social security annexe. There are parts that have not yet been implemented in national law. We mentioned the subsidies regime earlier. You then have Section 29 of the future relationship Act, which essentially says that even if it has not been implemented yet and it needs to be implemented, domestic law is to be treated as having implemented it—which is quite a difficult provision. It is a very novel provision, and it is not quite clear how that is going to be applied by the courts.

A priority is getting on with implementing what needs to be implemented in domestic law. Lord Thomas will have a much better perspective than me, but if I were a judge I would be thinking, "What do I do? I am supposed to be applying this new subsidies regime but there is nothing in domestic law that tells me how to apply it". There is the agreement that lays down substantive rules but there is nothing by way of procedure. That is quite a difficult ask of the courts. So one urgent thing is to be getting on with implementing. The Government should be getting on with implementing these areas that need to be implemented.

The Chair: That is another very valuable point. Can I, on behalf of the

committee, thank all four of you for being very generous with your time and having given us an incredibly interesting session? I am sure it will feature very large in our report, which will come out in the second half of March.