HOUSE OF COMMONS

European Scrutiny Committee

Oral evidence: The institutional framework of the UK/EU Trade and Cooperation Agreement, HC 450

Monday 12 July 2021

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Watch the meeting

Members present: Sir William Cash (Chair); Jon Cruddas; Allan Dorans; Richard Drax; Margaret Ferrier; Mr Marcus Fysh; Mrs Andrea Jenkyns; Mr David Jones; Craig Mackinlay; Anne Marie Morris.

Questions 1 - 44

Witnesses

I: Christophe Bondy, Partner, Steptoe & Johnson LLP; Professor David Collins, Professor of International Economic Law, City, University of London; Dr Lorand Bartels, Lecturer in International Law, University of Cambridge, and Counsel, Freshfields Bruckhaus Deringer LLP; and Martin Howe QC, Barrister, 8 New Square Chambers.

Examination of witnesses

Witnesses: Christophe Bondy, Professor Collins, Dr Bartels and Martin Howe.

Q1 **Chair:** On behalf of the Committee, I welcome you all and thank you for appearing to give evidence this afternoon. As you will be aware, as part of our recently initiated inquiry, we are investigating the governance structure of the UK-EU trade and co-operation agreement, otherwise known as the TCA. Today, with your considerable experience and knowledge, we would like to achieve a better understanding of, first, the bodies that the TCA establishes—what they are and what they can do; secondly, the transparency requirements of the committees that the TCA establishes; thirdly, the relevant dispute resolution mechanisms and remedies for breaches of the agreement; and, fourthly, the development of the TCA in terms of how it will interact with future UK-EU, and UK-EU member state, supplementing agreements.

As I am sure you agree, the TCA is of considerable legal and political importance, and fully warrants the detailed scrutiny that we are undertaking and to which you are contributing. As we are holding this session remotely, we will address questions to you individually, but for those not directly addressed, please feel free to come in afterwards when I have addressed the first question to that person. Before we start, would you please be so kind as to introduce yourselves and briefly explain your specific areas of expertise? I will ask each of you in turn. First of all, Martin Howe.

Martin Howe: I am a practising barrister. My primary field of practice is intellectual property law. In addition, until 31 December last year, I did a great deal of work on free movement of goods and services, much of it linked to the intellectual property field but more generally in that field. Apart from that, my other role has been as chairman of Lawyers for Britain, the pro-Leave lawyers organisation that played a significant part in the events leading up to Brexit and the implementation of our exit from the European Union.

Q2 **Chair:** Thank you very much. Professor David Collins, please.

Professor Collins: Hello, everybody. I am a professor of international economic law at City, University of London, and my areas of expertise are, loosely, international investment law and world trade law involving the World Trade Organisation and free trade agreements. Thank you.

Q3 **Chair:** Thank you very much. Christophe Bondy, please.

Christophe Bondy: Good morning. I am an Ontario barrister. I spent many years in the Department of Foreign Affairs, at the Trade Law Bureau of the Government of Canada where, among other things, I worked for a number of years on the Canada-EU free trade agreement negotiations. I am in private practice in London with Steptoe & Johnson, and my main focus is on investor-state arbitration and advising on international trade issues.

Q4 **Chair:** Finally, Professor Lorand Bartels from Cambridge.

Dr Bartels: Thank you. I teach trade law at the University of Cambridge, along with international law more generally, and I practise in the field of trade law as counsel at Freshfields.

Q5 **Chair:** That is extremely helpful and good to know. I will ask the first question of Martin Howe QC. Could you explain the key features of the Partnership Council and committees that are part of the governance structure created by this TCA? What are they and what are they designed to do?

Martin Howe: The Partnership Council and its committees are set out in article 7, and following, of the trade and co-operation agreement. The Partnership Council is the top co-ordination body across the whole agreement and is co-chaired by a member of the European Commission and a representative of the UK at ministerial level. In fact, it is quite similar to the similar body under the withdrawal agreement. We have had a double-hatting arrangement under which Mr Šefčovič has represented the European Union in both capacities and, similarly, we have kept the same representative on the UK side. Under the trade and co-operation agreement, there are a large number—I have not actually counted them; there must be 20, 25 or so—specialised sub-committees.

The Partnership Council itself has certain abilities by consensus to amend provisions of the agreement, although only in areas specifically set out. Its primary role is to oversee implementation; in addition, it has the ability to delegate some of its powers, including amending powers, down to the specialised committees. Those are set out under article 7. They are similarly constituted in the sense of being joint committees co-chaired by an EU and UK representative but not at the same level. It is a hierarchical structure; they report up to the Partnership Council. I suppose the single most important body is the trade committee, which oversees the trade aspects of the trade and co-operation agreement and itself has many specialised sub-committees.

Chair: Good. Thank you very much. Andrea Jenkyns will ask the first question for Professor David Collins.

Q6 **Andrea Jenkyns:** Hi, David Collins. There are over 20 bodies with different roles and powers. How does that compare to other committees created in other FTAs?

Professor Collins: By my count, there are 18 committees and four working groups in addition to the Partnership Council and the Civil Society Forum. I would say, generally speaking, that this is more than you would see in most free trade agreements, but I think—

Chair: We have lost you.

Christophe Bondy: If it would be helpful, I would be happy to step in to carry on with that response.

Q7 **Chair:** Christophe, if you could do that, we will come back to David Collins. Thank you.

Christophe Bondy: When I was considering these questions, I looked at the USMCA, which is the new NAFTA.

Professor Collins: I am back. I do not know what happened.

Q8 **Chair:** Christophe just came in on your account, but carry on, please, David Collins.

Professor Collins: Christophe knows more about CETA than I do. I think there are 10 committees in CETA and nine in CEPA, the Japan-UK free trade agreement. We can see from that that the trend is that the TCA has substantially more, but, I suggest, not unduly so given the breadth and complexity of the treaty.

Q9 **Chair:** Good. Thank you very much indeed. Christophe, is there anything further that you would like to add to that because you partly answered the question?

Christophe Bondy: To pick up on David's response, as he notes, the breadth of the agreement is broader than the typical FTA. That relates to the very deep and broad relationship between the UK and other EU member states over 45 years. You have security issues, you are dealing with population issues and there is a broader range of what would typically be covered in an FTA, so you have a greater number of committees.

Generally speaking, it is quite typical to see a structure with an oversight committee and then a number of specialised committees with the ability to delegate between them. The one thing I would add in response to Martin Howe's comment about the range of the powers is that they can, importantly, be a focus for consultations when disputes arise under the agreement. The dispute resolution provisions generally require consultation before that, so there is a referral mechanism back to specific committees, or indeed the Partnership Council.

Chair: Anne Marie, would you be kind enough to address your question to Christophe Bondy in the light of what he has just said?

Q10 **Anne Marie Morris:** I will indeed. Mr Bondy, we heard from Martin Howe that there is power to amend the TCA, but in certain bespoke areas, not in others. You talked about the need, when there is a dispute, for consultation, so that gives rise to questions about real power and how these bodies will actually work in practice. How do the Partnership Council and the committees work together in practice? I know it is early days, but what do you see and what do you anticipate? Given those powers, constrained as they are with consultation and with limitations on the changes they can make, are they really just talking shops, or do they have important powers? To what extent can they actually change the terms of the TCA with all of those constraints?

Christophe Bondy: They are important bodies because they are the point of engagement between the parties to the agreement. A free trade agreement is not the end of a relationship; it is the beginning of a relationship, typically the beginning of a deeper relationship. The co-operation councils and sub-committees provide an important forum for discussion.

The point is that they can decide things on consensus. It depends on both parties having a political level of approval for agreement to any changes and modifications that they might wish to agree upon. The consultation process is in the context of a dispute. Upon the failure of that consultation, it goes to arbitration. They provide an important continuity of focus for the parties to come together.

On an individual basis, there will be people appointed to the committees who know each other and will be able to work through some of the issues. There is obviously a very complex relationship between the UK and its former EU member state partners. Given the speed with which this agreement was negotiated and signed, I would expect that a number of issues will arise over the next decade that will need a focus for them to be raised in a technical context. That is what the committees will serve to do.

Q11 **Anne Marie Morris:** Okay. Do you believe the political will is there to get that consensus, because without consensus we will end up in gridlock? Secondly, you say there are clearly some issues that are going to come forward. What are the issues, or at least your top few, that you think we are going to be looking at having discussed by those bodies?

Christophe Bondy: I am not sure I am the one to advise on whether or not the political will is going to be there. That is more in the hands of politicians on both sides of the English channel. As for the issues that have arisen, you have already seen issues with regard to Northern Ireland being a very strong focus.

I assume there are issues with regard to the status of persons on both sides of the channel, the issue of subsidies and the issue of the level playing field. Those are quite distinctive aspects of the trade and co-operation agreement. They may well be the elements of the agreement that give rise to the most discussion. The importance for the purpose of the committees is that, even though they may not have any decision-making power except by consensus, the point is that they give a focus and a forum for more technical discussions to take place. I think that can, typically, be productive.

Q12 **Anne Marie Morris:** Finally, can I ask you—Martin may want to comment on this—what are the areas that are excluded? What are the things in the TCA that they cannot change?

Christophe Bondy: I cannot say that I have specifically looked to see which areas of the TCA they can’t change. Don’t forget, at the end of the

day, this is an agreement between the UK and the European Union. Under international law, if parties at the level of parties to an international agreement want to change elements of it, they can do so. The committees may not be able to change specific things, but the point is that, if the EU and the UK wish to reach agreement to change things, they can do that notwithstanding the terms of the TCA. That is, for me, the more important issue.

Q13 **Anne Marie Morris:** That is very helpful. Martin, do you want to comment, given that it was you, at the outset, who talked about some areas being off limits?

Martin Howe: It is more that only some areas are on limits. I confess, I have not done a trawl through the 1,000 pages to find the instances of powers to amend.

I agree with Christophe's answer. The Partnership Council, quite apart from its power to amend certain limited areas itself operating by consensus, also has an untrammelled power to recommend amendments to the agreement. Obviously, the procedure would be different. If within the Partnership Council it is agreed by consensus that certain aspects of the agreement should be amended, there would then be a need for the respective parties to undertake their ratification procedures for amendments to the agreement. It would be more cumbersome, but if there is political will to make changes to the agreement, we would end up in the same place.

Anne Marie Morris: Thank you, Martin.

Q14 **Chair:** Thank you very much. Do you want to come back on that, Christophe?

Christophe Bondy: If I could add one thing, I would caution that when parties have gone through the often challenging, sometimes agonising exercise of reaching a final compromise agreement there does not typically exist a huge amount of will to reopen it; there is a sense that it is a package and that it was done as a collective agreement. Some of the amendments or issues that I would expect would be more tinkering with some of the mechanics rather than the wholesale changing of significant aspects of the agreement.

Reopening these agreements is always challenging. There was a provision in NAFTA, for example, about the ability to amend aspects of the agreement, or we would sometimes think, "It would be better if this aspect of the NAFTA were somehow different than it is," but the notion of reopening of agreements was such an enormous issue that they let the agreement stand as it was for a very long time, at the end of the day—about 25 years—before the USMCA.

Chair: Thank you very much. Against the background of those questions and answers, Professor Lorand Bartels, would you be able to give some indication, in the light of the question that is now going to be asked by

Alan Dorans—

Margaret Ferrier: Chair, could I come in off the back of that question, please?

Chair: Yes.

Q15 **Margaret Ferrier:** Professor Collins, you mentioned 18 specialised committees and four working groups. Could you clarify what the working groups do and whether they have any power, or are they more of an advisory group?

Professor Collins: Very briefly, the purpose of the committees is to do technical work. The word "technical" comes up many times. They are there to assist and support the Partnership Council. To go even deeper, the working groups are even more about technical expertise than the committees are. It is an ascending pyramid of specialism. That is the way it has been designed.

My understanding of working group—a more British term than I think I have seen in other contexts—is that it is a smaller group, maybe four or five people, who are real super-experts. The committee will probably be more like 10 people and so on. There is very little guidance that I have seen in the TCA on precisely how the working groups will differ from the committees. That is my understanding from what the concept of a working group traditionally means.

Chair: Alan Dorans, would you like to ask your question? If Dr Bartels would come in on the back of that, in the context of the previous questions, that would be very helpful. Alan, over to you.

Q16 **Allan Dorans:** Thank you, Chair. Good afternoon, Dr Bartels. How far does the trade and co-operation agreement participate in the Parliamentary Partnership Assembly, and what can they do?

Dr Bartels: There is provision in article 11 of the agreement under the heading "Parliamentary cooperation" for establishing a parliamentary assembly. It is a purely consultative body. It does not have any real powers. The only power that it has is to make recommendations to the Partnership Council. The other powers, which lead into that, are that it has the power to request information from the Partnership Council, which then is under an obligation to supply the assembly with that information. It also has the right to be kept informed of what the Partnership Council decides, but it is by no means a legislative body. It is just a consultative body between the Parliaments of the two sides.

I want to take the opportunity, if I may, to add something to what was being said about the powers of the Partnership Council. I do not disagree with anything that has been said. It is certainly true that it has the power to make binding decisions in the areas that have been specified under the agreement. The important thing about that, of course, is that it does not go back to Parliament, either in the EU or in the UK. Consensus is

obviously important as between the two Executives, the two Governments, but you do not have parliamentary control any more at that level.

It is also worth noting in that context that Article 7 paragraph 4(d) says that for four years following the entry into force of the agreement, which, I guess, takes us to the end of 2024, the Partnership Council has the power to "adopt decisions amending this Agreement or any supplementing agreement," which I imagine we will come on to, "provided that such amendments are necessary to correct errors, or to address omissions or other deficiencies." In other words, for four years there is a power to amend anything in the agreement. There is an exception for the institutional provisions that we are talking about now, but anything else can be amended, provided that you can shoehorn your amendment into the system as being an omission or a deficiency. Of course, that is the sort of thing where you normally have an amendment anyway. There is quite an extensive power for four years. Of course, as has been said a few times, that depends on consensus.

Chair: Thank you very much. Marcus Fysh, you are going to ask your first question of David Collins.

Q17 **Mr Fysh:** Thanks. Dr Collins, given the powers that we have heard about for the TCA's Partnership Council and committee, does the TCA provide, in your view, for an appropriate amount of information to be given and made available to Parliament and other interested parties at the right time? How does that compare with arrangements in other FTAs?

Professor Collins: I would say that the TCA has fairly extensive commitments, in the consultation requirement, with the broader public, less so in the publication requirements. There is a statement at one point that "Parties shall consult civil society on the implementation of this Agreement, in particular through the interaction with the domestic advisory groups and the Civil Society Forum." There are many provisions like this: "shall consult...domestic advisory groups...including non-governmental organisations, business and employers' organisations, as well as trade unions, active in economic, sustainable development, social, human rights, environmental and other matters." There is a lot of material on that.

On publishing what is going on in the committees and in the advisory forums, the obligations seem to be less clear. I could not find any requirement to publish minutes, for example, of their meetings or even agendas. The convention, from my experience in most free trade agreements, is that, in fact, you would see some of that. You would see the committees publishing agendas. You would see the committees having invitations to the public to attend.

In the last year, for example, under the USMCA, those meetings have been done electronically online, and the public have been able to join them. You can find agendas for the meetings online; in terms of minutes,

less so. I was able to find online a transcript from the USMCA's environment committee, but not formal minutes. It looked to me like it was someone who had attended and typed up their own recollection from their notes, and it was not on a Government site. To answer the question succinctly, the public participation and consultation provisions in the TCA are very broad. However, the requirements to publish are less so, but they are not out of line with conventional free trade agreement practice.

Q18 **Mr Fysh:** Do any of the other members of the panel want to come in on that, in particular, to try to give any insight on the way they think the EU might treat its own Parliament and its own consultative bodies over the publication, for example, of draft Acts that it may choose within those bodies to perpetrate? Dr Bartels?

Dr Bartels: The European Parliament has long agitated for oversight of what goes on in foreign affairs generally, but more specifically, and relevant to us, decisions that are made by the European Commission and by the Council. There is, in fact, an inter-institutional agreement that is also now written into the Lisbon treaty, and parts of that say that the Parliament has the right to be informed of what goes on, and that includes trade negotiations, in fact. The right is taken so seriously that it comes along with all sorts of confidentiality safeguards. Parliamentarians have the right to see what is happening when there is a sensitive issue, but in a closed room, phones left outside and so on.

We do not really have enough information at the moment, based on the text of this agreement to see how it will relate to all of that. I imagine that the same sorts of rules would apply on the EU side. Whether that level of transparency will also be seen on the UK side, of course, remains to be seen.

Q19 **Chair:** Can I come in on that and ask Professor Bartels, or any of the others for that matter, about the EU practice of the LIMITE procedure, which has been used on a number of occasions simply to shut out information from Parliament? I had a big row with the Chancellor of the Exchequer about this a few years ago. He was pretty rude about me for suggesting that perhaps something that he wanted to remain LIMITE should not be kept under wraps, and we had quite a row in the Committee about that. Can you see the LIMITE procedure being applied unilaterally by the EU in this context?

Dr Bartels: I don't know. I cannot answer that question. It is, generally speaking, up to each side to decide how much it wants to be transparent with its own Parliament. You can see that more generally in the EU. Some member states have extremely generous transparency agreements, particularly the Nordic countries, and that has caused difficulties historically within the EU; matters that would normally have been seen as confidential were tabled publicly in Parliament because that is just how you have to do it. There are different traditions and different cultures. We will have to see what happens if the UK wants to make something public;

there might be some exceptional matters, but as a rule it would be a matter for the UK.

Chair: We are going to need to keep a close watch on this one. It is all about information, and the information in turn will lead to the question of how it is accepted by all the different trade associations and all the people involved legally, politically and economically. If the information is not made available, as Marcus asked in the question, to other interested parties at the right time, clearly, questions could arise, and other Select Committees may want to know about things, including the BEIS Committee, the International Trade Committee and so on. Therefore, I can see this as a potential area of interest. I will now move on to the next question, which Craig Mackinlay will put to Lorand Bartels.

Q20 **Craig Mackinlay:** Thank you, Chairman. The purpose of my questioning is to tease out how the dispute mechanism will actually work in practice, and to highlight whether it is in any way vastly different from other free trade agreements the EU has. There are three big ones that always spring to mind: the Canada one that I understand Mr Bondy was very closely linked to, and Korea and Japan.

Dr Bartels, could you give me an example of the type of dispute that might arise under the TCA and how that might amble its way through the system to a conclusion, and what rights and influence the different dissenting parties have within the arbitration panel?

Dr Bartels: Yes, certainly. It is very much modelled on the WTO system, and very similar not just to the FTAs you mentioned, but to hundreds of FTAs. All modern FTAs have dispute settlement systems very similar to this. It is a very familiar system.

Essentially, the way it works is that you have three panellists who are essentially judges, one nominated from a list provided by each side, and then a chairperson of the panel who is supposed to come from a list that has been jointly agreed. There are default provisions for what happens if the parties do not supply a list. There is strong encouragement to come up with some names. It is interstate, or intergovernmental, I guess you could say in this case. There is no right for a private individual or a business to trigger dispute settlement proceedings. It is very different from EU law where individuals have direct access to EU law. This is international law, and, as such, with the exception of human rights and investment law, it is always just Governments who operate the system. It is very much the same here, so, if you were a business, you would need to get a Government on side to bring a case.

The other important thing to say about dispute settlement in this system—we will probably come on to this a little bit—is that it is actually only a formal dispute settlement in the sense of arbitration panels and so on. It is only one way by which the agreement is enforceable. The other, which is not across the board, but in select areas, is unilaterally suspending the agreement. There is dispute settlement attached to that.

It is not that you get to do it like a blank cheque; you have to do it in a very proportionate manner. The option of self-help, of saying, "We are just going to do this now," runs through the agreement in a number of areas, and some areas of real interest such as, for instance, the level playing field, which we may discuss a little bit later, or fisheries access.

The other thing at a general level is that the TCA can be suspended for non-compliance with arbitral rulings under the withdrawal agreement, and that is set out both in the withdrawal agreement and in the TCA itself. That is a very powerful way of enforcing obligations under the withdrawal agreement, including, of course, the Northern Ireland protocol.

The standard dispute settlement—I do not want to go on for too long about this—is very much like WTO law. It is supposed to be faster. Whether that will cause problems for the panellists is at best an open question. There are very ambitious timings—extremely ambitious. In fact, they are much faster than any panel proceedings in the WTO, even in the early days when things were not as complicated as they have become more recently, so I wonder whether that is actually realistic. The timing is, basically, half a year, which is very short. What you get at the end of that, if you win, is that the other side is, of course, supposed to comply. If the other side does not comply, you get to retaliate, and there are complicated rules saying which sector you are allowed to retaliate in. Some of the agreement is off limits—for instance, social security. It does not cover everything, but if we are focusing, for instance, on trade, fish, transport, aviation, that sort of thing, it is basically all enforceable.

The last thing is about how it compares to other FTAs. It is basically the same, in the sense that the economic obligations are enforceable. Where it is a bit different from, certainly, EU FTAs and, of course, the UK FTAs that either continue those or, as in the case of the Australia agreement, adopt a similar model—we do not quite know, but we imagine it would adopt a similar sort of model—is when it comes to the level playing field obligations, in particular the enforcement of environmental and labour obligations.

The US and Canada and a few other countries that are familiar with that model, largely in Latin America, have proper enforcement mechanisms in principle—there are limits, in fact, on what can be done—for violations of labour standards and environmental standards. In this agreement, you also have that. In fact, without straying too much into the substance of the matter, the obligations are quite tight. Essentially, you have to comply with your obligations as they were as a matter of EU, or domestic law for that matter, at the end of the year, 31 December 2020.

Those obligations go under the heading of non-regression obligations and are enforceable by trade sanctions. That is something that the EU has never done before. It goes far beyond CETA or any other EU FTA, but it is not unknown in FTAs. It is just a tighter obligation than you would even

see with the US or Canadian agreements because there is more flexibility about being able to reduce your standards. I won't get into it too much unless someone wants to know more about it. Let's just say that, for someone interested in enforcing environmental and labour obligations, you would have to call that pretty gold standard.

Q21 **Craig Mackinlay:** Mr Bondy might be able to assist. Level playing field is at best an abstract concept in many ways, and in the league table of support for different industries the UK has never ranked very highly in that ranking across the EU. If there is a dispute under level playing field, it is not within these arbitration measures, I understand. How does that get decided? Is it simply intergovernmentally or—

Dr Bartels: No, that is enforceable.

Christophe Bondy: This is one of the most distinctive aspects of the trade and co-operation agreement. To be honest, I think it reflects a level of concern around the issue in the context of this specific negotiation, and therefore there are much more robust provisions with regard to the ability to take unilateral action, but then to have dispute resolution in relation to unilateral actions that are taken either with regard to rebalancing measures that are adopted by parties to the agreement in light of consistent policies or policies adopted further to the policies of the other side that they say create economic imbalances, or in relation to subsidies for that matter. These powers are much more robust, and there are dispute resolution provisions that are attached to them referring back to the arbitral mechanisms.

There is an ability to take unilateral action on the part of a party to the agreement and then the ability to review those unilateral actions that could lead to the withdrawal of some of the benefits of the agreement on the other side. With regard to labour and the environment, there is a sort of isolated expert committee approach where, again, if one thinks that a party is reducing the level of labour or environmental protections, that can be challenged as well. I think the issue of level playing field is not abstract, in the sense that it is linked to things like state subsidies or to standards. It was obviously of great concern in the negotiations that led to these bespoke provisions.

Q22 **Craig Mackinlay:** Mr Bondy, as I have you in the chair now, we will continue. I am very interested in your massive experience in the CETA deal. You were very much involved with that. Words are words, and intents are intents. How often do you think any of these procedures are likely to be used, drawing on your experience of the EU and Canada relationship? It is not that old but it has been in place for a while. Has there been recourse to any of the arbitration bodies on any of these issues since it has been in force? Do you think we will have a similar light touch or a heavier touch in our ongoing relationship with the EU?

Christophe Bondy: I am not aware of any invocation of the formal dispute resolution provisions between Canada and the EU. My impression

of the relationship on the Canada-EU side is that it is reasonably harmonious. They are seeking to make the agreement work. I think the political context in which the UK-EU agreement was concluded was fundamentally different. The nature and the depth of the relationship was far deeper and more complex than the relationship between Canada and the EU and the context for that agreement. It is a divorce agreement.

Think of parties coming together to do business together. They are going to try to make it work. The context of a divorce agreement tends to give rise to more conflict, so it would not surprise me to see the dispute resolution provisions invoked. All I can say is that it does not have to be that way if both sides adopt a constructive approach. Considering that this is the UK's fundamental economic relationship and that it is a very important economic relationship for the EU, it would make sense for both sides to be as productive and as constructive as possible to avoid the dispute resolution provisions needing to be invoked.

Dr Bartels: Chairman, do you mind if I add something?

Q23 **Craig Mackinlay:** Yes, of course. Can I ask something else that you might be able to cover as well, Dr Bartels? Obviously, this is a lengthy and complex agreement that covers most of the dispute type of issues that might arise. There is still a possibility for recourse to WTO-type mechanisms. Are there any aspects that are not encompassed within the TCA that would require adjudication by the rather lengthy, as you described them, WTO mechanisms?

Dr Bartels: That is actually what I was going to say. One has to always see FTAs against the background of WTO law, and WTO dispute settlement. One of the reasons why there is so little dispute settlement under FTAs is that the parties just go to the WTO. There are various reasons for that, including that there is a very well-established legal secretariat—there used to be two of them but now there is one—which knows what to do, and you can rely quite heavily on it as a panellist. The system is very well established. Canada and the EU get on, but sometimes in the process of getting on it is not a bad thing to have a third-party arbiter to sort out some disputes. No doubt, Christophe will know what the figures are, but there have been several quite well-known disputes between Canada and the EU over the years, and probably since CETA. That is just normal.

The US and Canada are constantly fighting, not so much under NAFTA these days or USMCA, but rather in the WTO. Australia and New Zealand have ANZCERTA but they had a case in the WTO. The question that you ask is absolutely pertinent. It is highly likely that with two entities of the size and economic importance of the EU and the UK, one would expect disputes to arise. Statistically speaking, if you look at who gets involved in disputes, it tends to correspond to size and the size of the market.

The TCA itself has a provision on forum shopping. It says that you can bring a matter to the TCA, but if there is another agreement that has

substantially similar obligations between the parties—the WTO is in mind, but actually it goes beyond the WTO—you can choose to go there and you are stuck with your decision. You have to choose your battlefield and you are stuck with what happens. There is a slight carve-out in case the other system is broken down, but that is basically the system. The question is how many of these obligations are substantially similar to WTO obligations.

The core obligations from a trade law point of view on non-discrimination and so on are always the same. I would anticipate a WTO action in those sorts of cases. There is a lot in the TCA, and much more than one normally sees in FTAs, that is unique, where you do not have the option of going to the WTO because it is just not the same stuff—for instance, the level playing field obligations that we were talking about before. There is nothing like that in the WTO. There may well be disputes about fisheries, about aviation and a whole range of things that are covered in the TCA that you have no WTO analogue for. It is highly likely that there will be disputes because that is just in the nature of international relations. It does not mean that there is necessarily a relationship breakdown at the root of it. It can actually be quite a normal way for countries to communicate with each other.

Of course, at the moment, relations are more fractious than they probably will be when things bed down a little bit, so I think it is important to recognise that disputes are just the way it works. In the WTO, for instance, there have been just over 600 disputes over the last 25 years between all manner of countries. That is not a sign that globalisation or trade or anything is breaking down. If anything, you can see it as a sign of healthy disagreement. Those familiar with the field will know that the compliance rate is somewhere around 80% or 90% with those rulings. It is, on the whole, pretty normal. For that reason, one could anticipate disputes arising either under the TCA or the WTO.

Christophe Bondy: The issue that we have right now is that the WTO dispute resolution mechanism is not working, because the appellate body is suspended. You can go through the first phase of proceedings and then get appealed into the void, so another element will be whether or not the WTO dispute settlement process is fixed. I agree with Lorand that the WTO has provided an alternative forum. The other thing is that in the context of the WTO one can have third parties intervening in those matters in a way that is not possible under an FTA, and that can add to the dynamics of the agreement.

Q24 **Craig Mackinlay:** I have one last thing for you, Dr Bartels, and then I want to ask a very quick question of Martin Howe.

I was a magistrate for many years. If someone had a suspended sentence for something and they came back for another infringement of some sort, the general rule was that you could not really enact the suspended sentence for something that was completely different on a different offence. You could, but you generally did not. That was the

practice.

Is the TCA as proscriptive? Say we have a row about fishing and it is settled but we decide to go up the "We don't care less," route, which then allows a mechanism of retaliation. Does the retaliation have to be in that very strict same field, and who will be the arbiter to say "Well, this was about fishing, and you have suddenly expanded it to digital services"? Where is the arbiter going to be on that—that it is an unfair new process?

Dr Bartels: That is an excellent question. The term that is used in WTO law for this is cross-retaliation. You suffer a violation in one sector—say, trade in goods—and the question is, can you retaliate by suspending obligations in intellectual property or trade in services, for instance? There is a lot of cross-retaliation that can be done in the TCA. It is very prescriptive about when you can do it and when you cannot do it. There are some areas that are self-contained. Fishing in the Channel Islands, for instance, is self-contained. Financial services are self-contained, but other areas are not self-contained. I cannot go through it all now. It is not the right time to outline exactly where it works.

In principle, the rule for cross-retaliation, which is carried over—there are numerous carve-outs, exceptions and so on—is that you are allowed to cross-retaliate, if it is not effective or practicable, and the circumstances are serious enough, not in the sector in which you have suffered the violation. That is a subjective test, but it is not unbounded. There is actually quite a lot of WTO case law on the terminology. It comes from the WTO. What does it mean for retaliation in the same sector not to be practicable or not to be effective? When are the circumstances serious enough for you to be able to move on and suspend services or aviation in exchange for violation of a fishing obligation or something? We are not flying completely blind, but there is an element of subjective discretion, and, obviously, it is a fairly major issue.

You mentioned reactivating a suspended sentence. What is also important to note is how one measures the retaliation stick. How much do you get to retaliate by? What has been adopted is a very WTO-based model, which is to say that you look at the damage, you try to quantify the damage in dollar per year terms—I don't know what the currency would be but that is how you do it in the WTO—and then the size of your retaliatory stick is the same, essentially. If you have suffered discrimination and your businesses have suffered a loss of market access, you get the economists to figure out how much that damage is worth. If the other side does not comply, your sanction is calculated, again by the economists. By now they are making it up a little bit because you do not really know those hypotheticals, but they do the job as best they can. That is the size of your stick and that is how you are entitled to hit the other side.

It does not always work, because sometimes the stick is economically not very much, and it might mean more to you. It might be your fishermen, for instance—not that economically important, but politically very

important. The problem is that the size of your stick is not very much, and yet you want to be able to do something. In that sort of situation, cross-retaliation really comes to the fore. You can press on a politically more sensitive area to get the other side to comply, even though overall it might not be that economically important.

Q25 **Craig Mackinlay:** Thank you. Martin Howe, once we have gone through the whole arbitration system and a decision has been reached, what is the status of that decision in domestic or international law, or would it be a little bit like the howls that we have in our country—I don't know if the howls are the same abroad—that, when there is the vaguest threat of not doing what is deemed to be the right thing, it breaks international law and you hope that the howls of politics and public pressure will actually apply to the parties to go along with it? Is there realistically a legal stick that can be used to implement these arbitration rules?

Martin Howe: The answer to that point is explicitly covered in article 754 of the TCA. It is probably the same as would implicitly be the case, but it is spelt out. That is that arbitration findings that create international law obligations for the parties—for the EU and the United Kingdom at state-to-state level—explicitly do not create binding obligations against or rights in favour of companies or individuals. The arbitration findings on interpretation agreement are not binding on the courts of the domestic parties. One has to put some qualification on the "not binding" part, because it seems to me that an arbitral award would be likely to have persuasive authority if it is interpreting a treaty provision where a domestic court is applying the domestic law equivalent of that treaty provision. It would be persuasive but not binding.

Can I take this opportunity to add a slight rider to what Dr Bartels said about the non-regression provisions of the treaty, which go further than corresponding free trade agreements? They specify retaining laws in certain fields at the level of protection entailed on 31 December 2020, but they are subject to quite an important qualification; for example, article 387(2): "A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place." That is actually a requirement. It is not an unqualified obligation not to reduce levels of protection in those fields at all. It is an obligation not to do so in a way that affects trade or investment between the parties, which is an important practical qualification so that a complaining party at the end of the day would need to establish a trade or investment effect if there was a difference in labour standards or whatever.

Chair: Thank you very much for all that. This is all very illuminating and helpful. Now we move on to a question from Anne Marie, first to Christophe Bondy, and then perhaps David Collins would be kind enough to follow up, please. Over to you, Anne Marie.

Q26 **Anne Marie Morris:** Thank you, Chairman. We have heard about quite a complex range of dispute mechanisms. We can see quite a number within

the TCA itself, whether we are talking about arbitration, suspension, trade sanctions and other unilateral action and the special case of level playing field. We also have the various provisions under the WTO. Dr Bartels said, "It's up to them to make their minds up which they want to use." My guess is that that is not straightforward. How clear is it in the TCA which of these mechanisms apply? Is there some choice, and, if so, how might that choice be made?

Given that we know that there is also choice, whatever is in the TCA, in that there is other stuff we could use in the WTO, how is a decision made as to which mechanism is to be used, and can a dispute in its own right between which mechanism we were going to use be effectively a cause to frustrate the solution, and frustrate using any of these mechanisms at all, so that you actually end up with the thing being either chucked into the long grass or in an interminable, very expensive, non-productive debate about how we actually go about solving the dispute?

Christophe Bondy: Thank you for the question. The starting point for that analysis will always be what measure one takes issue with. Then the analysis goes to where are the possible fora for that dispute to be heard. As Lorand mentioned, there is overlap, which is typical between FTAs and trade agreements and WTO obligations, in areas like technical barriers to trade, for example, or sanitary and phytosanitary measures. There are going to be areas of overlap, so the question is, do we want to go under the FTA or under the WTO?

Right now, there is the additional question, is the WTO actually working, so shall we go there, or can we effectively go there? As has been mentioned, there are provisions in the TCA itself for a fork in the road. Once, as a party, you have decided to go outside the FTA route to, say, the WTO, you cannot change your mind, in a sense. There are also provisions that allow for reconciliation, so that once one has begun a proceeding and sought a remedy under one of those mechanisms, the party cannot go to the other mechanism and say, "They are failing to comply," and create a conflict between the two mechanisms. Internally to the trade and co-operation agreement, I think it is really just a question of analysis of whether it is a subsidy issue, a level playing field issue, or some other area of non-compliance with the agreement. Of course, there is a generic dispute resolution provision with regard to failure to comply with any area of the agreement, with some exceptions.

I think one of the more interesting questions, given the rather novel nature of the level playing field aspect, will be whether the non-regression or the subsidies mechanism is the best route to go down. Sometimes, it will be a question of what allows us to take steps more quickly. Can we, in this particular context, get to a remedy more quickly? That will be a case-by-case analysis. I do not think that it will necessarily be ineffective. It will just require more thought by the complaining party as to which of the various mechanisms to select and which will be more effective.

To respond to a question that was raised, I think by Mr Mackinlay, about the status of the enforcement, one of the ultimate means of enforcing any dispute resolution decision that is taken under the TCA is by withdrawing the benefits of the agreement in a targeted way. The agreement is there to grant relative ease of access by one party to the other party's market and vice versa. If a party thinks that the other side is not complying either with its obligations or, after that, with a dispute resolution decision, they can, in a targeted way, withdraw the benefits. That is a way of mutually enforcing the terms of the agreement, apart from the fact that formally not complying with an arbitral decision would be a breach of international law.

Q27 **Anne Marie Morris:** That is really helpful. Could I ask for Professor Collins's views? If I may, Professor, could I ask you to talk through an example of how the decisions are made as to which mechanism will be used? I am going to be difficult and ask you about something very topical, which is the Northern Ireland protocol. That is right now the thorny issue. Given all that you have said, and the particular challenges of the level playing field, which I suspect this fits into, if you were Mr Frost, what would your options be, and how would you go about looking at the mechanisms to help you through this seemingly intractable problem?

Professor Collins: That is a challenging question. To add to what Christophe said, I think he covered all the relevant issues in terms of parties having the autonomy to choose the strategy they want to seek the compensation that is their due. If you establish that the matter at issue is covered by both the TCA and the WTO, you have a choice. That is clear in the agreement. What the TCA clarifies—I think this is where it is focused in how proscriptive it is—is preventing complaints in multiple fora at the same time. That is one of the things it definitely precludes parties from doing. Once you have chosen one, you cannot choose another unless there is evidence that the first forum would not hear the dispute. One of the issues is that, in so doing, the party will therefore have to frame its complaint in a way that fits into that forum. If you are going to the WTO, you cannot refer to provisions of the TCA. The WTO will not hear that. If you go to the TCA arbitration, they will not be interested in hearing WTO provisions. That is just a practical element.

Backing up to the difficult practical question, what are the options available for the Northern Ireland protocol? It is a difficult one, and I almost feel that I perhaps should defer to Martin on this front. The fact of the matter is that the border on the island of Ireland is an international border. You have two members of the WTO on either side of it. In theory, the WTO could be used to deal with trade barriers that are present at that border—excessive checks, breaches of SPS, TBT and so on. The WTO could be used for that. I do not think it would be, because the Northern Ireland protocol was designed as a lex specialis for that kind of matter. I would be surprised if the WTO was used for that particular field.

Q28 **Anne Marie Morris:** Martin, do you want to comment? You looked like you were keen to do so.

Martin Howe: Yes, I think so. Obviously, this session is primarily directed to the TCA and its dispute settlement mechanisms. When we come to the Northern Ireland protocol, the relevant dispute mechanisms are those provided for under the withdrawal agreement, which are far more pertinent to the protocol.

In effect, there are three mechanisms. One is the Northern Ireland protocol, which provides for direct actions in the Luxembourg court, the European Court of Justice, as if the UK, or at least Northern Ireland, were still a member state. In exactly the same way as the Commission can take proceedings, the court can give binding judgments. I have been a vehement and long-term critic of these arrangements, which depart from normal international law practice by allowing the courts of one party to give binding judgments that bind the other party when it is not a multinational court in which we participate any more; there is no UK judge on the court. But there it is. That is one mechanism.

The other mechanism is in the arbitration provisions under the withdrawal agreement, and there is an important difference between those provisions and the TCA provisions. The TCA arbitration provisions, as you have heard, are very much in line with standard international practice. The withdrawal agreement arbitration provisions, however, contain a quite extraordinary provision, unprecedented, except, I think, in the agreements between the European Union and Moldova, Georgia and Ukraine, under which the international arbitrators are not allowed to decide any questions of European Union law or European Union law concepts but must send them off to Luxembourg for the Luxembourg court to decide. The third mechanism under the withdrawal agreement is, in effect, suspension and self-help remedies.

Q29 **Anne Marie Morris:** Martin, that is not only helpful but rather depressing. It sounds like the die is rather cast against us. I am rather assuming from what you are saying that there is nothing creative, other than taking the decision in our own hands and just acting unilaterally. There is nothing else that we can do, nothing else we can squeeze ourselves into, whether it is the WTO or TCA. We are stuck with Luxembourg.

Martin Howe: It is very difficult. I think you are asking a question that probably has many ramifications in its answers and requires considering other issues that certainly go beyond this session. In the Northern Ireland protocol, article 16 provides in certain circumstances for the suspension of its provisions. That can be exercised compatibly with its provisions. There are other principles of international law that potentially might arise regarding when states do and do not continue to be bound by provisions of international treaties having regard to the conduct of the other party, but I think that takes us very much beyond the matters that this evidence session was invited to address.

Chair: As Chairman, I congratulate you on making that point, Martin, if I may, otherwise we will be here until 2 o'clock tomorrow morning at least. I mention in parenthesis that section 38(2)(b) of the withdrawal agreement has the notwithstanding arrangements—notwithstanding the provisions of the protocol and the withdrawal agreement itself. Of course, there are, in international law, sections 46 and 48 of the Vienna convention. We have already agreed we are not going to go down that road today, but it is a matter to bear in mind. Don't get too depressed, Anne Marie, because we ain't finished yet. All right?

Anne Marie Morris: Glad to hear it.

Chair: The next question is from Margaret to Lorand Bartels, please.

Q30 **Margaret Ferrier:** Thanks very much, Chair. Dr Lorand Bartels, if an individual or a business is being adversely affected by the operation of the TCA, can they seek redress, and, if so, how would they go about that?

Dr Bartels: No, they cannot. Not directly. As I said earlier when I explained the overall structure of the TCA, it is a normal international treaty and, as is normal, Governments retain the sole right to decide whether or not to commence legal proceedings. If you are an affected business, you need to contact the relevant Minister and hope that you get some Government support for bringing a case.

In some countries of the EU, there is legislation at domestic level—it is all voluntary—that provides a guarantee that, if you are a business, the Government will listen to you. It is not always a guarantee that they will take action, but they can firm it up a little bit. There is not that sort of legislation in the UK, but if one were thinking of ways to make these agreements more directly helpful in institutional terms for businesses in the UK, or other affected parties as well of course, one thing that might be considered is adopting legislation that if an individual has a problem this is the way to attract the attention of the Government and, with appropriate filters, the matter will be taken seriously. At the moment, it is all a bit ad hoc. That would be something to think about. At the moment, you need a Government on side.

Christophe Bondy: Can I add something?

Chair: Yes, please do, Christophe.

Christophe Bondy: Under the procedural rules for arbitration in the TCA, individual third parties can bring an amicus curiae as of right, which is unusual. In the context of investor-state arbitration, there has been recognition that one can seek access as a friend of the court, which is what the tag means, to make submissions that one has a specific interest that is not otherwise represented. That would be a way in for a third-party individual affected by a measure, but, as Lorand points out, it is up to the party to launch the proceeding. The other way to have a word in

issues arising under the agreement is, of course, through the civil society fora that have been set up, which are a soft way to say, "Hey, this part isn't working," or, "We have an issue with this," or what have you. But that is not a dispute, it is just a way to attract attention to an issue.

Q31 **Chair:** Thank you. I will ask another question of David Collins. What are the key features of the dispute settlement mechanism in relation to the level playing field?

Professor Collins: Thank you, Chair. We have heard a lot on this already, and I do not feel it necessary to repeat what we have seen. There is a specialised system for level playing field that has even shorter timeframes, and that is in relation to labour and environment matters. The dispute settlement body is a panel of experts. The provisions were designed to use the wording of the TCA so that the relationship between the parties stands the test of time. That was both to lock in existing levels of standards in these areas and to facilitate dynamic alignment going forwards so that parties do not drift too far apart from each other. We know the political background for that was, at least in this country, the concern that the UK would become too super-competitive economically by lowering its standards.

The only main point I want to make that I think we have not covered—Martin was touching on it—is about the non-regression clauses. These are standard provisions in many free trade agreements: parties shall not lower or weaken their standards in the areas of the environment or labour in a manner affecting trade or investment. That is a very ambiguous concept. I submit that it would be a very difficult standard to fulfil to have material impact, which is the phrase that is used in the TCA.

There is very limited case law on that in international tribunals. The leading case is probably the US *v.* Guatemala under the US Central America Free Trade Agreement arrangement. The US suggested, as the complainant, that any effect on the competitive relations between the parties in terms of trade and investment would be enough to trigger breach of that provision. Guatemala said, "No, you need specific empirical demonstration of changes in trade flows." The tribunal ended up ruling halfway. They said: "Yes, it is a competitive relationship, but you have to demonstrate it empirically." We see that language in the TCA. It says that it cannot be conjecture. There has to be actual evidence that there has been a change. To me, that suggestion would need a change in trade flows or a change in FDI. I think that would be a very difficult counterfactual to demonstrate, particularly in the area of investment because of FDI flows going up and down every year.

The idea that one of the parties could demonstrate that a particular company set up in Britain and not in France because of some lower regulation, or maybe that it left France and went to Britain, would be really hard to do, and most of the academic commentary that I have read supports that. It is a very high test, so I do not think we are going to see it used very much.

The other provision about the level playing field that must be mentioned is the fact that these provisions can be reviewed after four years if one of the parties feels that they have been used excessively. If it were to transpire that there were a lot of claims being brought in this area—remember, as has been pointed out, that this can involve unilateral retaliation, so it is effectively a new kind of trade remedy, and a very powerful provision in that sense—and if it was being used excessively, the matter can be reviewed. I take that to mean that there is a chance that it might end up being struck out of the agreement in the future.

Q32 **Chair:** Could I slightly comment and ask a rhetorical question on this? Having been on this Committee for 37 years, which might surprise a few people, it seems to me that we should reflect on the question of whether there has ever really been a level playing field. I wrote about this in 1990. I said that with all the national champions and all the things that were going on, and the European Coal and Steel Community and the rest of it, everyone likes to talk about a level playing field in the trade relationship, but when you are talking about the single market, which is one of the reasons I had serious doubts about whether it would ever work properly, the question of whether or not there was a level playing field really seemed to me to be derived from legislation that was made in the Council of Ministers behind closed doors. Whether it is to do with big questions or generic lesser questions about standards and things of that kind, the consequence of its being done behind closed doors, when everybody knew in advance that it was going to be decided by majority vote, aka consensus so-called, was that for the level playing field, from a legislative point of view, the law was made, but it was made against a background of a decision-making process where, for example, the United Kingdom in particular was at a severe disadvantage.

We do have not time to go into all this today but I simply note the fact that, if you look at the voting arrangements over the past 30 years or so, it is perfectly clear that there are issues where we would never have agreed to regulations, and to certain arrangements and trading deals and things of that kind, but for the fact that we had decided as a matter of general policy to go into the European Union. We accepted it through section 2 of the European Communities Act 1972 as a matter of law, but, actually, the idea that it was a level playing field was pretty dubious. I throw that in partly as a question and partly as a comment. I think that, in the context of the question that I have just put to David Collins, the aspect of whether or not we are likely to want to continue to accept laws that were made by the other party—in other words, the European Union—is something that we are going to find it easy to accept because we are going to want to diverge. That is really the point.

Professor Collins: My only comment on that is that I think it is exactly why the language on the level playing field is so strong and the thresholds are so high. A good degree of organic, gradual divergence is acceptable and will be tolerated. It is really at the sharp divergences, the extreme changes, when the TCA would be triggered.

At least from within Britain, we have often perceived this as a way of the EU controlling Britain, but I think there is a very good chance that these provisions could be used aggressively by the UK against the EU. One of the things that comes to mind is corporation tax and how that has been used by certain EU member states to attract foreign direct investment. That is potentially lowering a standard, as it were, that could lead to a massive change in FDI flows. The other one, of course, is subsidisation, which we know the EU is no stranger to doing as well. The provision could be used either way.

Q33 **Chair:** Good. Thank you. Marcus Fysh, please, question 12. I think he has gone.

Martin, may I ask you for your view of provision for cross-retaliation under the TCA in respect of persistent non-compliance with the withdrawal agreement?

Martin Howe: As far as I can see, the right to cross-retaliate would appear to arise once you have an arbitral award under the withdrawal agreement. That is the most obvious point. I am not aware of provisions that allow unilateral cross-retaliation for alleged breaches to the withdrawal agreement without a prior arbitral process.

Q34 **Chair:** Does anybody have any further points on that?

Dr Bartels: I agree with that.

Chair: Good. David Jones has a double question to Lorand Bartels and then to David Collins.

Q35 **Mr Jones:** Good afternoon, Dr Bartels. Could you explain how any future agreements concluded between the UK and the EU, or the UK and EU member states, will fit into the structures of the trade and co-operation agreement?

Dr Bartels: Yes. I can answer half of that because it is set out in the TCA, but the other half is not. The half that is set out is what are called supplementing agreements. These are defined in article 2 of the TCA as agreements between the UK and the EU, and between the UK on the one side, and the EU and its member states on the other side. Those are what are called mixed agreements—pure EU agreements and mixed agreements on the EU side. But the EU has to be a party to those agreements for that to work, for there to be a supplementing agreement. The TCA takes a very robust approach to supplementing agreements. It says that they are basically an integral part of the TCA; they are referred to all over the place and they are treated as the TCA, essentially.

Your question went a bit further than that. You asked what about if there was an agreement between the UK and one of the member states. I could imagine that happening, for instance, in an area of mutual recognition of professional qualifications, for instance. The first question from an EU point of view is whether it is within the member state's reserved area of

competence, or whether it is a matter of EU law, in which case the EU should be brought in on top of that. That itself is a difficult question that I cannot get into too much here. If we are talking about an area that is exclusively member state and UK on a matter that does not involve the TCA and does not involve EU law or anything like that, it is irrelevant to the TCA process.

Q36 **Mr Jones:** How do you ascertain what is a supplementing agreement? Does it have to be stated explicitly to be supplemental, or is there some process by which you can ascertain it to be one?

Dr Bartels: The default is that an agreement between the parties is a supplementing agreement because the TCA is seen as a framework agreement. Article 2 of the TCA is quite specific on the point and says that it is possible that a subsequent agreement can itself say that it is not a supplementing agreement for TCA purposes and then it will not be. The default is that it will be, but it is possible to contract out of that system.

Q37 **Mr Jones:** Does the usual dispute resolution mechanism in the TCA apply to supplementing agreements?

Dr Bartels: Yes, it does.

Q38 **Mr Jones:** Okay. Professor Collins, what arrangements are in place to review the TCA?

Professor Collins: The TCA provides for a review every five years, and you will recall from my previous answer that there are also specialised reviews for certain parts such as the level playing field. How does that compare to other FTAs? It is very similar. The USMCA has a review every six years. The UK-Japan Comprehensive Economic Partnership Agreement has a 10-year review. If I am not mistaken, CETA does not specify a review period. Christophe may correct me on that. That is very common. About 70% of bilateral free trade agreements have review provisions in them, and the timeframe under the TCA is not unusual.

Q39 **Mr Jones:** Is it possible to accelerate that review schedule?

Professor Collins: It is specified every five years. I do not know if it is possible to accelerate. I do not believe so.

Q40 **Mr Jones:** Presumably, by agreement, it could be.

Christophe Bondy: It would have to be by consent.

Professor Collins: Yes, by consent.

Mr Jones: Thank you very much.

Q41 **Chair:** This is the last question, and I will put it to the panel as a whole. In what circumstances can the TCA be terminated in whole or in part? First, Martin Howe.

Martin Howe: Thank you, Chairman. There is a general provision for termination on 12 months' notice that brings the whole agreement to an

end. Twelve months can be given at any time of year, but it always comes into force on the first of the following month, if you see what I mean. That is leaving aside provisions for termination for breach. Assuming no breach, that is the general termination provision.

In addition, there are certain more specific termination clauses relating to participation in union programmes and law enforcement and judicial co-operation where there is a shorter period, generally nine months. It is quite complex because there are those scattered around. The total umbrella, if you like, in everything can be terminated on twelve months' notice.

Q42 **Chair:** Thank you. Does anybody else have any points to make on that?

Dr Bartels: Yes, I am happy to add a little bit. In addition, there is a general safeguards clause in article 773, which will be familiar to some people as being similar to article 16 of the Northern Ireland protocol. That is overarching and allows for suspension of the agreement. It has to be proportionate, so it is unlikely, unless it was a complete disaster, that it would lead to the termination or suspension of the agreement as a whole, but it is an important element of the overall package.

In addition to the various parts of the agreement that Martin was referring to, some of which have their own suspension mechanisms, another one worth mentioning, because it covers the lot, is what are called essential elements of the agreement. When there is a serious breach of these essential elements, the agreement can be suspended or terminated. Those essential elements are to do with certain very serious human rights violations. We need to assume that that is never going to be an issue. They also include failures against democracy. Climate change is there, and that is worth paying some attention to, because this agreement is the first time that climate change has been included as an essential element of the agreement.

I have a long-standing interest in essential elements because my PhD, quite a long time ago, was on essential elements causes. I know what they cover. They are weapons of mass destruction and that sort of thing. That is a bit more common. These have not been triggered, I should say, except for countries that are poor. It is always in pretty serious violations like military coups, human rights and democracy violations, or something very similar as with Syria. In those circumstances, it has been triggered on around two dozen occasions by the EU. It is a long-standing EU clause. It has never come anywhere near that, obviously, with like-minded countries. It is unlikely that it will be an issue, but I would keep an eye on the climate change provision in the long run. It may turn out to be important if policies diverge significantly.

Chair: David, you had your hand up.

Q43 **Mr Jones:** Yes, I did. Thank you very much, Chairman. I am interested in the interplay between the trade and co-operation agreement and the

withdrawal agreement. Are there any provisions in the TCA that could lead to a termination of it in the event of there being some repudiation, for example, of the whole or any part of the withdrawal agreement?

Dr Bartels: To go back to what Martin was saying, you could imagine a scenario in which one side violates the withdrawal agreement, the other side commences proceedings, there is a decision against the violating party that is then not complied with, and then in those circumstances the TCA can be suspended or terminated. It is the ultimate backstop for the backstop—or the front stop.

Mr Jones: I thought we had seen the end of backstops.

Dr Bartels: In law, you never see them.

Q44 **Chair:** Christophe, do you have any further points on that?

Christophe Bondy: No, just to note that, from what I have seen of the EU, it will enter into the kind of framework agreements that include an ultimate escape clause in the sense that there are serious or fundamental violations. There is a framework agreement, for example, in the context of EU-CETA. At the end of the day, in invoking any of these sorts of termination provisions, especially in the context of something as complex, and having so many different aspects, as the trade and co-operation agreement, the implications for individuals and enterprises across Europe would be so significant that I would be very surprised to see how one side could pull the plug on the agreement.

Chair: Gentlemen, thank you very much indeed. Does any member of the Committee want to raise a further point at this stage, or have we more or less covered everything? It has been a very helpful discussion. I am really grateful to the four of you for coming to give evidence. It has been extremely illuminating and very interesting stuff.

I think it was Maine in his book, "Ancient Law", who said that justice is to be found in the interstices of procedure. I think the outcome of all this will depend very much on the interstices of this agreement, which you have been good enough to give us so many thoughts about. Because some of the things that we have asked have given rise to questions that I think may well be matters on which you would like to enlarge a bit, if you would like to send us a paper to cover anything that you feel ought to be expanded a bit, feel free to do so. Other than that, I thank my colleagues for their attendance and the panel for their expert analysis. Thank you very much indeed.