



European Affairs Committee

Corrected oral evidence: Dynamic alignment

Wednesday 24 March 2026

11.30 am

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Members present: Lord Stirrup (The Chair); Baroness Ashton of Upholland; Lord Barrow; Baroness Brown of Silvertown; Lord Elliott of Mickle Fell; Lord Grantchester; Lord Jackson of Peterborough; Lord Moynihan of Chelsea; Baroness Smith of Newnham; Baroness Suttie; The Duke of Wellington.

Evidence Session No. 1

Heard in Public

Questions 1 - 13

Witnesses

I: Professor David Collins, Professor of International Economic Law, City St George's, University of London; Professor Catherine Barnard, Professor of European Law, University of Cambridge, and Senior Fellow, UK in a Changing Europe.

Examination of witness

Professor David Collins and Professor Catherine Barnard.

Q1 The Chair: Good morning. Welcome to the European Affairs Committee of the House of Lords and to the first evidence session of our inquiry into the concept of dynamic alignment between UK law and EU law. We are particularly delighted to welcome as our witnesses Professor Catherine Barnard, who is a professor of European law at the University of Cambridge and a senior fellow of UK in a Changing Europe, and Professor David Collins, who is a professor of international economic law at City St George's, University of London. They have kindly agreed to come and give us evidence on an overview of dynamic alignment—that is, what it means and what it is all about.

In that vein, perhaps I could start with a general question, since there is no formally recognised definition of dynamic alignment. What exactly is it? What key features distinguish it from other types of trade arrangement?

Professor Catherine Barnard: Thank you for inviting me to speak to you here today. At the highest level, dynamic alignment means that a country agrees to follow the latest EU law in a particular area. However, I think that you need to break it down a bit more than that.

You could say that there are two ways of looking at it. First, there is unilateral dynamic alignment, where a state voluntarily follows EU rules. There is evidence that we are doing this at the moment; we might come on to the new piece of legislation, the 2025 Act, that allows us to do it. Then you have bilateral dynamic alignment, where dynamic alignment is prescribed in a treaty.

Within that bilateral model, there are probably four sub-ways of looking at dynamic alignment. First, at the one end of the spectrum, you have the EEA agreement—the agreement between the EEA EFTA states, which are Norway, Liechtenstein and Iceland, and the EU—which has had dynamic alignment since 1992. It is perhaps the most generous and, I would say, case-by-case approach to dynamic alignment; it has caused quite a lot of complexity.

Secondly, you have the more recent Swiss model. It also involves a degree of dynamic alignment, but the Swiss have emphasised very clearly that dynamic alignment is not automatic. They have a way of saying, “No, we’re not going to apply these rules”, but there is a consequence as a result: compensatory measures.

Thirdly, you have the Northern Ireland protocol, where Northern Ireland must respect and update 300 or so areas of EU law. That is almost automatic, subject to the Stormont brake in the applicability motion.

Finally, you have perhaps the most robust and brutal one of all: the dynamic alignment found in the Gibraltar agreement. What you see in that agreement is hardcore automatic dynamic alignment in the areas

listed, with a very hardcore sanction for non-compliance: the agreement can be terminated within three months.

So, in talking about dynamic alignment, although you can see that, at the highest level, it means following EU rules, in essence, if you then break down the agreements that already contain dynamic alignment, you actually see a spectrum of approaches.

Professor David Collins: I would add to that. This is an issue of semantics: how do you define these concepts? I would suggest that the phrase “dynamic alignment”, as it is traditionally understood in international law, falls into only the final category to which Professor Barnard just alluded, which, in my view, she was quite right to label “hardcore”.

As it is conventionally understood, dynamic alignment means, “You’re stuck with what the other party tells you to do in perpetuity, and you’re at the whim of the other party as things change”, and this is automatic. That is all absolutely true—it is quite comprehensive in different kinds of agreement where you see concepts that are related to dynamic alignment—but it is not the term that I would use, and I do not think that that term is commonly used. You could call them kinds of dynamic alignment but, at that point, we are playing around with concepts. The definition I think you are alluding to, and the one with which I am familiar, is that final one: “You do what you are told and you do it when we feel like it in future, no matter how things change”.

The Chair: That is interesting. So we already have a definitional issue here in talking about dynamic alignment. Let me follow up on that. Under any of those headings—whether it is dynamic alignment, as Professor Collins said, or hardcore, as Professor Barnard said—does the UK have any dynamic alignment obligations at the moment under the trade and co-operation agreement? If we were to go for some form of dynamic alignment, even if it were a lesser form than the hardcore one that has been described, what would the impact be? How big a change would it be to the current relationship under the TCA?

Professor David Collins: Obviously, you have the Northern Ireland arrangements, which are dynamic alignment in its purest form—let us call it hardcore dynamic alignment—with respect to that particular part of the country. It remains under the umbrella of EU rules, as they change and so on, for the purpose of eliminating the border on the island of Ireland. Following on from that, we have friction between Great Britain and Northern Ireland.

In addition, you have what are, in effect, non-regression provisions—the rebalancing provisions—which refer to changes that might materially affect trade or investment going to either the EU or the UK. That is not real dynamic alignment. It looks a bit like it, but it is not dynamic alignment because it is not obligatory; it is triggered only if substantial changes in investment or trade can be proven. There is a mediation and arbitration mechanism to deal with that; that mechanism is neutral in

that it is not part of either country's legal framework. Should it be determined that there has been a variation in the regulatory framework—one that has led to a material change in trade or investment for one of the two parties—that could potentially trigger compensation obligations, which would be in the form of tariff reductions and so on in other areas. Those are the only facets of the TCA that I would reference.

Professor Catherine Barnard: Obviously, we need to draw a distinction between the withdrawal agreement and the TCA; of course, the withdrawal agreement has dynamic alignment in respect of the Northern Ireland protocol/Windsor Framework, and it is at the reasonably hardcore end of the spectrum.

In respect of the TCA, the whole objective was that we should not have dynamic alignment. My colleague talks about the so-called level playing field provisions in the TCA, which cover matters such as the environment, employment and social affairs.

What is striking about those provisions is that, although the UK is required to keep broadly up to speed with EU provisions, there is no obligation at all to apply those EU provisions. In respect of prospective—ie, new—EU measures that have been adopted post 2020, the EU will look to see whether we have significantly fallen behind and then trigger the mechanism that has been referred to. But in fact, we are not obliged to follow, however closely, the EU rules on social or environmental matters and, indeed, we have not done so.

The Chair: If we were to adopt a process of dynamic alignment in any of the guises which Professor Barnard has suggested—the four flavours, if you like—would that constitute a significant change to the TCA?

Professor Catherine Barnard: Yes, it would. Absolutely.

Q2 **Baroness Smith of Newnham:** I should declare an interest as professor of European politics at Cambridge University, but I am also on the management committee of the Centre for European Legal Studies, of which Professor Barnard is the director. I do not have any financial interests to declare. Before I turn to question 3 on your exam paper, could I just ask for a bit of clarification? I realise that we have not exactly got a glossary of terms that might be helpful for members of the committee. I do not want to pre-empt questions 10 to 13, but when we talk about alignment of rules, are we only talking about regulations? Or could we be looking at directives where we are talking about framework legislation? That was one of the areas where, when the UK was a member of the European Union, we were sometimes accused of gold plating. But are we looking at legislation where we would actually have to decide precisely how we enshrine it into British law?

Professor Catherine Barnard: Traditionally, when we talk about dynamic alignment—if you look at the EEA agreement (that is the 'Norway' agreement)—it covers both legislative Acts and non-legislative Acts. I realise this jargon is not very transparent, but legislative Acts are

adopted via the so-called ordinary legislative procedure and will cover regulations, directives and occasionally decisions. But in addition, it also covers so-called non-legislative Acts which are, in UK-speak, secondary law adopted under the legislative Acts. The terminology is difficult.

The interesting question, which perhaps is implicit in what you are asking, is about case law of the court of justice, in interpreting those legislative Acts and the non-legislative Acts. The combination of dynamic alignment, plus the rather clunky term of the duty of homogeneity, which is strongly there in the EEA agreement, requires, essentially, that the Norwegian, Liechtenstein and Icelandic courts follow the case law of the court of justice, as indeed must the EEA EFTA Court. You see that also being followed through in, for example, the more recent Swiss agreement.

Baroness Smith of Newnham: The very specific question that was wondered about was something like the Product Regulation and Metrology Act, where the UK Government can specify that meeting an EU product regulation constitutes meeting a UK one. Is that dynamic alignment? Is that what you would call unilateral dynamic alignment?

Professor David Collins: That is probably a fair way to characterise that. That is not obligatory, but it is deferential to EU law. It is presumptively valid, but there is no obligation to do so. So, yes, if you wanted to use that term, I think that would be correct.

Professor Catherine Barnard: I would go one stage further. I would say unilateral dynamic alignment, obviously, is the choice of an individual state, and we now have powers to do it. The problem for UK manufacturers is that it still does not mean that they have greater market access. It means that they only have to comply with one set of rules rather than two. Think of the case of CE marking and whether we should have our own version, which, as we know, has somewhat fallen by the wayside. UK manufacturers can now manufacture according to that one set of rules, but nevertheless, because we do not have conformity assessments—that was not in the TCA—widgets made in the UK to EU standards have got to be tested by assessment bodies in the EU to check that they conform to those EU standards, which adds to costs. One of the areas that, going forward, seems to be ripe for further consideration, if the EU would accept it, is something to do with conformity assessment, because we already have so much alignment, and the Product Regulation and Metrology Act will facilitate that further.

Q3 **Lord Moynihan of Chelsea:** Thank you both for coming this morning, and it is good to see you both. Do any countries or trading blocs other than the EU operate trade agreements that involve dynamic alignment or the equivalent?

Professor David Collins: I have looked into this, and I cannot find any example anywhere in the world that is like what the EU does. Even Australia and New Zealand, which have very strong mutual recognition,

do not have dynamic alignment in the sense of a rule-taker and a rule-creator.

Canada and the US do not have this. There is one agreement they have that is a little bit like this, but even that is more consultative. This is an EU concept; to my knowledge, it does not exist anywhere else in the world. It is something that the EU has with its trading partners.

Professor Catherine Barnard: The EU has a lot of it. It goes back to the EEA agreement, which is the testing ground for quite a lot of this.

Lord Moynihan of Chelsea: Are there no others?

Professor Catherine Barnard: No. I would just add on the back of that that the lessons the EU has learned from the EEA agreement, including the problems with the operation of dynamic alignment, have been rectified in some of the much more recent treaties.

Lord Moynihan of Chelsea: To sum up those answers and the good, interesting answers you have given before, I think everybody is keen to reduce trade friction. But this particular mode of doing so is, as Professor Barnard described earlier, a pretty hard, extreme way. It involves giving back control over your laws in sectors where they export much more to you than you do to them. No one else does it. As Professor Barnard said, the TCA was designed explicitly to avoid it. And you pay up for the privilege ahead of time—for example, by giving up 12 years of fish. But would it still be excessive to call it, as some are, extortionate?

Professor David Collins: That is difficult to answer. I am not sure in what context it was called extortion, and I would need to see the final price tag. It seems odd that the United Kingdom, as the country that receives more imports from the EU than vice versa, would be the rule-taker in this regard. Would it not make more sense that the United Kingdom would require the EU to be aligned with its laws, given the nature of the trade flows? That would seem more natural to me.

Since it is not a model that is copied anywhere in the world among countries that have very healthy trading relationships with each other, including Canada and the US, it seems excessive. Just from the standpoint of sovereignty, why would a country surrender its sovereign right to create regulations specific to its own economic needs simply to have access to another country's market when it is offering more lucrative market access than it is receiving, given current trends?

Professor Catherine Barnard: I have two practical points. First, size matters. The reality is that the EU is a regulatory hegemon and therefore sets standards, which it expects everyone who trades into its market will comply with. The EU is still our largest trading partner, so therefore UK companies still look to EU rules, to comply with them. That is my first point.

My second point is if you look at what has happened post Brexit in regulatory dealignment—and by that, I mean departing from EU rules—

there were probably about 7,500 EU rules on the UK statute book at the time of Brexit. About 3,000 or so have been amended or repealed, but there are still 4,500 or so which apply in the UK. In fact, that number has remained pretty consistent, from the time of Rishi Sunak as Prime Minister onwards.

Lord Moynihan of Chelsea: Could I just clarify what you said? I believe you said that this is the price of trading with this regulatory hegemon, but how many countries around the world have not been asked to or do not have dynamic alignment with the EU and trade very happily with it and, in fact, are growing their trade and so forth? Is it not the exception that you get asked to do dynamic alignment, not the rule?

Q4 **The Chair:** In that context, to add to it, you may not be able to answer this, but this morning I was reading about the Australia-EU trade agreement. Are you aware of dynamic alignment featuring in that at all?

Professor David Collins: No, it does not feature in the Australia-EU agreement. It is true that the Australia-EU agreement has somewhat limited market access, and that may precisely be the reason. CETA—the Comprehensive Economic and Trade Agreement between Canada and the EU—is another example. I am not going to suggest that Canada would have the equivalent market access that an EU member state would have or that a partner that is engaging in dynamic alignment would.

If I may say, the focus here is too much on the friction. Too much attention is being paid to the border friction of trade. Clearly, dynamic alignment would work towards reducing frictions and maybe even eliminating them, but that ignores the much larger problem that no one seems to want to look at: the damaging internal effect that the EU regulations will have on this country, if they are adopted. The regulations are anti-growth and anti-prosperity, and that far outweighs any benefit that will arise from the reduced friction at the border.

Lord Jackson of Peterborough: I—

The Chair: Very briefly, if you could. We need to make some progress.

Lord Jackson of Peterborough: I was going to mention Australia and New Zealand. I will ask a specific question. This is in the context of this essentially being manufactured goods, rather than services. Obviously, there has been a different dynamic since 2016 for those two sectors. Has there ever been any academic study of a cost-benefit analysis? Accepting that this is a unique situation—as Professor Collins said, there is nothing in the world like the relationship between the UK and the EU—has there been a cost-benefit analysis that measures the costs and benefits of a regime of mutual recognition vis-à-vis a regime of dynamic alignment? Coming back to the point that David Collins made, there is opportunity cost as well, if you go down the route of closing off opportunities in, say, gene editing and that kind of thing. Has there ever been a study to look at the two different models?

Professor David Collins: I suspect there has, and I certainly will not be able to tell you which one on the spot, or else I would require fact-checking. I am fairly certain that there has been. In particular, with Canada and the US, you may be aware that the USMCA—the United States-Mexico-Canada Agreement—is still under negotiation. It was a rollover from the North American Free Trade Agreement from the late 1990s.

There have been many studies about different levels of integration, the economic costs and what-not. I am not aware that dynamic alignment was ever even remotely considered as a potential eventuality for Canada-Mexico-US relations. It would never have been on the cards. There is no way that would have been politically tolerable in any of the countries. But I suspect that there have been studies. Obviously, the broader the mutual recognition, the greater trade benefits you will recoup from that.

The question is: what are the risks with mutual recognition? Typically, one of the risks with deep, perhaps unrestrained, mutual recognition is that you might get low-quality services, which could be a threat to your consumers or something of that nature. All these things would need to be assessed.

Of course, the WTO wants its member states to recognise mutual qualifications for services. It is right there in the GATT. This is the kind of thing that leads to economic prosperity, and we should welcome that, up to a point.

The Chair: If you become aware of such a study specially, perhaps you could let us know. That would be very helpful.

Professor David Collins: Yes.

Q5 **The Duke of Wellington:** In trying to understand the disadvantages and advantages of dynamic alignment in an agreement, could you tell us how it works when there is a trade agreement between countries and there is no dynamic alignment incorporated into the agreement and the regulatory environment changes between one side and the other? What is the practical outcome of that? What happens when there are different regulatory regimes and a free trade agreement?

Professor David Collins: Typically, what you see in a free trade agreement is that the regulations are harmonised on the basis of principles and respect for similar means of regulation. So, you would have a good regulatory practice chapter. Crucially, for sanitary and phytosanitary arrangements, you would see texts in the treaty along the lines of, for example, the CPTPP, which is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. You would see language to the effect of “parties agree that regulations will be based on scientific evidence and will be no more burdensome than necessary to achieve legitimate social purposes”. There is an understanding that you are more or less on the same page.

If it were to transpire that one of the parties enacted regulation that the other felt did not respect those principles—let us say, for example, that it was not scientific and was perhaps more emotive and terribly risk-averse—consultations would be triggered at one of the committees. Depending on how those went, that could be escalated. Then you might end up having some kind of a claim being brought under the dispute resolution mechanisms of the treaty, which is arbitration, in a neutral arbitral tribunal. There would be committees and meetings, and they would tend to meet several times a year. They would discuss new regulations and why they were doing that: “This is why, let us see the evidence”. It would be done, let us say, diplomatically.

Professor Catherine Barnard: I would like to be pragmatic. We are talking about a relationship with the EU. The EU does not recognise mutual recognition in trading relations with its geographic proximate partners. Those geographic proximate partners will be the EEA states, Switzerland, Andorra and San Marino. We are about to see Gibraltar added to the list, and we could add Northern Ireland to that list, too. Because we are a geographic trading bloc, where the EU dictates the rules, it will not accept mutual recognition. While it might work, and there is equivalence in the New Zealand-EU relationship, New Zealand is on the other side of the world. Mutual recognition is not on offer to us.

The Duke of Wellington: I should quickly declare a farming interest. In something like fresh food, if we have a standard in this country that does not allow hormone-containing food to be fed to animals, and yet in the United States it is permitted, how does that work out in practice?

Professor David Collins: In practice, that would mean that hormone-treated food from the United States could not enter this country’s market. In my opinion, you would have higher prices and less choice for consumers. That might be problematic now. The consequence, if the UK were to allow hormone-treated beef in from the US yet be under the rubric of the EU would be that this would become illegal and it would have to be stopped. The alternative is, absent a dynamic alignment arrangement with the EU, you would have EU non-hormone beef and American hormone beef coming in. You could not have two separate regulatory spheres operating for American and EU beef, because that would be a violation of “most favoured nation” under the WTO. So it would create distortions in the market.

Q6 **Lord Jackson of Peterborough:** First of all, can I observe that this would include partial participation in the single market and so, to a certain extent, is a breach of Labour’s manifesto commitment at the election. That is my observation. You may want to comment on it or not.

I have specific questions around the main question. What is “decision-shaping” in this context? It is something that we have been told is going to be a weapon—not a weapon; that is a bit pejorative—a strategy that we can use. What does it mean in practical purposes? Do you think that inevitably the UK’s involvement via dynamic alignment will mean propping up the EU’s cohesion policy and financial contributions? Is that

inevitable because it will go into a big pot rather than offset economic imbalances across the EU?

I concede that you have not seen the legislation yet, but will we have a practical veto such as the Norwegian veto on the postal services directive, which it exercised and which was subsequently withdrawn? My final question is—I know I have asked a lot of questions here—do you foresee that the EU will say to the UK, “We are going to withdraw some access to the single market if you do not adhere to your legislative commitment for dynamic alignment”? It has not happened before. Do you think it is likely that it would happen?

Professor Catherine Barnard: Thank you for those multiple questions. I will try to break them down into groups. In respect of your observation that this is a breach of the Labour manifesto’s commitment that we will not go back into the single market, the limited dynamic alignment that is proposed in the common understanding really does not touch the core of the single market. The core of the single market covers free movement of goods, persons, services and capital. The areas that are under discussion—energy, SPS and youth mobility—really do not touch anywhere near the core of the single market.

Your question about decision-shaping is a rather interesting one. I wonder whether I might refer you to the Swiss agreement. There has been a package of Swiss measures updating their earlier agreements. The way that the Swiss agreements—it is agreements, plural—work is that the institutional arrangements are now appended to each separate agreement. I have in front of me the agreement on free movement of persons. The institutional arrangements are appended at the back. This spells out what decision-shaping actually means for Switzerland. Specifically, and rather strikingly, it says that the Commission shall inform Switzerland of a draft proposal and informally consult Switzerland’s experts, in the same way that it asks for the views of experts from the member states of the Union, for the drafting of its proposals. So Switzerland will be involved in, or at least consulted over, the drafting. However, once the decision process shifts from the drafting phase to getting into the ‘tunnel’ of negotiations, Switzerland is absolutely kept outside the door. My understanding is that a very similar approach is taken in respect of the EEA states too.

The question is: to what extent will we be able to piggyback on the provisions in the new Swiss agreements so that we can be involved in decision-shaping? I have asked my colleagues from these countries about how influential they are in decision-shaping and what differences it makes. Views vary, it must be said. Some people say that the EU listens to them, particularly if they send very high-quality experts, because the Commission respects high-quality input. Others say that the EU listens to them but that ultimately, if it is an important EU principle at stake, they will not follow them.

The Swiss Government gave an interesting example of where decision-shaping led to a change in legislation. It was legislation on the carrying of

firearms. In essence it was a ban on the general public carrying firearms, but there is an issue in Switzerland about those doing military service. An amendment was made to the directive to allow for those doing military service to be able to take their firearms back home with them. So, there are examples—I would not say many, but there are examples—of where decision-shaping leads to a change.

On your question about whether we will we have a veto, there are in essence de facto vetoes in the EEA agreement and the Swiss agreement. In the EEA agreement, as you probably know, the jargon is about the two pillars. What you see is that the EU says that a measure is EEA-relevant. Once it is designated as EEA-relevant, it goes to the joint committee of the EU and EEA EFTA states to decide whether it really is EEA-relevant and whether it should be incorporated into the EEA annexes—if it is, it has to be implemented by the EEA States. In fact, there are 600-plus pieces of EU legislation that have never gone through that process, including some rather significant pieces on deposit guarantee schemes and GMOs. So, there is a sort of brake in the EEA agreement, which happens because of the blockage in the process that I have just described.

On the Swiss agreement, as I said, it is not an automatic dynamic alignment and it expressly foresees the situation where Switzerland says, “We’re not having that rule”. The Swiss agreement then makes provision for what it calls “compensatory measures”, where it is, essentially, agreed up front that if Switzerland refuses to take on board a new provision on, say, the free movement of persons, it will be blocked in respect of something to do with that area of the agreement. So it is not quite a veto, but there is flexibility.

The Chair: Just for clarification, you referred to the “tunnel of negotiations”. What does that mean? Is it a term of art?

Professor Catherine Barnard: No, I just mean that—

Lord Jackson of Peterborough: Tim has been in the tunnel many times.

Lord Barrow: I am afraid I have been stopped there once.

Professor Catherine Barnard: Maybe it would be better for Tim to explain what the “tunnel” means. I am not using it in a technical way.

The Chair: In which case, I understand. I just wanted to make sure—

Professor Catherine Barnard: Basically, what I mean is that there is a draft text and then, if it is ordinary legislative procedure it goes to the Council and the European Parliament and they will probably try to do it through the trilogue process, which is an extraordinary process that only insiders will have seen. Only insiders have seen how what is known as the sausage factor actually makes the sausages. It is at the making of the sausages stage that there is no involvement by the Swiss and the EEA.

The Chair: We need to make some progress. I will move on to Lord Barrow, who is also interested in this issue.

Q7 **Lord Barrow:** I declare an interest as having negotiated an awful lot of the agreements that we are talking about, as has been alluded to. That is not a financial interest. On this question of the decision-shaping, Professor Collins, I wonder whether you have anything to add, particularly on where decision-shaping has had an impact. It seems to me that the Swiss model and the example about carrying weapons if you are part of the military is not a particularly economic issue. Is there any precedent for decision-shaping where you can see a change to an economic measure on the basis of a third country's representation?

Professor David Collins: In the case of the EU, I do not have anything further to add to what Professor Barnard said. I have no further comments to make on that.

Professor Catherine Barnard: On decision-shaping, the EEA states say that they work very hard at trying to get influence by taking people out for vast amounts of coffee and for lunch, and they say that is probably more effective than decision-shaping. It is probably not so good for their waistlines, but it is better for the overall interests of Norway, Iceland and Liechtenstein.

Lord Barrow: That takes me on to the question of how dynamic alignment is viewed in those countries—Switzerland and other non-EU, non-EEA countries. How controversial is it? We have heard slightly different views from you on how it might be perceived, but how do they perceive it? What benefit do they think they are getting from it? Where are the controversies?

Professor David Collins: My answer will not necessarily be an expert one; it is based more on discussions that I have had with people informally. My sense is that it is viewed with quite a bit of suspicion, particularly in Norway. My understanding is that it is not quite sure what it is getting out of it. I cannot cite any particular study; that is more from conversations I have had.

Professor Catherine Barnard: It depends which side of the political divide you are on, I think—that is, whether or not you are pro joining the EU. Governments—in particular the Government in Norway, which is broadly pro EU and would like to join the EU—find this process problematic because it politicises things that are otherwise quite technical. Furthermore, they are decision-takers not decision-makers so, when the matter goes to the Norwegian Parliament, the equivalent of the Remain side—the side that wants to go in—is having to defend the difficult position, which is that Norway is subject to these rules and had very little say in making them. Each time, it provides an opportunity for those who are hostile to the EU to make the case that this is undemocratic.

On balance, I would say that Norway recognises that it is a small country—it has a population of only 5 million people—and that it is in its collective interest to be in the EEA. In fact, my understanding is that quite a lot of people are happy to stay in the EEA and do not want to join the EU. The trade-off, therefore, is that they are decision-takers. Of course, with a population of 5 million people, it would not have such great say in the EU.

The other point that is worth thinking about is that Norway is a very different country to the UK. Apart from the obvious geographical differences, its principal exports are only four or five products: oil and gas, both of which are hugely wanted by the EU; some alloys; fish and aluminium. That is pretty much it. Because Norway operates at the level of raw materials rather than finished products, it presents much less of a threat to the EU and other states. In the UK, we have a much bigger economy, covering a whole range of issues. Because Norway is in this unique situation and is very wealthy, it is very happy, more or less, with that situation.

Lord Barrow: What about the Swiss?

Professor Catherine Barnard: With the Swiss, it is more interesting because, as you know, there is going to be a referendum in Switzerland on this new package of measures. Things are not at all clear. Even though it would be a very good deal for Switzerland within the confines of the geographic reality of where it is located—the Swiss have got quite a good deal out of the EU—the fact is that there is a reasonable chance that the Swiss public will reject the whole package because of the combination of cantons that have to vote in favour for it to go through. The issue of democratic deficit is very live there.

Q8 Baroness Ashton of Upholland: I am conscious of time so I will wrap my follow-up question into my main question. I do not have any financial interests to declare but, of course, I was Trade Commissioner and then the first EU high rep, so I recognise the tunnel very well from the other side, as it were.

My main question is: why do you think we have agreed to do this? Why have the UK Government decided that this is a good thing in these three areas? I then want to link that to a broader background question, which stems partly from what Professor Collins said about the opportunities that are lost when you do not have an open market. When I was Trade Commissioner, we were very concerned about what you might call flooding the market and the consequences of opening the market—especially in the US, where you had brilliant producers who were capable of sending a lot of products very quickly. All of you will remember chicken and beef, which I lived with for a long time, but, for me, this is a question of national security.

In terms of the broader national security issues with which I and others around this table have been involved, food production was a national security question. If you could neither provide food yourself nor buy it

locally—that is, from your nearest countries—you would run into issues along the lines of, again, what happened in Covid around distribution problems. Of course, we are now seeing the same problem with energy through the Strait of Hormuz, as well as in the broader context of war, climate change and so on. The costs involved can be extraordinary. How far does all that play into any thinking that might go on at either end of the tunnel?

Professor David Collins: Since you have asked such an interesting question, I will tell you my suspicions around why this is being contemplated. It is no secret that the United Kingdom is struggling with a very weak economy. Growth has been awful. Unemployment is high. I would suggest that the Government are grasping at straws and see realigning with the EU as a potential solution to these economic woes.

However, I would suggest that the effect would be the exact opposite. There have been numerous economic studies on this—I am not an economist; I can only read the studies I find—saying that aligning with the EU would have the opposite effect, in that it would lock the country into more problematic regulations, which are burdensome to growth and not conducive to economic dynamism, and would stifle innovation in all of the key sectors. Look at what the EU has done on artificial intelligence, for example. The EU has been a disaster zone in the past 20 years in terms of its economic productivity and its shocking levels of growth, despite its intentions to achieve otherwise. I would also add that the EU is an ever-declining market for the UK: every year, it is declining in the percentage of UK exports and imports.

On your second point, I totally agree with you about national security. You are absolutely right that it is a huge issue. Food security has probably never been more important than it is now. Yet, again, the EU regulations that will flow through as a consequence of dynamic alignment will make it harder and harder for farmers to have livelihoods and to produce food that will be consumed in this country.

I want to make a final point. You referenced the flooding of products into the United Kingdom. That is a danger, of course, but there are mechanisms under international law to protect against that. The WTO's safeguards agreement is there for that purpose. If there were ever a concern that there would be a flooding of, say, dumped products from China or wherever, that mechanism could be triggered; then you can have lawful tariffs that will fit within that timeframe. Also, as I am sure you know, the free trade agreements have other safeguarding chapters that go further in transparency, so there are mechanisms in place to prevent those outcomes coming true.

Professor Catherine Barnard: I am a lawyer, not an economist, but the Government estimate that these agreements might increase the economy by 0.2%. They will not shift the dial significantly. On the other hand, my understanding is that the Government hope that they will be a stepping stone to a further, more proximate relationship. Therefore, the

Government have clearly taken the view that it is in the best interests of the country, but I am not here as a politician.

Q9 Lord Elliott of Mickle Fell: I thank you both for your evidence today. I would like to zoom out to global trade. If the UK Government go ahead with the new agreement with the EU, what will be the impact on trade with the rest of the world—in particular, on the trade agreements that we have negotiated since leaving the EU?

Professor David Collins: This is probably my biggest concern as a lawyer and as someone who is respectful of international law, as I know our Government are.

Let me give the most prominent example. Signing up to dynamic alignment with the EU would probably transgress the SPS chapter of the CPTPP; that is particularly noteworthy since this country joined that agreement only a short time ago. The reason why I suspect there would be a misalignment there is that EU regulations tend to be based on the precautionary principle and very risk averse, not scientifically focused, whereas the SPS chapter of the CPTPP expressly calls for rules based on scientific evidence. So there is a tension there, and you see similar tension in the UK-Australia and UK-New Zealand FTAs, which contain the same wording.

I would be concerned that following EU SPS regulations invites a breach, if another country were to say that this was a reduction in market access into the UK from one of the CPTPP countries. I am just imagining how that might play out. If it led to a legal claim under the CPTPP through its dispute settlement mechanism and the UK were to lose because it was now following rules that were not based on scientific evidence, I do not know what the UK would do. It would not be in a position to amend its regulations to fulfil the rulings of that international tribunal. It would have to go to Brussels and ask for permission to do so, which I suspect would not be forthcoming. That would then leave the UK in breach with the CPTPP, which would probably have knock-on effects in additional market access or tariff reductions, or perhaps even compensatory payments to whichever country it might be—perhaps Australia—which had brought the claim.

I can tell you from my own discussions that trade representatives from Canada, Peru and Japan have all said to me, “What’s going on with Britain? You guys just signed on to the CPTPP but you are already basically thinking of pulling out of it”. It is the SPS chapter that is really the problem here, so I would be very concerned about that.

To follow on from that, we had some commentary earlier about EFTA. As you know, the EFTA states can form their own free trade agreements. They have one with Canada. There is no SPS chapter in it because there cannot be. Those countries have surrendered their SPS regulations to Brussels, and that is what this country would be doing. There could never be SPS chapters ever again in free trade agreements that this country signed, and that would blow a hole in “global Britain”. No country would

waste its time negotiating with Britain because there are only so many things that could be committed to.

SPS is a classic provision of an FTA, and I have it on good understanding—this is second hand now, not my own personal discussion—that it would be the end of a free trade agreement with the US. The US is not going to sign on to an agreement that does involve SPS, which again we cannot do because of dynamic alignment. There are big problems.

Professor Catherine Barnard: This is not my area of expertise, but I will make a couple of observations. First, as we know, it has proved almost impossible to have a free trade agreement with the US, even under a rather different President. Secondly, there is a good chance that the EU will also sign up to CPTPP—it is also having trade deals with Australia and New Zealand—so this perhaps presents a less serious problem than would first appear.

Lord Elliott of Mickle Fell: I noted that Professor Collins's evidence said that alignment with the EU is prioritising economic relations with the low-growth EU over those of the UK's other trading partners. It struck me that the Government want to make growth the number one priority. Professor Barnard, do you think the UK should be prioritising the low-growth EU or trade with the rest of the world?

Professor Catherine Barnard: As I say, I am a lawyer, not an economist, and obviously it is a matter for the politicians to decide which way they want to go. Something that we have learned in the last couple of years, given the current geopolitical situation, is that, while Brexit was thought for a time to be an opportunity for us to do trade deals across the globe, in fact the trade deals that we have done have generated very small returns—the one with New Zealand scarcely shifts the dial—and it therefore seems inevitable that the UK would look at its largest trading partner, the EU, and try to berth more closely to it.

The Chair: That is an issue that we will no doubt wish to pursue later, but we need to move on.

Q10 **Lord Grantchester:** Welcome to the committee. I should declare my interest as having a farm receiving environmental payments. Part of the question is perhaps missing so I will put a little extra wording in and maybe follow up with a quick question. Could you set out in more detail how dynamic alignment is likely to work in the UK case in terms of the legal processes and mechanisms involved? I will add that you should bear in mind that the UK was previously an EU member; that could be taken as a double-edged sword. If there is time for a quick follow-up, how would decision-shaping happen in these circumstances?

Professor Catherine Barnard: Can I just check: do you mean the parliamentary process?

Lord Grantchester: In this case, yes. We might be too early in terms of how our inquiry works with non-government organisations, such as the

Food Standards Agency, but I am thinking that there is quite a jigsaw of complexities in decision-shaping work.

The Chair: We are going to come on to the parliamentary aspect in the next question.

Professor Catherine Barnard: In respect of decision-shaping, there are two things that I will say. First, I anticipate that we would look back to see how we got our experts involved last time. It is possible for even non-EU states to have national experts seconded in. That is an opportunity that the Norwegians use extensively to get upstream knowledge of what is coming before it even becomes a twinkle in the eye of having a proposal. It is extremely important that the work of UKMis is there already, but one of the lessons from Norway is that they put a huge amount of resource into their equivalent of UKMis, which is a very large embassy, to try to find out what is coming down the track. Then the relevant experts—the Food Standards Agency is an obvious example, but also Defra civil servants—would be sent out.

Professor David Collins: I do not have anything to add to that.

Lord Grantchester: Do you envisage a new initial process being involved other than what already existed when we were an EU member?

Professor Catherine Barnard: I imagine it is more likely that they will look to see what is done in respect of EEA and Swiss experts, and piggyback on that. They clearly do not want us to have anything better than Switzerland or the EEA, because there is a long-term concern that we should not be rewarded for having left the European Union.

Q11 **Baroness Brown of Silvertown:** Given that Governments do not like politicising things that are technical, do you think it is important for parliamentarians to have a decisive say in this process? If so, at what point?

Professor Catherine Barnard: The obvious answer is yes, not least because this is a process that is lacking in democracy. It is clear that we will ultimately be decision-takers, so what little mileage we can get out of parliamentary involvement we should absolutely use.

It is worth bearing in mind, and you will know this better than me, how the Parliamentary Partnership Assembly works, and that there are softer ways of influencing apart from the harder ways that we have talked about. It is important that some decent horizon scanning should be done before a measure even gets adopted. There is some evidence of that happening in respect of Northern Ireland already, but then of course we need to be on it, both in the influencing and lobbying that is done in Brussels and in the fact that Parliament should get a say in, or at least sight of, what is being proposed. I say Parliament, but of course a lot of the proposals in this area cut across the work of the devolved Administrations, so there is a role not just for Westminster but for Cardiff and Edinburgh as well. There needs to be some quite good thinking about how the mechanism works between Westminster and the devolveds.

The loss of the European Scrutiny Committee in the Commons is significant. The Commons Foreign Affairs Committee's report points out that it is the one who keep an eye on what is coming. But, of course, it specialises in foreign affairs; it does not specialise in specific issues about animal welfare or diseases. It would seem logical to have a European scrutiny committee that could second or at least send information to the other relevant committees so it can be looked at by those with particular expertise.

The other issue, of course, that the Government will face is how to transpose all the EU measures that come up under any SPS agreement. The Government have already identified about 200. They need to be transposed into UK law, whether via a Henry VIII clause rather similar to the old Section 2(2) of the European Communities Act or a different mechanism. The risk of using Henry VIII powers is, on the one hand, it is quick and efficient, but, on the other hand, it compounds the democracy failings of this whole process.

The Chair: I bring Baroness Suttie into this, because she had a specific question about the devolved Administrations, which you have touched on. Perhaps this will be the right moment to feed that in.

Q12 **Baroness Suttie:** Thank you very much, Lord Chair. You have just touched on the fact that there should be some quite good thinking about how you would have Westminster relate to the devolved Administrations. Given that the three areas we are talking about here are all devolved matters, what do you think the impact could be on the devolution arrangements, as we currently have them in the UK? As a secondary question, what do you think would actually happen if one of the constituent parts of the UK failed to give consent?

Professor Catherine Barnard: Because this will be an international agreement, and it will be a supplementary agreement under the TCA, it is Westminster that will be responsible, not the individual devolveds. The work on the framework in respect of the relations with the devolveds has improved quite a lot recently, so there are better relations between Westminster and the devolved Administrations.

Ultimately, the buck stops with the UK Government and not with the devolveds. To be blunt, the devolveds refused consent over every major piece of Brexit legislation. The legislation went ahead, because ultimately the buck stops with the UK Government and not with the devolved Administrations.

Baroness Suttie: But on individual matters, such as legislation coming forward on ETS or SPS measures, surely the devolved parliaments would still have a say on them?

Professor Catherine Barnard: Absolutely, they should.

Baroness Suttie: On a case-by-case basis, if they were to refuse consent, do you think that would be problematic, or do you think that they would just continue as you have described?

Professor Catherine Barnard: In the Swiss agreement and the EEA agreement is a reference to what they rather ambiguously refer to as “constitutional requirements”. “Constitutional requirements” is not defined, but in the EEA agreement, it seems to refer to the constitutional requirements of, for example, Liechtenstein, which says that if the decision is going to cost more than a specified amount, there will need to be a parliamentary vote on it. You could imagine that there will be constitutional requirements that would mean that devolveds should have their say. It could be that that should get factored into our constitutional requirements. I suspect that we will get something on constitutional requirements, because it is referenced in the Common Understanding. This is where the Swiss agreements have learned from the EEA agreements, because the constitutional requirements could take for ever.

There is a wonderful story. In Iceland, there is still a filibuster. If the Icelandic parliament does not want a piece of EEA legislation, the members filibuster: they stand and read the sagas out for as long as the session lasts. I am not suggesting that this is a way forward to address our constitutional requirements, but the very fact that Iceland has a filibuster means that in the Swiss agreement, there is a guillotine after two years—you cannot use the saga-reading equivalent to last more than two years before the measure has to be adopted. But you can see that there would be a role to say that our constitutional requirements mean that this is a devolved issue, and therefore the Scottish and Welsh parliaments—there is the interesting question about how Northern Ireland fits and cuts across the Windsor Framework—should at least have a say. The question is, because the buck will ultimately stop with the UK, how influential their say could be.

Of course, if ultimately the decision is taken that we would not comply, this goes back to where we would fit on that spectrum of dynamic alignment. I suspect there will be provisions on compensatory measures, as the Swiss have, if we do not comply.

Q13 **Baroness Smith of Newnham:** Finally, on dispute resolution, it would appear that the Commission is recommending that the court of justice would be the ultimate arbitrator in the event of a disagreement. How significant do you think this would be?

Professor Catherine Barnard: In fact, it is not clear to me that it would be the ultimate arbiter. My understanding is that if there is uncertainty as to the meaning of what an EU rule is about, the court of justice will be the ultimate arbiter on that but not on compliance with the agreement.

My best bet is that what you will see is a model, which looks rather like the dispute resolution mechanism in the withdrawal agreement, where there is a role for the court of justice on interpreting a concept of European law. For those of you who are not familiar with the reference process, it means, essentially, that the arbitral tribunal will ask a question to the court of justice as to what provision X means. The court of justice gives a ruling on what provision X means and that comes back to the arbitral tribunal to apply it to the facts.

That model is what you see now in the Swiss and Gibraltar agreements. In the EEA agreement, there is a slightly different mechanism, not least because they have got the EFTA Court. But even there is a possibility of reference to the court of justice, but it is a discretionary reference, whereas in respect of the other agreements, it is mandatory. But it is only mandatory on determining what a concept of EU law means.

Professor David Collins: If I may respond to that, I would suggest that the process that Professor Barnard just articulated would, practically, give enormous power to the European court. Again, I cannot emphasise this enough: it is unprecedented around the world. There is no free trade agreement in the world wherein the dispute mechanism is the court of the other country. It just does not happen in free trade agreements. In trade agreements around the world, the dispute mechanism is a neutral arbitral tribunal, and the parties choose indicative members—either a standing roster or a list of people that can be on that roster. It is by no means the court of one of the parties. My sense is that this would be a significant encroachment on the sovereignty of the United Kingdom.

Professor Catherine Barnard: I will just clarify, going back to your question, that if you look, for example, at the text of the Swiss agreement, it is absolutely clear that the ultimate decision is taken by the arbitral tribunal, not by the court of justice. If there is a question of interpretation or application of a provision of EU law and “the interpretation of that provision is relevant to the settlement of the dispute and necessary to enable it to decide, the arbitral tribunal shall refer that question to the Court of Justice”. But it is the arbitral tribunal that makes the ultimate decision. It says very clearly that “the arbitral tribunal shall settle the dispute”.

Lord Jackson of Peterborough: Following up from that, it is pretty obvious from experience over the last 30-odd years that the ECJ would seek to interpret law based on specific disputes between the UK and the EU. You talked about regulatory hegemony. It is also looking at legal hegemony as it goes forward. The likelihood is that it would seek to expand its competence rather than just a very dry interpretation. Would you not say that there is a risk of that in this situation?

Professor Catherine Barnard: There is a risk of that in all courts. But on the other hand, it is likely that what has been heard here will be something which is highly technical—phytosanitary matters, or about the ETS. It is in those areas where you do not see the court going so far. Where you see the court being perhaps more—I was going to say dynamic, but that may not be the right word—broad in its approach is in areas which have much more constitutional significance; for example, cases on the values of the European Union. You do not see what some people might call overreach in respect of really quite technical matters. Remember, these agreements that we are looking to negotiate are on quite technical issues.

I should also say that, under the Northern Ireland protocol, where there is the possibility of ordinary references to the court of justice, there has not been a single reference.

Professor David Collins: I just wanted to add something on that process that Professor Barnard just illustrated there. The equivalent in a conventional free trade agreement would be that if a question of foreign law was before the tribunal, that would be characterised as a question of fact; and it would be resolved by an expert coming in and giving expert witness to the tribunal. By no means would they say, "Oh, we had better go and ask the court of this country to tell us". Again, just to be clear: that is unprecedented in international law on conventional free trade agreement dispute settlement.

Baroness Ashton of Upholland: I would not disagree with that, Professor Collins, but this is not a free trade agreement. Having negotiated free trade agreements, it absolutely is not that. I think one has to be a bit careful about the comparison because it does not work.

Professor David Collins: Well, it is an international agreement—

Baroness Ashton of Upholland: That is not what you said.

The Chair: Like so many of the issues that we have covered today, we could debate this for hours and hours, but we do not have those hours. I must draw the meeting to a close and thank our witnesses very much indeed for the evidence they have given us. It has been extremely interesting and illuminating. I am particularly intrigued by the notion of a politician standing up and reading out the saga of *Burnt Njal*, and I am sorry that it is unlikely to happen.

At the heart of all this, of course, is that like most things in life, there will be benefits and costs to a process of dynamic alignment, and the issue is about where that balance lies. In order for people to debate that properly and meaningfully, they need to understand the concept of dynamic alignment and something about those various costs and benefits. We have heard a lot about that today, and we will hear a lot about it in future evidence sessions, but you have got us off to a very good start. Thank you very much indeed. I draw the formal part of the meeting to a close.