European Affairs Committee

Protocol on Ireland/Northern Ireland Sub-Committee

Corrected oral evidence: Legal implications of any invocation of Article 16, and of the current operation of the protocol

Wednesday 1 December 2021

3.45 pm

Watch the meeting

Members present: Lord Jay of Ewelme (The Chair); Lord Dodds of Duncairn; Lord Empey; Baroness Goudie; Lord Hain; Lord Hannan of Kingsclere; Baroness O'Loan; Baroness Ritchie of Downpatrick; Lord Thomas of Gresford.

Evidence Session No. 1 Heard in Public Questions 1 - 17

Witnesses

I: Dr Sylvia de Mars, Newcastle Law School, Newcastle University; George Peretz QC, Monckton Chambers; James Webber, Shearman and Sterling LLP.

Examination of witnesses

Dr Sylvia de Mars, George Peretz QC and James Webber.

Q1 **The Chair:** Good afternoon and welcome to this public meeting of the European Affairs Sub-Committee on the Protocol on Ireland/Northern Ireland. We are today holding an evidence session exploring the safeguarding mechanism in Article 16 of the protocol on Ireland/Northern Ireland and other legal issues relating to the operation of the protocol. I should say that we had thought, when planning this session, that the Government might be about to invoke Article 16. It now looks as though we have at least until Christmas before it emerges again as a real possibility, so we can look more calmly at the issues today. We have a panel of distinguished legal experts to help us do so. You are all very welcome and we very much look forward to your evidence.

I would be grateful if you would introduce yourself briefly the first time

you speak. Today's meeting is being broadcast and a verbatim transcript will be taken for subsequent publication. That will be sent to each of you to check for accuracy. I should also refer to the list of members' interests, as published on the committee's website. We will aim to finish by 5.30 this evening, which may require a little legal brevity, but I think that suits us all best if we can achieve it.

I will ask the first question. What would you identify as the principal legal issues arising in relation to the operation of the protocol since it came into force?

George Peretz: I will list some and I am sure Sylvia and James will chip in with others. I will do this in no particular order. Domestically, you have had a challenge to the status of the protocol in the Northern Ireland courts. That raised issues based on the Act of Union with Ireland and with a claim of incompatibility with Article 3 of protocol 1 to the ECHR, which is the right to be able to vote for a Parliament that makes your laws.

There are a number of issues. One we can identify in relation to what we might call the UK internal market. The United Kingdom Internal Market Act contains a regime that is designed to preserve a single UK market. It is, effectively, replete with exceptions in relation to Northern Ireland. I had the pleasure yesterday of listening to a little video produced by the Competition and Markets Authority on the Internal Market Act, which talked in glowing terms about the UK internal market and the ability of goods to move around freely. I felt that every sentence of that should have been followed with "except in Northern Ireland", which is an illustration of some of the difficulties. There are other issues, but I will hand over to James or Sylvia.

James Webber: I agree with George's contribution. The principal legal issue is also a practical issue, which is the imposition of customs checks and associated documentation for trade flowing between Great Britain and Northern Ireland. That is obviously an issue that affects by far the greatest part of Northern Ireland's trade in goods. As I think is well established, Northern Ireland exports over twice as much to the rest of the UK as it does to Ireland. It imports over four and a half times as much from GB as it does from Ireland. That is the Northern Ireland Statistics and Research Agency's presentation that it put out last month. On the very great part of Northern Ireland's trade, the imposition of a customs border and associated checks is probably the single biggest issue.

Related to that, the at-risk concept in the protocol was, by design, intended to restrict the application of the protocol, so far as possible, to goods that were at risk of passing into the single market. That at-risk concept had some development around this time last year in the Joint Committee but has subsequently been relatively undeveloped in Northern Ireland. The stalling of the development of that principle is a problem.

The potential end to the grace periods—at the moment, extended with no deadline in sight—in respect of the goods to which they apply, such as chilled meats et cetera, is another unresolved legal issue.

The last one on my list would be state aid, which is a very substantial legal problem that has not yet manifested itself in a practical way, except perhaps in a case that British Sugar has brought against the Department for International Trade and Tate & Lyle Sugars. It is the first case that has engaged the state aid provisions of the Northern Ireland protocol. Those issues are legally very serious. Essentially, the jurisdictional perimeter of the EU's state aid rules is currently very unclear. Is it just constrained to Northern Ireland? It is probably not, on its face. How far and what it catches in respect of state aid measures in the rest of the United Kingdom is also highly uncertain. That would be my starter for 10.

I should also say that I am a partner at Shearman and Sterling and an EU competition lawyer.

Dr Sylvia de Mars: I am a senior lecturer in law at Newcastle University. I am an EU generalist who, for the last six years, has looked basically at nothing except Northern Ireland and the issues arising in Brexit. I believe that is why I am here today.

I do not have much to add to what George and James already raised. In terms of purely legal concepts, I too flagged the concept of a good "at risk" as being one of the core legal problems in the protocol. Depending on how narrowly or broadly you define that concept, you end up with a spot-check border or a border that actually substantially restricts trade in a practical manner. It is a legal practical problem.

On the legal political side, the other thing that as a constitutional lawyer I consider a legal problem is the amount of democratic input that parties in Northern Ireland have into the EU law applicable under the protocol. We will come to that with a later question, but that is definitely something that I have flagged as being of concern.

The Chair: That is a very good start. There are a number of points that you have raised that we will come back to later in the session.

Q2 **Lord Hain:** Welcome to our witnesses. We are looking forward to hearing more from you. What would happen in the short and longer term in the event that Article 16 was invoked? What would be the consequences? The Government acknowledged in their July Command Paper that the actions that can be taken under Article 16 are limited to the specific difficulties faced and are subject to the uncertainty of an as yet untested dispute settlement process and would be temporary. That is what the Government said. What are the implications, in practical terms, of Article 16's use as a tool to resolve difficulties with the protocol?

Dr Sylvia de Mars: That is a very big question. I will tackle it in three parts. What would happen first is a lot more discussion. Negotiation and talking is basically the immediate outcome of deciding to use Article 16. Under annex 7 to the protocol, it is made clear that, if the UK wants to

rely on Article 16, it first has to notify the Joint Committee that it is considering it. Then a month of talks are required to begin. Only following that month of consultation, if nothing is resolved then, is the UK allowed to put in place any safeguard measures.

In response to that, the EU would then be allowed to take rebalancing measures under Article 16(2) of the protocol. All these measures, as they are written down, are designed to be the least disruptive of the protocol possible. That is the aim with the initial Article 16 action—for it to disrupt the protocol as little as possible. Whatever the EU does in kind has likewise to be proportionate to what the UK has done.

It is difficult to give a clear indication of what might actually happen, because so much depends on what the UK would choose to adopt as safeguard measures. It is almost impossible to predict how the EU will react until we have a clearer idea of what the UK sees as the problem that it will tackle with Article 16. If it involves basically disapplying the entire protocol insofar as customs and trade is concerned, the EU might react significantly more strongly than if a minor adjustment were made, for example in trade in a particular good like medicines. Those would be two very distinct extremes of action. After that, once safeguarding measures and rebalancing measures have been taken, every three months the parties have to come back together and talk in the Joint Committee about whether it is time to end the safeguard measures yet, and, if not, set, hopefully, a new expiry date for them ending.

The end consequence of this is that it really depends on what the UK hopes to do with Article 16. If it is protesting the fundamental set-up of the protocol, Article 16 will lead to eternal discussions with, to my view, little scope for any sort of resolution that was not already found at this point.

Lord Hain: Did you say "eternal discussions"? Sorry to interject.

Dr Sylvia de Mars: Yes, basically for ever. If the UK is justified in having the safeguard measures, fine, but they still revisit them every three months. If the EU has rebalancing issues—we will come back to that later, because it is difficult to see how the EU would rebalance disapplying parts of the protocol—whatever it does in time, it again has to come back and talk about those every three months.

Article 16 does not force a renegotiation of the protocol, so it really depends on what exactly the UK Government are protesting here. If it is inherent to the set-up of the entire protocol, I am not sure that Article 16 would result in any change that we were not getting through discussions we are already having, if that makes sense.

Lord Hain: Can I clarify? You get a month of immediate discussions, so nothing happens. The status quo prevails for roughly a month.

Dr Sylvia de Mars: Yes.

Lord Hain: Discussions take place and then, presumably, dependent on

what the UK did and what the EU did in retaliation, the rest would follow as you describe it.

Dr Sylvia de Mars: Yes, then you enter the three-month cycle of further discussions. The EU has more options that it could also undertake. It really depends on what the UK does. This is why this is so difficult to describe. If the EU disagrees with the rationale for the UK's invocation of Article 16, it could very well take that to the Joint Committee for arbitration. It is very likely to do that, in my view, if it believes that the grounds for Article 16 have not been met in the case the UK has made.

Then you would get the arbitral panel, working alongside these meetings every three months—all of this happens contemporaneously—deciding on whether the serious disruption or the diversion of trade has taken place. Those concepts would be interpreted.

Depending on what the UK does, the EU could also start infringement proceedings before the Court of Justice. If, for example, it feels that, in the safeguard measures the UK has taken, it has actually derogated from one of the articles of the protocol, that would be grounds to start an infringement proceeding under Article 12 of the protocol, before the Court of Justice. What takes precedence between the Court of Justice and arbitration under the Joint Committee? We have no idea. It is more or less written as if there is an assumption that those two things would never happen at the same time, or, if they do, they would just work themselves out.

Like I said, it is difficult to give a concrete answer as to what specific avenue is taken. It really depends on what grounds there are for invoking Article 16, how those are received and what the scale of getting away from the protocol looks like at the end of the day.

Lord Hain: That is really helpful. Perhaps George Peretz could follow, and could you briefly introduce yourself?

George Peretz: I am a barrister at Monckton Chambers in London. I used to describe myself as a specialist in EU law. I now do EU relations law, of which the protocol is part, as well as various things that used to be EU law, such as subsidy control and State aid.

I entirely agree with everything Sylvia has said. An awful lot depends on exactly what measure is taken, the type of the measure, whether it is just a targeted measure dealing with one particular problem or a much more broad-brush thing.

One thing I would add to Sylvia's list of possible legal actions that might be fired off as a consequence of using Article 16 is the possibility of domestic legal challenge in the Northern Ireland or, conceivably, the English courts. Whatever the Government choose to do, there will probably be somebody domestically who is unhappy about it or has standing to challenge it. If what the Government are doing with their Article 16 measure is, putting aside Article 16, clearly in breach of some

other aspect of the protocol, the domestic courts would have to decide whether Article 16 justifies a breach of the Northern Ireland protocol.

One has to remember that the Northern Ireland protocol is part of domestic law. In fact, it is supreme as a matter of domestic law. It has the same status in domestic law as the treaties on the functioning of the European Union and all the other treaties had while we were EU members. That is section 7A of the European Union (Withdrawal) Act 2018, which was inserted by the 2020 Act introduced by the current Government.

It is part of the apparatus of the withdrawal agreement that the withdrawal agreement and the protocol have direct effect in UK law. Our courts have no choice but to uphold the supremacy of the Northern Ireland protocol above any other measure that the UK Government choose to take, subject only to their going to Parliament and asking Parliament clearly, unequivocally, in letters visible from outer space to pass primary legislation that indicates that Parliament wants to break the withdrawal agreement, of which the protocol forms part. We are back to the debate that we had about Part 5 of the United Kingdom Internal Market Bill last year. That is the only way in which the Government could insulate themselves from the possibility of a domestic challenge on the basis that the conditions of Article 16 were not made out.

Lord Hain: That is bringing primary legislation.

George Peretz: It would have to be primary legislation. It would have to be an Act of Parliament.

Q3 **Lord Hain:** Could you briefly explain what would happen if there were judicial proceedings involving the European Court of Justice and the domestic courts in either Belfast or London at the same time?

George Peretz: The domestic courts would almost certainly be faster, because domestic courts can move very fast indeed. The European Court of Justice finds it quite difficult to move that fast, for infringement proceedings anyway. There is a whole set of procedure that has to be gone through before the case even hits the door of the ECJ. Domestic proceedings could be brought more or less instantaneously if there was sufficient urgency.

The likelihood would be that, if there was a domestic challenge, it would go first, and probably before all these arbitration or ECJ cases, because they all take time. It would then be up to the domestic courts to decide what to do.

My own view would be that a domestic court would be quite reluctant, faced with a claimant who said, "I want this decided here and now", to accept that it ought to sit by and let what might well be a serious breach of the protocol sit there, simply on the basis that it would wait to see what the arbitration panel and the ECJ would decide, which might be some months or years later. If you have a claimant who genuinely says, "There is a problem here and I'm suffering losses as a result of what the

Government have chosen to do", I do not think a domestic court would be prepared to do that.

James Webber: I agree with Sylvia's description of the procedure. If we go back, what are the short-term and longer-term consequences? It is absolutely right that, if you look at the waterfall anticipated by Article 16 itself and the procedures in annex 7, they are exactly as Sylvia has described. That precipitates more talking. That really is the legal answer to what happens, because that is what we can read in the protocol itself.

When we stray beyond that, we are hitting the problem Sylvia and George have both identified, which is that we do not quite know how Article 16 will be used. You can probably say that these legal instruments are essentially discussions in the Joint Committee, which will happen anyway, because that is what the protocol says. There are then options: establishing a joint arbitral tribunal and the EU seeking to challenge the UK's use of Article 16 or the UK to challenge the EU's response to the UK's use of Article 16. The litigation could go either way, and it is quite likely that it would go both ways. If the EU sued the UK, the UK would counterclaim that the EU's response has been disproportionate. That is quite likely.

The infringement proceeding in the ECJ is probably a bit of a sideshow, because it is hard to get a decision in any sort of timeframe that would be relevant to the dispute and the negotiations. As George said, there is a long procedure before you can even issue proceedings in the ECJ. I do not know how long the tribunal will take, but it will not be as long as it will take to get a judgment out of the ECJ. The ECJ component is a bit of a blind alley in my view, in terms of practical, legal consequences. It will be one of those things where they launch the proceedings and then we will not hear about much of it for a long time thereafter.

It is worth commenting on George's remarks about domestic legal proceedings, because they rather hinge on being able to say that there has been a breach of the protocol. Article 16 is of course a part of the protocol. I imagine the argument would be, "We consider the UK's use of the protocol in whatever way to be so outside of Article 16 that we can already say it is a breach". That is quite an ambitious argument when what you are really saying is, "These arguments about what 'diversion of trade' and 'serious economic and social difficulties' mean, et cetera, are all undefined things for the tribunal to decide". That is the agreement. That is what the treaty says.

The court will be in a bit of a difficult position, unless it is very clear that the Government has strayed so far outside of Article 16 that it is a breach of the protocol itself. I imagine that the Government will be alive to that. My sense is that that will be quite a significant hurdle to get over for a claimant in a UK court.

George Peretz: If I could come back briefly on that, I entirely agree that the question whether a particular set of political or economic circumstances are serious difficulties is probably territory into which

courts would be very reluctant to second-guess government. Any rationality-based challenge will face an uphill struggle there.

There are, however, issues of law around the application of those tests that would be matters for the court. We may get into discussing some of these later. To take diversion of trade as an example, one issue is whether one has to find a diversion of trade that is more than just a necessary and obvious consequence of the protocol. We can discuss this later, but there seems to be a very respectable, probably correct, legal argument that the trigger conditions in the article simply do not apply in relation to things that are just inevitable consequences of the protocol.

If you have a set of regulatory and customs barriers down the Irish Sea and you do not have them across the Irish border, there will be some movement of trade. That was foreseen. It was foreseeable. Indeed, I think the UK Treasury foresaw it in its comments on the protocol when it was first negotiated in 2019.

Lord Hain: The Treasury said that on the record, did it not?

George Peretz: It is actually a question of law. If the Government are saying that they will point to that as our trigger condition, it would seem to me to be a question of law and it would be for the courts to decide whether that was right, or whether the Government would have to point to something unforeseeable as a trigger condition.

Q4 **Lord Hannan of Kingsclere:** Thank you for that set of answers. It was very useful. I will ask you to talk me through a hypothetical scenario. I know it is difficult in your DNA as lawyers, but humour me as a politician. Let us imagine that the Government were to say, "The circumstances exist to justify using Article 16 as follows: diversion of trade". Notwithstanding the points just made by George Peretz, they will say, "There is an excessive use of checks, more checks than on the whole of the eastern frontier of the EU—rabies for pets, tests on items that cannot possibly end up in the Republic. We also reckon that there's a serious economic and societal difficulty"—let us leave aside environmental—"posed by the fact that every unionist party is now opposed to the protocol. In Northern Ireland, the general presumption was that we do things on a cross-community basis if it is an important thing".

That is my hypothetical scenario. It is not completely imaginary. I asked Lord Frost in the Chamber a couple of weeks ago, "If you are triggering Article 16, will it be for jurisdictional questions as well as just diversion of trade issues? In other words, will you tackle the question of ECJ arbitration?" He said, "Yes, we do not regard the current dispensation as credible or maintainable".

Let us say that happens. Early next month, the Government say, "We don't mind the ECJ arbitrating EU law, but we are not having it arbitrating the treaty. We're not having one team, as it were, being the referee. At the same time, we're unilaterally lifting the following checks". Talk me through what then happens. What do you think is the likeliest sequence of events, in terms of the challenges, the legal arguments that we hear

and which way people are likely to rule? Confine yourself to the law. I am not going to ask you about the political implications. What happens the next day, who brings the case, where does it go first and what are the arguments that we hear in the courtroom?

James Webber: Sorry, Lord Hannan, what exactly was the UK suspending in your scenario?

Lord Hannan of Kingsclere: In this scenario, it is removing the obligation to do tests on goods that it does not regard as being at risk of crossing the border. It is moving to a risk-based approach where it only allows checks on things that it thinks are likely to cross into EU territory. It is saying, "We don't accept ECJ arbitration over whether we're doing this properly. Here is what we're doing to maintain what we regard as our obligations as a good neighbour. Here are the measures we are putting place to stop stuff leaking across the border, but we're not going to accept the European court telling us whether that is adequate".

James Webber: The implication of that is that you would have to suspend Articles 5 and 12 of the protocol, certainly most of Article 12 of the protocol. That would be regarded, in our scale of responses, as a very substantial use of Article 16. Let us take that. Once we serve our notice under Article 16 and trigger the process in annex 7, the EU will object, presumably stoutly. Consistent with that would be a dispute that the EU would raise in the tribunal, so ask for consultations under the dispute mechanism and seek to have a tribunal constituted.

They would also be looking at their own ability to retaliate under Article 16(2), which is the rebalancing mechanism that Sylvia talked about. The rebalancing mechanism allows them, if they consider the UK action to have created an imbalance in the rights and obligations—I suspect they would if we used Article 16 in that way—to then take proportionate rebalancing measures as are strictly necessary to remedy that imbalance.

The first problem they will have is that they are essentially alleging that we have overused Article 16, but their rebalancing is subject to exactly the same legal test as our original use. They have to be careful to ensure that their rebalancing is proportionate, connected to the imbalance that it has created and strictly necessary to remedy that imbalance. Given that the imbalance will happen across the Irish Sea, they will have to try to show that they have been adversely affected by the imbalance created. That will mean showing that the single market has been imperilled in some way, not that goods flowing into Northern Ireland should not be flowing into Northern Ireland but that the single market has been imperilled, which is really the central purpose of the protocol.

The EU will have an evidential difficulty with that. We have not yet seen the flow of non-compliant goods, or evidence of non-compliant goods flowing into the Republic. I have not seen any evidence of that. On that basis, what measures they can take will be quite constrained, and it will be quite difficult for them. The EU wants to try to avoid a situation where it sues us, takes us to the arbitration and then we counterclaim, saying

that it has overreacted and that, when we get to the tribunal, we end up with a "plague on both your houses" judgment, where they say, "Yes, the UK overused Article 16, but the EU overreacted in its rebalancing". The EU would then also have broken the withdrawal agreement, and that would be a judgment that it wishes to avoid. I think that is immediately what it will do.

I would leave the ECJ to one side, because it may well do that, but I do not think that is immediately legally relevant.

Dr Sylvia de Mars: I agree that the first step that the EU would take is to try to pursue arbitration to get a judgment on whether the use of Article 16 is justifiable - basically, if the grounds exist to invoke Article 16 - and then if the measures taken are the least disruptive measures possible under the protocol. The EU would likely challenge on both grounds—both that the UK has done too much to imbalance what it perceives as the problem, and that the problem may not exist in the way described.

On a practical level, I agree that rebalancing will be very difficult for the EU, especially under the protocol itself. What do you normally do when one side does something to a border? You react by doing something at your border, but obviously the protocol exists to avoid the border being between Northern Ireland and Ireland, so the EU cannot naturally react by, for instance, raising a border in response to the UK no longer checking goods that it may deem at risk. On a practical level, it is really hard for me to say what the EU could do if, as James described, the UK effectively disapplied Article 5 of the protocol.

I would read Article 16(2) slightly differently than James does, though. It talks about an imbalance between the rights and obligations under the protocol. Under the protocol, the obligation that the UK has agreed to is to basically check those goods at risk in the way described in the protocol. If the UK was to stop doing that, the EU could naturally say, "It is not doing the thing that it said it would under the protocol, so we are not getting everything we are supposed to out of the protocol". In a way, that case to justify rebalancing of some kind is fairly easy to make but, like I said, practically I am not sure how the EU would engage with rebalancing measures under the protocol, as has been described.

Lord Hannan of Kingsclere: What happens then? Let us say that the EU comes out with something that is close—it may be slightly excessive or just within the bounds—and the UK carries on disapplying the measures. Is that a new frozen conflict that has created new facts on the ground, or is there a resolution?

Dr Sylvia de Mars: That is why I would describe Article 16 as leading to endless conversations, however invoked. Unless one of the parties changes its mind about the way things are functioning, Article 16 itself will not result in a change of relationship, if that makes sense.

Lord Hannan of Kingsclere: George, I suspect you may have a slightly

different take on this.

George Peretz: I agree with an awful lot of that. Part of the difficulty is that the example you gave conflates two very different types of invocation of Article 16. One is that you were talking about what you described as excessive checks and so on. One can imagine certain targeted measures dealing with particular checks that fairly naturally fit within Article 16.

A wholesale suspension of Article 5 brings me back to the legal issue I mentioned earlier, which is that it is pretty obvious when you read it what Article 5 says. It requires checks. Any suggestion that checks were unpredictable, that they would not happen, seems to me to be inconsistent with a plain reading of Article 5. It was pretty obvious what was going to happen. Indeed, people writing about it said so at the time. You have the issue about whether you can use Article 16 to deal with something that is inherent.

Talking about, as it were, tackling the role of the European Court of Justice, the European Court of Justice's role is absolutely baked into the whole structure of the protocol. If you are thinking about tackling that, you really are using a particular article of the protocol to undermine a basic element of its whole structure. As a lawyer used to interpreting contractual documents and treaties, it is very difficult to defend that sort of interpretation of a provision like Article 16. Any court or tribunal will lean very strongly against an interpretation of a provision like that in a way that allows a party fundamentally to revise what it agreed to, and what it clearly agreed to, in the original agreement. The courts do not like that sort of thing. They lean against that sort of interpretation.

A point that has not been mentioned, which is very important, is the possibility of a domestic challenge. A domestic challenge is not a diplomatic matter that can be dealt with in diplomacy. If somebody wants to bring a challenge and goes to court, the issue for the court is whether Article 16 has been used in a way that is clearly beyond its scope.

It seems to me that it is, at the very least, a respectable argument that the wider end of the spectrum measures that you are talking about is an area where a domestic court would have to conclude, on the basis of legal argument, that the Government had exceeded the scope permitted to them by Article 16, at which point a domestic court would issue an order to the Government quashing the measure concerned. As I said, the only way in which the Government could insulate themselves from that sort of challenge is by getting primary legislation through Parliament.

Lord Hannan of Kingsclere: If they have declared that they are removing the jurisdiction of the ECJ, and if that cannot be done short of denunciation of the treaty, presumably that is the route they would take.

George Peretz: Yes. As I have said, the Northern Ireland protocol has the same status in UK law as the EU treaties did when we were a member. It was clear, and the higher courts said so several times during

our membership, that if Parliament ever passed legislation that clearly intended to displace the supremacy of EU law, the courts would give effect to what Parliament decided. Parliament was always, in the end, sovereign, and Parliament is, in the end, sovereign here. It is just that, at the moment, the way the law currently stands, the Northern Ireland protocol is supreme and the courts would not give effect to secondary legislation that was inconsistent with the protocol. It would need to be primary legislation that was absolutely clear that it intended to breach the protocol. The precedent is Part 5 of the Internal Market Bill, which was discussed by your Lordships' House in some detail last year.

Lord Hannan of Kingsclere: Indeed, yes. Thank you. That was very useful.

Q5 **Lord Hain:** Very briefly, George, could you envisage in the circumstances you have just described, where Parliament passes legislation, that the Supreme Court would then be asked to adjudicate between parliamentary legislation and an international treaty to which Parliament has given its agreement?

George Peretz: As a matter of orthodox UK constitutional law—I should probably say, more accurately, English constitutional law; I would never dare to give advice on Scots law—Parliament is supreme. You cannot attack an Act of Parliament by saying that it is inconsistent with an international obligation of the United Kingdom, however recently entered into and however clear the obligation was.

Clearly, Parliament is sovereign and, ultimately, the court has to give expression to its wishes. It is just that when Parliament has also said, as it has, that it wants the Northern Ireland protocol to be supreme in UK law—that is section 7A of the European Union (Withdrawal) Act—the courts will assume that Parliament means it until it issues a very clear statement to the contrary.

The Chair: Thank you very much. That was a very interesting discussion.

Q6 **Baroness Ritchie of Downpatrick:** I have two questions to ask. First, what are the legal consequences of the terms on which any invocation of Article 16 is based, for instance whether the invocation is narrow or broad in scope? On the basis of which articles of the protocol, or aspects of its operation, could a case be made for invoking Article 16? Which are the strongest or weakest arguments?

Dr Sylvia de Mars: We have already indicated that the legal consequences regarding the scope of the invocation of Article 16 are twofold. First, they determine what kind of rebalancing measures are possible for the EU, and whether those would be broad or narrow in scope. The other legal consequence, depending on the breadth of the invocation of Article 16, would be whether it is a measure that is suited to fit within Article 16 to begin with. Article 16 is not, to my mind, designed to disapply the entire protocol. I am not implying that that is what the UK wishes to do, but if that were to happen, that would not legally fit in Article 16 as drafted.

In terms of which articles of the protocol make for a case to invoke Article 16, I should have mentioned this in response to Lord Hannan's scenario but I did not. A particular problem with attaching issues regarding the Court of Justice to an Article 16 claim is that Article 16 very explicitly deals with the application of the protocol, which I also read as its operation, and the Court of Justice to date has literally done nothing with the protocol at all yet. To my mind, it would be a very difficult case to make that it is in the treaty, we agreed that it would be in the treaty, but now, in practice, it has been a big problem. The court has not done anything yet. That is probably the weakest case, to my mind.

Given where most of the agreed problems and ongoing negotiations are, a case will probably involve Article 5, perhaps Article 7, of the protocol. We have heard nothing about the functioning of the Single Electricity Market, so I am not sure how that would be used. I will leave whether the state aid provision is grounds for Article 16 to the learned gentlemen who are accompanying me, who are saving me from having to pretend to understand state aid, so that is very nice. Anything that does not have to do with the operation of the border is not going to make a case for Article 16, so that excludes the rest of the protocol.

James Webber: The most obvious use of it will be in respect of diversion of trade and societal difficulties. We have talked about diversion of trade a little, and that most obviously attaches to the trade provisions, which are Articles 5 and 7 predominantly. There, George has made the point a couple of times that the challenge will be to differentiate. Article 16 merely refers to diversion of trade, so Article 16 does not, on its face, differentiate between diversion of trade caused by the protocol as such and diversion of trade that is of a type that Article 16 should be used for. It just refers to diversion of trade, so we are already layering on to the treaty an interpretive gloss to say that, because the protocol anticipates a trade border down the Irish Sea, it must mean something other than a diversion of trade necessarily deriving from that trade border. You would have to establish that point first.

Then it gets a little bit murkier. I am not sure that you can say that all the diversion of trade that has happened was a necessary consequence of the protocol , because it is not a normal customs border. Uniquely in the world, it is a customs border that is operated by the same sovereign state on both sides. It is also a customs border where the EU has given reasonably—in fact, in international law terms, very—strong obligations to use best endeavours to facilitate the trade between Northern Ireland and other parts of the United Kingdom, which is Article 6(2).

A case could be made to say, "A diversion of trade by a customs border implies a certain amount of trade diversion, but much more than we were expecting because of the other provisions of the protocol". It seems to me that that is a perfectly respectable argument. Exactly how much diversion of trade and which category your trade diversion fits into would be something for the arbitral tribunal. Diversion of trade is the first place you would go when looking for a legal basis to trigger Article 16.

The second is societal and social difficulties. That goes to the comment Lord Hannan made. What amounts to that and what parts of the protocol are causing it is undefined. The lack of any support for the protocol from the unionist political parties in Northern Ireland is a very major problem for the protocol anyway. There is a good argument, with the context of Northern Ireland and its constitutional traditions since the Good Friday agreement, to say that that in itself is sufficient societal difficulty. What is precipitating that? Is it merely the restriction in goods, or does it spread more widely to the areas of the protocol that have not yet caused practical difficulties—to Sylvia's point. That would be argued, too.

My own view is that I have a preference not to treat the ECJ separately from EU law. We will talk about it when it comes to Article 10 and the proposed solution for Article 10. Rather than trying to leave EU law behind and get rid of the ECJ, we should be looking at solutions that are not applying EU law in Northern Ireland more broadly than in respect of goods that are likely to cross the border into the single market. With EU law comes the ECJ, of course.

George Peretz: I will add a couple of comments on that. There is one other question that would need to be considered when thinking about political/ societal difficulties caused by the application of the protocol: one also has to look at the counterfactual and try to work out what the position would be absent the protocol and whether those societal or political difficulties would be better or worse. That is perhaps not an entirely easy question.

I will say something briefly about the State aid provision, because Sylvia trailed it and it is an issue that has caused some practical difficulties. Both James and I have had experience as practitioners in the area of trying to advise clients and grant-giving authorities on the position. The real difficulty there, to be blunt, is nothing to do with Northern Ireland at all. The problem is that it is an issue of what has become known in the jargon as "reach-back".

It is in the way Article 10 is framed. This is not a hidden problem. It is a problem that immediately strikes you, if you know anything about the area, as soon as you read it. Article 10 applies to any UK measure—a measure given by the Sussex county council is a UK measure—that has an effect on trade in goods between Northern Ireland and the EU. The problem is that the classic EU State aid law approach to "effect on trade" is that that is an extremely low threshold indeed, a threshold that is very hard to trip over. Almost anything of any significance can create an effect on trade. Here it obviously has to be related to goods in Northern Ireland.

It is very easy to think of examples. I have certainly come across some as an adviser, for example a local authority in the north of England thinking about giving a grant to a company that owns a factory that produces goods that are sold in Northern Ireland. If you read the Commission guidance on Article 10, it will tell you that that is a situation where there will quite possibly be an effect on trade in goods between Northern Ireland and the rest of the EU. If you read the UK Government's

guidance issued by BEIS, it tells you equally firmly that that should not happen.

You, as the granting authority, the client or the lawyer advising either of them have to make up your own mind. Unfortunately, because lawyers and other people are cautious, that tends to be to say, "In which case, because of the risk, because there is no question of anybody in the UK being prepared to notify this to the European Commission", which means that it is unlawful if it is caught by the protocol, "we're not going to proceed with the grant". That is all a bit unfortunate.

Can you say that that is an application of the protocol leading to serious societal and political difficulties? The problem there, and the way the State aid rules work, is that, if you have a measure that you think is a bit problematic, the answer in State aid law is that you just notify it to the European Commission. If the European Commission thinks it is absolutely fine, the measure does not create any problems and it would not affect the EU adversely in any serious way, it will, necessarily, clear the measure under its powers to do so.

It is actually very hard to identify, under Article 10, any respect in which the Article 16 trigger is satisfied. It does not lead to difficulties really, because the Commission can always clear things. It certainly does not really lead to difficulties in Northern Ireland either, because in Northern Ireland it is pretty clear that a quite a lot of things will be caught because of geographical location.

Q7 **Baroness Ritchie of Downpatrick:** I have one more question, and I simply ask Sylvia this one. Are there any precedents in other treaties that can be drawn on in assessing the case for and the likely impact of the invocation of Article 16? How frequently are similar clauses in other international agreements invoked?

Dr Sylvia de Mars: I did some digging in response to this question. My first point here is that there really is nothing quite like the Northern Ireland protocol in international law. Insofar as we are drawing analogies, they are vague, if we can put it that way.

The vast majority of escape clauses, as they are sometimes called in international economic law, that produce these kinds of safeguarding measures are found in regular free trade agreements. Investigations to start those under the WTO have been initiated about 400 times since 1995. The safeguard measures have been adopted 196 times. What does this tell us? In international trade terms, surges of imports from other WTO members are a fairly common occurrence, and other nations frequently take corrective measures in order to counterbalance the effect of those imports on domestic industry.

Is that analogous to what we have here? I do not think it really is. However you define diversion of trade, it does not just describe imports coming in from somewhere. It describes something different.

Conversely, if you look at human rights treaties, you tend to have derogation clauses in those treaties for serious societal, economic, political and environmental events. Those tend to be relied upon only when an unforeseen catastrophe strikes in some way. Currently, we have 10 members of the Council of Europe derogating from the ECHR and particularly the freedom to gather, freedom to congregate, because of Covid. They are putting restrictions in place on that and saying, "We need to do this because of the current situation".

The common ground there is that they have all been in response to unforeseen events that have caused particular problems for a limited period of time. That is quite comparable. Outside of Covid, nine different states to the Council of Europe have relied on Article 15 of the ECHR. Quite a number of cases involve Ireland and the United Kingdom in light of the Troubles. There is some precedent there for societal events requiring the use of an escape clause.

The only other example I can think of that comes closest to what we have in the protocol is the derogation or safeguarding clause in the EEA agreement. I have been doing this for so long now that this feels like a lifetime ago, but I remember, back in the days when the referendum vote had just come in, that there was quite a lot of discussion about how Liechtenstein had a derogation from the free movement of people baked into the EEA.

That was the only context in which I was aware of that safeguarding measure being used, but there is another example and it is to do with Norway and salmon fishing. In 1995, the European Commission relied on this safeguarding measure. Because of an anti-dumping investigation with Norway's main exporting partners, the price of Norwegian salmon had gone through the floor. It had plummeted completely. Norway was way overproducing salmon and was sending it all to what was then the European Community.

The Commission intervened and said, "This is killing our salmon farmers. They live in very outlying territories. They don't have any other sources of income. They can't compete with this on these prices. We want to use Article 112 to put a floor in place on the price of EEA imported salmon". This worked in exactly the way that Article 16 described. They announced that they would do it. There were negotiations and consultations about it. They said that they would do it for six months and then revisit how things were going. Six months later, there was a follow-up, saying, "We're getting rid of this now. This has been resolved".

That is as close as we can come. As I say, it is still not comparable to what the protocol itself is there to safeguard, if that makes sense, or what the evidentiary requirement would be for starting an Article 16 invocation.

Q8 **Lord Dodds of Duncairn:** It is fascinating going through all that. Sylvia, I wonder if you have looked at the precedent, such that it was, of the almost invocation of Article 16 itself on 29 January by the EU. What

process was followed and what reasons did they give? We know that it was pulled back at the very last minute, but there must be some reasons for why it was there and what the process was. There was no notification to the Joint Committee, as I understand it. What about that as some indication of how the EU would approach the invocation of Article 16?

Dr Sylvia de Mars: That is a very good question. I have to confess that I noted that it had happened and I did not look at it in preparation for this meeting, so I will decline to comment on that in detail. I can send a written comment with my views, if that is helpful.

Lord Dodds of Duncairn: That would be very helpful. There is a concrete example of Article 16 almost being invoked by one side. I would have thought that would be very useful to have. Thank you for that offer.

Dr Sylvia de Mars: I will absolutely do that. Sorry, I did not look at it because, as you said, they did not actually invoke it. As far as I can tell, just off memory, I do not see a clear connection to the diversion of trade argument there. I would have to investigate the specific ground that the Commission was playing around with.

The Chair: It will be very helpful indeed if you could write to us. That would be extremely useful.

Q9 **Baroness Goudie:** Good afternoon. James, we are now in the current operation of the protocol. Aside from Article 16, what other legal paths are open to the United Kingdom and the EU to address the problem that the protocol has given rise to? How likely are they to lead to a successful resolution in the current situation? Further, what are the legal and political implications if the current talks do not lead to an agreement?

James Webber: I am probably not qualified to comment on the political implications, but the most obvious of the legal paths is Article 13(8) of the protocol, which is the ability to be able to negotiate a subsequent agreement. In some ways, what the Command Paper in July was asking for and what the EU has so far resisted is a renegotiation of the protocol. That is the most obvious path. Beyond that, you end up back in the arbitration, then the adverse findings, and then use of Article 16 and the countermeasures frozen conflict world that we talked about. There is not really another legal path within the protocol.

The last legal path, which is very rarely discussed, and there are probably good reasons for that, would be denunciation of the withdrawal agreement under the Vienna convention. That would be an extremely difficult thing, politically and legally. Essentially, the Vienna convention governs the termination of treaties and the denunciation of bilateral treaties like this in which the treaty itself does not have termination provisions. The convention does have some provision for being able to argue that one party is entitled to walk away from their treaty obligations. They are entitled to serve 12 months' notice for their treaty obligations to finish.

This is not my area. This is more for Sylvia or other public international lawyers. To my mind, the most credible argument I have heard is that the treaty was temporary because its legal basis was Article 50 TFEU, which was never supposed to represent permanent relations between the United Kingdom and the EU. The temporary nature of the withdrawal agreement would form the basis for the UK to argue that, notwithstanding the fact that it had no termination provision built into the withdrawal agreement, it was never intended to persist. I say that not because it is my area of expertise but because it seems a credible legal argument.

Replace the protocol with something else under Article 13(8). Continue the frozen conflict route, which essentially is use of Article 16; litigation and retaliation against its use; litigation against the response to the use of Article 16 and so on back-and-forth. It is essentially a continuing negotiation using litigation as one of the fora for that, which does happen in international agreements. That is how the Airbus-Boeing subsidies dispute has ground on for 20-plus years. The last option would be looking at the UK's ability to denounce the withdrawal agreement in its entirety.

Dr Sylvia de Mars: I would agree. That would essentially have been my answer. As to Article 50 and the temporary or not nature of the withdrawal agreement as a whole, that would be an incredibly difficult argument to make anywhere, for the very simple reason that it would be someone other than the EU deciding on the EU's competences. I am not sure that would help anyone in the long run. It is a route best avoided for the sake of ongoing decent relationships between the UK and the EU, not least because both parties ultimately agreed to do this using Article 50. It would seem rather disingenuous now to say, "You've tricked us. It's forever". You were there when it was done.

George Peretz: I do not have much to add to that. I simply observe that there are provisions of the withdrawal agreement that are definitely to the benefit of the United Kingdom that will go on for a very long time. The most obvious one is the part of the citizens' rights provisions that provide protections for UK citizens resident in the EU. Those provisions are designed to go on for the rest of their lives, which could of course be up to and even exceeding a century.

Q10 **Lord Dodds of Duncairn:** I want to come on to the EU's four non-papers that were published in October. They and the Government's Command Paper are currently the subject of discussions, or negotiations—call it what you will. Does the EU have much more room for manoeuvre legally to put more on the table to solve some of these problems, in particular the issue of the so-called democratic deficit? This is the lack of not just a say or influence, but the final decision-making on laws affecting Northern Ireland by anyone elected to Stormont, a local council, Westminster or wherever.

How does the EU paper address that? It talks about greater consultation, a role in influencing and so on. In terms of the voting and decision-making, legally speaking do Northern Ireland elected representatives

have any meaningful say under the current arrangements or the proposals that are put forward in the EU papers?

George Peretz: Three of the EU non-papers are not about the democratic issue, which I will come to in a minute. There have been indications that the EU may offer some greater flexibility than is in those papers. One area that I take an interest in is medicines regulation, for example. The current non-paper deals entirely with medicines that are, in technical jargon, subject to the decentralised procedure. They are not centrally authorised products, so they do not have to be authorised by the European Medicines Agency in EU law. Centrally authorised products include such topical products as antiviral products, products developed from biotechnologies and cancer treatments.

The currently published non-paper does not deal at all with issues arising out of those medicines. There is the potential issue that such a product could be licensed by the MHRA, which is the UK medicines authority, in relation to Great Britain, but the MHRA could not license them in relation to Northern Ireland because it is EMA only. The EMA may take longer because of divergent legal procedures or different times taken to go through the procedures. There could be a situation in which a cancer treatment was available in Liverpool but not in Belfast. There are clearly problems arising out of that. I gather from the press that the Commission has indicated that it might be prepared to look at that as well, so there may be some movement.

Turning to the democratic issue, just as a legal comment, and as Lord Dodds will be well aware, the Allister case in the Northern Ireland High Court had as one of its star arguments the argument that the protocol was inconsistent with Article 3 of the first protocol to the ECHR. That argument was dismissed by the judge. Article 3 is the provision that contains the right to vote for your laws.

There are two levels at which one can look at the judge's reasoning. Is that the correct legal reasoning under the jurisprudence of Article 3? Of course, one is entitled to say as a politician that, even if it is correct legal reasoning, it still does not deal with the political issue. It is quite hard within the structure of the protocol to see how this can be addressed. The Commission paper talks about greater engagement, but, ultimately, Northern Ireland is not represented on the European Council and the Council of Ministers by a member state, and Northern Ireland voters have no right to vote for Members of the European Parliament. I have occasionally seen suggestions that the Republic of Ireland might allow voters from Northern Ireland to vote for Irish MEPs, but there are obvious political issues with that in Northern Ireland and it is a somewhat patch job to solve a real problem.

All one can say is that the problem was absolutely obvious in the protocol. Indeed, the current Government managed to insert the consent provisions in 2024, because they had identified this as an issue. It seems to be a perfectly reasonable political position to say that those are good as far as they go, but that they do not go anything like far enough.

Nobody can say that the problem was not obvious. It was absolutely obvious, and the current Government were well aware of it when they signed the protocol.

James Webber: I would probably focus on the room for manoeuvre set out in the four non-papers. If we just look at the single market papers, which are the three trade papers, the EU has a very large amount of room for manoeuvre should it wish to use it. That is because the practical risk to the single market from non-compliant goods leaking across the north-south border is very small. In some ways, that has been evidenced by the fact that, since the grace periods have been in place since this time last year, when the previous Chancellor of the Duchy of Lancaster negotiated them, we have not found instances of illicit sausages appearing on the shelves of supermarkets in Galway or Cork, et cetera.

That is notwithstanding the fact that the EU rule that is supposed to apply on the Irish Sea border banning trading in chilled meats is obviously in a grace period, so it is not in place. That trade has continued between GB and NI, yet there seems to be no evidence at all to say that those products are finding their way into Ireland. That is not surprising in lots of ways, because these products are distributed using normal retail routes. It is not surprising that they are not appearing where they should not be, because the people who are operating that are trying to comply with the law.

The longer the grace periods go on for and the longer the negotiations continue, the more the facts on the ground demonstrate that the practical risk to the single market is extremely modest. When you think about it, that is not really how the EU justifies or explains the position. The position is more—with some justification, by the way; this is not illegitimate—that the single market works, because it is a single legal entity with the institutional hierarchy and relationships that the treaty of Rome establishes, with the court at the apex of them. The analogy is rather like a balloon: you put a hole in it and the whole thing does not work. The whole thing has to stand and fall together.

That is the EU position. The UK is constantly trying to say, "Yes, but practically this isn't going to make any difference". If the EU is prepared to think practically, an enormous amount of room and space will open up based on the actual risk of goods entering the EU market.

The EU actually has a very high tolerance for practical risks from non-compliant goods. The EU has a very diverse 27 member states, with very different levels of compliance with EU rules in the real world. The EU has to pick and choose which enforcement actions it takes and which enforcement actions it does not; we see it with Poland and Hungary today. Inside the EU, that works of a fashion because everyone has a political seat at the table, whereas of course now the UK has no political power or influence inside the European Union. It is easier to take a more theocratic view of protection of the single market, but if the EU were to take a risk-based approach, an enormous number of opportunities would

open up. There is much more room on the EU side than it has currently given.

Dr Sylvia de Mars: It does not matter all that much if there is a real risk of goods that should not cross the border crossing the border. What determines the EU position and its flexibilities is if it perceives this as a risk, whether reputationally, practically or legally. That is the position it has been negotiating from.

More flexibility can probably be shown in a number of directions. Of course, the reality is that if the member states will it, the EU can in principle do whatever it wants, within the scope of the treaty's competences. For example, more should be doable on medicines and pets. This always surprises me as an ongoing problem with the protocol, just because pets are not generally smuggled across borders if they are actual pets. Animals might be, but the movement of pets is fairly controllable.

More can be done, but at the same time we have to stay conscious of the fact that the entire protocol effectively outsources the EU's external border. Nothing like that exists anywhere else in the world. We are now in a moment of experiencing practical problems stemming from the protocol that make it easier to forget this, but the EU has said, "Okay, we'll give it up. You run our border for us. Just try to do it in line with these rules". The response has now been, "We don't like those rules", but it is still effectively the EU's border. How much flexibility can you reasonably expect there, when the EU are effectively saying, "I'm giving up control of my border and letting you run it"? It would be great if everyone could be pragmatic about this, but the reality is that there are sensitive issues of sovereignty at play on both sides. That has to be taken into account.

As far as democratic deficit goes, the EU can and should go further. At the very least, what Norway has under the EEA should be on offer, and I am not clear to date that it is. Norway gets a very structured ability to provide input into EU legislative proposals. It is not the same as voting, and will not be, but it should be made clear that the EU is extremely willing to countenance that, because it seems like something that should be possible and should have been offered before now.

Q11 **Lord Thomas of Gresford:** This question just follows on from what you said on dealing with the democratic deficit, Sylvia. We are now used to pre-legislative consent Motions in Scotland, Wales and possibly the Northern Ireland Executive. The idea that legislation that affects people should be forwarded to Northern Ireland for pre-legislative scrutiny seems to be an important principle. Although not entirely solving it, it would go a long way to assuaging the argument that is so hotly contested in Northern Ireland about the democratic deficit. I would be interested in your comments.

Dr Sylvia de Mars: I completely agree with that. Once interparliamentary co-operation fully gets set up and functioning between

the EU and the UK, involving Northern Ireland as appropriate in this case, that should definitely be possible. We are obviously in a situation in which the laws we each make have direct impacts on each other. Proper communication about these issues can only help to build better relations. Especially in the case of Northern Ireland, this should be done and prioritised.

George Peretz: I was just going to come back on a slightly different point, which was the outsourcing of the border. I am also an Irish barrister now, and one point that I am often reminded of when I talk to Irish colleagues of mine is the history of the Irish border as a focus of smuggling activity. That has continued even throughout EU membership, to some extent, on products that are subject to different VAT rates and various other bits and pieces.

The greater the extent to which the UK's trade policy differs from that of the EU so that the UK is letting in products that the EU does not or is imposing very different tariffs, and the greater the extent to which the UK diverges from the EU in its regulations, the greater the prospects are for smuggling. As I said before, I have an interest in medicines regulation. Around the world, one sees extraordinary medicines being smuggled that an outsider would never dream would be the subject of a black or a grey market because of regulatory divergences between entirely civilised jurisdictions. They just take different approaches and therefore give rise to quite serious problems of smuggling.

Q12 **Baroness O'Loan:** I was reflecting as I was listening to the discussions that the Northern Ireland Court of Appeal sat for the last two days hearing the appeal against the Allister judgment. I wanted to ask our experts what their betting was on what the Court of Appeal would say, but I will hold my fire on that one for the moment.

I will ask the question I was tasked to ask, which relates to the grace periods that James and others have referred to. What is the legal status of the various grace periods pertaining to the protocol following the Government's unilateral announcement, and the EU's tacit acceptance, of a standstill period in September 2021? For how long can the standstill period persist from a legal viewpoint?

James Webber: There is no particular legal barrier to the standstill period persisting. It would be for the EU to object to it as a unilateral measure by the United Kingdom. As you say in the question, the EU has tacitly accepted it. It will persist for as long as that continues. The EU's remedy, as we have discussed in respect of Article 16, is to take it into consultations first and then into the arbitral tribunal, saying that the UK is not implementing the elements of the protocol that it has agreed to and we have gone past the grace periods that we have agreed to have. There is no limit on how long it can carry on for legally.

George Peretz: Ultimately, the question is whether anybody will take action to stop it. Assuming that the grace periods are inconsistent with the protocol in some way, if the EU is perfectly happy to let them stand

and nobody in Northern Ireland is interested in trying to challenge them in the domestic courts, probably because they do not cause anybody any harm at all and people either think they are a good idea or do not mind, things can go on for quite some time. The law books are replete with examples of government measures that just lay around for some time, and then, perhaps in 10 to 15 years, somebody decided to take them to court and it was held that they were unlawful. During the period when they were operational and nobody bothered to challenge them, they had effect.

Baroness O'Loan: It is largely a very political question, because the effect of the grace periods is to allow trade to continue. If the European Union were to stand against them, that might have a catastrophic political effect, whatever the legal rights of such a decision.

Q13 **Lord Empey:** Good afternoon. I wanted to ask a question pertaining to the Government's Command Paper in July of this year. It dealt with their proposals for the dual regulatory regime, the removal of medicines from the scope of the protocol, which we have touched on, and of course the redundancy of the existing provisions of Article 10 on state aid, which we have also touched on.

James Webber: I will take the question in reverse order, because I have most to say in respect of Article 10. The Government's proposals on Article 10 are viable, unsurprising and entirely right. Article 10, as George has explained, has two problems. One is that its application in Northern Ireland, now that we have the subsidy control provisions of the trade and co-operation agreement, is superfluous. Those obligations of the TCA were not there when Article 10 was introduced, and many of us in the subsidy control world were working under the misconception that Article 10 and the state aid rules in the withdrawal agreement that preceded the TCA would be replaced by the TCA when it was negotiated. When the TCA came in, it did not touch on Article 10. In fact, it did not even discuss Article 10 or how the two things should interact.

The first point is that Article 10 has been superseded by the TCA. If you think that Article 10 is really about ensuring that subsidisation by the United Kingdom authorities does not harm the single market, that is exactly the same purpose that the trade and co-operation agreement and level playing field provisions in respect to subsidies have. It is also what the EU is trying to do with its foreign subsidies regime, which is being developed at the moment, which it says it will also apply to the United Kingdom.

We are now at a mille-feuille of state aid /subsidy control rules. We have the subsidy control rules of the EU that apply in Northern Ireland, the TCA and the foreign subsidies regulation that has come in. There is definitely redundancy in that pile, so removing Article 10 in its entirety is both reasonable and perfectly viable, not just in respect of the reach-back. The reach-back is a very severe issue that George correctly identified and described earlier, but Article 10 in its entirety really is redundant and ought to go. That is the first thing.

George is better placed than me to comment on medicines. On the dual regulatory regime for goods in Northern Ireland, my own preference—I am in writing on this—is a system called mutual enforcement, which is a way to control the trade of goods using each side's legal system such that it would essentially be unlawful for anyone to export from the United Kingdom into Ireland a good that did not comply with EU standards or had not paid EU duties. The Irish and the Europeans would adopt an equivalent rule going south-north.

That is, by far, the most intellectually coherent way of handling the border other than having a border in the Irish Sea. I say that, because it means that each side can have the entire panoply and complete sovereign control over its legislation, including the judicial architecture that sits atop it, with it just being enforced in respect of goods that are travelling into that jurisdiction. The UK would essentially take whatever the EU rules were and enforce them against its traders that participated in this trade north-south. The Irish would do the same to us, and there would be referral mechanisms to each other's senior courts to resolve any ambiguities in the rules themselves.

That would be EU law applying in Northern Ireland, but only in respect of goods that were travelling into the Republic. That seems to me to be the purest expression of an extraterritorial enforcement of your laws such that you can avoid having a physical border – you have enforced your rules beyond it. If I had been Lord Frost, I would have drafted that instead of the dual regulatory regime in Northern Ireland in the Command Paper, but I accept that that is a different concept to the one in the protocol. He refers to mutual enforcement in the Command Paper. He wanted something that was closer to the ethos of the protocol, which is the pedigree of the dual regulatory regime idea.

Dr Sylvia de Mars: I will freely admit that I do not have much to add on state aid or the regulation of medicines. I will leave the medicines to George to comment on more if he wishes to.

I am afraid that the dual regulatory regime almost feels like déjà vu to me, because it sounds a lot like asking for effective mutual recognition of regulatory standards. It was not good enough for the EU in all previous negotiations on the protocol; I am genuinely not sure why that would have changed now. It thinks that the risk of problems is too great, especially once the UK starts diverging more and more from the still currently applicable EU standards, whether it is because of new trading relationships or just different domestic policy priorities. It thinks that market surveillance alone is not enough of a control on goods meeting different regulatory standards crossing borders. It would probably argue that the current exemptions and grace periods that are in place affect such a small number of goods that it is nowhere near the problem it would be if it was any good in existence that might move anywhere. I genuinely do not see that being enough of a protection for the single market, in the view of the EU.

The mutual enforcement concept sounds interesting, but I would bounce back and say that I am not sure that the involvement of the Court of Justice in that kind of context would be any more tolerable to the parties involved than the current set-up is. It is a more pragmatic proposal than the ones that are being made right now, and they have to assume a certain level of willingness to fudge what absolute sovereignty looks like and to assume more co-operation than is currently being set out as desirable—perhaps in better times, if that makes sense.

Lord Hain: I just wondered if both Sylvia and James had time to write to us on this, because it is quite a fascinating issue, and they have different points of view on it.

The Chair: On which particular issue, Peter?

Lord Hain: On this mutual recognition issue.

James Webber: I call it mutual enforcement.

Lord Thomas of Gresford: On mutual enforcement, James's approach seems to me to be very interesting, as do Sylvia's reservations about it. I would like to know more about that, if we are looking for solutions.

George Peretz: I do not have anything to add on that issue. The problem with these ideas is that there is a certain element of, "I just wouldn't start from here". We have had a long period of discussing this, and some of these ideas have been around and dismissed. As a practical answer, I see the intellectual attraction of James's solution. I just suspect that, for better or worse, it just is not practical politics in terms of what the EU is prepared to accept, at least in the short or medium term, but there we are.

James and I wrote a piece together on State aid, and we both agree that it is a shame that Article 10 is still there, because of the reach-back problem, and, as James said, it is not really necessary, even in Northern Ireland, given that, as was by no means certain at the time of the withdrawal agreement but is clearly the case now, the UK will have a subsidy control regime. That has been agreed in the TCA.

Historians may investigate the question of why the current Government did not negotiate at the time of concluding the TCA. Something that would have been obvious to pick up was something to replace Article 10. It may simply be that time ran out. The agreement on subsidies was in fact reached at a pretty late stage in the negotiations, so it may very well be that time ran out. We are where we are on that, but both James and I agree that it would be quite good to remove Article 10 from the protocol and that it is not really needed any more.

On medicines, the Command Paper makes the point that many medicines are subject to fairly strictly controlled distribution arrangements, often effectively under the control of the NHS. That is, of course, true of a lot; it is not true of all. I made the point earlier that one is surprised about the extent around the world to which there is cross-border smuggling of

even quite recherché, expensive, innovative, life-saving medicines. Smuggling does take place, so one does not want to dismiss it as an issue. As Sylvia said, the problem is that the greater the potential divergence, the greater the possibility of regulatory arbitrage giving rise to profitable smuggling opportunities. The EU and Ireland in particular are worried about that.

Q14 **Lord Empey:** Our guests may not wish to answer this right now, but there has been a lot of talk about diversion of trade. Could I just point out that the treaty was signed between the United Kingdom and the Republic of Ireland in 1999 and took effect in 2000 to set up cross-border bodies as part of the Good Friday agreement process? One of those bodies is called InterTradeIreland. I set it up when I was Trade Minister. Its objective is to grow trade between the jurisdictions on the island. I am just throwing that in as one of the things.

The extent of trade is pretty low. It has been running at about 1.4% of the Republic of Ireland's imports from Northern Ireland, and it has grown very substantially since the treaty to 1.9%.

If the witnesses do not wish to comment on that, if they wish to send anything in writing, I would be very interested. I have not heard it referred to, but it is there in the treaty.

The Chair: Would any of our witnesses like just to comment in writing on InterTradeIreland and its concept there? Do I detect enthusiasm or not?

James Webber: I would not want to, no. I will write to the committee on mutual enforcement, at Lord Hain's suggestion. There is a component of the discussion when we are looking at protecting the Good Friday agreement in "all its dimensions", as the phrase in the protocol describes it. The Good Friday/Belfast agreement has an institutional structure to it. This is especially true with the British-Irish Council, which strikes me as a forum that is underused.

The protocol talks about the Good Friday agreement, and then immediately forgets it and does not refer at all to the institutional structures included within it. Everything else in the protocol is about protecting the EU single market, which is really its only practical function. I would certainly be happy to make that point. InterTradeIreland is not a body that I am personally familiar with, but I shall look it up.

Lord Empey: The point I am trying to raise is that, if you are arguing about diversion of trade, a treaty exists creating a body designed to do precisely that.

James Webber: Yes.

The Chair: It will be very helpful to have a paper on mutual enforcement, as you suggested, James. I am not quite certain whether Sylvia wants to write to us on that or not, or whether we just leave it at your paper.

Dr Sylvia de Mars: It would be helpful if James could send me his contribution. I could then see whether the Court of Justice issue that I think is in it is an issue. I would likewise respond. If James is happy to do that, that might be the most efficient way forward. I just want to make sure that I understand mutual enforcement correctly before writing something.

The Chair: Let us certainly have a paper from James on that. If you feel that there is something you would like to add, we would much welcome that. If you just let us know that you had nothing to add, that would be fine.

Q15 **Baroness Ritchie of Downpatrick:** This is a question for which just an answer in writing would be sufficient. What impact do the experts believe invoking Article 16 would have on wider UK-EU relations and, if it is more defined, on UK-Irish relations? That is a political question of lawyers, I appreciate and respect that, but if they could provide us with something in writing, it would be very useful.

The Chair: Who would like to do that?

Dr Sylvia de Mars: I am happy to take that one for the team.

The Chair: That will be very helpful, Sylvia.

James Webber: I will give you my answer very briefly if you want, Lord Chair.

The Chair: I am conscious that time is moving on. If you could just give us what you would have said to us in writing, James, that would be really helpful. Thank you.

Q16 **Lord Thomas of Gresford:** Thank you very much for some very interesting replies and ideas that you have put forward. Can you tell me your assessment of the Government's case as set out in their Command Paper for replacing Articles 12(4) to 12(7) of the protocol, which concern the role of the EU institutions, and specifically the CJEU, with "a normal treaty framework ... in which governance and disputes are managed collectively and ultimately through international arbitration"?

A sub-question is whether there is a viable compromise between the UK and EU positions on governance and the role of the CJEU. May I mention here that I have been trying to explore the possibility of a special chamber of the Court of Justice of the European Union under Article 234, or something like that, of the legislation, which gives power for a special court to be created within the overarching structure of the CJEU? This could have an equal number of British and European judges and independent presidents in its membership to resolve disputes, as opposed to having an ad hoc arbitration system such as Lord Frost has been suggesting.

Are the Government's concerns regarding the jurisdiction of the CJEU a legitimate reason for invoking Article 16? What would be the implications if Article 16 were invoked on those grounds? Listening to you today, I get

the impression that Lord Frost threatens Article 16, but he is really threatening the denunciation of the protocol. The procedures that arise if he invokes Article 16 will be endless discussions, but he wants to get rid of it, although he threatens Article 16 and holds it up as a shibboleth for all his supporters to rally around. I would be grateful for your response on that, Sylvia.

Dr Sylvia de Mars: That is a lot of questions. I will take them in turn and try to be as succinct as I can. My first point is that, as long as there is EU law in the Northern Ireland protocol, there is no getting rid of the Court of Justice altogether. There is extensive case law on this. Any treaty signed by the EU that involves an interpretation of EU law must have that interpretation done by the Court of Justice. The court itself will not accept any alternative. As long as we have the protocol as it is with the application of the significant EU law of the free movement of goods, the Court of Justice has to have some role in at least interpreting that EU law.

As to whether that role has to be the role that is currently set out in Article 12 of the protocol, that is where the flexibility can be found. The suggestion has been made repeatedly, most commonly by Anton Spisak over on Twitter, where most of us do a lot of our work these days, that it is very possible for the protocol also to work with the exact same set-up that is in the Withdrawal Agreement more generally, whereby arbitration takes place, but if an issue of EU law arises, arbitration is paused, they refer the question to the Court of Justice, and the Court of Justice interprets the EU law and sends its interpretation to the arbitration panel in a binding fashion.

I do not fundamentally see that that does not protect the interests that the EU has here. That is a compromise that we could land on. The only practical obstacle is that it would obviously involve opening up negotiations on the protocol again, but if the EU is willing to go to that extent, I see this involvement for the Court of Justice as being perfectly functional.

I have already made my views clear on reliance on the role of the Court of Justice when it comes to invoking Article 16. I do not see a case for this. I am not sure to what extent Article 12 itself causes economic, societal or environmental difficulties. It does not result in a diversion of trade. If they tried to link it to the serious societal difficulties argument, I would agree with James that the issue here was the EU law more generally. It would not specifically be the Court of Justice. Indeed, we then end up in the territory of saying, "The majority of the protocol as it relates to the border is what is unacceptable and causing the societal difficulties". The case for just trying to get rid of Article 12 that way would be very difficult, if not impossible, to make for the UK.

I genuinely like the idea of the creation of a special tribunal. I am not sure that it would satisfy what is in part driving the complaints about the Court of Justice, which is to be separate from the EU infrastructure altogether. In that sense, the preferable fudge from the UK perspective

would be the arbitration with a reference to the Court of Justice if specifically needed on a point of EU law.

George Peretz: I have very little to add to that pretty comprehensive answer. Just picking up on the last point, I have not thought about whether a separate chamber of the Court of Justice could be set up to deal with it.

The most obvious example of an area where there is free trade to an enormous extent with the EU, but with countries that are not subject to the jurisdiction of the European Court of Justice, is with Norway, Liechtenstein and Iceland in the EEA. They have their own separate court, which is the EFTA Court. The EFTA Court is compatible with the line of case law that Sylvia was referring to, where the Court of Justice says, "We cannot have any other court or arbitration panel being the final arbiter of questions of EU law".

The EFTA Court works because it is technically not interpreting EU law. It is applying EEA law, but in doing so it has an obligation of homogeneity, as it is called in the jargon, that effectively pulls EEA law towards the EU. Very occasionally, it is pulled the other way and the EU is pulled towards the EEA. Given the size of the jurisdictions, it is inevitable which way the major pull will go.

Whether one could imagine something like that for Northern Ireland, I do not know. Certainly, when we had the debates that all of you will remember with variable degrees of enthusiasm about various possible post-Brexit arrangements, and when people were thinking about something like an EEA model, there was a discussion that you might dock into the EFTA Court for bits of the single market that the UK wanted to be part of. This is fairly blue-sky thinking in terms of the Northern Ireland protocol.

The basic message is that, if you have EU law, you have the European Court of Justice, and there is simply no way of getting around that. Either you have it directly as you do now, or you have it indirectly via the arbitration panel. One could debate what the difference is worth.

James Webber: I agree strongly that the key is removing EU law. There is no way to cleave the ECJ away from EU law, so if you want to get rid of the ECJ, you have to get rid of EU law. There are ways of doing that. We have already talked about Article 10. That is EU law as it stands, in terms of state aid rules. The policy problem that that is trying to deal with can be dealt with without using EU law, which is what the TCA does. That is a nice example of removing the Court of Justice by solving the policy problem without using EU law.

As I said, with my mutual enforcement hat on, you need EU law, and the EU is entitled to ensure that anything coming into its territory complies with EU law. That is a fundamental part of economic sovereignty. Normally, that is achieved through a customs border post and being able

to implement checks on that border. In the context of Northern Ireland, that is obviously what we are all trying to avoid.

If there is not going to be a border check, the UK must accept in a mutual enforcement context that it will apply EU law, including by reference to the ECJ, for anything that crosses the border into the Republic of Ireland. That works. That does not present a sovereignty issue to the United Kingdom in the way that the protocol does. The protocol applies EU law to part of our territory, and it applies it much more broadly than the goods that are going into the Republic, because of the at-risk concept and the border checks happening between GB and NI. This is a much more intrusive look than EU law only applying in respect of things that are exported from Northern Ireland into the Republic.

Of course, the Irish and the EU would have to accept the reverse, because the UK would not have a border either. UK law would be applied by the Irish authorities in respect of goods exported from the south into the north in the same way. That symmetry is fundamentally a more stable solution than the protocol one, which is essentially an asymmetrical arrangement. All the obligations sit on the UK, and the EU has no responsibility under it. You have this big mismatch between the parties' incentives and the way the agreement works, which is why it is unsustainable.

I agree that the only way to remove the ECJ is to remove EU law, but there are ways of removing EU law. For that bit, which you definitely need in respect of the goods flowing into the EU, we can accept that in a way that is compliant with UK sovereignty.

Q17 **Lord Hannan of Kingsclere:** I have a very specific question on that last answer. Why would it need to be mutual? I completely get what you said about removing EU law and having checks going the other way, but does it depend on the reverse? What if Britain said, "Look, we're perfectly relaxed about what comes in on your side. we're not asking for you to undertake any obligations. This is what we propose to do to secure your internal market"?

James Webber: It has to be mutual, because the UK has an obligation to its trading partners to enforce its trade border under international WTO rules. That said, I suppose you could look at whether you could apply a security exemption to that and argue that the WTO rules are suspended because of the security situation in Northern Ireland.

But in order to operate a border in the way that I am suggesting, the UK also needs to know what the EU rules it is enforcing on the Irish behalf are. UK traders need to be able to pay the duties they owe in order to be able to comply with that legal obligation. The UK cannot have access to sufficient information from the databases of the customs tariff schedules or the current EU sanctioned people, et cetera, without access to the EU information. It seems to me that you can only do it through co-operation.

Lord Hannan of Kingsclere: Of course, that is true. I am not

suggesting that you can do it unilaterally, but we would not need to put a reciprocal duty on the EU to police our border. We could agree that bit while still, as we are doing at the moment, saying, "We're perfectly relaxed about what comes into our territory from the EU. We've given a fairly open-ended exemption on all of that nationwide, never mind in Northern Ireland".

George Peretz: There are WTO law implications of saying in effect to one of our trading partners, "Look, we don't really mind what comes in from you across the Irish border", but saying to other trading partners, such as Australia, New Zealand or Canada, "Yes, we do mind, and we do want to check, what comes in from you to make sure that it complies with our regulatory standards". Of course, there are countries with which we have no free trade agreement as well.

There is a WTO issue there. It has been talked about in relation to the current situation that applies at the moment. A lot of goods are still coming into the EU without checks. There is general consensus that it is contrary to WTO rules, particularly Article 1 of GATT. At the moment, nobody is bothering to enforce it. There is no sign of any complaint, but there may come a point at which you cannot carry on relying on the silence of all the people who might complain. In the long run, you need to try to be consistent.

The Chair: Thank you very much. We have come to the end of our time now. I would like to thank you all very much indeed for the evidence you have given us. It is evidence that really will bear reading the transcript of when it comes out, and I look forward to doing that.

Sylvia de Mars has very kindly agreed, in reply to Lord Dodds' comment earlier, to write a note on the Commission's attempt to invoke Article 16 earlier this year. James Webber has very kindly agreed to produce a note on mutual enforcement, which we are also looking forward to getting, and Sylvia de Mars has also very kindly agreed to write, as proposed by Baroness Ritchie, on the implications of the invocation of Article 16 on EU-EU and UK-Irish relations. I realise that that may go rather beyond the legal into the politics, but it would be very helpful to have your thoughts on that.

With that, can I once again thank all three of you very much indeed for a very interesting afternoon's discussion? We will, as I said at the beginning, send you a transcript so that you can just check that we have quoted you correctly. With that, I have some magic words to say for the benefit of the broadcasters: the meeting is now concluded. Thank you very much.